

International Scientific Conference  
“Towards a Better Future: Human Rights,  
Organized Crime and Digital Society”

Conference Proceedings, Volume I

Faculty of Law - Kicevo, University “St. Kliment Ohridski” - Bitola  
Bitola, 2020

CIP - Каталогизација во публикација  
Национална и универзитетска библиотека "Св. Климент Охридски", Скопје

342.72/.73(062)  
343.3/.7(062)  
004:316.323.6(062)

INTERNATIONAL scientific conference (2019 ; Bitola)

Towards a better future : human rights, organized crime and digital society : conference proceedings / International scientific conference, Bitola, 03 October, 2020 ; [editors Goran Ilik, Angelina Stanojoska]. - Bitola : "St. Kliment Ohridski" University, Faculty of law - Kicevo, 2020. - 2 св. (338, 309 стр.) : илустр. ; 25 см

Фусноти кон текстот. - Библиографија кон трудовите

ISBN 978-608-4670-14-8 (V. 1)  
ISBN 978-608-4670-15-5 (V. 2)

а) Човекови права -- Собири б) Кривично право -- Собири в) Дигитално општество -- Собири

COBISS.MK-ID 52460549



International Scientific Conference

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### **Publisher**

Faculty of Law - Kicevo, University “St. Kliment Ohridski” - Bitola  
*Center for Scientific Research at the Faculty of Law - Kicevo*

### **For the Publisher**

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### **Address of the Publisher**

Rudnicka BB  
6250 Kicevo, Republic of North Macedonia  
+ 389 45 220 267  
<http://pfk.uklo.edu.mk>

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ISBN  
978-608-4670-14-8  
608-4670-14-8

## PREFACE

*As Dean of the Faculty of Law at “St. Kliment Ohridski” University in Bitola, I must emphasize that it is a special honor and pleasure that finally came to the realization of the third international scientific conference organized by our faculty, as an opportunity for our affirmation in the international arena, for establishing contacts with our colleagues from home and abroad, contacts with various higher education and research institutions, as well as making a serious contribution to the scientific thought both in the Republic of North Macedonia and in wider context, especially in the time of coronavirus pandemic. This is also reflected by the high interest shown both by home and foreign authors and participants, who applied for participation in our conference, as evidenced by the submitted articles. The choice of the main topic for our third international scientific conference was made carefully, thereby taking into account all internal and international developments in the legal and socio - political processes, by precisely locating the basic postulates of the organized crime in the contemporary democratic political systems constituted upon the human rights and freedoms in the new era of artificial intelligence.*

*In the year when the European convention on human rights celebrates 70 years since its signing, unfortunately despite the development and modern evolution in every aspect of social life, we have to be constantly reminded of equality and the connection of human rights with all human beings, regardless of their collective or individual characteristics. Or as the famous Europeanist and author Alexandre Marc emphasized: “Human rights are the very crux of what we are doing. They are neither the dessert nor the starter, but the basis, the foundation and the keystone of everything that we want to do”.*

*At the same time, organized crime is one of the hotspots of human development, primarily of the technical and technological evolution. The positive effects of the changes on daily life through open borders, the free flow of people and goods, organized crime groups have skillfully turned into relief for their illicit activities. On the other hand, some criminal groups use the inclusion of public office holders in their ranks; have embedded themselves in the social structure which prevents radical change for the better.*

*The modern society is associated with the constant flow and acceptance of information and communication technologies at home, in the workplace, in the process of education, even in recreational activities. The development of digital technologies has not only challenged the protection of individuals' fundamental rights such as freedom of expression and data protection. Even more importantly, this new technological framework has also empowered transnational corporations operating in the digital environment as hosting providers to perform quasi-public functions in the transnational context.*

*Finally, I must express my deep gratitude to the Organizational Committee members who worked tirelessly in the direction of successful realization of our third international scientific conference, and all those well-wishers who understood the*

*significance of this project both as an advantage for our faculty and as an investment in the global scientific thought.*

*Let this conference be the continuing of the path that we started to trace together with a single purpose – **Towards a better future!***

*Dean of the Faculty of Law – Kicevo  
Assoc. Prof. Dr.sc. **Goran Ilik**  
Bitola, 2020*

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# JUVENILES AS VICTIMS OF TRAFFICKING IN HUMAN BEINGS AND SPECIFICATIONS IN THEIR PROTECTION<sup>1</sup>

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## **Abstract**

The specificity of the situation of juvenile victims of trafficking in human beings, as well as the difficulties that accompany their participation in criminal proceedings, indicate the need for the application of special measures of criminal law protection as well as special measures of assistance and support to juvenile.

Juvenile have been recognized in all relevant international documents as a particularly sensitive category of victims of trafficking, which is why their protection is of primary importance. The issue of protection implies, inter alia, the establishment of effective and functional mechanisms that would contribute not only to their identification but also to the reduction of the risk of trafficking.

In this paper, it will be considered cases of juvenile as victims of trafficking in human beings in the Serbia in the period 2017-2019, with special attention to the methods of victimization and exploitation, as well as their criminal legal treatment.

**Keywords:** *victims of trafficking in human beings, juveniles, exploitation, victimization, measures of protection, assistance and support*

## **Introduction**

Juveniles are particularly vulnerable categories of victims of trafficking in human beings due to increased risk in the recruitment phase, especially disastrous consequences of their capture, exploitation and during their participation in criminal proceedings against traffickers. This fact indicates the need for taking more adequate measures, including creating preconditions for criminal prosecution and adequate punishment of traffickers and maximum protection, assistance and support of victims.

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<sup>1</sup> This work is the result of the realization of scientific research project titled „Development of Institutional Capacity, Standards and Procedures for Countering Organized Crime and Terrorism in Terms of International Integrations”. The project is funded by the Ministry of Science and Technological Development of the Republic of Serbia, No. 179045.

Accordingly, the United Nations Convention against Transnational Organized Crime and Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)<sup>2</sup> include significant provisions emphasizing the need for creating specific measures for protection of children as victims of trafficking in human beings.<sup>3</sup> Primarily, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of article 3 - the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (Palermo Protocol, article 3c). The same provisions, regarding the meaning of the term child and the special conditions for the existence of a criminal offense for persons under eighteen years of age, are contained in the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>4</sup> The specifications related to the particular regime of protection for children as victims of trafficking are also evident in the provisions of the Council of Europe Convention which emphasize that each Party shall take specific measures to reduce children’s vulnerability to trafficking, notably by creating a protective environment for them.

### **Criminal legal protection of victims of trafficking in human beings under eighteen years of age in the Republic of Serbia**

In line with determination for more effective combating to the crime of trafficking in human beings, the Republic of Serbia has criminalized trafficking in human beings by adopting the Law on Amendments and Additions to the Criminal Code in 2003<sup>5</sup> (CC/2003). In provision which was classified into a chapter of criminal offences against personal dignity and morals, criminal responsibility was established for anyone who use force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person, with intent to acquire some gain, to exploit such person’s labour, commission of offences, prostitution or mendacity, pornography, removal of body parts for transplanting or service in armed conflicts (article 111b, paragraph 1).

For the listed acts, legislator has prescribed penalty of imprisonment of one to ten years. When the offence referred to in paragraph 1 of this article is committed against person under 14 years of age, the offender shall be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration (paragraph 4).

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<sup>2</sup>It was incorporated into the national legislation by adopting the Law on ratification of the United Nations Convention against Transnational Organized Crime and Additional Protocols, since June 22, 2001, Official Gazette of FRY“ - International Treaties, No. 6/01.

<sup>3</sup>“Child” shall mean any person under eighteen years of age (article 3d).

<sup>4</sup>Adopted by the Council of Europe on May 16, 2005 in Warsaw. In national legislation incorporated in 2009, Official Gazette of the RS, No. 19/09.

<sup>5</sup>Official Gazette of the RS, No. 39, since April 11, 2003.

Paragraph 2 listed a number of alternative qualifying circumstances and prescribed stricter punishment (by imprisonment of a minimum of 3 years)<sup>6</sup> when offence referred to the paragraph 1 of this article was committed against more than one person, by abduction, during performing official duty, within a criminal group, in a particularly cruel or particularly humiliating manner or resulted in serious bodily injury of a person.

The most serious form, which included the possibility of the most severe punishment of the perpetrator (by imprisonment of a minimum of 5 years), was related to cases when offence referred to the paragraph 1 was committed against a juvenile or person resulted in the death of the person, indicating determination in combating child trafficking by prescribing severe penalties.

Beside the fact that the legislator made a mistake by anticipating the acts of smuggling as a criminal offense of trafficking in human beings, it was adopted that basic form of offence of human trafficking exists even if there was no use of force, threat or any of the other mentioned methods of perpetration, but only in the case of persons under 14 years of age, excluding juveniles between the ages of 14 to 18.

In the provision of article 388 of the Criminal Code which was adopted in 2005 (CC/2005), within a chapter of criminal offences against humanity and other right guaranteed by international law, a special regime of protection has been extended to all juveniles, including any person under 18 years of age - when the offence referred to in paragraph 1 of this Article is committed against a juvenile, the offender shall be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration (paragraph 2).<sup>7</sup>

The qualified form and severe punishment (by imprisonment of a minimum of 3 years – which is less severe punishment than the one prescribed in CC/2003) was provided in the paragraph 3 in cases when the offence referred to in paragraph 1 was committed against a juvenile.<sup>8</sup>

In the cases when offence referred to the paragraph 1 and 3 resulted in serious bodily injury of a person, the offender shall be punished by imprisonment of from 3 to 15 years (paragraph 4). In relation to juveniles, this legal solution is in the opposite with the request for severe punishment in the case of serious consequences. This is inadequate because for the offence referred to the paragraph 3 only special minimum is defined, while the maximum remained at the level of the

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<sup>6</sup> At the time of validity of this law, according to the provision of the article 38 of Basic Criminal Code the absolute maximum was imprisonment of 15 years. Only for the most serious criminal offences or the most serious forms of serious offences the penalty of imprisonment of 40 years could be also prescribed. ("*Official Gazette of the SFRY*", No.44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, "*Official Gazette FRY*", No. 35/92, 16/93, 31/93, 37/93, 24/94, 61/2001, "*Official Gazette RS*", No. 39/2003).

<sup>7</sup> The legislator raised the special minimum from one to two years of imprisonment, compared to the special minimum prescribed in the CC/2003.

<sup>8</sup> The legislator excluded some of the previous qualifying circumstances - when offence is committed against more than one person, by abduction, during performing official duty or in a particularly cruel or particularly humiliating manner.

legal maximum (20 years imprisonment).<sup>9</sup> On the other hand, when offence referred to the paragraph 1 and 3 resulted in serious bodily injury of a juvenile; it is defined special maximum of 15 years of imprisonment.

The Criminal Code of Republic of Serbia also incriminated trafficking in minors for adoption as separate criminal offence (CC/2005, article 389). Criminal responsibility was established for anyone who abducts a person not yet 14 years of age for the purpose of adoption contrary to laws in force, or whoever adopts such a person or mediates in such adoption, or whoever for that purpose buys, sells or hands over another person under 14 years of age or transports such a person, provides accommodation or conceals such a person. The offender shall be punished by imprisonment of from one to five years for this offence.

By the Law on Amendments and Additions to the Criminal Code adopted by National Assembly of the Republic of Serbia in August 31, 2009 (CC/2009),<sup>10</sup> the legislator raised a special minimum (from 2 to 3 years of imprisonment) and special maximum (from 10 to 12 years of imprisonment) for the basic form of human trafficking offence (article 388, paragraph 1). While the absolute maximum was retained, the special minimum was raised from 3 to 5 years when the basic form of human trafficking offence is committed against a juvenile (article 388, paragraph 3).

Even though the special minimum was raised from 3 to 5 years in the cases when offence referred to the paragraph 1 and 3 resulted in serious bodily injury of a person, the legislator missed the opportunity to eliminate the illogicality reflected in defining of a special maximum of 15 years of imprisonment also in the case when this offence is committed against a juvenile.

By the provision of article 388, paragraph 8, the legislator established criminal responsibility and punishment, by imprisonment from 6 months to 5 years, for anyone who knows or should know that a person is a victim of trafficking, and abuses his/her position or allow to another to abuse his/her position for the exploitation referred to in paragraph 1 this article. If the offense referred to in paragraph 8 of this article is committed against a person whom the offender knew or should have known that was a juvenile, the offender shall be punished by imprisonment from 1 to 8 years (article 388, paragraph 9).<sup>11</sup>

Through the amendments to the Criminal Code from 2012<sup>12</sup> (CC/2012), the legislator only partially solved the illogical legal solution contained in article 388, paragraph 4, by prescribing that the offender shall be punished by imprisonment of a minimum of five years when offence referred to the paragraph 3 resulted in serious bodily injury of a juvenile. In this way, illogicality related to the maximum of

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<sup>9</sup> In the article 45, paragraph 1 of the CC/2005 is defined that a custodial penalty may not be less than thirty days or more than twenty years.

<sup>10</sup> "Official Gazette of the RS", No. 72/09. At the same time, the legislator defined that penalties for several criminal offences, including offence of human trafficking, may not be mitigated (CC/09, article 57, paragraph 2).

<sup>11</sup> The novelty is also contained in paragraph 10, which regulate that the agreement of persons to be exploited or placed in slavery or servitude referred to in paragraph 1 this article shall not affect the existence of the criminal offence referred to in paragraphs 1, 2 and 6 of this article.

<sup>12</sup> "Official Gazette of the RS", No. 121/2012.

threatened imprisonment was solved just for juvenile victims who suffered serious bodily injury in the cases when offender used force, threat or any other mentioned methods of perpetration listed in article 388, paragraph 1. It is also illogical that the legislator prescribed the same punishment for qualified form of this offence, as well in the case when the minor victim did not suffer serious bodily injuries. Furthermore, even with this legal ground for punishment, the legislator did not include cases referred to in article 388, paragraph 2, in which there was no use of force, threat or any of the other mentioned methods of perpetration listed in paragraph 1 of this article, against a juvenile victim.

### **Juveniles as victims of trafficking in human beings in the Republic of Serbia for the period 2017-2019**

Since 2012, the Service for Coordination of Protection of Trafficking Victims (hereinafter: the Service), as an internal organizational unit of the Centre for Protection of Trafficking Victims (hereinafter: the Centre), has the authority to conduct the formal identification procedure of victims of trafficking in human beings in the Republic of Serbia.

The Service conducts identification based on Operational guideline (instruction) for the identification of victims of trafficking in human beings. At first, the Service must assess if there are elements to start the identification process in a particular case. This assessment should be completed within one week after receiving the report, with the conclusion in which is determined whether it is a presumed victim or not. The identification procedure will be initiated only for the identified presumed victims.<sup>13</sup>

For the period from 2017 to 2019, the Service worked on 461 reports of suspicion that a person was a victim of human trafficking. Although the submission of reports, and thus the so-called preliminary identification, is preceded by activities which should result in determination whether there is a ground for suspicion of trafficking in human being (most often of the applicants from the social protection system, police and specialized civil society organizations), in 88 cases (19.08%) the Service found that the initial suspicion is unfounded and rejected the report.

Proceedings regarding 9 reports started in 2019 are continued also in 2020. The identification process was initiated in 364 cases (presumed victims), and 158 persons were identified as victims of trafficking (Tables 1 and 2).

**Table 1. Reports of suspicion that a person is a victim of human trafficking and treatment**

Reports and treatment	No.	%
Submitted reports	461	100
Rejected reports	88	19,08
Work on report in progress	9	1,95
Initiated process of identification (presumed victims)	364	78,95

<sup>13</sup> The Centre for the Protection of Victims of Trafficking in Human Beings, Work report 2017, pp. 7.

**Table 2. Victims (presumed and formally identified)**

Victims	No.	%
Presumed victims(initiated process of identification)	364	100
Formally identified victims	158	43,40

Although a larger number of victims of human trafficking are adults - 80 of them (50.63%), when the analysis is performed by grouping victims according to their age and sex, it is noticeable that the most common category of victims are underage female victims - 69 of them and they are represented with 43.67% of the total number of victims. Furthermore, there are adult female victims (59) with 37,34%, adult male victims (21) with 11.66% and underage male victims (9) with 5,69% (Table 3). It can be concluded that females are the most dominant category of victims (128) with 81,01%, and among them 53,90% are juveniles. On the other hand, among male victims, there are more adults. Male juveniles are represented with 30%.

**Table 3. Representation of juvenile/adult female and male victims in total number of victims**

Under 18 years		Over 18 years		Total
female	male	female	male	
69 (43,67%)	9 (5,69%)	59 (37,34 %)	21 (11,66%)	158 (100%)
78 (49,37%)		80 (50,63%)		

Sexual exploitation is the most represented form of exploitation - 78 victims are exploited in this manner (49,37%) and among them 43 are juveniles (55,12%) (Table 4). Bearing in mind that all victims of multiple exploitation (28 victims, among them 13 were juveniles) were sexually exploited, it can be concluded that this number is even larger – 67,08% of total identified victims were sexually exploited. Among them, females are the dominant category – 105 of 106 victims were females, and only one male victim of multiple exploitation was also sexually exploited.<sup>14</sup>

Forced marriage as a form of exploitation of trafficking in human beings is determined in 14 cases and victims were only females, primarily juveniles (10 cases) This data clearly indicate that female juveniles are the most represented victims of the forced marriage with 71,42%.<sup>15</sup>

<sup>14</sup> Victims of multiple exploitation are represented with 17,72% in total number of identified victims.

<sup>15</sup> This data is even more significant because of the fact that forced marriage is very often introductory phase for other forms of exploitation. Centre for the Protection of Victims of Trafficking in Human Beings, Work report 2017, p. 26.

Juveniles are also dominant category of victims in the cases of mendacity and commission of criminal offences. From 10 victims of mendacity, 7 of them were juveniles (70%) and 3 victims were forced to commit a criminal offences – 2 of them were juveniles (75%).

Bearing in mind usual forms of labour exploitation of victims of human trafficking, it is not surprising the fact that juveniles are significantly less represented as victims of this form of exploitation. Only 2 male juvenile were victims of labour exploitation. Other 23 victims were adults, among them 20 males and only 3 females.

**Table 4. Forms of exploitation of victims of trafficking in human beings**

Forms of exploitation	Under 18 years		Over 18 years		Total
	Female	Male	Female	Male	
Sexual exploitation	43	1	34		78
Forced marriage	10		4		14
Multiple exploitation	12	1	15		28
Forced labour		2	3	20	25
Mendacity	4	3	2	1	10
Commission of criminal offences		2	1		3
Subtotal	69	9	59	21	158
TOTAL	78		80		

### **Criminal procedural aspects of protection of juveniles as victims of trafficking in human beings**

Although national legislation among the persons who are injured by a criminal offence recognize and distinguish victims and binds to them the application of certain institutes of criminal law,<sup>16</sup> even certain powers of authorized police officers,<sup>17</sup> the legislator does not define the criteria by which it does so, nor does it

<sup>16</sup> Term victim is mentioned in article 54 of Criminal Code which defines general principles on sentencing („the court shall determine a penalty for a criminal offender with regard to particularly his attitude towards the victim of the criminal”); within provisions of article 72 which defines protective supervision („the court may order protective supervision of the offender, considering particularly his attitude towards the victim of the offence”); in article 73 („protective supervision may comprise one or more of the following obligations and one of them is eliminating or mitigating the damage caused by the offence, particularly reconciliation with the victim of the offence”); in article 77, paragraph 4 („in deliberating whether to pronounce a judicial admonition, the court shall, having regard to the purpose of the admonition, particularly take into consideration specifically his attitude to the victim of the offence”); in article 388, paragraph 8 („whoever knows or should know that a person is a victim of trafficking...”).

<sup>17</sup> In article 59 (“if a missing person has been reported and there are grounds for suspicion that such a person is a crime victim”); in article 99, paragraph 4 (“to protect victims of a criminal offense, a police officer shall be authorized to prohibit recording of the scene”; in article 100 („a police officer may use a vehicle and communications equipment of a legal or natural person if he has no other means to transport to the nearest health care institution an injured person who is a victim of a crime”). Law on Police, "Official Gazette of the RS", No. 6/16, 24/18 i 87/18)

specify the meaning of the term victim. An injured party is the term that is only defined in the Criminal Procedure Code of Republic of Serbia<sup>18</sup> and denotes a person whose personal or property right has been violated or jeopardised by a criminal offence (article 2, paragraph 2, bullet 11).

The injured parties are always personally interested in the outcome of the criminal proceedings, but often perceive it as a very unpleasant experience, especially in cases when they are severely traumatized by the committed crime, due to its nature, manner of execution or consequences. Emphasized sensitivity can be also caused by the personal situation and circumstances of the injured person, and especially by his age and life experience.<sup>19</sup>

The fact is that, in relation to concrete criminal offences, the term victim is associated only with the offence of trafficking in human beings, and that this offence, due to its nature, manner and consequences of execution is associated with the application of numerous criminal legal institutes (exclusion of mitigation, special evidentiary actions, confiscation of property derived from a criminal offence).

Valid Criminal Procedure Code (CPC/2011)<sup>20</sup> in article 103 regulate especially vulnerable witness and indicate: "The authority conducting proceedings may ex officio, at the request of parties or the witness himself, designate as an especially vulnerable witness a witness who is especially vulnerable in view of his age, experience, lifestyle, gender, state of health, nature, the manner or the consequences of the criminal offence committed, or other circumstances."

The ruling determining a status of an especially vulnerable witness<sup>21</sup> is issued by the public prosecutor, president of the panel or individual judge.

If it deems it necessary for the purpose of protecting the interests of an especially vulnerable witness, the authority conducting proceedings will issue a ruling appointing a proxy for the witness (at the same time as the ruling determining status or after that - if the authority conducting proceedings finds out about the reasons which were not known before, or if new reasons or circumstances occur). The public prosecutor or the president of the court will appoint a proxy according to

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<sup>18</sup>"Official Gazette of the RS", No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.

<sup>19</sup> Criminal Procedure Code regulates that if a person under 14 years of age is being examined as a witness, the panel may decide to exclude the public during his examination and if a person under 16 years of age is attending a trial as a witness or injured party, he will be removed from the courtroom as soon as his presence is no longer necessary (article 400).

<sup>20</sup>"Official Gazette of the RS", No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.

<sup>21</sup> The ruling determining a status of an especially vulnerable witness must contain an explanation, because of the fact that rules on examining an especially vulnerable witness restrict rights of defendant, including right to ask question directly, to confrontation with witness and public examining at the trial. Sinanović, B., *Posebno osetljivi svedok u krivičnom postupku*, Bilten Vrhovnog kasacionog suda, br. 3/14, Beograd, 2014., str. 28

the order on the roster of attorneys submitted to the court by the bar association competent for designating court appointed defence counsels (article 76).<sup>22</sup>

Related to this issue is a question whether it would be purposefully that the legislator has defined what is the nature of criminal offences, the manner of execution or the consequences, and under what conditions it is possible the acquisition of the status of a particularly sensitive witness. In that case, the legislator would have to consider all categories of injured parties/victims in context of the risk of secondary victimization during the conducting proceeding of competent authorities regarding to the concrete events/criminal offences, before and during the criminal proceedings. Most likely, the legislator would singled out those in whom the risk is particularly emphasized, so victims of trafficking would certainly be recognized as such.

The question is, what can be so significant about the age that it can, by itself or in the context of other circumstances, be the basis for appointing the status of a especially vulnerable witness? Is it every juvenile of a witness,<sup>23</sup> every juvenile of an injured party who is examined as a witness, every juvenile of an injured party of the certain type of offence/offence committed in a certain way/with certain consequences, or just some of them?

In order to protect especially vulnerable witnesses, the legislator defined rules on their examination (CPC, article 104). Only authority conducting the proceedings may ask questions to the witness, treating him or her with particular care and endeavouring to avoid possible detrimental consequences of the criminal proceedings to the personality, physical and mental state of the witness. Also, examination may be conducted with the assistance of a psychologist, social worker or other professional, which will be decided by the authority conducting proceedings (article 104, paragraph 1). If the authority conducting proceedings decides to examine an especially vulnerable witness using technical devices for transmitting images and sound, the examination is conducted without the presence of the parties and other participants in the proceedings in the room where the witness is located (art. 104, para. 2). An especially vulnerable witness may also be examined in his dwelling or other premises or in an authorised institution

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<sup>22</sup> It seems adequate that the authority conducting proceedings appoint a proxy for a juvenile witness, regardless of whether he was injured party or not, from the ranks of attorneys with special skills in the field of the rights of the child and criminal and legal protection of juveniles. This is especially important when witness is an injured party (The law on juvenile criminal offenders and criminal protection of juveniles, article 154). In the Republic of Serbia, as a result of the project of NGO Astra, since 2012, it has been formed a sustainable network of lawyers who are trained and sensitized to work with victims of trafficking and their representation in the criminal proceedings. Anđelković, M., i drugi, *Trgovina ljudima – priručnik za advokate*, ASTRA – Akcija protiv trgovine ljudima, Beograd, 2012., str. 5.

<sup>23</sup> When juveniles occur as witnesses in the criminal proceedings, the objective facts of their age and lack of their life experience, clearly indicate to conclusion that they are the witnesses with increased risk of stress and reaction to a stressful situation during the examination. The witness is even particularly sensitive in the case of violent offence or if some person close to the child or juvenile participated in the commission of a criminal offense, so it should be designated as particularly sensitive witness. Sinanović, B., *Ibid.*, str. 33

professionally qualified for examining especially vulnerable persons. In such case the authority conducting proceedings may order application of the measures referred to in paragraph 2 of this article (art. 104, para. 4).

Related to this issue, it should be considered provisions of the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles.<sup>24</sup>In article 150 of this Law is determined that the provisions of this Law will be applied in accordance with provisions of Criminal Procedure Code, in the criminal proceeding against adult offenders of criminal offences listed in article 150 of this Law (including human trafficking), committed against juveniles. Also, the state prosecutor shall initiate proceeding against adult perpetrators of other criminal offences if in his opinion it is necessary to do so for purpose of protecting personality of juveniles as victims in criminal proceedings (article 150). In addition to the specialization of the authority conducting proceedings and a proxy of juvenile victim, in the field of the rights of the child and in criminal protection of juveniles, there is an obligation to treat the victim with care, having regard to his age, character, education and living circumstances; questioning of a child or juvenile shall be conducted with the assistance of psychologist, pedagogue or other qualified person and questioning may be conducted at most twice (exceptionally more if necessary to achieve the purpose of criminal proceeding); when a juvenile has been questioned with the aid of technical devices for transmitting of image and sound or in their apartment or other premises and/or authorised institution, the record of his testimony shall always be read at the main hearing or a recording of the questioning heard; if a juvenile is questioned as witness, who due to the nature of the criminal offence, consequences or other circumstances is particularly vulnerable or is in a particularly difficult mental state, confrontation between him and the defendant is prohibited; if recognition of the defendant is done by a juvenile who is a victim, the Court shall proceed with particular care and shall conduct such recognition in all phases of the proceeding in a manner that completely prevents the defendant from seeing the juvenile (article 152-155).

### **Review of the case-law in the Republic of Serbia on trafficking in human beings**

The results of analysis of data from 19 judgments of the Higher Courts issued in 2016, 2017 and 2018 and related to the cases of trafficking in human beings, indicate that out of 25 victims, 14 (56%) were adult at the time of commitment of the criminal offence and 11 (44%) were juveniles. Out of 21 female victims, 12 were adults, and 9 juveniles – 5 were juveniles at the time of the trial; out of 4 male victims, 2 were adults, and 2 juveniles - both were juveniles at the time of the trial. Five female juvenile victims were sexually exploited – one victim was exploited through prostitution (4 victims were juveniles at the time of the trial).

Three offenders were convicted for trafficking in human beings (art. 388, para. 3), two of them were sentenced to 5 years and one to 6 years of imprisonment. A first offender was convicted for the offence from article 388, paragraph 2,

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<sup>24</sup>"Official Gazette of the RS", No. 85/05

referred to in paragraph 1, and sentenced to 3 years of imprisonment. Also, 3 “service users” of victims which were exploited through forced prostitution were sentenced under the offence of article 388, paragraph 8, referred to paragraph 9 (a first was conditionally sentenced to 1 year and 6 months, second to 1 year and third to 4 years of imprisonment).

In cases of multiple exploitation, 2 victims were also sexually exploited – one through forced marriage, servitude and sexually (the offender was sentenced to 5 years of imprisonment) and second was victim of forced labour, sexual exploitation, mendacity and forced commission of criminal offences (offence was committed by a three-member criminal group – two of them were convicted to 7 years and one to 8 years of imprisonment). One female juvenile was exploited through forced labour and 2 male juveniles were exploited through forced commission of the criminal offences.

Out of 11 juvenile victims, only 2 victims exploited through forced prostitution were designated as an especially vulnerable witness, and 7 juvenile victims were appointed with a proxy during the criminal proceeding. Two victims were adult at the time of trial and one is examined in the presence of guardian. Based on analysis of 11 judgements issued in the offences against juvenile victims, it is noticable that public was excluded only at one trial.

According to the data of the judgement of the Higher Court in Novi Sad (K.br.91/16), the Higher public prosecutor appointed a status of especially vulnerable witness to a juvenile victim of forced prostitution, which was recruited and controlled by offender using their love affair. In opinion of the team who conducted psychiatric expert examination was emphasized: "Undoubtedly, the victim entered in this event under the influence of manipulations and emotional pressure from the defendant and in fear of possible rejection and breaking up a relation with him..." After the re-interview of victim, an expert suggested that her testimony should be read, because she reacted with expressed anxiety to the possibility of being questioned again at the trial related to this events, which was accepted by a court and the parties in order to prevent secondary victimization.

In the judgement of Higher Court in Pirot (K.br. 26/16), the Higher prosecutor issued a ruling appointing a status of an especially vulnerable witness to juvenile victim of human trafficking. In this case, mother of victim was accused, so court used as relevant the report of the Centre for the Protection of Victims of Trafficking in Human Beings and findings and opinion of an expert in clinical psychology. In opinion of an expert was indicated that “in terms of mental functioning, the victim is at the level of twelve/thirteen-year-olds and that her ability to actively resist the demands of the authorities in a mature way is poorly, which is why the victim behaves in front of the authorities on the principle of passive obedience."

In the 6 first-instance judgment<sup>25</sup> issued during 2019, related to the offence of human trafficking, which were analyzed by NGO Astra, there were 17 victims of human trafficking and one victim of trafficking in juveniles for adoption. The status of an especially vulnerable witness was appointed to a two juvenile victims in two

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<sup>25</sup> Eight judgements issued based on the plea agreement.

proceedings. In first case, the court read the previous testimony of the victim given in the premises of the Center for Social Work and in second case, the offender was stepfather of the victim, so she and her mother were placed in the Shelter for Women and Children Victims of Violence and Trafficking. In the investigation phase and at the trial was used her testimony given with the aid of technical devices for transmitting of image and sound. Out of 10 juvenile victims of trafficking in human beings, only 5 juveniles had a proxy, and the public was excluded only at 2 trials.<sup>26</sup>

## Conclusion

The state bodies of the Republic of Serbia have a well-defined legal grounds and framework for treatment in the area of human trafficking, in accordance with the obligations undertaken by the incorporation of relevant international legal acts into national legislation. Nevertheless, there is a space for improvement, both in the legal area and in the practical implementation of available solutions.

Regarding the legal area, the current legal solution prescribes the same sentence of at least 5 years of imprisonment for qualified form of trafficking in human beings – when basic form of offence resulted in a serious bodily injury of the juvenile victim (CC/2012, article 388, paragraph 4), as well as in case when such injury did not occurred (paragraph 3). This solution indicates that qualifying circumstances are not taken into account and the fact that they make the crime more difficult which justifies more severe punishment. This inadequacy could be solved by increasing the special minimum for this qualified form into at least 8 years of imprisonment. Further, one of the recommendations is that this qualified form (article 388, paragraph 4) should be also referred to in paragraph 2 of this article, which would cover the case of severe bodily harm to a juvenile person due to the offence, even if there was no use of force, threat or any of the other mentioned methods of perpetration.

Trafficking in human beings, by its nature, manner of execution and consequences, almost always causes severe traumatization of victims, especially when a juveniles are victims, bearing in mind their age and life experience. The current situation in the Republic of Serbia indicates that juveniles are a widely represented category of victims of trafficking, which is why it is necessary to treat these victims as an especially vulnerable witness. If the authority conducting proceedings designate them as an especially vulnerable witness a witnesses, there is a possibility to appoint them a proxy from the ranks of attorneys with special skills in the field of the rights of the child and criminal and legal protection of juveniles. Also, special rules of examination would be applied to them, which would prevent the possibility of their further victimization.

Despite the growing commitment and determination for granting to this category of victims the status of especially vulnerable witnesses during the

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<sup>26</sup>*Položaj žrtava u krivičnom postupku, Analiza pravosudne prakse za 2019. godinu za krivična dela posredovanje u vršenju prostitucije, trgovina ljudima i trgovina maloletnim licima radi usvojenja*, Astra, Beograd, 2020, str. 5 i 19.

investigation phase, numerous of juvenile victims did not get this status neither in the later phases of criminal proceeding. An analysis of actual case-law indicates that the possibility of examining juvenile victims of trafficking in accordance with procedural provisions on especially vulnerable witnesses is not sufficiently used. Such treatment is not in line with valid provisions of criminal protection of juveniles and increases the possibility of appearance harmful consequences of the proceeding to their personality and development. At the same time, in the cases of human trafficking, the efficiency and success of the proceedings largely depends on psychological, emotional and physical protection of juvenile victims, which indicates the need for practical implementation of existing procedural provisions.

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# INCOME, INSTITUTIONS AND EDUCATION AS HUMAN DEVELOPMENT INDICATORS AND THEIR IMPACT ON HUMAN RIGHTS<sup>1</sup>

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## **Abstract**

The levels of gross domestic product (GDP) and personal income are not the only determinants of citizens' quality of life and of the level to which they will be able to achieve their human rights. Human development is a wider concept that involves the creation of an environment that will enable citizens to fulfill their needs and interests. Despite rising GDP and income in the past period, Serbian society became more closed regarding mobility to higher levels of education. Moreover, during the past decade, the rise of GDP and income was followed by the weakening of institutions, stagnation in the fight against corruption, and poorer rule of law. One of the consequences of rising inequalities and weakening of the rule of law and institutions were more intensive migrations from Serbia to Western European countries although income lag was reduced.

**Keywords:** *human rights, rule of law, institutions, education, income*

## **INTRODUCTION**

Human rights include persons' rights on an adequate standard of living, appropriate housing, health care, education, etc. Higher level of meeting those goals indicates citizens' better quality of life that means they achieve in practice their rights to a greater extent.

Citizens are very sensitive regarding their human rights and in case they can't achieve them on an acceptable level they tend to leave the country and migrate to those countries where human rights are satisfied at a higher level. That tendency

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<sup>1</sup>This paper was written as part of the 2020 Research Program of the Institute of Social Sciences with the support of the Ministry of Education, Science and Technological Development of the Republic of Serbia

was clearly recognized in the past few decades worldwide. In this paper, we will focus on migrations within Europe – from Central and Eastern European (CEE) countries to the Western ones during the past three decades.

Citizens and state authorities may perceive the relevance of specific components of quality of life and human rights differently. Governments tend to overestimate the positive effects of rising GDP or income per capita on quality of life as well as on standard of living. However, (Petrović, Brčerević and Šaranović 2020, 38) shows that increased GDP should not be equated with a standard of living rise. The authors illustrated that by comparing changes in GDP with a rate of migrations that were considered as indicators and consequence of changes in quality of life. They compared GDP per capita in CEE countries with the ones in Western European (WE) countries and concluded that GDP in the Central and Eastern European countries was 38% of the GDP of their western neighbors in 2000 while in 2018 the share increased to 60% indicating that the lag has narrowed. However, in the same period, the level of migrations from East to West of Europe intensified indicating that the gap in the standard of living between the two groups of countries did not follow the GDP patterns.

According to (Petrović, Brčerević and Gligorić 2019, 20), although GDP and income level are powerful factors of migrations, they are not the most significant ones. Namely, rule of law, strong and independent institutions, corruption control as well as the quality of public services (such are health service, education, administrative services, etc.) had a dominant impact on migrations within Europe. That explains the higher share of emigrants in the working-age population in Croatia with an average salary of 900 euros compared to a significantly lower share of emigrants from Latvia and Lithuania whose citizens have an average salary ranging between 800 and 850 euros.

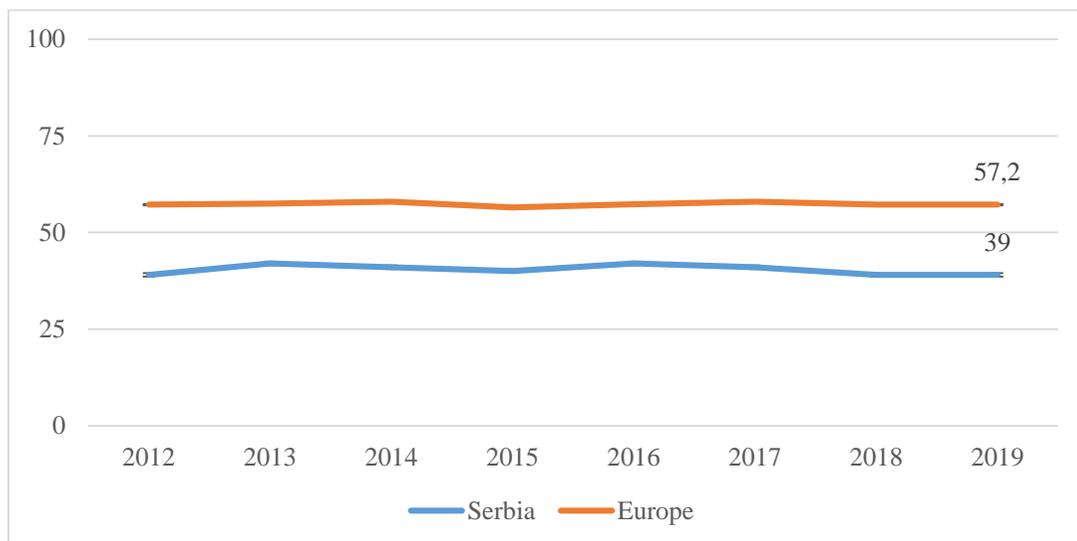
The econometric model (Petrović, Brčerević and Šaranović 2020, 40) was applied in order to project changes in migrations from Serbia to WE countries in three different scenarios. The first one is so called “status quo” with no changes in income and with absence of reforms related to rule of law, institutional building and curbing corruption. In that scenario, research team estimated that emigration from Serbia will continue to rise in the period 2021-2025 reaching 1,2 – 1,3% of the working-age population compared to present 1%. In the second scenario, if average salaries reach 900 euros (presently an average salary is 500 euros) which is a target set by the Government for 2025, the moderate slowdown of the negative tendency could be expected – a share of emigrants from Serbia would be 1,05 to 1,10% in its working-age population. Finally, in the third scenario, if institutions are strengthened properly, rule of law reach EU recommended standards, as well as a level of corruption is reduced to moderate level, emigration rate from Serbia could be decreased to 0,85 – 0,90%.

It could be assumed that the rate of emigration indicates differences in quality of life and level of human rights among countries. In other words, people are moving from countries with a lower standard of living and actual human rights to those with higher standards where they can truly achieve their human rights. Thus it would be important to detect at which level is Serbia in terms of corruption, rule of law and institution building presently and what are major causes of the current

situation. Furthermore, it should be analyzed why previous measures and activities in that respect, undertaken during the past two decades in Serbia and strongly supported by EU and other international organizations (IOs) did not bring expected results. Finally, recommendations on how to avoid the past practice of inefficient, superficial, and formal changes with poor effects in practice would be presented.

### **RULE OF LAW AND CORRUPTION IN SERBIA**

According to the Transparency International Corruption Perception Index (CPI), Serbia is a country with high corruption risk, with a score of 39<sup>2</sup> in 2019 (Transparency International 2020). As it could be seen at Graph 1, Serbia had significantly higher level of corruption than the European countries (Graph 1).



**Graph 1: CPI changes for Serbia and Europe**

Source: [www.transparentnost.org.rs](http://www.transparentnost.org.rs), July, 2020.

Serbia has a corruption risk that is more than one third higher than an average one in Western European and EU countries (66). Even within a group of Central and Eastern European countries, Serbia is in the lower part of the list (Table 1).

**Table 1: CPI of the former socialist countries of Europe**

Country	CPI
Estonia	74
Slovenia	60
Lithuania	60
Poland	58
Czech Republic	56
Latvia	56

<sup>2</sup> CPI range from 0 for the highest level of corruption to 100 indicating corruption free countries.

Georgia	56
Slovakia	50
Croatia	47
Romania	44
Hungary	44
Montenegro	45
Belarus	44
Bulgaria	43
Armenia	42
Serbia	39
Bosnia and Herzegovina	36
Northern Macedonia	35
Albania	35
Moldova	32
Ukraine	30
Russia	28

Source: [www.transparentnost.org.rs](http://www.transparentnost.org.rs), July, 2020.

In the past two decades, Serbia made significant progress regarding CPI. In 2000, Serbia's CPI was only 1,3 placing it at the bottom of the Global Corruption Perception list as one of the most corrupted countries in the world. However, during the first decade of the 21<sup>st</sup> century, Serbia almost tripled its CPI score to 3,5 in 2010.

A decade later, in 2019, CPI was 39 at the same level as it was in 2012. Thus the period of the past two decades in the 21<sup>st</sup> century could be divided into two sub-periods: the first one marked by breakthrough and dynamic improvement and the second decade characterized by minimal progress (0,4 for the whole decade) that could be considered as stagnation.

The key obstacle is the low level of rule of law characterized by poor implementation of regulation and contracts. One of the most striking examples is that the Government, in the past seven years, practically stopped the processes of selection and dismissal of directors and civil servants on appointed positions that were its obligation according to the Public Enterprise Law and Civil Servants Law. In that way, majority of directors in the public sector remained in the acting position that made them highly vulnerable to be dismissed without any explanation.

Furthermore, the largest infrastructure projects were excluded from the Public Procurement Law (PPL) based on international agreements concluded with certain countries on a bilateral basis. Those agreements served as a basis for avoiding transparency and open competition procedures provided by the Law indicating a high risk of unfavorable terms in spending citizens' money. The absence of rule of law in the sphere of public procurement undermines the standard of living and quality of public services since large amounts of money are spent on non-transparent and on an inefficient way thus reducing available funds for other purposes of vital importance for citizens.

In general, the decision-making process of state authorities is nontransparent resulting in questionable decisions. Recent large construction works in the City of Belgrade that raised the huge interest of the local community, but with

no answers from authorities were good examples of that practice. Serbian Free Access to Information of Public Importance Law is among the most advanced laws in this area on the world, however, enforcement of the Commissioners' decisions were poor since state authorities refused to comply with the decisions.

Similar situations are in the areas of financing political parties and election campaigns as well as in prevention of officials' campaigns during elections that are highly regulated, but almost completely ignored by authorities and state officials when it comes to implementation of the regulation. Significant weaknesses in enforcement of the regulation in this area lead to undermined trust of citizens in the election process thus hurting their right to vote.

EU progress reports pointed out the huge gap between the quality of legislation measured by the level of alignment with directives on one side and the effectiveness of its implementation on the other side. We can illustrate that on an example of public procurement that is closely linked with the issues of corruption and rule of law, directly affecting the standard of living and quality of services that meet citizens' rights on education, health, etc.

During the past decade, legislative activities in the area of public procurement were intensive in Serbia. Concretely, in 2012 the new PPL was adopted and it was amended in 2015, followed by the adoption of the new PPL in 2019.

Although the amending of the laws enabled further alignment with EU directives that was not a key challenge. Namely, in EU Progress report 2016 for Serbia in Chapter 5, Public procurement, it was said: "The legal framework is broadly in line with the *acquis*" and then more specific: "The law on public procurement is largely aligned with the *acquis* on classical and utilities procurement". At the same time, real-life public procurement status was significantly different from its regulation status i.e. what was "on paper": "Serbia is moderately prepared in this area which is particularly vulnerable to corruption. Further efforts are needed to prevent corruption from occurring during the procurement cycle. Significant efforts are needed to further improve competition and transparency in public tenders" (European Commission 2016, 4).

Instead of focusing efforts on how to provide a strict implementation of the regulation that is already "largely aligned with *acquis*", Serbian authorities decided to prepare a new Law in 2018. The same could be said for the whole area of the corruption control in Serbia: "The legal framework for the fight against corruption is broadly in place" and further "corruption remains prevalent in many areas and continues to be a serious problem. There have been limited results from the implementation of adopted legislation" (European Commission 2016, 4).

Intensive activities on amending laws and adopting the new ones, served to Serbian authorities to present themselves to the international community as well as to Serbian public that they work on curbing corruption and on rule of law strengthening. Since the impact of previous provisions was limited due to low enforcement capacities and efficiency, it was hard to expect that changed provisions would have different effects.

In that way, the gap between legislation and practice was widening with legislation being improved over time while practice being poorer. The outcomes

were more widespread corruption and weaker rule of law that undermined citizens' rights on adequate civil services such as education, medical care, etc. Non-transparent and non-competitive spending of taxpayers' money increased the risk of abuse and corruption thus hurting citizens' standard of living as one of the most important human rights.

In order to change the negative tendency of the increasing gap between legislation and its implementation, it is important to put in focus factors that caused such weak implementation of the regulation. By reducing obstacles to efficient implementation of legislation, Serbia would enable achieving a higher level of citizens' rights, better public services such as health care, education, etc. and a higher standard of living making the citizens ready to provide support for further reforms.

### **STRENGTHENING RULE OF LAW AND INSTITUTIONS BUILDING**

One of the key prerequisites for ensuring citizens' equal rights and full access to public services of adequate quality are institutions. In a narrow sense, institutions could be defined as public entities and regulatory bodies. A wider definition of institutions would include, apart from state and regulatory bodies, laws, rules, formal management processes such as public financial management, procurement, human resource management (OECD 2015, 4-5).

The factor of crucial importance for success in upgrading institutions is a clear political will. In its absence, superficial formal changes combined with the strengthening of negative tendencies regarding the status and capacities of institutions will occur. Experiences of Central and Eastern European (CEE) countries proved that political will for reforms including improved status and capacities of institutions was created primarily under external (EU) pressure as a part of the accession process.

Lack of genuine domestic (local) initiatives for institution building and rule of law raised a question on how sustainable they were. A SIGMA/OECD study assessed civil service reforms in CEE countries five years after accession to the EU (SIGMA 2009, 15). The study included countries that joined the EU in May 2004 and examined the extent to which these countries have continued the reform of civil service after accession and the extent to which their civil service systems fit the European principles of administration in 2009.

The paper argued that only a minority of countries had made progress since gaining full EU membership in 2004. According to the level of development of civil services systems reached five years after accession, three groups of countries could be distinguished. The first group was countries that continued pre-accession reforms and upgraded their civil service systems. In Lithuania, Latvia, and to a lesser extent Estonia, the civil service system achieved a relatively high degree of fit with European principles of administration, but the achievements still remain vulnerable and unconsolidated.

The second group of countries (Hungary and Slovenia) were classified as cases of "constructive reform reversals". Both countries have made progress in some areas of civil service governance but the fit with European principles had declined in others. Overall, the civil service systems in Hungary and Slovenia

demonstrate an intermediate degree of fit with European principles of administration.

The third group of countries (Poland, Slovakia, and the Czech Republic) were classified as cases of “destructive reform reversals”. In all three cases, civil service institutions had been eliminated since accession, without the establishment of new frameworks. Until 2009, the civil service systems of these three Member States had not reached an intermediate degree of compatibility with European standards of administration.

Based on the study findings, it could be concluded that most of the transitional countries lacked awareness of the importance of a professional and efficient civil service with high integrity. Their readiness for reforms was motivated primarily to fulfill EU requests. Once the EU was “pleased” and “green light” for accession from Brussels received efforts on institutional development ceased. The conclusion of the paper was that only three Baltic countries continued with reforms in this area after accession.

Lack of awareness of national authorities on the importance of rule of law and institutional building and thus an absence of authentic domestic initiative in upgrading them was clearly recognized in countries that joined EU in the next wave of EU enlargement – Bulgaria and Romania, in January 2007 as well. Furthermore, it could be said that external (EU) pressure played a key role in the process of reforming and strengthening the rule of law and institutions in Croatia that joined the EU in July 2013.

In Serbia, processes of upgrading rule of law and of developing institutions were induced, guided, and kept running due to the strong involvement of the EU Commission as a part of the wider accession process. When in EU the issue of enlargement was replaced by the necessity of internal reorganization after the UK Brexit referendum vote in June 2016, the reform processes in Serbia, including the strengthening of rule of law and institutions were abandoned. Step back in mentioned areas in Serbia was visible particularly since 2016 that coincide with Brexit referendum and with a weakening of EU interest for enlargement. Poorer performance of Serbian institutions resulted in a higher perception of corruption – Transparency International CPI score was 42 in 2016 while in 2019 it dropped to 39.

Moreover, Freedom House in its “Freedom in the World 2019” report downgraded Serbia to the status of “partly free” country. Serbia was one of the countries with the biggest declines in its democracy score, alongside Nicaragua, Tanzania, and Venezuela. Freedom House uses 25 indicators to rank countries on a 100-point scale. These indicators include electoral processes, human rights, and rule of law (Freedom House, 2019).

The transitional process enabled CEE countries to develop institutions, taken on a broader sense, much faster than it took Western countries to develop their own. For example, Croatia completed transitional process that ended up with joining the EU within a period of a decade. The “cost” of such fast pace is weak ownership by local authorities resulting in questionable and vulnerable sustainability.

It could be concluded that a key prerequisite for improving the quality of citizens' lives and for raising the availability of civil rights in practice is to provide a political will for reforms that would include upgrading the rule of law, institutional building as well as the fight against corruption. The incentive for creating such will could come either from outside (primarily from the EU, in the context of EU accession process of the Western Balkan countries) or from inside by domestic stakeholders such as political parties, business community, non-governmental organizations, etc. It is important to emphasize that in this paper we discuss how civil rights are applied in citizens' everyday life and not about the formal aspect since most of the rights are already available ("on paper") to our citizens by a constitution and by other relevant laws that were prepared as a part of the process of harmonization with EU standards.

Furthermore, in the absence of strong political will and commitment to the strengthening of rule of law and institutions, it is reasonable to re-examine usefulness of the present form of international assistance to reforms in these areas. Namely, although there is no genuine will for reforms, international organizations led by the EU continue to provide large technical assistance to Serbia in institutional capacity building and in strengthening rule of law. Trainings and promotions of "best practice" cases form a significant part of IPA and other international projects aimed to improve the way local institutions operate. However, if managers and employees of beneficiary institutions are not truly committed to reforms, trainings have a little impact if all.

According to the survey on motivation of public officers in public procurement (IPSOS 2019), majority of the officers were reluctant to take any action that required additional efforts and that brought more risk than usual. In other words, they prefer routine, not change. The consequence is that only minority of officers are truly willing to learn new techniques and procedures that would improve their performance as well as the performance of their organizations.

In case that agile, ambitious officers are faced with barriers and rigid systems within organizations unprepared for changes, they usually decide to leave the organization moving to more dynamic entities where they can meet their personal need for professional improvement. In that way, public institutions are left with fewer officers that possess advanced knowledge and have to rely more on those who are not interested in changes and who perceive training as "an unnecessary burden" to their everyday work.

The experience of reforms in Serbia, in the past two decades, proved that steps forward in the rule of law and in the development of institutions were critically dependent on the attitude of decision-makers. Where directors and heads of public authorities initiated and supported continuous reforms, chances for success were high. Otherwise, even the best trainings would have very limited impact due to the absence of will to implement newly acquired knowledge. Moreover, institutions that should serve as "pillars" of reforms in many cases were losing their "institutional memory" over time since officers that were most prone to adopt and apply new skills would opt for leaving rigid bureaucratic organizations thus additionally diminishing potential benefits of technical assistance.

Furthermore, institutional performance is highly dependent on so-called “soft skills” that affect behavior and motivation of officers. In transitional countries, changes were not needed just in “core businesses”, but in manners of organization, management, employees’ motivation etc. Research of the influence of deadlines set by Public Procurement Law on the actual duration of public procurement processes in Serbia proved that legal deadlines explain the duration of an average public procurement process to only 24% (Čudanov, Jovanović and Jaško 2018, 365). Remaining 76% comes from the organization of the process, internal delays and “bottlenecks”, etc.

This calls attention to organizational and managerial issues that were highly neglected in search to achieve public entity major goals. For example, in the public procurement area, one of the institutional key performance goals is the higher efficiency of the procedure. The major indicator of achieving that goal is the duration of the procurement procedure measured in the number of days required to complete the procedure. In order to meet the goal of providing supply of goods, services and works smoothly, without delays, managers of Serbian public procurement entities focused their initiative on cutting legal deadlines for the submission of bids. However, they overlook that EU countries undertake procurement procedures within the same legal deadlines as set by directives without delays. The reason lies in higher efficiency due to better organization and management.

Directors of Serbian public authorities make limited efforts aimed to organize the process at the level of organization better, to establish efficient monitoring and control mechanisms that would prevent irregularities and to enable detection of misuse much easier. Instead of focusing strictly on cutting deadlines through amendments of the Law, it is necessary to pay attention to the organization’s operational processes. Moreover, IOs should include in their programs of assistance, besides Law amendments, expertise in organization, management, and managerial responsibilities, in particular. In recent years, international organizations have already recognized the importance of this kind of expertise for institution building in transitional countries (SIGMA 2009, 21-5).

It could be concluded that current practice of providing expertise by IOs to the countries in transition aimed to develop institutions, strengthen the rule of law and curb corruption is far from being sufficient for success of reforms. It is important to keep in mind that the key prerequisite for achieving “zero tolerance” to corruption, strict implementation of rules relying on strong institutions with sufficient capacities independent from the influence of political parties and particular interest groups is to create and keep domestic political will for changes required to meet the abovementioned goals. Once the political will and orientation are provided, international technical assistance could be productive, not before.

The behavior of institutions’ managers should be targeted including the creation of a proper set of incentives for them, both positive (recognitions) and negative (sanctions), for acting in the desired manner. Improved evaluation undertaken by the local civil sector and other domestic stakeholders as well as by IOs would require shifting focus from formal changes to the practical ones. Evaluation should take into account if certain activities led to changes of real

indicators, not to simply report that planned activities were performed. The necessity of adopting a new approach to evaluation and to the assistance concept has already been recognized by IOs with World Bank's "Project for Results" (P4R) as one of the successful examples. Moreover, extension of technical assistance should be conditioned by achieving targets in practical sphere in the previous project as it was the case in the P4R. The new approach would help to avoid a scenario where frequent legal changes disguise lack of implementation, creating an illusion to domestic public as well as to the international community that local authorities are active in establishing rule of law, institutional development and fight against corruption while there is no progress in real life of their citizens.

## **EDUCATION AS A COMPONENT OF HUMAN DEVELOPMENT – FORMAL RIGHT AND REALISTIC POSSIBILITIES**

In addition to income, education is another important indicator of human development. Defining the Education Strategy and Education Policy as a public policy sub-discipline should give everyone an equal right to education, especially the availability of higher education levels. The realization of an equal right to education is conditioned by the degree of social development and the represented level of poverty and economic inequalities.

The Strategy for the Development of Education in the Republic of Serbia until 2020 deals with the determination of the purpose, goals, directions, instruments, and mechanisms of development of the education system in Serbia over the past ten years and attempts to shape the development of this system in the best-known way. The projection relied on the state of the system at the time when the strategy was prepared and was guided by the expected life and development needs of society in Serbia.<sup>3</sup>

The Action Plan for the Implementation of the Strategy for the Development of Education in the Republic of Serbia until 2020 specifies individual activities defined by the goals and priorities of the Strategy, elaborates ways of implementation, deadlines, key actors and executors, instruments for monitoring and set indicators of progress, as well as of procedures for reporting and assessing the effects of the foreseen strategic measures.

The Action Plan set out four goals for the long-term development of education that are binding on the education system as a whole and for every part of it. The goals are: 1) increasing the quality of educational processes and outcomes to the maximum attainable level - one arising from scientific knowledge of education and reputable educational practices; 2) increasing the coverage of the population of the Republic of Serbia at all educational levels, from pre-school education to lifelong learning; 3) achieving and maintaining the relevance of education, especially that which is wholly or partly financed from public sources, by matching the structure of the education system to the immediate and developmental needs of individuals, economic, social, cultural, media, research, educational, public, administrative and other systems and 4) increasing the efficiency of use of all

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<sup>3</sup> National documents: <https://erasmusplus.rs/nacionalni-dokumenti/>, 13 February 2020.

education resources, that is, completing education within the stipulated period, with a minimum extension of time and reduced school leaving.<sup>4</sup>

From the late 1960s and early 1970s the idea of the necessity of changes in the educational process matured, and “from that moment until today we can talk about a permanent reform of education in our society, that has been going through periods of ups and downs” (Miladinović 2011, 27). For example, in socialist Serbia, the children of the peasants made it relatively easy – especially when compared to the present day – to move into all secondary and higher occupations (Antonić, 2013, 161).

However, some research on the social structure in Serbia indicates that the right to education, especially to higher levels of education, depends on belonging to a particular social class. Thus, for example, in contrast to the period before the 1990s, members of the lower classes are not able to educate and do not have access to higher levels of education.

Social mobility was significantly reduced after the collapse of socialism and the following crisis that hit the country during the 1990s. This can be seen from the research conducted by Lazić and associates in 1997. The share of executives with peasant origin fell to 46 percent and of professionals to 41 percent, “the data point to the structural consolidation of deagrarianization carried out in socialism and the beginning of a linear reproduction of the layered structure. 'Private' kinship still strongly links the layer of farmers to the layer of small entrepreneurs, while the agricultural background of executives is gradually declining as new generations arrive in this layer. There are fewer farmers, and their offspring are increasingly struggling to enter higher positions in the social hierarchy” (Cvejić 2006, 137).

The survey by Lazić et al (2012), with Cvejić (2012) reporting on mobility findings, shows a further decline in agricultural and worker backgrounds among the upper classes. For executives this share fell to 22,5 percent (1988: 83,9 percent; 1989: 61 percent; 1997: 46 percent), for professionals to 37 percent (1988: 66,2 percent; 1989: 43,9 percent; 1997: 41 percent), while for private entrepreneurs it fell to 50 percent (1988: 71,3 percent; 1989: 57,1 percent; 1997: 68 percent). Although some of this decline can be explained by different patterns “the trend of increasing recruitment from the upper class and class consolidation is clear”, that is, “the recruitment circle for the higher layer is increasingly closing in the relation of the higher layer - the expert layer” (Cvejić 2012, 150-1). When it comes to professionals, while previously the children of peasants or workers were relatively easy to reach specialist positions, and especially clerical ones, nowadays opportunities for social ascent through education are much less favorable: “The offspring of parents who have no more than primary education are most likely to receive secondary education, and the offspring of parents with secondary education are more likely to go to universities so that in only two generations can a number of lower-class members be expected to reach middle one” (Cvejić 2012, 152).

The higher education system organized in this way additionally closes the already closed social structure (Miladinović 2011, 41). Whether Serbia will resolve

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<sup>4</sup> Action Plan: [http://www.mpn.gov.rs/wp-content/uploads/2015/08/Akcioni\\_plan.pdf](http://www.mpn.gov.rs/wp-content/uploads/2015/08/Akcioni_plan.pdf) 27 January 2020.

the economic hardships of a (semi)peripheral society remains to be seen, “but even with this trend stopped, it is unlikely that Serbia, in terms of intergenerational mobility, will ever be as open in the near future as it was during the 1960s and 1970s” (Antonić 2013, 167).

The results of the research on (in)equality in the ability of members of a different class to educate, especially the lower social strata, show that Serbian society is more closed, ie. that mobility to higher levels of education is no longer an option available to all members of society. The young experts with a degree became Serbia’s export item. It is obvious that in Serbia the components of human development – income and education, especially the availability of higher education, are in a direct correlation. Based on research on economic and educational inequalities, we can conclude that Serbian society since the 1990s has become a society where mobility to higher places in the social structure based on educational qualifications is increasingly an individual privilege, rather than a more widely understood right to an education that is accessible to all regardless of the social stratum they come from.

## CONCLUSION

Human rights include persons’ rights on an adequate standard of living, including appropriate housing, health care, education, etc. A higher level of meeting those goals indicates citizens’ better quality of life that enables them to achieve their human rights to a greater extent. State authorities tend to overemphasize economic components of standard of life such are GDP and personal average income. The consequence is that they make an equation between the rise of GDP and quality of life. However, in many cases, such it was in Serbia during the past decade, the higher rates of GDP rise than in WE countries were followed by deterioration of other components of quality of life such were: reduced corruption, strong and independent institutions, rule of law, mobility to higher education for all structures of society, etc. Based on migration trends within the EU, it could be concluded that citizens value the abovementioned non-monetary components even more than income. State authorities should put in focus on sustainable development goals such as are rule of law and education in order to create a better quality of life for their citizens.

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## CO-OFFENDING AND RE-OFFENDING AMONG CHILDREN

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### **Abstract**

Recidivism among children, draws the attention of criminal justice and criminological theory, especially the social response to prevent and suppress this phenomenon. Recidivism and repeated commission of crimes especially among children as subjects primarily is considered as an indicator that their behaviour is not a product of accidental circumstances and has not an episodic character, but that it is conditioned on the permanent and profound subjective and objective factors.

Criminologists associate committing a crime in a group with a negative criminological prognosis, meaning that those who have committed the crime in a group are more likely to continue actively committing crimes.

Results that will be presented in this paper show that recidivism rates are higher among individuals with a co-offending network, and there is a consistent, positive relationship between co-offending and re-offending.

**Key words:** *co-offending, re-offending, group, juvenile, delinquency*

### **INTRODUCTION**

Offending among children or juvenile delinquency is a serious universal problem, present in all ethnic, racial and social backgrounds. Today, this term implies to a wide range of unacceptable behaviors, starting from asocial, antisocial up to and including severe forms of criminal behavior. The moment when the asocial behavior crosses the boundaries of juvenile disobedience and enters the phase of breaking the criminal and legal norms i.e. committing crimes, we can talk about crime among children.

The child criminality, in a phenomenological sense differs from adult criminality, among other things and by the fact the crime committed by children in smaller or bigger groups is more common than crime committed by adults. Such manner of crime execution is narrowly connected and can be significantly

understood as a result of the bio-psychological and social traits of young people. It is commonly known that the need for socializing and intense social communication is particularly emphasized amongst young people. They tend to live in a group due to the fact that they feel safer in it, can realize themselves, affirm themselves and satisfy their need for belonging through it.<sup>1</sup>

Functioning in a group, as an appearing form of delinquent behavior in children is insufficiently considered as a critical indicator of the severity of delinquent behavior of perpetrators at this age. This lack of interest in our country can be partially explained by taking into consideration the fact that the association between children here is not as evolved in form nor number like it is the case with some other countries.<sup>2</sup> Judging by some of the existing knowledge, most of these groups are neither numerous nor firmly structured, but it would be completely unfounded to make claims that this sort of "associations" do not exist, i.e. that their manifestation in our country is such that it can be ignored. This especially in regards to possible further delinquent behavior, for what in literature can be very often seen that that recidivists, multiple recidivists and delinquents of habit are recruited from children that commit crimes in a group, which according to some authors consist the "most hardcore part of each criminal population, resilient to all measures of penal treatment"<sup>3</sup>.

Of course it is not possible to exactly demonstrate this connection without appropriate research. Hence the particular interest of the authors in dealing with this topic.

This paper summarizes the results from a more extent research with the goal to obtain more appropriate data necessary for determination of a relatively clear phenomenological picture.

## **THE CONECTION BETWEEN CO-OFFENDING AND RE-OFFENDING**

Co-offending is defined as the commission of an offence by more than one person, and consequently, co-offending networks (or groups) comprise actors who participate in a common event (i.e. commit a crime together)<sup>4</sup>.

The literature on crime and criminal behavior has long recognized that a large volume of criminal offending involves two or more individuals acting collaboratively. Although the true size and impact of co-offending is still not well

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<sup>1</sup> Арнаудовски, Љ. (2007), *Криминологија*, 2-ри Август С- Штип, Скопје, p. 467

<sup>2</sup> According to the Maxon-Klein typology, the dominant form in the United States *are the street criminal groups* that commit various crimes. Mostly it is an adolescent group *that exists between 10 to 15 years and consists of 10 to 50 members*. Their criminal behavior scheme is diverse. According to the presence, the next most registered street criminal group, especially in Europe, is the specialized one, with fewer members, on average slightly older, who narrowly define their criminal activity in a small number of crime types. (Đurđević, Z., Vuković, S., Radović, N., (2013), *Violence of crime street groups*. Science, safety, police, 18(1), p.29)

<sup>3</sup> Singer, M. (1996), *Kriminologija-drugo izdanje*, Nakladni zavod Globus, Zagreb, p.193

<sup>4</sup> McGloin, J., Povitsky Stickle, W. (2011), *Influence or Convenience? Disentangling Peer Influence and Co-offending for Chronic Offenders*, Journal of Research in Crime and Delinquency 48(3), Sage Pub, p.422

known, previous research suggests that up to 35 percent of all crime events involve more than one offender.<sup>5</sup>

At the same time, the fact that young people often commit offences in the company of peers has long been understood within the field of criminology. Shaw and McKay analyzed material from the Cook County juvenile court in Chicago and found that 82 percent of the offences dealt with by the court in the course of the year were linked to two or more perpetrators.<sup>6</sup>

It is not surprising that several core criminological theories either directly root etiological processes in social networks or, at the very least, integrate them into explanations of crime. Even though so many of our seminal theories use the group nature of crime to buttress their propositions, however, there is minimal research on co-offending patterns, processes, precursors, and consequences. Such a gap leaves answers to even basic questions about why individuals co-offend and the impact that such a group behavior can have on the criminal career.

Perhaps, in part, this void is the result of viewing co-offending simply as a characteristic of the criminal event or as evidence of the power of criminogenic social influence, rather than as holding any unique meaning in or of itself. In recent years, however, researchers have made significant strides in narrowing this empirical gap and, as a consequence, have demonstrated that co-offending is a worthy and important domain of criminological inquiry. There are clear indicators that group crime can alter and change offending pathways and that understanding the patterns and processes of co-offending can provide important guidance for law enforcement interventions.<sup>7</sup> For example, some researchers suggested that co-offending increases the likelihood of persistent criminality, especially when coupled with early onset.<sup>8</sup>

Broadly speaking, there are two main theoretical perspectives on the relationship between co-offending (as compared to solo offending) and continued offending.

First, the selection perspective argues that co-offenders' criminal trajectories are shaped by factors that are correlated with, but not influenced by, their co-offending behavior. While criminologists today seem reluctant to argue that

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<sup>5</sup> Bright, D., Whelan, C., Morselli, C., (2020), *Understanding the structure and composition of co-offending networks in Australia*, Trends & issues in crime and criminal justice, Australian Institute of Criminology, No. 597, p.1

<sup>6</sup> Sarnecki, J. (2001), *Delinquent networks – Youth co-offending in Stockholm*, Cambridge University Press, p.22

<sup>7</sup> McGlowin, M., Nguyen, H., (2014), *The importance of studying co-offending networks for criminological theory and policy*, In Crime and Networks, Taylor & Francis, p.13

<sup>8</sup> \*Deviant peers influence juveniles who already have some history of delinquent behavior to increase the severity or frequency of their offending. A few studies of children younger than 14 support this hypothesis. For example, in a study of Iowa juveniles, involvement in the juvenile justice system was highest for those who engaged in disruptive behavior and associated with deviant peers at a young age. (Wasserman, G., Keenan, K., Tremblay, R., Coie, J., Herrenkohl, T., Loeber, R., Petechuk, D., (2003), *Risk and Protective Factors of Child Delinquency*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, p.6).

\*Co-offending delinquents tend to commit crimes at higher rates than do solo offenders (McCord, J., Conway, K. (2002), *Patterns of juvenile delinquency and co-offending*, U.S. Department of criminal justice, Temple University, p.3)

co-offending has no unique effect on reoffending, it is important to note that the disentanglement of the importance of selection versus influence remains a prominent methodological challenge in co-offending groups as in other social groupings.

Second, what can be called the influence perspective contends that co-offending has a unique, independent impact on subsequent criminal behavior. Extending the concepts of social and human capital from conventional to illicit activities, co-offending might increase social criminal capital by providing a network of support, protection, knowledge and information and human criminal capital by providing specialized skills and knowledge through social learning processes with co-offenders.<sup>9</sup>

The notion of co-offenders as sources of criminal capital is substantiated by studies showing that individuals who are embedded in co-offending networks and/or have criminal mentors are aware of more criminal opportunities and have a lower risk of arrest and higher criminal earnings than those who are not.<sup>10</sup>

If co-offender ties nurture and develop criminal capital, these connections should significantly impact the offending patterns of connected offenders. Co-offending group members may be substantively different in at least two ways from those who typically offend alone.

First, according to Sutherland's theory of differential association, criminal behavior is learned through association with delinquent others. Individuals learn attitudes, or "definitions," favorable toward the violation of the law in the context of peer relationships (i.e., networks). Attitudes and norms for criminal activity then spread through the network and are reinforced.

Second, connections to criminal others may be associated with increased pressure to continue offending. Andresen and Felson find that co-offending may push offenders deeper into criminal lifestyles. Similarly, Matza suggests that individuals may be provoked into continued offending through group support, or the "situation of company". If an offender is tied to other offenders, it is harder for that offender to detach from a criminal lifestyle.<sup>11</sup> The decision-making of such an individual is influenced by the presence of others. Crime is facilitated by

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<sup>9</sup> Group crime nonetheless has the ability to further embed individuals in criminal lifestyles, as well as to expand and deepen offending repertoires. This process can happen through several, often complementary, routes. Group crime provides an opportunity for individuals to learn deviant behavior and attitudes, as well as the ability to recognize a wider range of criminal opportunities. Co-offending connections can lead to sharing new methods of committing crime, identification of potential targets, information about the police activities and opportunities to be part of specific criminal enterprises. (McGlowin, M., Nguyen, H., (2014), *The importance of studying co-offending networks for criminological theory and policy*, In Crime and Networks, Taylor&Francis, p.15)

<sup>10</sup> Andersen, S. (2019): *Partners in crime? Post-release recidivism among solo and co-offenders in Norway*, Nordic Journal of Criminology, p.3

<sup>11</sup> Lantz, B., Hutchison, R. (2015), *Co-offender ties and the criminal career: The relationship between co-offender group structure and the individual offender*, Journal of research in crime and delinquency, Vol 52(5), p.661

delinquent peers who, by their presence and encouragements, provide anonymity and a sense of shared responsibility.<sup>12</sup>

Empirical research on the topic has also produced mixed and conflicting result, probably due in the part to the use of widely varied samples and outcome measures. Co-offending was found to be associated with an increase in career length by Conway and McCord, however Reiss and Farington and McGloin and Stickle found no relationship between co-offending and risk of re-offending.<sup>13</sup>

## **HYPOTHESIS**

### **Main hypothesis**

The children that commit crimes in a group have negative criminological prognosis and often appear as recidivists.

### **Individual hypothesis no.1**

The commission of crimes in a group is a significant phenomenological feature of the criminality among children. The group structure is predominantly homogeneous, consisting of two to three children of the same or similar age.

### **Individual hypothesis no.2**

The dysfunction and the difficult financial situation of families, significantly determines their risky behavior and attachment to peer groups in which delinquent forms and criminal behavior can dominate.

## **SPECIFICATION OF THE RESEARCH**

The researches carried out so far on the territory of our country and within the Balkan Peninsula, focus on the analysis of data related to the criminality among children, which are recorded in the statistical records of the State institute of statistics and the Ministry of interior affairs. This data can partially give an idea of the scope and the dynamic of the juvenile delinquency, and through a partial analysis of the number of committed crimes and the number of offenders it is possible to come to a conclusion regarding the presence of grouping, as a trait of the criminality in this age category.

When speaking of juvenile delinquency, the statistical data does not represent the real state of the crime on specific area for various reasons. Firstly the statistical records include only those crimes/perpetrators for which a criminal proceedings have been initiated and are in a certain procedure phase. When speaking of children as a category of perpetrators, the fact that almost one third from reported crimes are not taken before a judge due to the fact that at the time of commission of the crime they were below 14 years old, or that the principle of opportunity of criminal prosecution is significantly applied on the population aged

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<sup>12</sup> Ouellet,F., Boivin,R., Leclerc,C., Morselli,C., (2015), *Friend with(out) benefits: co-offending and re-arrest*, In *Advances in Research on Illicit Networks*, Routledge, p.25

<sup>13</sup> Masrtigt,S., Carrington,P., (2019), *Co-offending*, In *The Oxford Handbook of Developmental and Life-Course Criminology*, Oxford University Press, p.140

14-18 should be taken into consideration.<sup>14</sup> Hence, part of the complete phenomenological picture remains- unrecorded and unanalyzed, and on the other hand, the statistical data is interpreted in such a manner that when it comes to group commission of crimes and recidivism as traits of juvenile delinquency, no specific features can be determined.

For these reasons, and in order to obtain appropriate data needed to determine a relatively clear phenomenological picture, this research was conducted in the Basic Courts with extended jurisdiction, namely the courts in Bitola, Gostivar, Skopje and Shtip.

The research sample includes all the legally binding cases in the period covered by the analysis<sup>15</sup>, available in the court archive during that moment. The cases consisting of one person as the perpetrator were placed into the records and the cases where the perpetrators were in a group of two or more children were submitted to a more detailed analysis based on a pre-determined research procedure. Data, primarily of a phenomenological nature, that was necessary for obtaining certain knowledge was collected through a content analysis and was processed by using the software package SPSS which helped to obtain the results that will be shown below.

## RESULTS FROM THE CONDUCTED RESEARCH

### *Summary results from the conducted research in courts*

- **Family members**

From the total number of cases, we have data for 3514. Out of all of the categories, dominant are the families with multiply members i.e. 55% of the perpetrators belong to families that consist of 5 or more members.

*Table no.1 Number of members of the perpetrator's family*

		Frequency	%	Valid %	Cumulative %
Valid	2	137	3,8	3,9	3,9
	3	359	10,0	10,2	14,1
	4	1048	29,3	29,8	43,9
	5 and more	1970	55,0	56,1	100,0
	Total	3514	98,1	100,0	
Missing	System	67	1,9		
Total		3581	100,0		

<sup>14</sup> Law on Justice for Children- "Official Gazette of the Republic of Macedonia" no. 148 from 29.10.2013, Article 17 paragraph 1, Article 20

<sup>15</sup> During the stay in each of this courts, an insight was performed in the available cases (completed cases against children as perpetrators of crimes for the period of 2005-2015).

- **Family functionality<sup>16</sup>**

As for the data on what kind of family it is - functional or non-functional, we have data on 3581 cases. 45.5% of the analyzed perpetrators originate from functional, and 54.5% from dysfunctional families.

*Table no.2 Type of perpetrator's family*

		Frequency	%	Valid %	Cumulative %
Valid	Functional	1620	45,2	45,5	45,5
	Dysfunctional	1942	54,2	54,5	100,0
	Total	3562	99,5	100,0	
Missing	System	19	,5		
Total		3581	100,0		

- **Financial state**

Out of the total of 3581 children perpetrators, 1177 or 31.9% live normally and 2383 or 66.9% survive each following day accordingly to the poor financial situation in which they find themselves.

*Table no.88 Perpetrator's financial state*

		Frequency	%	Valid %	Cumulative %
Valid	Satisfactory	2383	66,5	66,9	66,9
	Non-satisfactory	1177	32,9	33,1	100,0
	Total	3560	99,4	100,0	
Missing	System	21	,6		
Total		3581	100,0		

- **Total number of group members**

From the conducted analysis on a total of 3581 cases, it can be determined that the individual commission of crimes is with the lowest percentage, and that the crimes executed in a group are 76.2% of the cases. The analysis of the total data regarding the number of members in the group however shows that the crimes are almost identically executed by all analyzed groups with different number of

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<sup>16</sup> The qualification whether a family is categorized in the category of functional or non-functional families is performed on the basis of data derived from the Reports of the Center for Social Affairs that could be found in the cases themselves. Only the families where the children were not taken care of by their parents, were treated as non-functional by the researcher. These are families where the crime is present among its members, numerous socio-pathological phenomena in its functioning, i.e. completely degraded families in which children are left to fend for themselves. In further analysis we will see that even seemingly functional families (where some of the above forms do not appear), due to certain other factors such as social status, family size, etc., fail in their function and appear as an important predictor of juvenile delinquency, as well as the reason for their orientation towards the groups of delinquent peer groups where they find their sense of belonging and comfort.

members. The larger groups with over four people definitely do not dominate the complete phenomenological picture.

**Table no.3** *Number of members in the group*

		Frequency	%	Valid %	Cumulative %
Valid	Crime not committed in a group	851	23,8	23,8	23,8
	Crime committed in a group of 2 people	932	26,0	26,1	49,8
	Crime committed in a group of 3 people	812	22,7	22,7	72,5
	Crime committed in a group of 4 people and more	982	27,4	27,5	100,0
	Total	3577	99,9	100,0	
Missing	System	4	,1		
Total		3581	100,0		

- **Group structure**

And by analyzing this variable, the "loners" as perpetrators occupy only a small piece of the research "pie", more specifically 20.7%. Regarding the structure of the group we can make the conclusion that group execution dominates in a homogeneous group of peers aged 14 to 18 years with a high percentage participation of 47.7%.

**Table no.4** *Group structure*

		Frequency	%	Valid %	Cumulative %
Valid	Crime not committed in a group	739	20,6	20,7	20,7
	Homogeneous group (14-18)	1707	47,7	47,7	68,4
	Heterogeneous group (+18)	713	19,9	19,9	88,3
	Heterogeneous group (-14)	299	8,3	8,4	96,7
	Heterogeneous group (+18,-14)	119	3,3	3,3	100,0
	Total	3577	99,9	100,0	
Missing	System	4	,1		
Total		3581	100,0		

### Variables relations

*Table No. 5* Pearson X2 Values (Relation to Variable - *Group Structure*)

	Chi-Square Tests			
		Value	df	Asymp. Sig. (2-sided)
Family functionality	Pearson Chi-Square	15,599	4	,004
Family members	Pearson Chi-Square	55,189	12	,000
Financial state	Pearson Chi-Square	32,277	4	,000

The asymmetry (sig.) in all analyzed factors is much lower than the limit (0.05), which shows that the fact that the perpetrators come from dysfunctional, numerous and poor families is an important precondition for complicity in the commission of criminal offenses.

- **Recidivism**

Regarding the recidivism variable, data is obtained for total of 3581 perpetrators. From this number, as seen in the table, 1802 persons or 50.3% are not registered as recidivists, but a significant part 1764 or 49.3% belong to the recidivist category i.e. they are recidivists that began their criminal career long before the event that led them before the courts.

*Table No. 6* Recidivism among the perpetrators

		Frequency	%	Valid %	Cumulative %
Valid	No	1802	50,3	50,5	50,5
	Yes	1764	49,3	49,5	100,0
	Total	3566	99,6	100,0	
Missing	System	15	,4		
Total		3581	100,0		

### **Variable relations**

As we have already mentioned, criminologists associate the commission of a crime in a group with a negative criminological prognosis, i.e. they claim that those who committed the crime in a group continue more often to actively commit crimes.

**Table No. 7 Relation of the recidivism and group structure variables**

		Group structure					Total
		Crime not committed in a group	Homogeneous group (14-18)	Heterogeneous group (+18)	Heterogeneous group (-14)	Heterogeneous group (+18,-14)	
Recidivism	No	361	972	303	110	53	1799
	Yes	376	734	406	183	65	1764
Total		737	1706	709	293	118	3563

As seen from table no.7 the participation of recidivists in the total number of analyzed cases is high, but the number of those committed in a group is almost dominant. More evident is the data seen in table no.8 that supports the above mentioned thesis.

**Table No.8 Pearson X<sup>2</sup> Values in Relation to the Recidivism Variable**

Correlations		
		Recidivism
CT	Pearson Correlation	<b>,080</b>
	Sig. (2-tailed)	,000
	N	3563

The value of the Pearson coefficient demonstrates a high correlation from which we can reasonably expect that the grouping and the recidivism are interrelated phenomena. We can confirm this conclusion by reading the value of the Chi-Square test,  $X^2 = 67.54$  at the level of Sig = 0.00, which shows that there is an intensity of correlation between the group structuring and the recidivism.

**Table no.8 Pearson X<sup>2</sup> Values (Relation to the Recidivism Variable)**

Chi-Square Tests			
	Value	Df	Asymp. Sig. (2-sided)
Pearson Chi-Square	67,542	4	,000
Likelihood Ratio	67,892	4	,000
Linear-by-Linear Association	22,574	1	,000
N of Valid Cases	3563		

## DISCUSSION

This analysis leads to the conclusion that the dysfunctional larger families with low socio-economic status are a nursery for criminal-oriented children, especially for those that began and carried out their careers in co-offending. The summary of the descriptive analysis demonstrates that over 55% of the families of analyzed perpetrators are dysfunctional and large and 66.9% of them live on the edge of poverty.

The statistical analysis confirms the conclusion that such families are dominant among the children who commit crimes in a group. The correlations between the co-offending and the family traits, shown through the values of  $X^2$  indicate that the fact the perpetrators originate from dysfunctional, large and poor families is an important precondition for co-offending in committing crime.

Also, out of the children included in the analyzed sample, 76.2% committed the crime in a group. Dominating groups are those consisting of 2-3 members, and in only 27.5% of the analyzed cases it is a matter of larger groups that consist of more than 4 members. Regarding the structure of the group, we came to the conclusion that 47.7% of the groups are homogeneous and consist of peers aged 14 to 18 years. Hence, it is unequivocally confirmed that when it comes to juvenile delinquency in the Republic of North Macedonia, the commission of crimes in a group is an important phenomenological feature.

Finally, throughout the overall research, it was evident that recidivism is present among children as perpetrators of crimes.

When speaking of grouping, according to the value of the Pearson coefficient, as well as the value of  $x^2$ , it is determined that there is an intensity of connection between group structuring and recidivism, thus the main hypothesis that "*Children who commit crimes in a group have a negative criminological prognosis and often appear as recidivists*" is statistically confirmed.

## CONCLUSION

Through the analysis of all previous data and findings we can conclude that the commission of crimes in group is a significant and constant phenomenological feature of crime committed by children in our country. The groups are homogeneous, consisting of children of the same or similar age, are not numerous, but are a cause for concern. The analysis of the paper itself demonstrated a statistical connection between the grouping among the children and their affinity towards recidivism.

Despite all the possible flaws in the methodology of monitoring and processing the indicators in our research, the stated results show without any doubt that the recidivism in our country is very pronounced. If the fact that almost 50% of children do not appear in court records for the first time is devastating, we should imagine the number of those who were previously perpetrators, but for objective reasons remained out of the official records. Their number is dominated by those children who originate from large dysfunctional families with low socio-economic status, so as a real epilogue of such situation appears their orientation towards peer groups that motivate them and commit crimes with.

This indicates the strength of influence of the micro and macro-criminogenic factors on the delicate personality of a young person on one hand, and on the other hand the inefficiency of the state authorities and institutions in battling the criminality. From these general premises for the etiology of grouping and recidivism, arises the need to develop and implement the necessary programs in society aimed at eliminating the factors that lead the child in an undesirable direction.

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# CONSTITUTIONALIZATION OF THE INDIVIDUAL LIBERTY AS A HUMAN RIGHT IN THE US POLITICAL SYSTEM

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## **Abstract**

This paper investigates the federalist papers, while stressing the significance of the individual liberty in the US political system. The main intention of this paper is to locate and to define the current state of the individual liberty in the US, taking into account the US political authorities' attitude. This research derives from the following research question: What are the challenges of the individual liberty in the US as a human right taking into account the federalist papers? The US federalist papers are treated as a “Constitution” of the individual liberty, and its driving force. Besides the right to life, this human right emerges as the second but not less significant than the latter. The individual liberty confirms the right to life and the right to live in a free, prosperous and democratic society, where the state power is limited by the human rights, and thus, guaranteeing the well – being of the people. The individual liberty as a basic human right, especially recognizable for the US, remains as a main pillar of the US democratic political system, historically established by the founding fathers. At the end, this paper concludes that the individual liberty is taken, not given by the state, and thus, it must be improved and preserved, as a bulwark against the destructive forces of the state and its repressive apparatus.

**Key words:** *Individual Liberty; US Federalist Papers; US Constitution*

## **INTRODUCTION**

In the paper below, we will try to present the individual liberty, as a human right deeply embedded in the United States of America (US) political system. Also,

this paper tend to reveal the essence of the oldest federation in the world - the United States of America - whose founding fathers created numerous documents and papers, through which they have presented the benefits of the American people unity under one constitutional treaty based on the individual liberty as a human right. Those moments before creating of the US Constitution are actually even more important since the ratification of the Constitution, because that is where we can see the struggle, the idea and the foundation of the political system. It is a synthesis of ideational directions in the name of liberty, independence, justice, success, prosperity, pursuit of happiness, peace and welfare. All successful and unsuccessful attempts to create a constitutional treaty of the US federation are equally important because through this we can clearly see what is accepted and what is rejected for the people of the United States in efforts to form a common Constitution. One of the most important elements that really helped people to accept the draft US Constitution is that its creators directed their activities allowing the individual liberty to flourish, while the US Government to act with increased attention in order to protect such freedom and individual liberties of the US citizens. The main intention of this paper is derived from J. J. Rousseau stance about the freedom and liberty noted in the “Social Contract: Or principles of political right”: “Man is born free; and everywhere he is in chains. One man thinks himself the master of others, but remains more of a slave than they are. How did this change come about? I do not know. What can make it legitimate? That question I think I can answer” (Rousseau 1762, 2).

### **DEFINING THE INDIVIDUAL LIBERTY**

Individualism can be explained as a “political and social philosophy that emphasizes the moral worth of the individual” (Lukes 2013), as an opposite idea of the collectivism and statism as such, closely related to the anarchism and libertarianism, where individual sovereignty is a crucial premise for achievement of the individual liberty and freedom as a basic human right. The definition of individual liberty often contains the idea of autonomy and independence from other social values like justice, peace and equality. Everything is what it is “liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral” (Berlin 1958, 5). Individual liberty in itself involves providing opportunities for human rational ideas, while “the rejection of the possibility of individual self-determination destroys any chance of achieving human freedom; freedom depends upon the individual, not only to provide the impetus for social change but also as the subject in which [individual] freedom resides. A group cannot be liberated - it cannot, as a group, exercise freedom - only individuals can be free [in and out of a group]. To deny or reject the importance of human individuals is to deny the possibility of human freedom” (Brown 1959, 22). Therefore, “individual liberty is not to be understood as exercising free will (...) the question is whether others can impose their will on me, not whether I can follow my own will” (Miller 2010, 40). In this sense, theorist Friedrich A. Hayek stated: “one’s freedom never requires that other human beings act in certain ways but only that

they do not act in certain ways; that is, that my freedom entails prohibitions on others rather than positive commands” (Hamowy 1978, 287). One of the most prominent philosophers of individualism, Ayn Rand, defines the concept of individual liberty with the following words:

regards man - every man - as an independent, sovereign entity who possesses an inalienable right to his own life, a right derived from his nature as a rational being. Individualism holds that a civilized society, or any form of association, cooperation or peaceful coexistence among men, can be achieved only on the basis of the recognition of individual rights - and that a group, as such, has no rights other than the individual rights of its members (Rand 1961, 122).

Ayn Rand added a special attention to the individualism as a concept of a “man as a heroic being, with his own happiness as the moral purpose of his life, with productive achievement as his noblest activity, and reason as his only absolute” (Rand 1957). In this direction I would mention and John S. Mill, who talks about the free discussion of critical approach rather than blind acceptance of things in his book “On Liberty”. Only through debate and rational and objective judgment, one individual should build their own position, but he cannot consider it like eternal absolute truth because someone else can find the shortcomings of such an attitude and oppose to it.

Individual liberty meant freedom of the individual to fulfill its free will. However, it is constantly mentioned that such liberty should be protected, not oppressed. The authority that is upon, after all it has a minimum role in order to protect it, but cannot control at the same time. While the individual sovereignty means a lack of authority over the individual, or “merely the refusal to be dominated by others, regardless of whether such domination derives only from the arbitrariness of persons or from allegedly existing ‘higher’ beings, commands and ‘duties’ - whose real existence is unprovable” (Solneman 1977, 29). The sovereignty of the individual denies the existence of any authority over it, and thus, the individual is treated as an (ultimate) authority on itself elevated above all other controllers in its will and an absolute master of his own free will. Therefore, “[t]he sovereignty or the individual will be found on trial to be indispensable to harmony in *every step* of social reorganization, and when this is violated or infringed, then that harmony will be sure, to be disturbed” (Warren 1852, 26). This involves placing sovereignty of the individual over the state and its institutions, over bureaucratic apparatus, over “gods” and religion, over the nation and above the king. In this sense, the theorist Solneman stated: “If the people were actually sovereign, then there would be neither a government nor governed any longer, at least not in today’s sense. Only voluntary members of autonomous protective and social communities or non-members of such communities would remain” (Solneman 1977, 190). In this sense, we conclude that the individual liberty as a human right involves creativity by the people / individuals, who seeks to control their lives according to their individual principles, while respecting the US constitutive acts and the federalist papers as an emanation of their strive for creation of a “Heaven on earth” – the Heaven of freedom. This human right, unlike the other

human rights and freedoms, requires high awareness of the individuals in relation to the US political system. The aim of this human right is to enable a creation of political system where no individual will be ruled by another against his will. This type of political system, envisioned by the US founding fathers, is based on a free will, the property rights (the private property in particular) and the peaceful and voluntary activity of each individual within the American union, as a community of free individuals, liberated from the control and oppression of the central government. In this sense, the US central government, only need to preserve the free will of the people, in order to encourage the ability for improvement of property, societal and cultural needs of the US citizens, while living in a peaceful and prosperous social environment / community.

### **THE INDIVIDUAL LIBERTY IN THE US CONSTITUTIVE ACTS**

Alexander Hamilton, one of the US founding fathers, seeks the weaknesses of confederate government. The main objective of Hamilton was to establish a federal political system with a strong central government. In this regard, the term “central” does not mean “centralized” government, but on the contrary, Hamilton wanted to indicate the only supranational authority that will have a greater power than the power of the US member states – shared powers and shared *sovereignty*. Those limitations as minimal and protective functions of the central US Government are constitutionally defined and guaranteed by the concept of individual liberty. Therefore, “federalism serves the dual purposes of allowing the range or scope for central Government activity to be curtailed and, at the same time, limiting the potential for citizen exploitation by state-provincial units” (Buchanan, 1995: 2). The advantage of this kind of (federal) political organization based on the system of devolution, the central Government allows the creation of autonomous regions within the states, using the power that has been delegated to the states of sub-national level. The autonomous status of self-governing regions exists by the sufferance of the central Government and it is often created through a process of devolution, because:

a voice is more effective in small than in large political units. One vote is more likely to be decisive in an electorate of 100 than in an electorate of 1,000 or 1 million. Also, it is easier for one person or small group to organize a potentially winning political coalition in the localized community than in a large and complex polity (Buchanan 1995, 3).

Despite that, the private property is frequently used term. This type of property was especially emphasized by distinguished political philosopher Murray Rothbard, defined as “natural property” (Rothbard, 1998). Private property or property rights are one of the many rights that allow individuals to make full use of their assets and properties, which are part of their personal rights, without they are considered state-owned, or Government. The protection of such rights from interference, misuse or revocation of their owners, the Government actually protects the owner, protecting their individual liberty to dispose of what they acquired as personal property. At that time, the private rights (individual rights) are derived from the collective. However, it is a misconception, because the existence of the

collective rights, at first, should be an individual right. The respect for private property / property rights and its protection is actually protecting the individual right to property as a natural right of man, which in turn is one of the rights that are attributed to individual liberty of individuals. The private property belongs to the individual that further is confirmed by the US constitutional acts. Because, “one cannot talk about the protection of property rights in the United States without first placing that subject within the larger context of American Constitutionalism” (Pilon 2008, 1). Given that much of its legitimacy, the US constitutional acts, we draw from natural law and the influence of the theories of John Locke, where logical conclusion is that the natural rights such as the right to private property have a priority over other rights. First, it is going through the provisions of the US Declaration of Independence, and eleven years later, through the provisions of the US Constitution. James Madison’s idea as an unofficial author of the US Constitution was being constructed such US Constitution, will give power to the US political authorities in order to protect the rights of the people, and thus, the right of property. Therefore, the US Constitution creates a Government characterized by delegated, and limited powers and “it is no accident that a nation conceived in liberty and dedicated to justice for all protects property rights. Property is the foundation of every right we have, including the right to be free” (Pilon 2009, 346). With a limitation of the Government interference in what constitutes holiness of personal rights - ownership, entitles citizens to be free to use their right without fear that there is some power over them that they lurking and waiting for the right moment to take away what their right is.

Moreover, Alexander Hamilton wrote the federalist paper No. 9. As a Republican who favors a "tougher" system of regulation, Hamilton often mentions people's freedom or more precisely the freedom in decision-making of the individuals rather than one of the Government and the nation, because his ideas are based on the principle of local self-government. In this part of the Federalist, Hamilton harshly criticized the idea of confederation of states due to the reason that this kind of political organization disables the communication of the individuals with the ruling elite. Hamilton ruthlessly attacked this form of Government. This is precisely one of the reasons why Hamilton denied the confederation principles in favor of the federal ones.

In the Federalist No. 10, James Madison explained that it is a difficult to maintain the balance and continuity of the welfare and at the same time to protect private, personal rights, and it goes in the direction of a good society, the common good. In this sense, Madison stated that protecting the individual rights could not be detrimental to the public good or to other individuals. In this sense, James Madison appears as the first US founding Father who mentioned the significance of the protection of individual rights and the individual liberty.

Namely, James Madison stands firmly behind the Republican views, addressing criticism to the democratic order: “the democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property” (Hamilton, Jay, Madison 1788, 44). Between republicanism and democracy, Madison finds two differences. The first one is delegation of the management of a small number of citizens elected by the

rest, and the second one is delegating of a greater number of citizens. What we refer herein is the protection of the political faction thought that would lead to the danger of establishment of the common Constitution. Therefore, Madison has been an advocate of it to be politicized (pluralized) - there shouldn't be multiple authorities, because their interests might conflict with each other and this would lead to a schism between the countries and communities in the United States. According to him, the damages of faction cannot be removed in two ways: by removing the causes of faction and by controlling its effects. The first, destroying liberty, because:

Liberty is to faction what air is to fire, but it is impossible to perform because liberty is essential to political life. After all, Americans fought for it during the American Revolution. The other option, creating a society homogeneous in opinions and interests, is impracticable. The diversity of the people's ability is what makes them succeed more or less, and inequality of property is a right that the Government should protect (Hamilton, Jay, Madison 1788, 42).

Madison specifically states that due to the economic stratification, people cannot share the same opinion, i.e. they cannot establish collectivistic concord. That these efforts to protect the rights of economic inequality clearly states that his idea is not to establish a Union which will be built on economic equality, injustice or political oppression, but a community of free citizens where their rights will be on the pedestal of constitutional protection. Madison is aware that if they want to implement some conservative and Republican icon of political thought, it can do very simply by lifting the individual liberty, nationalization of property and enforcement of blind obedience and patriarchy. However, such a Union would be good only for the implementation of the political programs of the Government and not in the interest of the US citizens. The people are still under the impressions and the heat of the American Revolution, will not sit quietly and see how to implement the new slavery over the freedom for which they fought and what would expect politicians implementing such a system would be new revolution and the complete destruction of the idea for American federation.

Madison aware of that fact and the incontestable possibility of faction believes that the best it could be decided if they are given a freedom of choice on citizens and if there is any faction, controlling its effects. His genuinely liberal stance (for that time), aiming to achieve a balance between the Government control and the individual liberty, considering that unfettered individual liberty can turn into civil arbitrariness which is dangerous for the political order and on the other side, excessive control and limitation of freedom can lead to absolutism by the Government.

Furthermore, in the Federalist No. 39, whose title referred to republican principles, Madison makes a distinction between the two major elements – the national and federal – as a rival to the nation - state concept, clearly outlined in the following paragraph:

On one hand, the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, this assent and ratification is

to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. (...) The act, therefore, establishing the Constitution, will not be a *national*, but a *federal* act. (Hamilton, Jay, Madison 1788, 171)

Accordingly, Madison advocates the nation in which the citizens will elect their representatives in a representative homes of "democratic way". Other than his fear of democracy, he is more "scared" of the nation. The nation, which is an artificial creation of national and discriminatory policy, is consciously avoided as a concept and in its place instantly puts federation of states or respect towards ethnicities. Madison believes in the existence of a natural form of sovereignty that the states have, and therefore, there is confidence that gives voice and power of individuals or the people in those countries. But Madison fails to mention the lack of a state or nation in the whole federation but rather mentions that the ratification of the Constitution should be given by the people of these independent states. Valuing the state sovereignty means respecting the sovereignty of the citizens of the state, and thus their interests. However, human nature is such that it requires ever more power for them. The man is greedy, he is not satisfied with what he gets, and this is his only motive to proceed. The great philosopher Friedrich Nietzsche stated: "wherever I found a living thing, there found I will to power; and even in the will of the servant found I the will to be master" (Nietzsche 1999, 108). Therefore, a society cannot be left to be driven by human ambition and desire for power over others.

The Federalist No. 52 stressed that core function of the Government (as a main reason for its existence) is the fact that regulatory, balancing power that they have in themselves. So, "what is Government itself, but the greatest of all reflections on human nature? If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary" (Hamilton, Jay, Madison 1788 232). Therefore, "it is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part" (Hamilton, Jay, Madison 1788, 246).

This type of political system, envisioned in the Federalist No. 62, encompasses the division of powers into legislative, executive and judicial branch, and thus, its purpose is to thwart the unjustified expansion of the political power on the expense of the freedom of the US people. Tyranny "may be usually described as the concentration of all these powers in one set of hands one Administration. The Administration, be it remembered, is the organized human group of officials who hold and operate the great powers of the State residing in the Government" (Flynn 2007, 23). Power sharing will also prevent oppression of political minority and the expense of political stability would show high results. Furthermore, Madison speaks about Government activism known as "mutable policy" - a variable policy, believing that it would prevent with the new Constitution to establish a consistent, stable framework of laws, necessary to promote prosperity. Through this, Madison clearly meets the individual liberty, by allowing citizens unchangeable, functional

and clear legislation that will regulate their relations who enter at will. Or as Madison noted:

The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed? (Hamilton, Jay, Madison 1788, 279).

However, we can conclude that the US founding fathers created a pillar consisted of rights and freedoms that not only limit the arbitrariness of power, but it sets the “must act” framework for the Government. That framework is actually a protection of rights and freedoms and undertakes activities that improve the welfare of human welfare. If Hamilton and Madison wrote that the role of central Government is to regulate where it is requested, rather than to control, then looking through the current policies of the US Government, it is obvious that such boundaries were crossed long ago and the individual liberty of citizens is rigidly violated.

From the recent history, the memories of the violation of individual rights and liberties and the property rights are still fresh. The Watergate affair is quite representative phenomenon where for breaking into Democratic national committee, the US President - Richard Nixon - was faced with impeachment and the possibility of condemnation by the US Senate. In this case openly and publicly displayed image of the American executive power that taking this position, used illegal means to achieve a specific political goal. Suspected in this case was sixty-nine, where forty-eight of them were charged with “conspiracy, burglary, and violation of federal wiretapping laws” as well, “perjury, obstruction of justice, illegal campaigning” (Sirica 1979). However, what caused more reaction and affects not only the US citizens, but and the global public opinion also.

Whereas, Julian Assange, the founder and editor-in-chief of *WikiLeaks* in 2010 has revealed numerous US Government programs through the publication of a “material documenting extrajudicial killings in Kenya, a report of toxic waste dumping on the coast of Côte d'Ivoire, Church of Scientology manuals, Guantanamo Bay detention camp procedures, the 12 July 2007 Baghdad airstrike video, and material involving large banks such as Kaupthing and Julius Baer among other documents” (Ackland, 2009). This showed another face of the American politics. Suspicious way on that how the US leads the Global war on terrorism, the notorious prison Guantanamo etc. are major examples of that the ideas stipulated in the US Constitutive acts are not in a first place. However, the saga of Assange is just a significant beginning of what follows the next. After three years, while case *WikiLeaks* and the extradition of Assange are still present in the media, young Edward Snowden, published information about the National Security Agency (NSA) activities. The reason why we analyze this case is because here can be seen

the conflict between the individual liberty proclaimed in the US Constitution and how it is severely violated today. The problem appeared because NSA “is searching the content of virtually every email that comes into or goes out of the United States without a warrant”(Abdo, Toomey 2013). It also “details the internet protocol addresses (IP) used by people inside the United States when sending emails - information which can reflect their physical location. In this context, Julian Sanchez of the Cato Institute, emphasized:

The calls you make can reveal a lot, but now that so much of our lives are mediated by the internet, your IP [internet protocol] logs are really a real-time map of your brain: what are you reading about, what are you curious about, what personal ad are you responding to (with a dedicated email linked to that specific ad), what online discussions are you participating in, and how often? (Greenwald, Ackerman 2013).

In this case, the opinions are divided. The proponents of the US President Barak H. Obama accused Snowden for the nation treason. In this sense, Barak H. Obama stressed that: “our intelligence is focused above all on finding the information that's necessary to protect our people, and in many cases protect our allies; (...) America is not interested in spying on ordinary people” (Sky 2013), and thus, Edward Snowden “is not a patriot for revealing details of secret US surveillance programs” (Sky 2013). According to Robert Hager analysis, this activity is a violation of The Fourth Amendment of the Constitution, which prohibits “unreasonable searches and seizures” (Bill of rights, IV Amendment). This amendment involves:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (Bill of rights, IV Amendment).

Considering this amendment, it can be seen that this “crime” is significantly less than what actually did the US Government with such programs and activities. If citizens are wiretapped and recorded in their private conversations “the right of the people to be secure in their persons, houses, papers” (Bill of rights, IV Amendment) is directly threatened. Under the precedent of the US Supreme Court, in the case *California v. Avecedo*, 500 US 565, we conclude that it is not really a valid reason, in the context of the following statement: “it remains a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment” (Hagan 2013). The “seizure - the taking of private information - is what the Government has now been forced to admit in its decision to prosecute Snowden for telling the truth about their secret seizures” (Hagan 2013).

Moreover, the individual rights and privacy, ownership and freedom, continue to be oppressed by the US Government. There are numerous examples of how the US Government manipulates the trust of the people working under suspicious circumstances what lead to the question of the stability of one of the

oldest liberal Constitutions (and the first federal constitution as well) in the modern political era – the US Constitution. Considering this, The Director of the Constitutional Rights and Remedies Program at the University of Denver Law School, Mark Kamin, stressed: “(...) if there is a valid federal law, the federal Government can enforce it in any state. What it cannot do is force state officers to enforce federal law” (Walshe 2013). Some US member states explicitly opposed the adoption of such a law. Mississippi Gov. Phil Bryant along with House Speaker Phil Gunn stands up for what is stipulated in the Constitutive acts. In this sense Phil Gunn emphasized: “[t]hese are dangerous times, and people have a constitutional right to protect themselves and their property” (Walshe 2013). The author Bryant, supporting this view added: “we are going to continue to fight for their Second Amendment rights to bear arms (...) President's Executive Order infringes our constitutional right to keep and bear arms as never before in American history” (Walshe 2013). In this direction also is the stance of the state of Texas. Steve Toth stands in defense of the Second Amendment, adding that: “We can no longer depend on the Federal Government and this [Obama] Administration to uphold a Constitution that they no longer believe in (...) The liberties of the People of Texas and the sovereignty of our State are too important to just let the Federal Government take them away” (Walshe 2013). No different opinion has the State Senator Brian Munzlinger, emphasizing that: “We cannot let the total disregard of our constitutional rights continue” (Walshe 2013). In response to this, the constitutional law professor at the University of Pennsylvania Law School, Theodore Ruger, emphasized: “the federal laws and treaties are the supreme law of the land and that has been interpreted to mean in case there is any conflict when Congress or the president speaks clearly and with valid authority on a topic, states cannot thwart the application of the law within its borders” (Walshe 2013). While the political analyst Duke Chen, refers to the effects that would cause the law to favor and encourage gun trafficking: “President Obama is proposing a law prohibiting straw purchasing for guns, which occurs when people who would not pass a background check get someone else to buy the gun for them” (Chen 2013). What constitutional acts established two centuries ago, today is obviously edited. Since then, US has been a symbol of freedom and democracy exporter in the world, the present US policy dramatically changed a picture that had created front of the eyes of the world. While the private property, individual liberty and free market, obviously are not popular anymore.

## **CONCLUSION**

The individual liberty as one of the fundamental human rights could be treated as an execution of the free will of the individuals, without damaging the liberty of the others. Whereas the individual liberty deeply in itself incorporates the right of free speech, free press, private property etc., as a premises embedded in the US federalist papers, The US Declaration of Independence and above all, the US Constitution. In the past, the US founding fathers promoted their federal and libertarian ideas to the American people emphasizing that they articulate the principles of liberty, independence and self-government - motivation that led through the liberation struggle against the British Crown. Laying in the first plan

civic values such as individual liberty, private property, self-government through devolution of the power and the central government with limited powers, the people were ready to ratify the US Constitution after a dozen years after these ideas were presented. Nevertheless, today start a new era for the individual liberty, not just in the US, but also in the whole (western) democratic world. The political authorities, both in the US and the democratic world, continuously started to oppress the individual liberty as a human right as a compensation for the security of the people. The US example is terrifying, while taking into account the importance of the US in the world system as a super-power that started to oppress the individual liberty as a human right. That is evident with numerous US Government activities, such as Edward Snowden case, the saga of Julian Assange, the NSA activities and scandalous spying of the politicians across the globe. At the end, we can conclude that the US founding fathers succeed to create and to implement the US federalist papers, they succeed to create the first federation in the world based on the premises of individual liberty and succeed to raise the individual liberty as an essential, democratic human right of the US citizens, but today political authorities of the US obviously do not realize the importance of this human right, and therefore they continue to oppress it. This negative trend stimulate weakening of the US global authority, weakening of the internal political system of the US and its institutions legitimacy, while causing adverse trends of the premises set by the US founding fathers.

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# STRANGERS AT OUR DOOR: MIGRANT EFFECTS ON THE LABOUR MARKET, SECURITY AND CRIME

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## **Abstract**

The demographic situation of European countries essentially forces them to be open to migrants.

More than 22 million migrants live in the "old" EU countries, people who already constitute a dozen or so percent of the population. In Poland, this percentage is around 1.7% and therefore is a country with extremely low migration experience but which also has a high demand for foreign labour. However, as studies of Work Service SA show, almost half (48.1%) of Poles are afraid of the influx of immigrants to their country, the main reason being the fear of job losses. Another reason is the fear of crimes committed by foreigners.

Therefore, the aim and even the obligation of a host state should be to create, according to the needs and to ensure the efficient operation of integration institutions, so that immigrants are not marginalized, alienated from society, and therefore, as a result, criminal acts threatening security and public order are avoided. It is marginalization that fosters separatism, the radicalization of views, and the building of extreme ideologies. Integration, therefore, is a kind of investment in a "normal", secure future of society, with the proper and effective use of the hands that are so needed by the economy to work and the paid revenues to social security systems.

To what extent immigrants are a real threat to state security and to what extent they are myths and populism, the author will try to answer in the article below

**Keywords:** migrants in the EU, strangers, labour market, security, crime

## **Introduction**

Migration has affected and been a part of humanity for hundreds of years. It was based on the desire to improve one's situation in various aspects of life including that of the economic, political and social. The intensification of migration flows in the 21st century is a result of the simplification of the ways and lowering the costs of movement - various means of transport are more accessible now, especially to the less affluent and borders now being easier to cross

(especially those within the EU). The development of the Internet and its increasing accessibility have made living conditions in other countries "accessible" to people living even in incredibly remote places.

The demographic situation of European countries essentially forces them to be open to migrants. This requires the development of a strategy and, consequently, a migration policy that takes into account the goals to be formulated by the country concerned. Above all, labour markets and the economy need hands to function.

The theory of the dual labour market<sup>1</sup> assumes a permanent shortage of hands for work in highly developed countries, resulting from the fact that there are many jobs which, for reasons of pride and prestige, their citizens do not want to take. Those jobs are low-paid, sometimes dangerous and do not require high-level qualifications. They can be and most often are performed by migrants who do not compete with the indigenous people of a given country. Similarly, there is a high demand for highly qualified employees, especially in a country like Poland where, after its accession, 2.5 million people flowed to richer Western European countries, including a number of the well-educated.

Liberal governments emphasize aspects of the labour market in their strategies and programs. Conservative governments with a national attitude, often reaching for populist slogans, focus their policy rather on security problems which may be shaken and even threatened by the admission of strangers into the country.

More than 22 million migrants live in the "old" EU countries<sup>2</sup>, people who already constitute a dozen or so percent of the population. In Spain it's 12.8%, in Germany 14.8%, France 12.2%, and in Great Britain 13.4%. In Poland, this percentage is around 1.7%<sup>3</sup> and therefore is a country with extremely low migration experience but which also has a high demand for foreign labour. However, as studies of Work Service SA show, almost half (48.1%) of Poles are afraid of the influx of immigrants to their country, the main reason being the fear of job losses<sup>4</sup>. Another reason is the fear of crimes committed by foreigners. To what extent are these myths and populism and to what extent is the real threat the author will try to answer in the article below.

## **Migrants in Poland**

Poland, like other European countries, has entered a period of demographic crisis, and these tendencies seem to be permanent. This is due to a very low birth rate (-0.8) with a fertility rate of 1.45<sup>5</sup>, a large number of Poles staying abroad -

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<sup>1</sup> Michael J. Piore, *The Dual Labor Market: Theory and Implications*, Winthrop Publishers 1970

<sup>2</sup> Migrant population in EU countries, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration\\_and\\_migrant\\_population\\_statistics/pl](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics/pl) (access 10.02.2020)

<sup>3</sup> International Migrant Stock. The 2017 Revision, <https://www.un.org/en/development/desa/population/migration/data/estimates2/estimates17.asp> (access 10.02.2020)

<sup>4</sup> Obawy Polaków przed imigrantami na rynku pracy (Poles' fears of immigrants on the labour market), <https://www.prawo.pl/kadry/obawy-polakow-przed-imigrantami-na-ryнку-pracy,283563.html> (access 10.02.2020)

<sup>5</sup> Ludność. Urodzenia i dzietność. GUS (Population. Birth and fertility. Central Statistical Office), <https://stat.gov.pl/obszary-tematyczne/ludnosc/ludnosc/urodzenia-i-dzietnosc,34,1.html> (access 5.01.2020)

with numbers, according to GUS data, reaching 2.54 million<sup>6</sup>, a decrease in the share of people at the age of professional activity and a rapid increase in the size of the elderly population. A phenomenon that gives rise to concern is the decline in the number of people of working age; according to estimates, in the five-year period of 2015-2020 we have been dealing with a decrease of nearly 590 thousand people of working age, and this process will intensify in the coming years. In total, by 2030, labour resources may decrease by over 1.5 million people (approx. 6%). This generates serious shortages on the labour market and, not unlike other countries in similar situations, forces the seeking of solutions, preferably long-term ones.

Poland was a homogeneous country until major political changes came about in 1989. In the 2002 National Census, over 96% of respondents declared Polish nationality, 1.23% declared themselves as belonging to another nationality, while 2.03% of the population did not specify their nationality<sup>7</sup>.

Nationality is a declarative, individual feeling characteristic of each person, expressing their emotional, cultural or genealogical relationship with a specific nation. Citizenship is another, more objective feature. The results of the 2002 census showed that among the permanent residents of Poland over 98.2% (37.53 mln) are citizens of the Republic of Poland, 0.1% are foreigners, i.e. persons without Polish citizenship (equalling just over 40 thousand) and for about 1.7% of the population (nearly 660 thousand people), nationality has not been established. In the case of Poland, both indicators (nationality and citizenship) almost overlap<sup>8</sup>.

The author would like to present the problem of crimes committed by foreigners in Poland on the basis of two national groups whose participation in the Polish labour market and Polish social life is noticeable. They are the Ukrainians and Vietnamese. The choice is justified by the desire to compare how these two culturally different groups adapt in the host country and whether these cultural differences have an impact on crime.

### **Ukrainians in Poland**

According to the data provided by the National Population Council and many analysts, Poland should accept about 5 million immigrants in the next few decades in order to preserve the current state of its domestic labour market. Therefore, the absorption of migrants from Ukraine should be considered one of the strategic economic goals for the coming years.

The traditions of population migration from Ukraine to Poland are many years old, but they intensified in 2014. This happened as a result of the events related to Euromaidan when, on November 21st 2013, Ukrainian President Viktor Yanukovich postponed the signing of the association agreement with the European

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<sup>6</sup> Ilu Polaków przebywa obecnie za granicą: GUS (How many Poles are currently abroad: Central Statistical Office), <https://forsal.pl/artykuly/1355113.ilu-polakow-przebywa-na-emigracji-gus-ich-liczba-wzroslo-najnowsze-dane.html> (access 5.01.2020)

<sup>7</sup> Raport z wyników Narodowego Spisu Ludności i Mieszkań 2002 (Report on the results of the 2002 National Census of Population and Housing 2002), <https://stat.gov.pl/spisy-powszechno/narodowe-spisy-powszechno/narodowy-spis-powszechny-2002/raport-z-wynikow-narodowego-spisu-powszechno-ludnosci-i-mieszkan-2002,3,1.html> (access 10.02.2020)

<sup>8</sup> Ibidem

Union which, in turn, sparked protests amongst supporters of integration with the EU. In 2014, referenda were held in Crimea and the Donbas in which the inhabitants were given the opportunity to decide about their future. According to the plebiscites, the inhabitants decided to become independent, and the self-proclaimed authorities of Crimea announced their joining Russia which was subsequently confirmed by the Russian Duma. As a result, political, economic, and social destabilisation occurred in our neighbouring country to the east.

The decision to leave Ukraine as far as the Ukrainian population goes was dictated primarily by the poor economic situation - low economic growth, high inflation, rising unemployment, and low wages which resulted in a lowering in the standard of living and the satisfaction of needs. There was a huge disproportion between Ukraine and Poland in terms of GDP per capita - in Ukraine between 2014–2017 the gross domestic product was between \$2,135 to \$3,095 while in Poland it was between \$13,429 to \$14,337<sup>9</sup>.

In various migration theories, push and pull factors are of key importance in making migration-based decisions. Let's see how it looks in the case of Ukraine. Undoubtedly, the push factor was the lack of economic development in the country along with stagnation in opening new companies, industries and/or branches of the economy. In addition, innovation that motivated and inspired the economy and the people did not exist for economic reasons. The actions of the Ukrainian authorities to keep the employee on the local labour market were also conspicuously lacking. Research carried out on representative groups of Ukrainian citizens taking up work on the Polish labour market, among the reasons for leaving, cited higher wages there than in Ukraine (76% of respondents), a higher standard of living than in Ukraine (37%), better social conditions (21%), and a safer place to live (10%)<sup>10</sup>. The Polish labour market also favoured the admission of migrant workers. Those from Ukraine brought with them added value in the form of cultural and linguistic closeness.

In addition to being employees (including seasonal workers), Ukrainian migrants in Poland are also students. More and more Ukrainian migrants study at Polish universities. According to data from the Central Statistical Office of Poland, 30,589 studied here in the 2016-2017 academic year. They already constitute over 53% of the total foreign students in Poland<sup>11</sup>, with that trend being an upward one. A group of Ukrainian citizens applying for international protection have been staying in Poland since 2014 due to the political situation in Ukraine that was mentioned earlier.

It is difficult to assess the number of Ukrainian citizens currently residing in Poland with great accuracy. According to data from the Ministry of Labour, Family and

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<sup>9</sup> A. Adamczyk, *Imigracja zarobkowa do Polski. Casus Ukraińców (2014–2017)* (Economic immigration to Poland. The case of Ukrainians (2014-2017)), *The Central European Journal of Social Sciences and Humanities* 2018/2

<sup>10</sup>Raport „Postawy obywateli Ukrainy wobec polskiego rynku pracy” (Report "Attitudes of Ukrainian citizens towards the Polish labor market"), <http://www.workservice.pl> (access 10.02.2020)

<sup>11</sup> <https://perspektywy.pl>, [https://perspektywy.pl/portal/index.php?option=com\\_content&view=article&id=2899:w-polsce-studiuje-57-119-studentow-zagranicznych-ze-157-krajow&catid=22&Itemid=119](https://perspektywy.pl/portal/index.php?option=com_content&view=article&id=2899:w-polsce-studiuje-57-119-studentow-zagranicznych-ze-157-krajow&catid=22&Itemid=119) (access 22.02.2020)

Social Policy (MRPiPS), the number of Ukrainian citizens who had valid declarations of intent to employ a foreigner as of December 31st, 2017 was 517,000; 208,000 people had a work permit. To this number about 100 thousand should be added to account for those who stay in Poland permanently and do not need a work permit, or who study or stay in Poland for other reasons. This gives an approximate number of 900,000 migrants from Ukraine residing in Poland at the end of 2017<sup>12</sup>. According to estimates of organizations providing assistance and support to Ukrainians in Poland and employers' organizations, there may be as many as approx. 1.5 million Ukrainian citizens in Poland<sup>13</sup>.

Research shows that Poland is very often the first country of choice for economic migrants from Ukraine. Many of them have higher or incomplete higher education, so they often work in Poland below their qualifications (nearly 80 percent of Ukrainians do not find employment in line with their qualifications<sup>14</sup>). Because the purpose of their arrival is to make money, they often work beyond statutory working hours, including weekends and even on public holidays. So they are available, flexible, and fill the gaps on the Polish labour market according to the theory of the dual labour market and rarely do they face aggression from members of Polish society. Cultural and linguistic proximity favours adaptation processes. The huge role of the state and its institutions can be played in the process of the adaptation of Ukrainians in Poland. Because the encapsulation of such newcomers increases crime among them.

### **The Vietnamese in the country on the Vistula**

Vietnamese migrations to Poland have their beginnings in the 1960s and 1970s. During this period, about 4,000 people came to Poland on the strength of intergovernmental agreements. They were Vietnamese students and doctoral students, mainly in technical fields including mining and geology, shipbuilding, navigation and maritime transport<sup>15</sup>. They were characterized by a good education and a solid knowledge of Polish reality, language and culture. Some of them subsequently went back, and some stayed and started families, adapting to Polish society and creating the first framework of the so-called migration network.

The next wave of Vietnamese migration took place after 1986, when the Doi Moi or "Renewal" reform program was introduced in Vietnam. It was to lead to the construction of a "socialist market economy" model. While leaving the fundamentals of the centrally planned economy and the political monopoly of the

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<sup>12</sup> M. Jaroszewicz, Migracje z Ukrainy do Polski. Stabilizacja trendu, Raport OSW 10/2018 (Migrations from Ukraine to Poland. Stabilization of the trend, Report of the Center for Eastern Studies 10/2018)

<sup>13</sup> M. Pacek, „Studium przypadku: Imigracja z Ukrainy i Białorusi a polski rynek pracy” w: Polska w europejskim kryzysie migracyjnym (Case study: Immigration from Ukraine and Belarus and the Polish labor market "in: Poland in the European migration crisis), Nowa Konfederacja, August 2019

<sup>14</sup> P. Rogoziński, Jak ukraińscy pracownicy oceniają doświadczenia z Polski (How Ukrainian employees rate their experiences in Poland), <https://wiadomosci.onet.pl/kraj/ukraincy-w-polsce-raport-polsko-ukrainskiej-izby-gospodarczej/j0c0m3g>, access 21.02.2020)

<sup>15</sup> T. Halik, Migrancka społeczność Wietnamczyków w Polsce w świetle polityki państwa i ocen społecznych (Migrant community of Vietnamese in Poland in the light of state policy and social assessments), UAM, Poznań 2006

Communist Party, it was decided to introduce market elements, liberalize prices, develop the private sector, create an inflow of foreign direct investment and fully integrate the country into the international division of labour, including allowing Vietnamese citizens to migrate for work purposes.

A significant increase in the number of Vietnamese citizens arriving in Poland in the 1990s is associated with illegal migration from the former USSR and former Czechoslovakia as well as the decision of the German government at the end of 1995 to send back 40,000 citizens of Vietnam who, until 1989, had worked in the former GDR and did not return to the country after their contracts had ended. A significant group of people employed in the former socialist countries, in order to try to avoid expulsion back to Vietnam, went to Poland at that time<sup>16</sup>.

Subsequent groups of newcomers from Vietnam to Poland differ from the previous arrivals in that they are utterly lacking in or have a poor knowledge of the Polish language and their main motivation for coming to Poland - unlike the previous groups - was merely to improve their economic situation. When, at the 10th Anniversary Stadium in Warsaw, the "Europe Fair" was organized, the Vietnamese existed in the minds of Poles as a separate, culturally different ethnic group who had settled in their country. Later, a large shopping centre was created, mainly dealing wholesale in Wólka Kosowska where hundreds of Vietnamese migrants, both legal and illegal, found employment. A certain group of Vietnamese are not interested in legalizing their stay in Poland, because they treat their presence here as temporary. A significant number, however, recognize Poland as their home, organising Saturday Vietnamese schools for children, a Buddhist temple, restaurants and shops. Dr. Teresa Halik from the Department of Non-European Countries of the Polish Academy of Sciences estimates that about 35,000 Vietnamese live in Poland, of whom 16-17,000 have residence cards meaning, of course, that their stay in Poland is legal<sup>17</sup>. Father Edward Osiecki, a verbite and priest of Vietnamese Catholics, estimates their number, however, at 60,000. The Vietnamese usually settle in Warsaw, but have also settled in Szczecin, Łódź, Poznań, Kraków and Katowice.

Warsaw is separated from Hanoi by a distance of 11,000 km. Therefore, cultural similarities are hard to find. The more challenging aspects for migrants from Vietnam, especially those from the first migratory generation, is work and life in Poland. The differences in culture, tradition and language have certainly contributed to the encapsulation of this national group, and as it has already been mentioned, it sometimes generates criminal activity.

The Vietnamese community is divided into two groups in Poland. One group consists of relatively well-educated people who know the Polish language,

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<sup>16</sup> Społeczność wietnamska w Polsce. Polityka migracyjna Wietnamu, Wydział Analiz Migracyjnych. Departament Polityki Migracyjnej MSWiA (Vietnamese community in Poland. Vietnam Migration Policy, Department of Migration Analysis. Department of Migration Policy of the Ministry of Interior and Administration), Warsaw 2007

<sup>17</sup> A. Krzyżaniak – Gumowska, Raport o Wietnamczykach: inżynier żyje z bazaru (Report on the Vietnamese: the engineer lives from the bazaar ),wyborcza.pl 2008, <https://warszawa.wyborcza.pl/warszawa/1,54420,5002009.html?disableRedirects=true> (access 12.12.2019)

accept the social realities in which they find themselves and willingly interact with Poles. The children of this particular go to Polish schools and combine Vietnamese home traditions with Polish reality very well. The second group consists of people often staying in Poland illegally, with a poor grasp of Polish and who avoid contact with the Polish environment. They find employment within their own national group (usually within the textile trade and catering outlets), and rent flats close to the workplace thereby creating Vietnamese enclaves. The vocational strategy of the Vietnamese is strongly related to family. It involves the creation of small family businesses that provide gastronomy or commercial services in metropolitan regions. It also determines the strength and coherence of this group and can create a kind of protective barrier against crime.

The attitudes of Polish society to Vietnamese migrants has changed over the years. When a small number of people came to Poland, mainly students, doctoral students or interns, Poles got used to the sight of obvious strangers in the Polish social space. The locals showed them kind interest and acceptance, treated them kindly and with a dose of Slavic openness. This, however, began to change when migration from Vietnam increased significantly in numbers and the "quality" of newcomers changed - more and more groups of poorly educated people came from the provinces, focused almost exclusively on paid work in Poland, were without language skills, were less open to culture and contact with representatives of the host society. And this had an impact on the attitude of Polish society towards them. Where once this attitude was friendly, warm, and open, in recent years it has become suspicious, distant, full of fear and has fermented the view of the Vietnamese as unnecessary and undesirable competition on the labour market.

### **Crime committed by and against migrants**

The issue of crime should be considered in relation to migrants in two ways: the crimes they are subject to and the crimes they commit in a host country. This second aspect is always more willingly undertaken by politicians, the media and public discourse. The first aspect remains the domain of non-governmental organizations, mainly those dealing with human rights.

Migrants, and "strangers" in the host society are particularly vulnerable to discrimination, aggression and violence in this society.

Discrimination is defined as the "Unequal, worse treatment of a person based on their belonging to a certain group, distinguished on the basis of one feature, and being a derivative of existing stereotypes and prejudices. It means inappropriate, selective, unfair, unjustified and unfair treatment of individual entities because of their group affiliation"<sup>18</sup>." Discrimination can affect various spheres of life including the social, economic, political, professional, and the institutional. It may take the form of an overt demonstration against a group, or take the form of hidden, though noticeable, hostility. Aggression and violence are actions/behaviours aimed at causing harm, pain, humiliation, and demonstrating your dominance. Migrants, especially illegal ones, who often have traumatic

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<sup>18</sup> Słownik, równość.info (Dictionary, equality.info), <https://rownosc.info/dictionary/dyskryminacja/> (access 5.02.2020)

experiences of escape or dangerous crossings of borders behind them, are often unemployed for a long time and do not know the language, do not know or cannot claim their rights, do not have close and kind people around them, and are particularly vulnerable to such Results published by Eurobarometer showed that 7% of surveyed foreigners in Poland in 2008 and 10% of those surveyed in 2009 confirmed being victims of discrimination<sup>19</sup>. It is important to look at discriminatory practices which may take the form of inappropriate and unclear formulation of regulations, non-application of existing regulations in public offices and institutions, difficulties in starting a business, the refusal of assistance in obtaining communal flats, the refusal to admit a child to school or kindergarten, harassment at work, unwillingness to provide help in a healthcare facility, rejection when trying to open a bank account or service refusal in catering establishments<sup>20</sup>.

Often such practices are veiled, but still have the intended effect in that they hinder or even prevent a migrant's adaptation in a host society. The mere adoption of an EU directive on discrimination (e.g. the Racial Equality Directive)<sup>21</sup> does not mean its proper implementation, moreover, a number of institutions responsible for preventing discrimination do not meet the requirements set out in EU law. When it comes to crimes under the Criminal Code, the victims of which were foreigners, thefts, fights, robberies and road crimes have all been reported. In 2010, the Helsinki Foundation for Human Rights conducted a study in Poland of the experiences of foreigners who were victims of race-based crime. They showed that these crimes most often take the form of public insults, humiliation, pushing, spitting, beating, and intimidation. Such events most often take place on public transport, in the streets, in clubs or in sports facilities. It is most painful when school children find themselves the victims of such attacks and there is no proper, decisive response from teachers or school authorities. Such acts of aggression are most often directed against people of a different physical appearance or skin colour (Africans, Asians, Roma). Ukrainians, who are not visually different from Poles, experience this type of behaviour less frequently.

Reactions to acts of aggression and violence vary. Those aware of their rights, who know Polish or English, and who are convinced of the need to punish those responsible for such events, report their occurrence to the police authorities or other state institutions. Most often it concerns citizens of countries from Western Europe. Those who stay illegally, do not speak the language, do not believe in the effectiveness of law enforcement agencies, are afraid of the perpetrators' revenge, and do not make such reports and these events remain excluded from the statistics. An important factor influencing, for example, the Vietnamese avoiding reporting acts of aggression and violence, which the HFHR has pointed out, is that under the provisions on mutual transfer of citizens, after arrest, they are transferred to the

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<sup>19</sup> E. Urban, M. Piotrowicz, "Probl Hig Epidemiol" 2012, 93 (1), p.196

<sup>20</sup> Ibidem

<sup>21</sup> (Council Directive 2000/43/EC

of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=PL> (access 15.02.2020)

Vietnamese security service, forced to cooperate with this service, or threatened with deportation.

When analyzing the problem of crimes committed against foreigners in Poland, it is impossible not to mention the practice of human trafficking. It can take the form of trafficking children (for illegal adoption), trafficking women sold for the sex trade, trafficking in organs, or even trafficking cheap labour.

The La Strada Foundation points out that more and more often the victims of human trafficking, later forced into slave labour, are foreigners from the East: namely Ukrainians and Belarusians. They are misled about working conditions and accommodation and then deprived of their due wages. They are placed, and sometimes even detained, in places of accommodation whose quality defies all standards. Their freedom of movement is restricted, they are deprived of the use of telephones. Very often they do not have access to their passports and other documents and are forced to pay disproportionate fines for such trivial things as breaking a glass, smoking a cigarette in front of a building, or using running water at unspecified hours or days among other things. The debt grows and becomes impossible to repay for the victim of this practice. Ukrainian citizens take up work most often as caregivers for children and the elderly, domestic help, or as workers in agriculture or in gastronomy. The situation of Ukrainian victims of human trafficking involves direct exploitation by employers or by employment agencies<sup>22</sup>.

400 hours a week, for a humiliatingly low wage, did several dozen Ukrainians have to work in famous restaurants in Warsaw at one time. In small towns and villages, our neighbours from across the eastern border who come for bread are imprisoned, forced to work for many hours without pay, beaten and humiliated. Often times, the "employer" prevents them from escaping and the matter comes to light only by accident<sup>23</sup>. People who profit from the slave labour of foreigners are often wealthy, influential people in their environment, which contributes to the victim's lack of motivation to fight for their rights and dignity in the face of disbelief in the effectiveness of such a fight. In May 2018, a lawsuit against the owner of several construction companies employing workers from Ukraine began in Wrocław. She promised a legal, lawful job, normal salary and housing. The Ukrainians, however, were sent to a forced labour camp, their documents taken, and financial penalties were imposed without justification. As soon as they arrived, their documents were taken from them, and then they found out how much they owed the boss. In one instance, they were told that they had taken out a loan for an apartment, for work clothes, for health and safety training, or for medical examinations (someone had done so on their behalf using their signature). There was also a system of penalties for "offences" such as having dirty dishes, failing to answer the phone when the boss called etc. This is just one example demonstrating this type of crime against

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<sup>22</sup> Handel ludźmi w Polsce. Raport za 2017 rok (Trafficking in human beings in Poland. Report for 2017), <http://www.handelludzmi.eu/hl/baza-wiedzy/raporty-analizy-strateg/raporty-i-analizy-dotyc/6936.Handel-ludzmi-w-Polsce-Raport-2017.html> (access 19.12.2019), p. 36

<sup>23</sup>The author's interview with Irena Dawid-Olczyk, head of the La Strada Foundation, conducted in June 2018.

foreigners<sup>24</sup>. A National Consultation and Intervention Centre for victims of human trafficking has been established in Poland. In 2017, it provided assistance to 187 victims of such crimes, including 48 Ukrainian citizens and 6 Vietnamese citizens<sup>25</sup>. In 2017, the Border Guard identified 43 potential victims of human trafficking. 38 people were forced into forced labour (30 citizens of Ukraine, 4 citizens of Vietnam, 2 citizens of Belarus and 2 citizens of Poland)<sup>26</sup>.

The practice of trafficking Vietnamese citizens is organised, and the criminal groups responsible for this practice very often have a heterogeneous structure (most often they include citizens of Poland, Ukraine, Vietnam, Germany and the Czech Republic).

In the case of Vietnamese citizens, the incapacitation of the migrant takes place only after crossing the border, when the victim is forced to work in order to work off travel costs and obtain appropriate documents. Poland is a target country for criminals involved in such practices, so it is in Poland that foreigners are exploited. They are exploited through forced labour, prostitution, begging, and sometimes they also become victims of domestic slavery and criminal exploitation. Polish law enforcement has knowledge of many Vietnamese who are likely to be victims of human trafficking. Vietnamese citizens often cross the Polish border illegally and stay in Poland without appropriate residence permits. A noteworthy year in which many victims of Vietnamese citizenship were identified was 2015 when the Border Guard identified 17 Vietnamese nationals as alleged victims of human trafficking - 8 women were forced into prostitution and work.

Between 2013-2017, the National Intervention and Consultation Centre (KCIK) for victims of human trafficking provided assistance to 81 citizens of Vietnam in total. As far as the Victim / Witness of Human Trafficking Support Program is concerned, a total of 44 people of Vietnamese origin took part in it over the course of 10 years, i.e. from 2007 to 2017. Most of the victims were used mainly for forced labour, but there have been cases of sexual exploitation or domestic slavery<sup>27</sup>. These data, of course, relate to reported or identified cases. Many cases remain unidentified.

### **Foreigners as perpetrators of crimes in Poland**

The statistics of crimes committed in host countries indicate a noticeable share of foreigners in them. Of course, we cannot talk about their dominance in these statistics, because they constitute only a small percentage of a host society, but they are particularly widely used for media campaigns organized by groups of indigenous people who are against foreigners living and working in their host countries.

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<sup>24</sup> M. Rybak, Obóz pracy we Wrocławiu (Labor camp in Wrocław), <https://gazetawroclawska.pl/oboz-pracy-we-wroclawiu-kobieta-z-zarzutami-handlu-ludzmi/ar/13216345> (access 15.02.2020)

<sup>25</sup> Handel ludźmi w Polsce. Raport za 2017 rok (Trafficking in human beings in Poland. Report for 2017), <http://www.handelludzmi.eu/hl/baza-wiedzy/raporty-analizy-strateg/raporty-i-analizy-dotyc/6936,Handel-ludzmi-w-Polsce-Raport-2017.html> (access 19.12.2019), p. 32

<sup>26</sup> Ibidem

<sup>27</sup> Ibidem, p. 39

Migrants coming to a foreign country are situated among the poorer groups of a host society. They generally cannot afford to rent flats in richer neighbourhoods, and the poorer neighbourhoods tend to be characterized by higher crime rates. It is also very important that the migrant has a job - the more profitable, better paid, the less likely they are to come into conflict with the law, which may result in an order to leave the country.

The credibility of statistical data on foreigners may be subject to errors for various reasons. The existence of racial and ethnic prejudices among policemen and representatives of the judiciary may result in the "more willing" penalization of foreigners. The fact that they often cannot have a permanent place of residence and that they have a stable job causes more frequent arrests until the matter is resolved and/or disproportionately high bail is imposed on them in relation to the crime committed. A host society which is reluctant to welcome migrants is also more committed to reporting an offence or crime committed. The living of large groups of foreigners in districts or ghettos where the level of dissatisfaction with the living situation, work, the lack of family or loved ones, and a sense of alienation breed frustration and aggression and constitute factors contributing to criminal behaviour<sup>28</sup>.

The Police Headquarters in Poland has been collecting data on crimes committed by foreigners since 1992. Since January 2013, the method of registering data on foreigners suspected of committing crime has been changed - it is required to fill in the field with information about a suspect's nationality. Since 2001, it has been recording a decrease in the number of suspected foreigners, which can be connected to the sealing of Poland's borders in connection with the country's accession to the European Union. Since 2007, the number of suspected foreigners fluctuates around 2,000 - 2,200 annually which constitutes approx. 0.5% of the crimes committed in Poland.

The most common crimes committed by foreigners include excise crimes (importing goods without excise duty such as alcohol and drugs), road crimes (breaking the provisions of the highway code, drinking and driving) or crimes against property (theft, robbery, robbery, misappropriation) extortion, and fencing. In addition, this segment deals with document forgery, human trafficking and drug smuggling. The last two types of crime fall under the category of organized crime and, as a consequence, lead to the development of cross-border crime, the combating of which requires well-functioning cooperation between law enforcement agencies and the judiciary of the countries on whose territory it takes place.

Over the last two years, there has been an increase in the number of foreigners prosecuted in our country by arrest warrants. On the lists of people prosecuted by an arrest warrant, there are currently 3,949 people who committed crimes and 2,573 people wanted for offences in Poland<sup>29</sup>. The citizens of Ukraine

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<sup>28</sup> A. Aliverti, *Crime of Mobility: Criminal Law and the Regulation of Immigration*, Routledge, <http://www.routledge.com/products/9780415820905> (access 12.02.2017)

<sup>29</sup> I. Kacprzak, G. Zawadka, "Ukraińcy królują w policyjnych statystykach (Ukrainians rule in the police statistics)", „Rzeczpospolita” 3.09.2018, <https://www.rp.pl/Sadownictwo/309039926-Ukrajnicy-kroluja-w-policyjnych-statystykach.html> (access 18.02.2020)

lead these statistics with about 80% of Ukrainians being among those prosecuted. They commit crimes and misdemeanors, pay no fines and in many cases go unpunished because they flee across the eastern border and Polish services cannot prosecute criminals in countries outside the EU; they can only detain them when a person named in a Polish arrest warrant crosses our border or when such person is detained on the territory of another Member State thanks to common database systems. According to the data of the Road Transport Inspection, out of 973,000 violations of the road regulations recorded by speed cameras, 8 % were committed by drivers from outside the EU, mainly from Ukraine, Russia and Belarus. In 2017, foreigners (mainly Ukrainians, who were the perpetrators of more than half of all "foreign" crimes) committed a total of 6,200 crimes in Poland (1,700 more than the year before). Also in 2017, there were 1,700 Ukrainian perpetrators of road-based crime along with 1,600 Ukrainians convicted of drunk driving<sup>30</sup>.

The president of the Our Choice Foundation helping Ukrainians in Poland, Mirosław Keryk, explains this phenomenon with other conditions in Ukraine in this regard - in rural or poorly built-up areas there are very few road checks, and even if they are very common, it is very easy to bribe a police officer and remain unpunished. Such patterns of behaviour are transferred to other countries, including Poland.

As mentioned earlier, the Vietnamese are quite a hermetic group in Poland. This is due to the differences in their culture, traditions and established behaviour. The seriousness of their crimes is less than that of Ukrainians, but this is also the scale effect - there are simply fewer Vietnamese citizens in Poland. In addition, in their case we also have a significant number of undisclosed crimes that have not been reported to the judiciary authorities, thus not included in the statistics which is often the result of this group being closed in their own world. Their world is characterized by internal solidarity and the conviction that emerging problems must be dealt with only by involving trusted people, with very limited trust in the organs functioning in the host society.

The period of increase in crime among the Vietnamese falls in the 1990s. Organized crime developed especially at the time when many criminal groups illegally trafficking tobacco relocated their places of command from Berlin to Poland<sup>31</sup>. Trade in illegal goods without excise duty, pirated computer programs, CDs, and counterfeit branded clothes and electronic equipment flourished at the "10th-Anniversary Stadium". Vietnamese migrants who entered the Polish labour

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<sup>30</sup> G. Zawadka, Cudzoziemcy popełniają coraz więcej przestępstw w Polsce (Foreigners commit more and more crimes in Poland), „Rzeczpospolita” 21.03.2018, <https://www.rp.pl/Przestepczosc/303219904-Cudzoziemcy-popolniaja-coraz-wiecej-przestepstw-w-Polsce.html> (access 19.12.2019)

<sup>31</sup> M. Nowak, Charakterystyka przestępczości wśród cudzoziemców pochodzenia wietnamskiego w Polsce w świetle statystyki policyjnej, sądowej i penitencjarnej po 1989 roku (Characteristics of crime among foreigners of Vietnamese origin in Poland in the light of police, court and penitentiary statistics after 1989), „Studia Politologica Ucraino – Polona” 2017- 7, <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-30858e21-fcd5-4cbd-9d92-67835e59d7a9> (access 2.09.2019)

market worked for companies producing the above-mentioned goods as well as in small, gastronomy-based businesses such as small food vendors and eateries.

A frequent crime mentioned in the statistics on this national group is the forging of documents, often performed on very primitive equipment in private homes. In order to legalize their stay, the Vietnamese also marry in so-called “sham weddings” which is a commonly known practice, controlled and unmasked by the Office for Foreigners. Apartments are inspected at the addresses indicated in the applications for a residence card, as well as the age gap between and and social status of the spouses. This is often the reason for issuing a deportation order.

Organized crime by Vietnamese groups focuses on drug trafficking and the cultivation of cannabis organized in secluded homes in Poland<sup>32</sup>. This group of crimes also includes smuggling people across the border and obtaining the right to stay on the territory of Poland.

Recent years have shown that the Vietnamese-lead mafias have firmly established themselves in Poland. In Poland, the Czech Republic, Lithuania and Ukraine, 28 members of an international gang were detained in September 2011, on the basis of forged invoices on a large-scale import of, among others, clothes, electronics and household appliances to Poland. As the prices of imported goods were drastically underestimated, the treasury suffered enormous losses, and the mafia's annual profit amounted to billions of Polish zlotys. The money was exchanged for foreign currency and almost entirely transferred abroad. This criminal operation went on for at least three years. The collection point for imported goods was Wólka Kosowska, where the lives of the Vietnamese living in Poland have been focused for many years. Most of them live there, and there are shops and warehouses. Every Vietnamese person who wanted to do business here had to buy a "seat" from the mafia for 100,000 American dollars. This was treated as a debt that had to be repaid on a regular basis, regardless of utility costs and other tributes. According to ABW data, in 2010 there were over 1,400 business entities belonging to the Vietnamese in Wólka. 57 percent of them did not file any tax returns at all. There were two channels for the transfer of money earned from this practice by the Vietnamese mafia. The first step - with cash - was to create a network of couriers, sent primarily to Ukraine. Each of them was carrying a parcel of several hundred thousand dollars. Monthly, between \$30-40 million was exported to Ukraine using this method<sup>33</sup>. The head of the group responsible was a very wealthy Vietnamese man living in Kiev. This is one of many examples of organized crime, presented here to explain the mechanism of the operation of such structures.

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<sup>32</sup> G. Zawadka, Inwazja wietnamskich gangów w Polsce (Invasion of Vietnamese gangs in Poland), „Rzeczpospolita”, <http://www.rp.pl/artykul/626250-Inwazja-wietnamskich-gangow-w-Polsce.html#ap-1> (access 15.11. 2019).

<sup>33</sup> Wietnamska mafia kontra ABW (The Vietnamese Mafia versus the Internal Security Agency), “Newsweek” 15.09.2011, <https://www.newsweek.pl/wietnamska-mafia-w-polsce-kontra-abw/qlbnrlf> (access 12.02.2020)

## Conclusions

Foreigners in Poland are both the victims and perpetrators of crime. In the victims' case, the largest group are the victims of common crimes such as theft, robbery, and traffic-based crimes. This applies to both groups of foreigners, Ukrainians and Vietnamese analysed by the author. The statistics in this respect are rather imprecise due to the fact that they are not reported to the judicial authorities - the reason lies in the poor knowledge of the Polish language, little faith in the effectiveness of state authorities, and finally in the belief that one "has to take matters into one's own hands" and seek justice oneself. If a case is brought to law enforcement, it is unlikely to be classified as a race-based crime due to the different classifications of the act and the emergence of an unfavourable image of Polish society. If a foreigner's stay in Poland is illegal, the more likely it is that the crime will not be reported for fear of expulsion from the country. Intimidation and fear of revenge can also be reasons why a victim of crime does not report an offence.

Immigrants in Poland sometimes become victims of verbal aggression and even violence. Different facial features, skin colours, and eye shapes can become sufficient excuses for received aggressive behaviour. They are based on stereotypes about the perceived destruction of Polish culture, xenophobia and nationalism and such attitudes are sometimes used by political parties to build their political and social capital. The smaller the migration experience of a given country, the easier it is to use negative emotions to shape social attitudes to one's political will.

Cultural conditions and social habits taken from a country of origin, along with stress, a lack of job stability and poor future prospects are among the causes of criminal acts committed by foreigners in a host country. This does not include, of course, criminal tendencies that are inherent in the personalities of a group of people, regardless of national or social affiliation. We do not have much influence on the latter factor which contributes to the committing of crimes, but the former could be remedied by effectively-planned and conducted integration of "strangers" in a host society. For this to occur, it is necessary to prepare a strategy (taking into account the goals and needs of the state), formulate an integration policy and create tools for its implementation and, unfortunately, it appears that most immigration countries have not learned this social lesson. They limit themselves to an offer on the labour market, while lacking a long-term plan for managing an incoming workforce. Poland, with its relatively short migration history, began to fit into the patterns extant in Western European countries. A properly understood integration that will bring added value to the society should focus on such elements as: access to the labour market, education, participation in political life, access to citizenship and anti-discriminatory practices<sup>34</sup>.

Access to the labour market usually is not a problem, because it is the labour market that creates the need for cross-border labour, in the face of a shortage of domestically-sourced labour. \*The situation is worse with the proper use of the qualifications of the incoming employees. People with high professional

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<sup>34</sup> These are a few criteria that are used by the Immigrant Integration Policy Index, the creation of which, to compare the level of integration in European countries, was prepared by the British Council, [http://www.mipex.eu/sites/default/files/downloads/mipex\\_ii\\_abridged\\_poland\\_pl-2007.pdf](http://www.mipex.eu/sites/default/files/downloads/mipex_ii_abridged_poland_pl-2007.pdf)

qualifications encounter a barrier related to the recognition of these qualifications on the Polish labor market, they are not fluent enough in Polish to quickly and effectively recognize diplomas, and additionally they often have to overcome the mistrust of the host society towards strangers reaching for prestigious professional positions.

Education plays a very important role in the integration process. It is here that you can have the greatest impact on shaping a young person, building their social affiliation, and raising a valuable member of a host society. It is an area of activity in relation to foreigners that requires great knowledge, empathy and commitment. But it is a well-invested commitment, because it will help raise a person who knows Polish culture and customs, a person who can find a satisfying job and who is not a social welfare subsidiary, frustrated with the feeling of being a citizen of an inferior category and reaching for aggression, violence, and criminal acts in order to change their situation.

The assistance provided to a foreigner at the beginning of their journey in Poland also plays an important role. Often, unfamiliarity with or poor command of the language, ignorance of the law and the functioning of institutions make a newcomer from another country feel lost and helpless. Information programs familiarizing people with the broadly understood Polish reality and raising qualifications are at first a burden for the institutions of a host state, but then they will be their beneficiaries. In Poland, such activities are mainly undertaken by non-governmental organizations which, unfortunately, have limited resources and range. Some system-based solutions in our country are not adapted to accepting and integrating immigrants from other cultures, for example Muslims. We do not have the mechanisms to counteract violence against women, marriages involving under-age girls, or honour murders. These are acts penalized in Poland but which can constitute part of an Islamic newcomers' culture.

Therefore, the aim and even the obligation of a host state should be to create, according to the needs and to ensure the efficient operation of integration institutions, so that immigrants are not marginalized, alienated from society, and therefore, as a result, criminal acts threatening security and public order are avoided. It is marginalization that fosters separatism, the radicalization of views, and the building of extreme ideologies. Integration, therefore, is a kind of investment in a "normal", secure future of society, with the proper and effective use of the hands that are so needed by the economy to work and the paid revenues to social security systems<sup>35</sup>.

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<sup>35</sup> See more: W. Klaus, Integration - marginalization, criminalization, or the crime of foreigners in Poland, Analyzes, reports, expert opinions, No. 1/2011, Association of Legal Intervention

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## FORENSIC ENTOMOLOGY AND ITS ROLE IN CRIME SOLVING

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### **Abstract**

A significant part of the forensic science from which we receive information about insects that can be used to draw conclusions about the criminal investigation of cases that involve human bodies or wildlife is known as forensic entomology. There are several types of insects that can assist in forensic entomological investigations, such as: blowflies, flesh flies, cheese skippers, hide and skin beetles, rove beetles and clown beetles. The presence of this type of insects can be used on the both types of crime investigations on land and in water (Anderson, 1995; Erzinçlioglu, 2000; Keiper and Casamatta, 2001; Hobischak and Anderson, 2002). The practice of using insects to solve criminal activities has been recorded as early as mid-tenth century in China (Cheng, 1890; cited in Greenberg and Kunich, 2002). But, forensic entomology became a branch of scientific studies in the 17<sup>th</sup> century in Italy when experiments were carried out on different animal species. And in the 20<sup>th</sup> century the value of insects has been shown in court cases regarding criminal cases where body parts were recovered from water and not just about corpses found on land.

This branch of the forensic science has been developing in the Western countries where cooperation between academics and practitioners is at its highest level and its use has shown positive result in crime solving. The purpose of this paper is to show the importance of forensic entomology in crime solving and present the scientific and practical use.

**Keywords:** *forensic, entomology, insects, crime solving, crime investigation.*

## INTRODUCTION

For as long humans have lived the Earth, insects were also there to bite, chew, fly, and annoy them. Results of such interaction were and are loss of food, spread of disease, destruction of property, and attacks on humans, livestock and pets (McNeill, 1977).

Mostly used insects during forensic entomological investigations include blowflies, flesh flies, cheese skippers, hide and skin beetles, rove beetles and clown beetles. Some of these insects consume dead bodies only during juvenile stages (carrion feeders), and others (necrophages) consume it during both juvenile and adult stages of their life. Sometimes, some insects can be found on a dead body, only because they feed on necrophages (Gennard, 2007).

The first known mentioning of insects and criminal investigation has been recorded in the middle of the X Century (Greenberg and Kunich, 2002). After providing the important insect identification, especially of the forensically important *Calliphora vomitoria* (during 1668 and 1775), a significant legal case happened during 1850. Namely, when a boarding house has been renovated, a mummified body of a baby was found. Dr Bergeret carried out an autopsy and found moths and larvae of the *Sarcophaga carnaria* (fleshfly). Using the insects, he concluded that the body has been sealed up during 1848, and that the moths gained access to the body a year later (presumed that those were from the family *Tineidae* (*Lepidoptera*). This conclusion helped to exonerate the current occupiers of the house and to accuse the previous ones (Bergeret, 1855).

Megnin in 1894 explained the eight different stages and waves of insect succession on bodies, of course, connecting those to the environment (temperature, whether the body has been clothed or not, etc.) (Gennard, 2007).

Another really important case, was the one in Edinburg, Scotland, where body parts were recovered from water, and also on land. They were identified as Mrs Ruxton and Mary Rogerson (the nanny for the family). On the body parts there was presence of the larvae of *Calliphora vicina*, indicating that the eggs have been laid prior someone dumped the bodies in the river. At end the police, thankfully to all results and evidence, convicted Dr Ruxton for murdering his layer.

Depending to geographic location, season and air temperatures, but also abiotic and biotic influences, several species of insects arrive on a dead body and in connection to the time passed from death, their development is highly predictable.

Using the life cycle stages of particular fly species that are recovered from the corpse, or the succession of insects present on the corpse, the forensic entomologist could provide a measure of possible post mortem interval (PMI). The estimated time can be given over a period of hours, weeks or years. Actually, the PMI starts at the moment when the first fly lays its eggs on the body, and it ends when the corpse is discovered and the life stage of the oldest colonizing specie is

recognized. The duration of this stage, together with the particular stage of decay, makes possible the measuring of the probable length of time the individual has been dead (Gennard, 2007).

The paper analysis the importance of forensic entomology and its use in cases of death (homicide, suicide, accident, or negligence).

## **THE STAGES OF DECOMPOSITION OF THE HUMAN BODY AND THE PRESENCE OF INSECTS**

The interest of scientists and the study of decomposing or decaying organisms during period of time, including the process of forming fossilized remains, is called taphonomy. The processes involved in the decaying are the same, but there are no two organisms that decompose in the same manner (Vass, 2001 as cited in Dahlem & Rivers, 2014). The physical and chemical processes are unique for each organism, and the events are sequential and relatively predictable.

Temperature, moisture levels, the place where the body has been found (terrestrial or aquatic environment), location (geographic), seasonality, access to the body by scavengers and insects, can change the rate of decomposition and the other aspects of decay (Goff, 2010).

The three most recognizable processes of body decomposition are autolysis, putrefaction and skeletal bone decomposition (diagenesis).

During autolysis, which is the natural process of decomposition, the body cells are digested by enzymes (lipases, proteases and carbohydrases). This process is most rapid in the brain and the liver (Vass, 2001 as cited in Gennard, 2007). As result of this process, nutrients as food source for bacteria are released, and the process of putrefaction starts. It is the tissue breakdown by bacteria, and as a result of the process, gases such as hydrogen sulphide, sulphur dioxide, carbon dioxide, methane, ammonia, hydrogen and carbon dioxide are released. At the same time, anaerobic fermentation takes place when the volatiles propionic and butyric acid are formed (Gennard, 2007: 3). In the process of active decay, protein sources are broken down into fatty acids (skatole, putrescine and cadavarine) (Vass, 2001). After the removal of soft tissue, skeletal material is broken down (under the influence of environmental conditions) into components of the soil.

When the body is allocated on land, there are five stages of post mortem changes. During the first stage (fresh stage – from the moment of death to the first signs of bloating of the body) the first organisms that arrive are the *Calliphoridae* – blowflies.

In the second stage (bloated stage) the bacterial activity starts or putrefaction. As result to the gases released because of the metabolism of nutrients, the corpse starts to swell, initially the abdomen, but later the whole body. During

this stage, mostly because of the smell of gases, more and more blowflies are attracted to the body.

The active decay stage (or third stage) is characterized with sloughing of the skin from the body, the subsiding of the inflation of the body (because of the release of gases) and continued putrefaction. After the fermentation process, butyric and caseic acids are generated, starting the active putrefaction. During this stage, insects such as the silphid beetle *Nicrophorus humator* (Gleditsch), the histerids *Hister cadaverinus* (Hoffmann) and *Saprinus rotundatus* Kugelann, and the muscid fly *Hydrotaea capensis* Wiedeman (= *Ophyra cadaverina* Curtis) are attracted (Gennard, 2007).

In the fourth, post-decay stage, what remains on the body are skin, cartilage and bones, some remnants of flesh, and the intestines. Tissues are dried, there is reduction of the dominance of flies, and increase of the presence of beetles on the body.

The skeletonization is the fifth and final stage of decomposition. There is no obvious group of insects that is associated with this stage, with exceptions to beetles (*Nitidulidae*).

In cases where bodies are submerged in water, all of the already mentioned stages occur, but there is an additional one. It is the floating stage when the body rises to the water surface. At this stage, besides aquatic insects, also terrestrial insects colonize the body. This is the stage when a body is in most cases found and recovered (Gennard, 2007).

The life of flies and beetles is a cycle which shows a complete metamorphosis. The cycle starts when the adult female lays eggs in batches, in places of the body that provide protection. The number of laid eggs is around 150-200. The second stage of the fly life cycle is the larval stage. The third is the development of puparium, from which adult fly emerges. Fly puparia at the crime scene are usually found at some distance from the body, 3-5 cm below the soil surface, in pockets, under carpets, in leaf litter, nooks and crannies.

## **CALCULATING PMI (POST MORTEM INTERVAL)**

Calculating the post mortem interval is a matter of crucial importance in cases of homicides. Why? Because in such way, the information we could get could help us in identifying both the criminal and the victim. The identification will be possible by eliminating suspects and connecting the deceased with reports of missing persons during the same amount of time.

What is of crucial importance is the time when the victim was last seen alive, but also the body is the one that must tell us when death occurred (Henssge et al., 1995).

What provides a minimum PMI is the estimated age of an immature insect that has fed on a body, because (with rare exceptions) adult females do not deposit their offspring on a live host. But, as a conservative form of PMI estimation, it does not estimate the maximum PMI, because the period between the death and the deposition of eggs is unknown, and in correlation to conditions on the (crime) scene and insect species, the PMI could be less than one day to more than one month (Smith, 1986, as cited in Byrd & Castner, 2001).

In the process of PMI calculating there are several factors that influence carrion insect development and succession, such as individual species characteristics, weather and seasonality, the presence of maggot mass, food type, drugs and other toxins, geographic region, preservation method, insect colonization preceding death.

Having the model of place where the body has been found, the additional information needed includes: identification of the flies, species and the development stage; experimental data of the development process of the fly of interest at the relevant temperatures; temperature data from the crime scene; also temperature data from a nearby weather station; calculating the stages of development of the insects found on the body; calculating the accumulated days on the crime scene (Rivers & Dahlem, 2014).

## **CONCLUSION: THE IMPORTANCE OF FORENSIC ENTOMOLOGY**

In a case of a found body of a boy in a thicket at the edge of a wood, the examination of the body revealed that blowfly larvae are present and that its age indicates that death have occurred two days previously. Also, because of the air temperature that was too low for fly activity, it was concluded that the death had occurred indoor. Later on during the police investigation, these conclusions were proved to be correct (Erzinclioglu, 2010).

The extent of the larval development is not the only method by which is possible to estimate the time of death, but also it can be estimated using the nature of the composition of the insect fauna found on the corpse. Even in cases of skeletonized body, the number of puparia and the dominant species represented by the puparia, can help us discover the season when the death had occurred.

There are cases where the soil fauna can be used as an evidence of time of death. Namely, when a body has been lying over soil for some time, the soil fauna undergoes a change. At the beginning the number of species and individuals decline rapidly and are reaching the lowest point after about two months. Afterwards, a new and different soil fauna starts to develop (Erzinclioglu, 2010).

In many of the cases of homicides, the murderers move the bodies of their victims. As well-known ecological fact that insect faunas are different for different

habitats, it is possible to conclude whether a body has been moved from one place to another.

Insects can also be used to possibly conclude how the murder has been committed. Actually, when flies attack a corpse, they normally search out the natural body orifices and there they lay their eggs, and after the infestation of the body follows a pattern. But, when the murder is committed using a gun or a knife, then flies are attracted by wounds and there they lay their eggs. In those wounds, the pattern of infestation is different from the usual one, helping investigators to conclude whether the murder has taken place where otherwise they would not have reasons to be suspicious.

Forensic entomology when used, has shown its full potential and its power as a tool in the process of solving crimes. As a field of biology, it still has a long path in front of it to be recognized and to receive support for further development.

Used in the past, around eight hundred years ago, insects helped people to find the suspect, understand how the crimes has been committed, and when it was committed (or what is the time of death). The life cycle of insects, their number and species can give answers about the season when the death happened, whether it happened indoor or outdoor, did the murderer moved the body, for how long the body has been left in the place where it had been found.

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# EVIDENTIARY SIGNIFICANCE OF FINGERPRINTS<sup>1</sup>

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## **Abstract**

Fingerprints have been used for identification of perpetrators for over a hundred years. Considering the characteristics of papillary lines and the fact that fingerprints appear due to a contact of a person with an object, the traces which are found at the scene prove only the fact that a particular person was in contact with the touched object, but not that he/she was at the scene. Their evidentiary significance is influenced by the place where the evidence was found and the position in which the evidence was found. The time of origin of the fingerprints should also have an impact on the evidentiary significance, as the evidence may have occurred at the scene much earlier than the time when the crime was committed. The paper will also present the decisions of the US Supreme Court on admissibility of fingerprints evidence and expert witness testimony.

**Keywords:** trace, fingerprints, forensic evidence, admissibility of evidence.

## **Introduction**

Human skin is composed of the dermis and the epidermis, wherein the epidermis is the outer layer that consists of the connective tissue, elastic tissue, smooth muscles and adipose tissue. There are also the *Malpighian* corpuscles that surround sweat gland ducts, which resemble volcanic craters ranging between 0.2 mm and 0.5 mm in width and 0.110 to 0.255 mm in height (Mitrović, Stupar 2002, 48). The epidermis follows the shape of the dermis and the forms matching the

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<sup>1</sup> This paper is the result of the realisation of the Scientific Research Project entitled "Development of Institutional Capacities, Standards and Procedures for Fighting Organized Crime and Terrorism in Climate of International Integrations". The project is financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia (No 179045) and carried out by the University of Criminal Investigation and Police Studies (2011-2020).

corpuscles appear on it, their density being the highest on the skin of digits, the palm of the hand and the sole of the foot. These forms are called papillae and they are distributed in a series which forms a line resembling a furrow of arable land. There are several arrays of almost parallel furrows on the skin, referred to as papillary lines, which form a unique pattern.

Given the fact that they possess scientifically established properties, papillary lines represent one of the sources of scientific evidence and are used for establishing the identity of a person who the traces (fingermarks) or the prints of papillary lines (fingerprints) originate from. The papillary lines are found on the skin of all people and there is no human without them except in the case of having been maimed and lacking the body part on which the skin has papillary lines, at birth or through injury sustained at some point during lifetime. This property of papillary lines is called universality. In the course of a lifetime, the papillary lines retain the specific type of a pattern which they form while the human is still at the stage of a foetus in the mother's womb. This property is called durability. The papillary lines are constantly covered by sweat so that upon touching a surface the pattern is transferred onto the touched surface, which accounts for the quality of transferability. The property of individuality means that each human has a characteristic, unique pattern of papillary lines. All papillary line patterns have been classified into specific types.

A fingerprint is a two-dimensional impression of the skin on the fingertips in which the papillary lines are black and the interpapillary space is white and which is taken in official premisses by rolling. The impression of papillary lines is left at the crime scene and can be two- or three-dimensional and usually results where pressure is applied onto a surface forming a pattern which mainly represents a fragment of the print and as a rule contains a smaller number of identification characteristic as compared to the fingerprint.

The establishment of a person's identity based on the fingermark, i.e. the impression of papillary lines has a tradition of over one century. Nowadays, with the development of computer technology, the job of experts in the field of dactyloscopy has been facilitated by the introduction of the Automated Fingerprint Identification System (AFIS). Until 2004, the collection of fingerprints in Serbia was designed in the form of a card index and the identity was established manually (Bjelovuk and Popović 2017). At that time, the process was time consuming and involved a larger number of employees. Today, establishing the identity based on the fingerprints in practice is defined by standard operative procedures, which take into consideration the recommendations of the European Network of Forensic Science Institutes (ENFSI) and international standards.

Upon establishing the identity of a person, it is necessary that both the fingermark and the fingerprint match the general characteristic, which implies the type of pattern (arch, radial loop, ulnar loop or whorl) and then search for matches of identification characteristic in terms of type and position.

Identification of persons based on fingerprints uses Balthazar's criteria (Mitrović 1998, 57) that define the need for twelve characteristics (minutiae such as the start of papillary line, the end of papillary line, fork, island, bridge, spiral, delta, whorl, etc.) which have to be matched in a fingermark (which was taken at the

crime scene) and in a fingerprint (which was taken in the police lab). Fingerprint identification is performed by registered court experts in the field of dactyloscopy, during the dactyloscopic expertise.

The expert for the appropriate field is appointed after the procedure that involves a public invitation by the Minister of Justice in the Official Gazette of the Republic of Serbia and on the Justice Ministry's website. By reviewing the court database of experts for dactyloscopy in the Republic of Serbia, it can be noted that registered court experts have different professions and levels of education. It should be noted that one can find only basic, very scarce and imprecise data about the registered court experts that are available at the website (Žarković, Bjelovuk and Borović 2014, p. 696).

A closer analysis of the fingerprint reveals some anomalies, such as ridge endings, bifurcations, crossovers, short ridges, etc. These local features of fingerprints, called *minutiae*, can be used for manual or automatic fingerprint identification since their number and position defines a fingerprint's individuality. The majority of AFIS are based on the minutiae comparison, so extraction of genuine minutiae from the input fingerprint image can be seen as a critical step for accuracy of performance. Although there is a number of different minutiae types, according to the FBI recommendation only two - ridge endings and ridge bifurcations (forks) are chosen to be used in AFIS (Popović and Bjelovuk 2017). AFIS system has been validated for establishing identity in accordance with the ISO17025 standard. All experts who work on the AFIS are familiarised with capabilities and limitations of the system.

In keeping with the ENFSI recommendations, defined in the *Best practice manual for fingerprint examination*, identifying a person on the basis of fingerprints can be performed by using three possible approaches: 1) the numerical approach, when the number of identification characteristics, which varies from one country to another, is defined; 2) holistic, where the number, quality and type of characteristics are determined by an expert; and 3) probability, where software based on a probability model is used.

### **Papillary line traces at the crime scene**

Papillary line traces are found at the scene of different criminal offences and can be either latent, when they need to be visualised by using various methods, or visible, two- or three-dimensional. They usually represent fragments of the fingerprints taken by rolling in the official premises and therefore cover smaller surface and possess fewer identification characteristics. Papillary line traces can be of different origin, such as transferring the material from papillary lines on the touched object, removal of material from the touched object on the papillary lines and by impression. Regarding the manners in which the papillary line traces may occur, they may indicate only whether a certain person was in contact with the touched item (an object or some surface such as floor, wall, etc.). After finding the papillary line impression at the scene and its possible visualisation, there follows an analysis focusing on its suitability for identification. Namely, the impression is examined for identification characteristics such as the delta, fork, core, ridge, creases, scars, etc., and conclusion is made as to whether these are clearly

pronounced, whether they are present in sufficient numbers and whether they form a pattern. Following the evaluation of the impression's suitability for identification of a certain person, what takes place is the lifting of the prints found at the scene by making an entry in the minutes of the crime scene inspection, report on forensic examination of the crime scene, photo-documentation, drawing into the sketch and a situation plan, in which it is mandatory to enter coordinates and fingermark direction, as well as their lifting from the crime scene, in terms of their physical removal. Producing documentation on the found papillary line impressions is mandatory. In all cases of photography scales are essential.

Ensuring the continuity of evidence or chain of custody implies creating an accurate documentation of all the details related to the papillary line traces from the very moment they are found at the crime scene. If the trace was examined by more than one expert, it is necessary to make a list containing the names of all persons who were in contact with the trace, the so-called transfer list, whether in paper or in electronic form. In this sense, it is of utmost importance that the list is signed by all the participants – both the transfer and the transferee. The main objective of the examination and comparison of the traces and impressions of papillary lines is to either establish the identity or exclude or eliminate common origin.

### **Evidentiary significance of papillary line impressions**

Examination of papillary line impressions falls within the scope of dactyloscopic identification and is perceived as a reliable and universal means for identification of persons. Establishing identity is the initial step that creates conditions for locating the person for whom there are grounds for suspicion that he/she has committed a criminal offence. This is why this action is one of the basic police activities taken in the pre-investigative procedure. It is known as establishing the identity of persons and objects as provided for in Article 286 paragraph 2 of the Criminal Procedure Code of the Republic of Serbia (Official Gazette RS, nos. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19; hereinafter: CPC). It is a search action which is mainly applied in the pre-investigative procedure in order to detect criminal offences and their perpetrators, i.e. in order to establish and confirm the identity of a person or to identify and object. This action is of operative significance for activities of officers exercising police powers (Milošević, Kesić and Bošković 2016, 102).

However, identity establishing is achieved through the implementation of the proving action of obtaining biometric samples (Article 140 CPC). It is stipulated that in order to establish facts in the criminal proceedings, impressions of papillary lines and body parts, buccal swabs and personal data may be taken, a personal description may be made, and a photograph taken of a suspect even without his/her consent (Article 140, paragraph 1 CPC). But taking the impression of papillary lines can be undertaken in order to eliminate suspicion about involvement in a criminal offence from an injured party or other person found at the crime scene even without their consent (Article 140, paragraph 3 CPC). Regardless of whether the papillary line prints are taken from the suspect or other persons for the purpose of eliminating, what is required is the order of the public prosecutor or a court, depending on the stage that the criminal procedure is in. The action itself is

undertaken by a qualified professional, or any person who contributes to resolving criminal matters by using their knowledge in certain fields, provided that this knowledge exceeds, both in quantity and quality, the knowledge of laymen or average experience (Milošević 1996, 20). In this case, the lifting of papillary line prints represents a proof in criminal proceedings.

Evidentiary value of the papillary line trace depends on the established relation between its being deposited at the crime scene, a certain individual who left it and the criminal offence (Simonović 2004, 376). The papillary line traces as a rule represent an indication of presence at the crime scene, but the location and direction where they are fixed may increase or weaken their evidentiary power (Simonović 2004, 376). Dactyloscopic evidence is the strongest when it can be proved that the fingermark was created at the time of and in the course of the perpetration of a criminal offence. It means that for such evidence the following facts need to be established: that the print is genuine, not planted or forged, that it was actually left in the spot where it was retrieved and that the incriminated print could only come from the perpetrator of the criminal offence, concluding this on the basis of the analysis of a specific triad: conditions, place and time of leaving the trace (Vodinelić u: Simonović 2004, 376).

Evidentiary significance of the papillary line traces must be analyzed from the aspect of fulfilling two types of criteria, legal and scientific ones. Legal criteria are manifested in fulfilling the formal and material conditions provided for by the law for lifting the prints of papillary lines. The formal conditions relate to establishing jurisdiction for taking this action and the procedure of obtaining permission to implement it. In Serbian law on criminal procedure, the formal condition is fulfilled if there is an order issued by the public prosecutor or the court and if the papillary line prints are lifted by an expert. The consent of the suspect or other persons is not required. Comparative legislation offers similar examples: e.g. in England and Wales fingerprints may be taken both with and without the consent of individuals in specifically stipulated cases which are related to arrest, detention and other procedural situations. If the prints are taken without the consent of the person, the action has to be approved by the official who must be of the rank of inspector or higher and who believes that this action will be of assistance in preventing or detecting crime (Ozin, Norton and Spivey 2013, 133). In the US, the papillary line prints may be taken from a lawfully arrested person even if there are no legal/statutory provisions on this (Moenssens and Meagher 2011, 24). The prints may be also taken in cases where there is no probable cause for arrest. The Court stated that the police could transport petitioner to the station house and take his fingerprints on the basis of their reasonable suspicion that he was involved in the crime (*Hayes v. Florida*, 470 U.S. 811, 1985). Subjects that are responsible for taking the prints of papillary lines are, as a rule, police officers and other law enforcement officials. The material condition refers to the existence of a certain degree of suspicion as to the existence of criminal offence and a specific person as its perpetrator. This condition is not explicitly provided for but it may be concluded that it is expressed in the existence of grounds for suspicion, given that the taking of fingerprints is performed in the earliest stage of the procedure, i.e. in the pre-investigative procedure.

As regards the scientific criteria for the papillary line print analysis, they can be defined as a set of rules resulting from development and promotion of scientific findings about the characteristics of papillary line traces and scientific methods used for lifting, developing, lifting, preserving and storing such traces. The analysis of papillary lines uses numerical and non-numerical methods of identification. The numerical method starts from the number of identification characteristics that have to match in order to prove that two prints belong to the same individual and this number ranges between 9 and 15 across different states, the required number in Serbia being 12. Non-numerical method of identification uses other individual characteristics, such as: sweat pores, degree of curvature of papillary lines, etc.

In the US, the analysis of the papillary line traces belongs to the group of scientific evidence, and in order to use it in criminal proceedings, it needs to fulfill general conditions in terms of chain of custody and expert witness testimony (Federal Rules of Evidence, 702-703). Initially, the US courts questioned the scientific nature of such evidence, i.e. it was unclear if a forensic friction ridge impression examination is scientific, technical, specialized knowledge, or a combination of two or three of these choices (Moenssens and Meagher 4). The dilemma was solved by the Scientific Working Group on Friction Ridge Analysis, Study, and Technology (SWGFAST), a recognized body charged with formulating guidelines for the friction ridge impression examiners' discipline. SWGFAST stated that forensic friction ridge impression examination "is an applied science based upon the foundation of biological uniqueness, permanence, and empirical validation through observation" (Moenssens and Meagher, 5).

The examination of friction ridge impression in the US uses the standard method of fingerprint identification, ACE-V. It is an acronym denoting Analysis-Comparison-Evaluation-Verification. An examiner must have a latent print and a suspect print to conduct an ACE-V examination. "The analysis phase involves a qualitative and quantitative evaluation of a fingerprint's friction ridges at three levels of detail: flow, or direction of the ridges; an examination of each individual ridge's characteristics and a close examination of the pores of the ridges" (Cooper 2016, 7-8). The comparison phase requires examination of the latent and suspect prints to determine if they match. The examiner will study the friction ridge to determine if their details match in similarity, sequence, and spatial relationship, but there is no specific formula examiners are to use in order to determine whether there is a match (Cooper 2016, 7). The third phase in the ACE-V method is evaluation, which requires the examiner to form a conclusion about the prints. The examiner can conclude that the prints are a match (individualization/identification), that they are not a match (exclusion), or that the result is inconclusive (Cooper 2016, 8; Cole 2005, 9-10). In the final stage of the ACE-V method, verification, a second examiner analyzes the same latent and suspect prints in an effort to verify the first examiner's conclusion (Cooper 2016, 8).

Despite the unquestionable significance and admissibility of the papillary line prints as evidence in criminal proceedings, it is interesting to note the conclusions reached by the court in the *US v. Mitchell* case (Moenssens and Meagher 2011, 18-20). In this case the court evaluated each of the factors that had

to be met by scientific evidence as defined in the case *Daubert v. Merrell Dow Pharmaceuticals Inc.* The first factor is testability, that is “whether the premises on which fingerprint identification relies are testable or, better yet, actually tested”. The court concluded that the premises that friction ridge arrangements are unique and permanent, and that a positive identification can be made from fingerprints containing sufficient quantity and quality of detail, were testable and had been tested in several ways. The second part of the testability factor involves the fact that making a positive identification depends on “fingerprints containing sufficient quantity and quality of detail”. The second is the peer review factor, and the court took the stance that “the ACE-V verification step may not be peer review in its best form, but on balance, the peer review factor does favor admission” of friction ridge comparisons and individualizations. The third factor relates to the error rate, that is to the number of false positive and false negative identifications, which, according to *Daubert v. Merrell Dow Pharmaceuticals Inc.*, has to be zero (Cole 2005, 7). The court stated: “Where the government experts testify to being unaware of significant false positive identifications, the burden of producing contrary evidence may reasonably be shifted to the defense. Although the error rate may not have been precisely quantified, the court was persuaded that the methods of estimating it showed it to be very low”. The fourth factor is the maintenance of standard, which confirmed that ACE-V is a satisfactory method in the examination of papillary line traces and that its implementation satisfies the condition of reliability, which is required for scientific evidence in the cases of *Daubert v. Merrell Dow Pharmaceuticals Inc.* and *Kumho Tire Co. v. Carmichael*. The fifth factor was the general acceptance on which the court concluded that “most factors support (or at least do not disfavor) admitting the government’s” evidence on friction ridge individualizations (Moenssens and Meagher 2011, 20).

Certain doubts regarding reliability and accuracy of the examination of papillary line prints were expressed in the report submitted in 2009 by the National Academy of Sciences (NAS), under the title Strengthening Forensic Science in the United States: A Path Forward.<sup>2</sup> The Report concluded that “with the exception of nuclear DNA analysis..., no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.” The NAS Report made some specific criticisms about friction ridge analysis including that it was not properly “underpinned” (Cooper 2016, 4). Soon after the Report was published, the US Supreme Court acknowledged that many forensic sciences are subject to “serious deficiencies” (*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319, 2009, Cooper 2016, 4). This was followed by large number of court cases in which the defendants challenged admissibility of the papillary line prints and the court, upon

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<sup>2</sup> One of the best known cases in which false identification based on latent traces of papillary lines occurred is the terrorist attack at the Atocha Station in Madrid on 11 March 2004, in which 193 people were killed and almost 2000 injured. On the basis of the latent papillary line traces found on the bag with explosive and detonators, FBI claimed to have identified Brandon Mayfield from the US with a 100% accuracy, despite his claims that he had not left the States for years. This conclusion was verified by two FBI supervisors. A subsequent examination of the said traces resulted in Spanish police identifying Ahmed Daoudi, an Algerian who lived in Spain (Cole 2005, 3).

deciding, mainly referred to the standards of the adversary proceeding and engagement of the defence counsel in the cross-examination of the prosecution's expert witnesses, engagement of expert witnesses by the defence and presenting the opposing evidence. The court did not embark upon an analysis of the so-called scientific dilemmas which were pointed out in the scientific circles, but rather took the stance that the adversary criminal proceeding had adequate mechanisms for refuting or supporting evidence, including the papillary line prints (*U.S. v. Rose, Pettus v. U.S., State v. Sheehan, People v. Luna, etc. Cooper 2016, 12-23*).

## **Conclusion**

Most states have introduced an automatic system for identifying persons based on fingerprints. Although, looking from the outside, it seems that the process of establishing identity is quite simple and that the computer performs almost everything, the factor of human knowledge cannot be disregarded. The computer marks the matches of certain identification characteristics, but it is up to an expert to check them, especially if there are specific characteristics such as scars, deltas, etc. Although the process of automation improved the functioning of dactyloscopy section of the National Forensic Centre within the Ministry of the Interior of the Republic of Serbia, it does not fully exclude the significance of human factor in the identification process. During an expert examination, an expert can determine the monodactyloscopic formula, which the computer does not establish. It is of great importance for experts in the field of dactyloscopy to constantly upgrade their expertise and exchange experiences with their peers, as well as to observe standard operative procedures when establishing identity and to have their expert findings cross-checked by another expert in accordance with the ACE-V method with or without information regarding the conclusions of the first expert. An expert who uses AFIS has to be aware of all capabilities and limitations of the system (expressing only two sort of a large number of minutiae, showing false minutiae, offering options of possible matches, etc.). An expert must be complete, registered and must testify in court so as to present the entire process of his expertise and all the methods he has used in order to reach a certain conclusion, based on which he has formed his opinion.

Even with all necessary prerequisites related to entries made in the documentation from the crime scene and the presentation of the results of expertise in a dactyloscopy lab, which have to be such as to include clear, concise and structural information, evidentiary potential of the papillary line impression extends only to proving that a certain individual was in contact with the touched surface. Such a trace may become an indication of the presence at the crime scene only if it is impossible to refute the possibility that the touched item was brought to the crime scene. The location, orientation and time of finding the trace may also influence interpretations of the trace origin and its evidentiary potential in terms of whether a person is legally entitled to access certain premises and items or not (perhaps they were visiting the day before, perhaps they live there; the position and orientation of the papillary line traces on a bottle neck when drinking from the bottle may be different from the trace originating from hitting with a bottle, etc.).

Evidentiary significance of the papillary line impressions depends on whether the legal criteria have been met in the sense that the fingerprints used as comparison material have been obtained in a lawful manner, whether the chain of custody established from the moment the traces were found to their presentation in an expert testimony before the court. It is also important to satisfy scientific criteria in terms of being continuously informed about scientific breakthroughs in this field, their evaluation and verification, in order to avoid errors in the identification procedure, and thereby unfounded criticism. We have witnessed serious reconsiderations in the US scientific community regarding reliability and accuracy of identifying persons based on the examination of the papillary line traces. Despite it, courts almost exclusively rely on legal capabilities (adversary proceeding and broad rights of defence in proposing and refuting evidence) for overcoming possible doubts about the veracity of such evidence, without embarking upon any serious analysis of the views expressed by the scientific community.

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## **ORGANIZED CRIME IN HUNGARY FROM A CRIMINAL GEOGRAPHICAL POINT OF VIEW**

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### **Abstract**

The study examines Hungarian organised crime from an aspect that has not been used before. Criminal geographic researches have brought this new aspect to life. These criminal geographic researches have examined crimes from both spatial and temporal aspects. The current examination is unique, since practically none has examined crime from spatial aspect in Hungary yet. This has multiple reasons. On the one hand, it is difficult to get access to this kind of criminal statistic data. On the other hand, the number of prosecutions related to organised crime per year is quite low, which makes drawing conclusions about the spatial and temporal aspects of crimes difficult. This study presents the characteristics of Hungarian organised crime.

**Keywords:** *organized crime in Hungary, criminal geography, spatial analyses*

### **Introduction**

The relatively well-known crime phrase of Bertrand Russell (1872-1970), a renowned Nobel Prize winner in England, is: "Sin is geographical". Geography and spatial representation have a huge role to play in many crimes. For some delinquencies, the location of the offense has above-average relevance (e.g. most crime against property / theft, robbery / smuggling of human beings, serial crimes Ürmösné, 2015: 35.), while for other crime types the role of space is less dominant (e.g. offenses related to the World Wide Web) (Horst 1973: 82, Pődör 2015:17, Mátyás et al. 2016: 89).

Investigating the mobility of offenders in law enforcement is an extremely important issue, as it can answer many unanswered questions during investigations. Consider, for example, geographic profiling, where the offender-specific spatial (mobility) data can provide relevant information about travel patterns. This allows you to draw intersections, which, if fortunate, identifies the offender's place or place of residence.

The Analysis and Evaluation Unit of the National Bureau of Investigation of the Standby Police (NNI) has provided me with 53 indictments and 11 convictions. The indictments were issued by 24 prosecutors' offices and the

judgments were issued by 9 courts. On the basis of the above, it can be concluded that there are judgments and indictments from all over the country, which results in the fact that none of the territorial units of the country is overrepresented and that the distribution of cases is proportionate.

### **Investigating offender mobility by each mode and means of transport**

In order to overcome spatial distance, we physically change our position, travel for which we need some equipment or means. It is necessary to distinguish between between road, rail, water, air, and pipeline transport. (The first four areas are relevant for law enforcement.) (Grasseli, 2016:4) For each mode of transport, it can be stated that there are both advantages and disadvantages (speed, price, convenience, etc.). However, the pros and cons are taken into consideration and weighed by the offenders just as much as a citizen or shipping company wishing to travel. Analysis and continuous monitoring of these from a law enforcement perspective is extremely important as criminals seek to exploit the current security deficiencies in each subsystem and find the safest form of transport for themselves.

Transport is given particular attention in order to make transport networks and systems as advanced as possible, as it can also be a driver for economic development. However, the benefits of improvements are not only enjoyed and used by law-abiding citizens, but also by criminals. The significant evolution of transport infrastructure over the last two decades has also significantly changed the travel patterns of criminals, changing their location faster and reaching virtually any continent, or travel among the states of the US as serial killers (Ürmösné, 2020:44), or other perpetrators in a matter of hours. It is essential to control and monitor new trends in transport by law enforcement, as this is the only way to guarantee the expected level of public safety.

With regard to the transport sectors, it can be stated that the defendants in the cases used almost 100% the land transport (road and rail transport), they travelled by air only twice. The means of transport could be identified in 138 cases, which is considered to be an extremely high number in relation to the number of cases examined (between 2012-2017) (Table I). You may wonder what the reason might be. The difference in price between land and air is in no way a justification, as in some cases it is cheaper and quicker to travel by air than sometimes traveling by car for more than a thousand kilometers. In addition, the organized crime groups involved in the case have accumulated significant assets over several months of operation, which would have allowed them to pay any additional costs.

**Table I. Vehicles used by criminals (2012-2017)**

<b>Type of transport</b>		<b>car</b>	<b>motorcycle</b>	<b>bicycle</b>	<b>other</b> (public transport, coach, truck)	<b>van</b>
road	134	97	3	1	3	30
railway	2					
waterway	-					

air	2					
pipeline	-					<b>Total: 138</b>

Source: National Bureau of Investigation

The use of land-based infrastructure is primarily for security reasons. On a flight, the luggage is carefully scanned and the passengers are registered, which leave traces for years (Dávid et al. 2007:163). Some airline companies also carry out a raster investigation to carry out a risk analysis, which must be avoided for a person who commits a crime. For some types of crime, the use of air travel is impracticable, because either a package of special size / material (e.g. narcotics) must be moved or people who do not have the necessary flight documents (e.g. human smuggling) must be transported.

Land transport is therefore a form of transport which is of primary relevance to Hungarian organized crime groups. Dividing the land transport further, the following conclusion can be made: The dominance of road transport can be observed, the weight of rail transport is practically negligible. Train was used by criminals in 2 cases, both in connection with human trafficking (between 2012-2017).

The indictments and convictions analyzed also included unspecified means of public transport (human smuggling), a tourist bus (a crime of drug possession) and a truck (for drug trafficking) (between 2012-2017). The usage of bicycle has arisen in a case where the offenders were prosecuted for committing drug trafficking offenses in a criminal organization. Despite the fact that the bicycle was involved in only one case, it is likely that the vehicle plays an important role in the distribution of drugs in larger cities, as the risk of police control is relatively low (less than driving a car or walking). Motorcycles were used by criminals in 3 cases: in 2 cases in connection with the smuggling of human beings, in order to move faster on the green border, and in 1 case to commit robbery. Last, but not least, the aircraft was used by criminals in two cases. In one case, they are perpetrators of fraud using an information system, while in the other, they are perpetrators of human trafficking. Water transport (lakes, rivers) was not used by the offenders in the cases under investigation. If we look at the percentage of individual land transport vehicles, the proportion of passenger cars (72%) and vans (22%) in road transport was statistically insignificant (motorcycle: 2%, bicycle: 0, 7%, other 2%) (National Bureau of Investigation).

### **Type-testing of vehicles used for crime**

The most common means of transport was the passenger car, which was named by type in most of the indictments. We can wonder why a vehicle type can be useful for law enforcement purposes. So far, in Hungary, law enforcement agencies have not carried out risk analysis based on the type of vehicle. On the other hand, the types of cars included in the indictments and convictions in question indicate which car types are most common and which car brands have been most frequently used to commit the crime. Risk analysis (gender, age, nationality, time of entry / exit, etc.) is still part of daily practice at border crossing points, so it is

primarily at the border that the greatest practical benefit can be gained by testing vehicles by type, particularly in the case of human trafficking.

Below, the types of cars the offenders have used are reflected. A total of 97 cars were used to commit a crime, broken down as follows: 1. branded (eg Ford) or branded and modelled (eg Ford Fiesta) (80 cars); 2. without type and brand (17 cars). Vans were used in 30 cases: 19 times with brand or brand and type, and 11 times without type and brand (Table II). The car involved in a given case was counted as one car, meaning that they could have committed several crimes in a single crime case.

**Table II. Vehicles used by criminals (by type)**

	<b>car</b>	<b>van</b>
<b>Total</b>	97	30
<b>Without brand name and type</b>	17	11
<b>With brand name</b>	80	19

Source: National Bureau of Investigation (2012-2017)

Most of the cars involved in crimes were Opel vehicles, which is practically not surprising, since the Opel is the most popular car brand in Hungary. The Renault and Skoda brands, however, are already surprising, these being only the fifth and sixth most popular car brands in 2016. On the third place on the imaginary podium is Volkswagen, which was the third most popular brand in 2016.

There is a "competition" concerning vans. There were a total of 7 Ford pick-ups on NNI records, of which 6 times Ford Transit was used for committing crimes. The Mercedes brand van was involved in 6 cases (of which the Mercedes Vito 5 times) and the FIAT Ducato 3 times (Table III). With regard to these three types of vans, it can be concluded that they have always been used for the crime of smuggling human beings, so it is strongly recommended that these types of vehicles are considered as risk factors in the context of border risk analysis.

**Table III. Vehicles used by criminals (cars of types)**

	<b>Car</b>	<b>Van</b>
<b>1.</b>	Opel (2), Opel Astra (5), Opel Corsa, Opel Omega, Opel Sintra, Opel Vectra, Opel Zafira (2)	Ford Tranzit (6)
<b>2.</b>	Renault, Renault Twingo, Renault Espace, Renault Laguna (2), Renault Scenic, Renault Megane  Skoda, Skoda Felicia, Skoda Octavia (3), Skoda Superb (2)	Mercedes Sprinter, Mercedes Vito (5)
<b>3.</b>	VW Golf (2), VW Passat, VW Polo, VW Sharan, VW Touran	FIAT Ducato (3)
<b>Other</b>	Audi A4, Audi (2), Audi 80, Audi A6, BMW (6), Chrysler, Chrysler Voyager, Citroen C1, Citroen C5, Citroen Xsara, Dacia Logan, Daewo Nubira, FIAT	Citroen Jumper, Citroen Jumpy, IVECO Daily, KIA

	Bravo, FIAT Multipla, FIAT Punto, Ford Escort, Ford Focus, Ford Galaxy, Ford Mondeo, Ford Galaxy, Jaguar, Jeep Cherokee, Jeep Grand Cherokee, KIA, Mazda, Mercedes (3), Mitsubishi Charisma, Mitsubishi Pajero, Peugeot 206, Rover, Seat Ibiza, Skoda, Skoda Felicia, Skoda Octavia (3), Skoda Superb (2), Suzuki, Suzuki Swift (2), Toyota Avensis (2), Toyota Corolla, Volvo, Volvo S80,	Pregio, Opel Vivaro, Peugeot Boxer, Peugeot Expert, Renault JL Traffic, Toyota Hiace, Volkswagen Crafter (2), Volkswagen kisbusz
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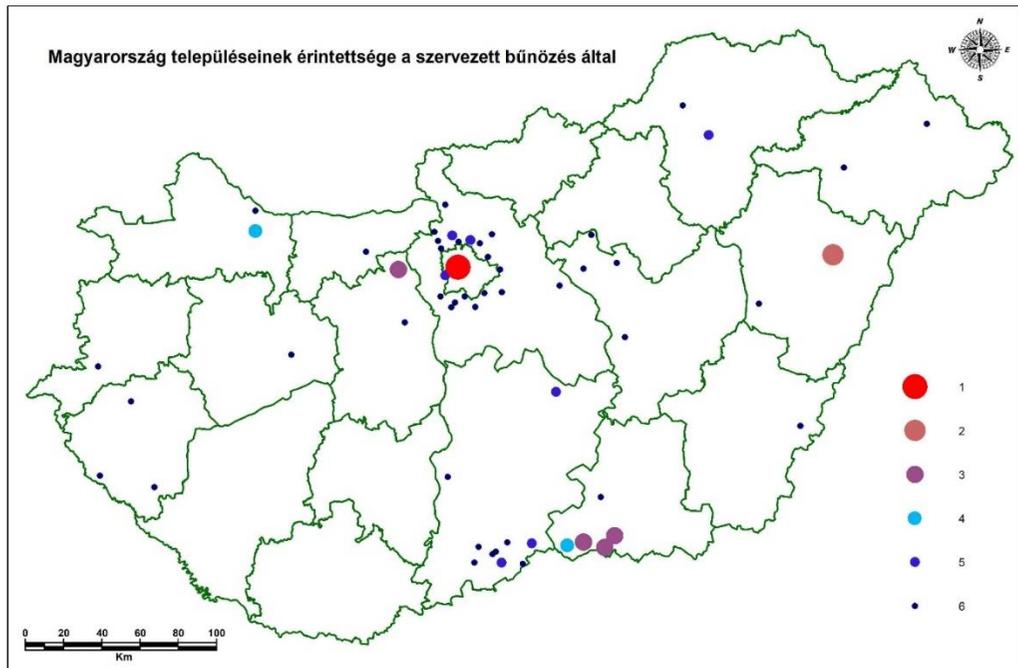
Source: National Bureau of Investigation (2012-2017) (direct contact)

### Domestic crime scenes

Concerning the Hungarian settlements, the following conclusions can be made: In its case numbers, the impact of the individual settlements is much lower than that of the capital city, but if we look at the proportion of the population and the number of crime cases, I conclude that Budapest is not significantly affected. On the contrary, the incidence rate per 10,000 individuals is much higher in smaller settlements than in the capital city. In the case of settlements with a single number of case, any analysis or search for correlation may seem unfounded, so the author ignores it. It is worth mentioning, however, that in the case of settlements with a single case, two large groups can be identified, which illustrates that it is by no means the "accidental act" of the crime but its geographical location.

One group includes the settlements belonging to the suburbanization zone (agglomeration ring) of the capital. The other group includes the settlements where the crime case is related to the proximity of the border. More than three-quarters of settlements with a single case number fall into one of these two categories. The proximity of the capital and the presence of organized crime can be related to several settlements (eg Alsónémedi, Budakalász, Dunaharaszti) (Map 1.).

In the case of the majority of settlements in the other group, it was the border factor that can be related to the commission of the crime (eg Bácsbokod, Balástya, Csikéria, Vásárosnamény). In the 14 investigated settlements in 10 cases the proximity of the border could be detected as a clear factor related to the committed crime.



Map 1. Hungarian settlements' infectedness by organised crime (2012-2017) (Mátyás 2018:148)

According to case numbers, Debrecen was the second most infected municipality by organized crime, which by its population is almost as affected as the capital (trafficking in human beings and drug trafficking). Debrecen, as a crime scene, was featured eight times in the examined documents.

### Summary

The study examined Hungarian organized crime using criminal geography methods of analysis, with special emphasis on the geographical investigation of crime. One of the most important findings of the research is that road transport is the most important element in the transport of criminals. In this context, offenders mainly drive cars and vans on motorways, and the role of by-passes is negligible. There are many settlements involved in organized crime, either along the border or in the agglomeration ring of Budapest. In many cases, research has shown that there is a close correlation between organized crime and certain geographical factors, but this varies with different types of delinquency. Other countries' law enforcement operations can also make use of the criminal geographic laws disguised in the study.

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# **INTERNATIONAL AND MACEDONIAN ENDEAVOURS, OBSTACLES AND SOLUTIONS REGARDING CITIZENS' PARTICIPATION OF ROMA AT LOCAL LEVEL**

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## **Abstract**

Equality in terms of equal opportunities for every person or group of individuals, including prohibitory regulations regarding discrimination, is of immense importance of contemporary complex societal, legal and political mechanisms. The Roma are among the permanent vulnerable categories both in Europe and in the Republic of North Macedonia as far as exercising human rights is concerned. Therefore, the legal and political mechanisms protecting the Roma rights require consistent and long-term attention and improvement, which this paper attempts to provide. Namely, the paper aims to identify the legal basis for protection, but also the obstacles posed by universal, European and Macedonian legislature regarding the Roma rights and to introduce solutions for boosting citizens' participation of the Roma at local level. Even though the existing legislative basis covers vast area, certain new possibilities within the legal and political system could be unraveled, dominantly by using the method of qualitative contents analysis of legal acts, strategic documents and empirical studies, thus concluding solutions that comply both with strategic 'top-down' policy making and 'bottom-up' measures and specific actions. This legislative and policy analysis comes to the conclusion that the continuity of affirmative action including the indispensable census, affirmative action concerning the municipalities with Roma inhabitants, targeted approach and changes in the primary school boards is needed that would benefit local government policy making subjects, experts and civil activists in the field of protection and development of human rights.

**Key words:** Roma political rights, equality, local government, affirmative action, policy making

## **INTRODUCTION**

Equality in terms of providing equal opportunities for every person or group of individuals, including antidiscrimination law, is of immense importance of contemporary complex societal, legal and political mechanisms. Namely, these axiological and legal preconditions contribute to the holistic use of social potentials, optimizing personal realization as well as to a greater functional cohesion and synergy in every area.

The Roma are among the permanent vulnerable categories both in Europe and in the Republic of North Macedonia as far as exercising human rights is concerned. Even though vast universal, European and Macedonian legislative and protective mechanisms are in place, still the effects regarding improvement of the quality of life of the Roma, are limited and policies, measures and possibilities for qualitative shift are yet to be unraveled. Boosting citizens' participation of the Roma in the local government could be a significant aspect of the 'bottom-up' approach to the end of greater local political inclusion and articulation of specific local Roma needs. To the end of providing prospective solutions to the issue in the ensuing period in RNM, the focus of the paper are the Macedonian domestic political and legal circumstances regarding Roma participation at local level, however a thematic universal and European normative overview is necessary in order to establish the legislative standards and tendencies for addressing issues that Roma are facing in the social and political reality in the most proximate context.

## **UNIVERSAL LEGAL FRAMEWORK**

The rights to be politically and civilly engaged at central or local level are essentially individual rights, however, when small ethnic communities are concerned, the political and societal inclusion also becomes an issue of respecting anti-discrimination law and equality principles in general, as well as respecting minority rights.

Therefore, the most general provisions of equality and non-discrimination are set by the Universal Declaration of Human Rights (UDHR) of 1948 stipulating in Article 2 "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..." and Art. 7 stipulates "All are equal before the law and are entitled without any discrimination to equal protection of the law..." These two sentences correspond in full to the Art. 26 of the International Covenant on Civil and Political Rights (ICCPR) 1966.

The citizens' political capacity is regulated by the Art. 21 of UDHR which states:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

This provision largely corresponds to Art. 25 of ICCRP, thus concluding the basic international standards for equal functioning within the internal political systems.

## **EUROPEAN LEGAL BASIS AND STRATEGIC CHALLENGES FOR ENHANCING ROMA INCLUSION**

### **Challenges for Roma integration in the EU**

The Roma is a large ethnic group living in every member state of the EU, comprising 10-12 million of the whole EU population, of which a significant part

live in extreme marginalisation and very poor socio-economic conditions. (European Commission - EC 2010, 2). The Roma in EU face substantial and deep-rooted social challenges, including discrimination, social exclusion, segregation, limited access to high quality education, difficulties in integration into the labour market, correspondingly low income levels, and poor health which in turn results in higher mortality rates and lower life expectancy compared to non-Roma (Ibid.). Roma exclusion entails substandard living and direct costs for public budgets as well as indirect costs through losses in productivity (Ibid.) Many Roma women and children are victims of violence, exploitation and trafficking in human beings, including within their own communities (EC 2012, 2).

It is both an EU's and common experts' stance that all these interrelated problems should be addressed simultaneously with an integrated approach (Ibid.), and the endeavours for tackling such challenges are elaborated in the following text.

### **EU legislation**

There are numerous EU legal acts that regulate the area of Roma inclusion, civil, political and social rights but the most relevant and largely used on the issue at hand would be the European Convention on Human Rights (ECHR) 1950, EU Charter of Fundamental Rights (EUCFR) 2000, Lisbon Treaty and **Council Directive 2000/43/EC of 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin.**

EUCFR is of particular significance for the EU legal system, since its legal binding force has been leveled up as primary EU law, when the Lisbon Treaty entered into force, in 2009, although this Treaty envisages the Charter separately.

ECHR in Art. 14, EUCFR in Art. 21 and the Lisbon Treaty in Art. 10 stipulate prohibition of any discrimination on similarly overlapping grounds, the most detailed being the EUCFR definition provisioning the grounds: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation and nationality.

EUCFR in Art. 40 and the Lisbon Treaty in Art. 20 Par. 2. Al. b. stipulate that "every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State." The Treaty goes further, by provisioning this right for citizens of the Union residing in a Member State of which they are not nationals and in the Art 20. Par. 2. Al d. stipulates the right of the Unions' citizens "to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language."

The **Council Directive 2000/43/EC envisages minimum requirements for combating discrimination on the grounds of racial or ethnic origin, i.e. stipulates nondiscriminatory access to education, vocational training, employment, social protection and all other goods and services which are available to the public, including housing.**

### **European endeavours and strategic commitments for Roma inclusion**

The EU, due to Commission's assessment, since December 2007, has adopted a strategic stance that besides the previous efforts for general respect of human rights and citizen-oriented policies, more intensive endeavours could be invested to support Roma inclusion (EC 2010, 2). In these terms, 26.5 bill EU funding was allocated through the Structural Funds and European Agricultural Fund for Rural Development in addition to the member states financial efforts and other nongovernmental financial support (EC 2011, 9) and several important strategies were issued with a strong tendency for their realization. First, the EC issued "The Social and Economic Integration of the Roma in Europe" in 2010; then, in 2011 issued the most important and practically, base-line strategy "An EU Framework for National Roma Integration Strategies up to 2020" (hereon: EU 2020 Framework) and in 2012 "National Roma Integration Strategies: A First Step in the Implementation of the EU Framework" which accentuates the significance of the national strategies, the economic integration of Roma and non-discrimination regarding several types of rights.

The EU 2020 Framework deserves attention as it addresses Roma inclusion for the first time at EU level and links it with the Europe 2020 strategy. As many other European strategic documents, this Framework considers the 10-year mark as adequate to achieve visible results (EC 2011, 14). It recognizes the need for a targeted approach: "to achieve significant progress towards Roma integration, ensure that national, regional and local integration policies focus on Roma in a clear and specific way, and address the needs of Roma with explicit measures." (EC 2011, 4). Another important element of the EU 2020 Framework is the strong monitoring mechanism, according to which the EC is obliged to report annually both to the European Parliament and the Council on progress on the integration of the Roma population in the member states (EC 2011, 13). Since four areas have been determined as most problematic: access to education, employment, healthcare and housing, the EU Roma integration goals should cover these areas, in proportion to the size of the Roma population (Ibid., 4). The national strategies for Roma integration must be designed, implemented and monitored with a continuous dialogue with regional and local authorities, as well as with Roma civil society (Ibid., 9).

Alongside these latest actions and previously existing mechanisms for protection of human rights in the EU, such as the guaranteed procedures before European Court of Justice and European Court for Human Rights, elaborate NGO monitoring and others, the EC has established a Roma Task Force (RTF) in 2010 to assess member states' use of EU funds.

Hence, on EU level, protection of human rights is established as paramount EU value through legal guarantees and elaborate institutional and non-institutional mechanisms, but also the principle of subsidiarity is widely accepted in EU practice, according to which each issue should be addressed at the most immediate level (mostly local government level) to the citizens if possible. Contextually, some of the Roma's most problematic areas, in many EU countries are local government competences, such as infrastructure, primary and secondary education, primary healthcare and housing. Therefore, it is uncommon to regulate this matter in more

details on international and EU level and treating the Roma issue in strategic EU documents is considered sufficient due attention, despite of long-term Roma's legal, political and socio-economic difficulties. Since the international legal frame refers to significantly broad circumstances in many countries, it could be stated that this more general regulative approach is adequate.

However, on EU level lies the possibility to intensify the process of ensuring political and social possibilities of Roma by introducing more specific provisions, such as quotas, ensured percentage in public bodies, ensured citizens' participation by specific Roma-targeting consultations etc., that aren't left to the member states or to the local government units. Namely, the principle of subsidiarity is sometimes interpreted far too extensively and in favor of the national member states' competences while some issues should actually be brought up to the EU level. As well, in the EU legal system, the activists and above all, the Roma citizens could benefit from codification of the numerous EU legal acts which in some terms are repetitive.

## **MACEDONIAN LEGISLATURE AND SPECIFIC CIRCUMSTANCES CONCERNING ROMA AT LOCAL LEVEL**

### **Roma challenges in the Republic of North Macedonia**

Generally, the problems of the Roma in RNM are similar to the ones described in the EU, but certain aspects are more accentuated in Macedonian terms. For instance, the salient problem of Roma in RNM is the issue of housing referring to improvised dwellings without electric, water supply or sanitary line-connector, as well as lacking property records for the flats (Stojanovski et al. 2014, 12-13). In this context, there are various legal impediments such as not regulated land proprietorship, problems with the urban planning and citizen's legal knowledge (Ibid., 18-22). Certain municipalities have already adopted strategies for housing, even though housing is not a competence of the local government, so given the narrow financial municipal capacities in RNM, the realization of these strategies is unlikely.

Education is a pressing issue for the Macedonian Roma - even though primary and secondary education in RNM is free and some additional incentives for Roma students are in place, there is a significant number of school leavers in primary and secondary education. Also, parents' seasonal work abroad and lack of accommodation capacities (kindergartens, nursing homes) negatively impact the Roma children's school attendance. (Ibid., 77).

Although in a couple of municipalities in RNM the Roma live mixed with other nationalities which necessarily implies fulfilled minimum standards of inclusion, Roma's living and educational circumstances are characterized with segregation. This is precisely where the local governments can undertake measures for the purpose of desegregation.

The Roma ethnicity is the socially most vulnerable one in RNM, especially the children (Ibid. 56-59). Roma's life expectancy is a lot lower than the country's average and health is a challenge, as well. However, health, currently isn't a local government competence and will not be in the proximate future since it is very specifically regulated having the central state as a background for its functioning.

As far as the local public sector is concerned, the Roma are generally underrepresented, given that on the last census they were 2.66% of the population while in the municipalities and the City of Skopje Roma are represented with 0.56% (Ministry of Information Society and Administration 2017, 56-57). Roma and human rights civil organizations are active in RNM but their effectiveness in the decision making processes is limited and civil participation of the Roma is very low. Hence, the necessity of enhancing citizen participation of Roma at local level is evident.

### **Macedonian national strategy and legal acts**

The national Strategy for the Roma in the Republic of Macedonia 2014-2020 envisages the same areas elaborated in the European strategic documents, among which the greatest attention is directed to education and employment, while less effective measures are envisaged in the area housing and health, and measures for the language and culture of Roma are also set down. Still, this Strategy lacks promotion of the Roma in the political life on central and local level – areas that could contribute to enhanced inclusion of this ethnicity. This aspect could be incorporated in the ensuing 10-year national strategy.

Numerous domestic legal acts regulate the issues of human rights in every area, in addition, RNM has quality anti-discrimination law, but for the purpose of the paper only the provisions that are narrowly - linked to the citizens' participation of the Roma at local level will be presented.

The Constitution of the Republic of Macedonia 1992 in Art. 22 stipulates the right of every citizen of age to vote and Art. 23 stipulates the citizen's right to take part in public office. Art. 115 provisions that "in units of local self-government, citizens directly and through representatives participate in decision-making on issues of local relevance particularly in the fields of urban planning, communal activities, culture, sport, social security and child care, preschool education, primary education, basic health care and other fields determined by law..." The amendment V of the Macedonian Constitution regulates the use of official and other language(s) and the most relevant stipulation is that "...in the units of local self-government where at least 20 % of the population speaks a particular language, that language and its alphabet shall be used as an official language in addition to the Macedonian language and the Cyrillic alphabet. With respect to languages spoken by less than 20 % of the population of a unit of local self-government, the local authorities shall decide on their use in public bodies."

The Law on the Promotion and Protection of the Rights of the Members of the Communities Which Are Less than 20% in the Population in the Republic of Macedonia from 2008 regulates aspects of equal representation of said persons in public offices, language usage, culture and education. These general provisions might concern local competences, but dominantly the provisions of this law are not specific regarding the local government units.

The most important and most detailed law regarding local government, including citizen participation is the Law on Local Self-government from 2002, the most theme-specific being the articles 26-30. Namely, civil initiative is regulated in Art. 26 Par. 1 which states "The citizens shall have the right to propose to the

council to enact a certain act or to decide upon a certain issue within its authority”, and Par. 3 says “the council shall be obliged to discuss this if it is supported by at least 10% of the voters in the municipality, that is of the neighbourhood self-government to which a certain issue refers”. Regarding citizens’ gatherings Art. 27 Par. 2 is relevant, stipulating “The citizens’ gathering shall be convened by the mayor of the municipality upon his/her own initiative, at the request of the council or at the request of at least 10% of the voters in the municipality, that is in the neighborhood self-government that a certain issue relates to”. The referendum which decision is binding for the council is defined in Art. 28. Par 1. “Through a referendum the citizens may decide on issues from under the competency of the municipality, as well as other issues of local importance.” and Par. 2 “The council shall be obliged to issue a notice of a referendum at the request of at least 20% of the voters of the municipality.” Art. 29. Par. 1 states “Every citizen shall have the right, individually or together with others, to submit appeals and proposals regarding the work of the organs of the municipality and the municipal administration”, and Art. 30 Par.1 stipulates “In the course of preparation of the regulations of the municipality, the council, that is, the mayor may previously organize public hearings or surveys or ask for citizens' proposals”.

This Law also envisages Committee for Inter-Community Relations in its Art. 55 Par. 1 “In the municipality in which more than 20% of the total number of inhabitants of the municipality determined at the last census are members of a certain community, a Committee for Inter-Community Relations shall be established.” This is an advisory body, although the municipal council, when deciding, is obliged to take into consideration the opinions of the Committee.

Conclusively, the subject matter is substantially regulated, based on quality normative framework that could be moderately improved in terms of providing more Roma-specific opportunities for civil and political action.

### **MUCH ADO ABOUT NOTHING? HOW MUCH IS ENOUGH?**

Even though the legislative basis covers vast functional area for the Roma, this is still the most negatively impacted ethnicity in EU and RNM. It is a common stance of the scholars, including RTF, that after the Roma Decade (2005-2015) and abundant financial allocations, still the effects are limited and even though certain progress is evident, it is largely moderate and the quality of life of Roma hasn’t changed in vast qualitative terms. The respective perceptions are also not favourable:

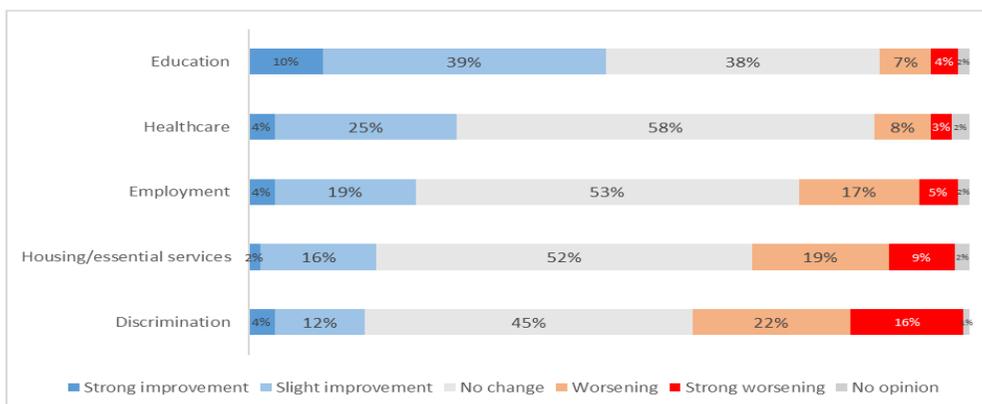


Figure 1: **Perceived changes in the situation of Roma 2011 -2018**

Source: European Commission. 2018. “Report on the Evaluation of the EU Framework for National Roma Integration Strategies up to 2020”. Brussels. COM (2018) 785, 2.

All described European problems still exist in great proportions, especially in countries such as RNM where the overall state capacity is narrow and although RNM was one of the nine founding members of the Roma Decade, still it is characterized with limited progress, and “clear signs of a government commitment to sustaining and expanding all relevant programmes to meet outstanding needs were lacking” (Friedman et al. 2012, 7). This EU and RNM situation, implies inadequacy and/or suboptimal effectiveness of used resources.

### **PERSPECTIVE SOLUTIONS AND POSSIBILITIES – CONTINUOUS AFFIRMATIVE ACTION AS A MUST**

Beside the low overall economic capacity of RNM, salient impediment for achieving developed local government in RNM is the deficient finances from significant sources of revenues that *inter alia* compromise the capacity of some municipalities to carry out their obligations (Todorovski 2015, 49, 51, 204, 205, 239, 240; EC 2016, 8). Therefore, the paper offers non-radical potential solutions and recommendations, dominantly in the field of the legislature, directed towards enhancing the Roma participation in the decision-making process at local level and towards convergence of the Macedonian Roma circumstances to the European programme documents.

The continuous and consistent affirmative action for addressing the Roma needs is of paramount importance.

In the current situation of inconsistent demographic trends in RNM, the conduct of a census is indispensable, for the purpose of coping with the manipulations with Roma votes in the electorate, establishing realistic principles for Roma factoring in the functioning of the public authorities and making adequate policies (quota determination, measurability of Roma participation in the public administration and in governing positions). In these terms, meanwhile, employing municipal and State Statistical Office capacities towards ensuring relatively realistic people’s register by using available statistical methods would be highly beneficial.

Given the limited resources of the LGU in RNM, greater attention should be put on using the possibilities for inter-municipal cooperation stemming from the Law on Inter-municipal Cooperation to the end of using joint financial and institutional capacities for drafting acts, strategic documents, project applications for additional funds, as well as increased control (inspection) for realization of previously adopted measures referring to improvement of the life of the Roma in the municipalities.

Furthermore, in a more concrete sense regarding the citizen participation, the census for citizens' initiative should be changed, from 10% to 5%, considering the demographic picture in municipalities with the Roma – in Bitola and Gostivar consisting around 3% of the local population, Delchevo 3.7%, Kochani, Kichevo, Vinica, Prilep, Shtip and Debar from 5% to 6% (SSORM 2004, 63-66). This suggestion could be incorporated as a change of the Law on Local Self-government in two ways: as an affirmative action – only aimed at the municipalities with the Roma population, or as a universal solution – for all municipalities.

Next, targeted approach should be adopted for employment in public administration where there is disproportionality between the number of inhabitants and employed Roma, such as in Shuto Orizari where 60% of the population is Roma and only 35% are employed in the municipality and on leading positions.

The Roma would benefit from introducing affirmative measure for assigning at least one Roma person in the municipal departments that have greater significance such as the ones dealing with economy, infrastructure etc.

In the school boards in primary schools, one of the parents' representatives should be Roma, if the school has enrolled at least 5% Roma<sup>1</sup>.

For the purpose of communicating pressing Roma issues and providing monitoring value, permeability in financing local Roma civil organizations should be ensured. Also, points for appeals and proposals should be set, along with an active, trained person for providing legal counsel in the area of citizen participation, organized by the LGU, in order to reach broader public with limited knowledge or technology access. As well, the public consultations could be improved by open municipal days and mandatory focus groups with Roma for Roma priorities identification, at certain time intervals.

Annually, a minimum number of realized sessions of the municipalities' Commissions for inter-ethnic relations should be legally introduced for boosting their functionality, given that there are municipalities with totally inactive Commissions. Also, such Commission should be established in those LGU where at least 5% of the population is Roma.

These eventual legislative interventions are possible to be introduced in a short term and with a reasonable effort.

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<sup>1</sup> Law on Primary Education, Art.124 1. Managing organ of the primary school is the school board 2. The school board in the primary school is consisted of 9 members: 3 representatives of the teachers, staff and educators, 3 of the parents, 1 of the founder and 1 from the Ministry of Education and Science.

## CONCLUSION

Even though elaborate universal, European and Macedonian legal basis is well-established, strategies had been adopted and their implementation has been closely monitored and the addressing of the Roma issues has been accentuated in many policies during the Roma Decade, still, very significant policy areas such as housing, healthcare, education, discrimination, social inclusion, societal and political engagement and others concerning the standards of living of the Roma could be stated that are suboptimal. Many of these issues could be tackled by intervening more effectively on local level and with greater participation of the Roma in the local decision-making process. For the purpose of addressing the Roma vulnerability in Europe and RNM, the legal and political mechanisms protecting the Roma rights require consistent and long-term attention and improvement, and in the foreseeable future, continuity of affirmative action concerning the municipalities with the Roma inhabitants. In European terms, codification of the numerous international and EU legal acts could be beneficial, as well as the more efficient use of the vast assigned resources for tackling the problems of the Roma and strong monitoring mechanism, while bringing more issues on EU level.

In RNM though, it is necessary a census to be conducted for the purpose of coping with the manipulations with Roma votes in the electorate, for realistic measuring of the Roma civil participation and eventual quota determination, meanwhile, alternatively, State Statistical Office register would be beneficial. Beside the census and incentivizing harvesting of the inter-municipal cooperation possibilities, certain modifications to the sound legal basis would enhance the Roma inclusion on local level, mainly as introducing quantitative measures such as lowering the municipal census for citizens' initiative compliant to the Roma percentage, then, minimum representation of Roma in public administration and important decision-making departments in the municipalities, as well in the school boards in the schools with 5% enrolled Roma students. To the end of ensuring constant Roma needs factoring, Roma CSO should be consistently financed, points for proposals and appeals and municipal open days should be set, as well as mandatory focus groups for Roma's priorities identification in the municipalities. This picture would be complete by introducing legal minimum for realized sessions of the municipalities' Commissions for inter-ethnic relations which should be established in all LGU where at least 5% of the population is Roma.

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## **SERBIAN APPROACH TO AN EFFECTIVE PUBLIC INTEGRITY SYSTEM AND COMBATING CORRUPTION**

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### **Abstract**

Corruption and lack of integrity in public sector undermine the values of democracy and trust in governments, impeding the effective delivery of public services. A preventive approach to corruption requires a coherent and effective public integrity system, given the complexity and wide variety of integrity breaches and corrupt practices. The paper examines the institutional and legislative framework to strengthen the effectiveness of the anti-corruption policy and public integrity system in Serbia. It also tackles rules governing the conflict of interest of public officials, arrangements for handling conflicts of interests and responsibility of public service. Adhering to rules for handling conflict of interest can be a powerful tool in establishing and maintaining citizens' trust in public institutions. The paper emphasizes institutional co-ordination by streamlining the mandates of the Serbian Anti-Corruption Agency encouraging anti-corruption policies and preventive actions which are required to address systemic and institutional weakness that facilitate corruption and other negative effects. Also, strengthening the capacities of the national framework for more efficient suppression of corruption by forming special departments for suppressing corruption under the jurisdiction of higher public prosecutor's offices, liaison officers, task groups, as important instruments of more efficient fight against this form of crime.

**Key words:** *Public integrity, Anti-corruption policy and legislation, Good governance, Accountability.*

## INTRODUCTORY REMARKS

The perception that personal interest is set aside and that priority is given to public interest, the citizens' interest and the good governance principles, sets sound foundation for further building of trust in the integrity of public officials and state institutions. The main goal of an accountable policy should be focused to integrity of state policy and administrative decisions. Good governance adheres to the rule of law principle – legality, administrative procedures, rights to legal protection, investigation, responsibility (Lane: 2012, pp.20). Preventing conflict of interest in public sector is one of the most important segments of the fight against corruption of every society because it is considered the lobby of corruption.

The concept of public integrity has been identified as a part of the founding principles of a professional and accountable performance of public authorities. Public integrity refers to the consistent alignment of, and adherence to, shared ethical values, principles and norms for upholding and prioritizing the public interest over private interests in the public sector. Consequently, public sector strives to employ professional and qualified people that have a deep commitment to the public service integrity values in order to create merit based public service.

Building integrity encompasses a number of elements, such as following – legislation, rules, code of ethics, fairness of public officials, professionalism, responsibility, awareness to perform duties in public interest, positive elitism, accepted social values and political leadership accountable to public and private sector and citizens (UN Resolution: 2004). Integrity refers to “honesty” or “trustworthiness” in the discharge of official duties, serving as an antithesis to “corruption” or “the abuse of powers”. In addition to this, integrity has been defined as “including but not limited to probity, impartiality, fairness, honesty and truthfulness” (UN: 2005).

Concretely, these concepts can be translated into an ethics infrastructure or a national integrity system of mutually reinforcing legislative standards, institutional structures and administrative procedures that ensure that public servants will put the interest of the public above their own. Maintaining public trust in the work of public institutions is a key task that can be achieved by preserving personal integrity of public officials, institutional and social integrity (Institute of Comparative Law:2018).

Although conflict of interest and corruption are notionally different, the policies dealing with conflict of interest are part of broader strategy or policy to prevent and combat corruption.<sup>1</sup> This practice is influenced by EU institutions,

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<sup>1</sup>In accordance with traditional notion of corruption (Plato, Aristotle, Montesque), corruption is a deviate behavior of an individual or a state that is not in compliance with common interest. Machiavelli and Russo believed that corruption is moral decay of people - annulment of social values. Contemporary definitions refer to administrative notion – in the context of an illegal behavior of individual in relation to public interest, economic - getting maximum profit by violating laws and ethics and using public utilities for personal interests or as a misuse of public interest in the favor of personal interests.

during the accession negotiation process moving this problem forward and creating more effective integrity management frameworks. Integrity management framework promotes several European principles of administration, in particular, political neutrality and professionalism, equal protection of rights, impartiality, disclosure of conflict of interest.

## **EUROPEAN PUBLIC INTEGRITY PRINCIPLES**

International and European organizations - United Nations, Council of Europe, European Union, International labor organization, have always been strongly interested and engaged in the international fight against corruption, given the threat it poses to the application of the basic principles defined by this organisation - lawfulness, the stability of democratic institutions, human rights protection and social and economic progress.

The European Union has paid due attention to the issue of the public officials' integrity. One of the key requirements is related to measures for promoting integrity, preventing corruption and ensuring discipline in the public service are in place. These measures refer to 1) effective and adequate legal provision and institutional arrangement and tools exist to promote integrity in public service, and are applied in practice; the following elements could be considered relevant to an effective public service integrity system: managers responsibility (managerial responsibility, regulation of incompatibilities and conflicts of interests, restriction of secondary employment, post-employment restrictions, guidelines for gifts and benefits, financial disclosure, whistle-blower protection, codes of ethics and conduct, ethics training and guidelines, anti-corruption and integrity policies and action plans and 2) corrupt behavior of public servants is criminalized in the penal code (OECD/SIGMA:2017). These principles serve as a guide for countries, which would incorporate them into their respective national instruments.

According to SIGMA Recommendations on public integrity, it is necessary to demonstrate commitment at the highest political and management levels within the public sector to enhance public integrity and reduce corruption, in particular through: ensuring that the public integrity system defines, supports, controls and enforces public integrity, and is integrated into the wider public management and governance framework; ensuring that the appropriate legislative and institutional frameworks are in place to enable public-sector organizations to take responsibility for effectively managing the integrity of their activities as well as that of the public officials who carry out those activities; establishing clear expectations for the highest political and management levels that will support the public integrity system through exemplary personal behavior, including its demonstration of a high standard of propriety in the discharge of official duties (OECD/SIGMA:2007).

The Recommendation by the Committee of Ministers makes clear that the adoption of the Code of Conduct for Public Officials is subject to national law and national principles of public administration (Council of Europe, 2000). The Code invites Member States to promote the principles of public administration and adopt

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national codes based on the Council of Europe's Model Code of Conduct for Public Officials. While the Recommendation points out that national codes should be based on the adopted Model Code, it also emphasises that they should be adapted to meet the circumstances of the particular public administrations. The Committee of Ministers participates in monitoring the implementation of the Recommendation. Article 2 of the Code sets the obligation for all public officials to observe and comply with the provisions of the Code.

According to Recommendation of Council of Europe, conflict of interest is defined as a situation in which the public servant has a private interest which is such as to influence the impartial and objective performance of his/her duties. Thus, personal (private) interest includes any advantage to him/herself, to his/her family members, close relatives, friends or persons with whom s/he has business or political relations. Furthermore, the public servant is forbidden from engaging in any activity or transaction that is incompatible with the performance of official functions. Additionally, public servants should declare their membership in organisations or associations that could affect their performance of official functions. In view of the main goal of maintaining citizens' trust in the impartiality of the administration, public servants are forbidden to demand or accept gifts or any other benefit for themselves, their family, close relatives or friends, or persons or organisations with whom they have or had had business or political relations which can affect the impartiality in the performance of their duties or constitute a kind of reward relating to their duties. Public servants should also take care that their political activities or involvement in political or public debates do not impair the confidence of the public and their employers, or their ability to perform their duties impartially and professionally, and that their exercise of public functions is not used in political purposes. Therefore, public servants must comply with any restrictions on the involvement in political activities, given the position and the nature of duties they perform.

In compliance with European standards it is also required to clarify institutional responsibilities across the public sector to strengthen the effectiveness of the public integrity system, in particular through: establishing clear responsibilities at the relevant levels (organizational, subnational or national) for designing, leading and implementing the elements of the integrity system for the public sector; ensuring that all public officials, units or bodies (including autonomous and/or independent ones) with a central responsibility for the development, implementation, enforcement and/or monitoring of elements of the public integrity system within their jurisdiction have the appropriate mandate and capacity to fulfil their responsibilities; promoting mechanisms for horizontal and vertical co-operation between such public officials, units or bodies and where possible, with and between subnational levels of government, through formal or informal means to support coherence and avoid overlap and gaps, and to share and build on lessons learned from good practices.

Conflict of interest regulations, incompatibility laws and other instruments, constitute a very effective approach to preventing corruption. Conflict of interest policies are also part of the detection and investigation of corruption, such as declaration of income or the declaration of family assets can help a great deal in the

detection of corrupt practices. In some countries, conflict of interest is considered a crime (or misdemeanour) and other countries have foreseen various sanctions for breaching the laws on conflict of interest (disciplinary sanctions) (SIGMA:2007). This implies to various regimes of legal responsibility (criminal, disciplinary, material, etc.).

## **SERBIAN RULES GOVERNING THE CONFLICT OF INTEREST – LEGISLATIVE AND INSTITUTIONAL FRAMEWORK**

The existence of a conflict of interest in the Republic of Serbia is regulated by the Constitution<sup>2</sup>, Law on the Anti-Corruption Agency<sup>3</sup>, Law on Civil Servants<sup>4</sup>, and a number of laws and secondary regulation (decrees, rulebooks, instructions, code of ethics). The substance of the Law on Anti-Corruption Agency stipulates the rules for resolving public office holders' conflicts of interest, while the Law on Civil Servants stipulates special rules that apply to civil servants. Law on Organization and Jurisdiction of State Authorities in Suppression of Organized Crime, Terrorism and Corruption,<sup>5</sup> prescribes the role of state authorities in investigating or prosecution of certain criminal offences.

Bearing in mind the above, the conflict of interest is a constitutional category and the Anti-Corruption Agency of the Republic of Serbia has the sole authority to decide on conflicts of interest. The Anti-Corruption Agency acts as an autonomous, independent state institution with a strong preventive role that had been lacking in any authority which had theretofore dealt with corruption. Its main objective is improving the situation regarding this area, in cooperation with other public authorities, the civil sector, the media, and the public in general.

The competence of the Anti-Corruption Agency is the prevention and resolution of conflicts of interest in holding public offices. The task of the Agency, with its decisions or opinions, as well as positions taken, is to prevent, resolve and eliminate the consequences of conflicts of interest in holding public offices; to resolve the cumulation of public offices; performance of another engagement, exercise control over the transfer of management rights and entrusting management; decide on the prohibition of establishing a company or public service during the holding of a public office, membership in an association and bodies of association, unauthorized influence on officials, prohibition of employment or business cooperation after the termination of public office, act in case of violation of the provisions of the Law on the Agency related to the conflict of interest. In order to prevent corruption, in this way, the Agency promotes the integrity and accountability of public officials, as well as institutional integrity.

Furthermore, regarding institutional framework, The Anti-Corruption Council of The Government, has advisory role, founded with a mission to see all the

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<sup>2</sup>*Official Gazette of the Republic of Serbia, no. 98/2006.*

<sup>3</sup>*Official Gazette of RS, No. 35/19.*

<sup>4</sup>*Official Gazette of the Republic of Serbia, no. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014, 94/17, 95/18.*

<sup>5</sup>*Official gazette RS", No. 94/2016 i 87/2018.*

aspects of anti-corruption activities, to propose measures to be taken in order to fight corruption effectively, to monitor their implementation, and to make proposals for bringing regulations, programs and other acts and measures in this area. The Anti-Corruption Council daily receives complaints of citizens which are proceeded to the relevant institutions. The Council deals with individual cases only if they point to a broader phenomenon, which emphasizes the sources of grand corruption in business and politics.

Adhering to European standards, Serbian legislation introduces essential arrangements for handling conflicts of interests in order to be applied precisely and completely. The most important rules to prevent and avoid conflict of interest are: restrictions on ancillary employment, declaration of personal (family) income, declaration of gifts, restrictions on property titles of private companies, restrictions on external concurrent appointments.

In accordance with Serbian legislation, public servants should not allow their private interest to conflict with their public position, hence they must avoid any actual or potential conflict of interest. A provision is also made for the accountability - civil or financial. Conflict of interest means a situation in which the public servant has a private interest which affects, may affect or appears to affect, his/her conduct in the performance of official duties, in a manner which threatens the public interest. Private interest of the public servant is any benefit or advantage for the public servant him/herself or for persons associated with him/her. Public servants must take all necessary steps to avoid any situation that gives rise to the conflict of interest. Given that the public servant is usually the only person who is aware of the possibility of the conflict arising, s/he is personally responsible to be cautious in respect of any actual or potential conflict of interest, to take steps to avoid it and disclose the potential conflict, or notify his/her superior thereof and comply with any decision to avoid the situation of possible conflict of interest. The Law also provides for a periodic declaration of personal or private interest. This obligation is preventive in character and applies to senior-level officials, since periodic declarations of interest are essential for the effective implementation of this measure.

With respect to principles of political neutrality and impartiality, the public officials are forbidden from engaging in any activity or transaction that is incompatible with the performance of official functions. The rules on prevention of conflict of interest also include the prohibition of extra work performed outside the public service employment. Public servants can, upon a written consent by their superior, work for another employer outside the working hours of the official workplace, unless such engagement is forbidden by separate regulations, or constitutes a conflict of interest or affects the impartiality in the performance of official duties. Extra work must be notified to the superior official the next business day following the day this work has started.

According to the Law, the public servant (or associated persons) must not demand, nor receive a thing, right, service or any other benefit, given or performed, without appropriate compensation - a gift, for him/herself or associated persons, which affects, can affect or appears to affect the impartial or professional discharge of duties, or which can be considered a reward in connection with the performance

of his/her duties, except for an appropriate gift of low value. The public office holder is allowed to accept a protocol gift or appropriate gift whose value does not exceed 5% of the average monthly net salary (after taxes) in the Republic of Serbia, i.e. appropriate gifts the aggregate value of which in a particular calendar year does not exceed one average monthly net salary in the Republic of Serbia. The public servant is required to report any gift received in connection with the performance of his/her duty to his/her public employer, no later than the next business day from the day of its receipt, while the related public authority has a duty to keep records of all gifts received by public servants.

The Agency also maintains the Assets Register including the information from the declarations (income level, ownership of immovable assets, vehicles, savings deposits, apartment tenures), based on which public office holders' asset declarations are cross-checked with their financial situation.

The public servant is forbidden from establishing a company, a public service, or engaging in entrepreneurial activity. Moreover, the public servant is not allowed to be a director, deputy director or assistant director of a legal entity; however, he or she can be a member of the managing board, supervisory board or other governing body of a legal entity if appointed by the Government or other public authority. The public servant is allowed to be member of a body of an association. Membership in bodies of legal entities, or associations, must be notified to the superior official.

Public servants should also take care that their political activities or involvement in political or public debates do not impair the confidence of the public and their employers, or their ability to perform their duties impartially and professionally, and that their exercise of public functions is not used in political purposes. Therefore, public servants must comply with any restrictions on the involvement in political activities, given the position and the nature of duties they perform.

Prevention of corruption implies raising awareness of its harmfulness, which is why the Agency pays great attention to citizens' complaints. In 2018, acting upon 474 cases formed by complaints was finalized. Based on the Agency's handling of complaints, the following was filed: two indictments for criminal offenses of tax evasion, association for committing criminal offenses, fraud, unauthorized use of copyrighted work or subject of related rights and unauthorized dealing with a particular activity; four cases of information for criminal offenses of abuse of power, forgery of official documents, disabling control, fraud, serious theft, malpractice, violation of the duty of avoiding conflict of interest (Anti-corruption agency, 2019).

In the course of 2018, 16 criminal complaints were filed with the competent prosecutor's offices for the existence of grounds for suspicion that officials had not reported assets or had provided false information to the Agency, with the intent of concealing information about assets. The highest number of measures and decisions of the Agency, a total of 124, were imposed to officials due to the cumulation of offices, while the following by number, 113 of them, were measures imposed on officials in situations of conflict of interest and nepotism. Of the total of 124

decisions related to the cumulation of public offices, the Agency made 38 decisions which imposed the termination of the second public office by force of law, imposed 77 measures of caution, 9 measures for publicly announcing the decision on the violation of the Law on the Agency and 1 measure of public announcement of recommendation for dismissal from a public office.

European Commission reports indicate that there are certain shortcomings in resolving the issues related to conflict of interest and as such remain one of the major challenges in countering corruption in Serbia. The most significant obstacle refers to unclear and inconsistent provisions of the current anti-corruption legislation. Some of the competent bodies are failing to act upon the Agency decisions for dismissal of public officials. Other important problem is the lack of possibility of direct access to database and records kept by the other competent state bodies. Incompatibility of databases of different public institutions are additional impairment to effective exchange of information. New regulation is expected to reduce imprecision of provisions related to Agency competences as well as to put foundation for more efficient collaboration and exchange of data with other relevant institutions (GRECO, 2017).

In its 2019 Report on the Implementation of Principles of Public Administration, European Commission recommended that the Serbian Government should ensure consistent implementation of the administrative legislation in order to ensure a depoliticised public administration and a stronger merit-based human resource management and revision of anti-corruption legislation, especially rules governing conflict of interest (SIGMA: 2019). It is beyond dispute that a certain level of awareness regarding this problem exists; however, conflict of interest is still perceived as an abstract category the consequences of which are not fully comprehended.

## **NEW CHALLENGES FOR SPECIAL ANTI-CORRUPTION DEPARTMENTS- BIG STEP FORWARD OR NOT?**

The criminal legal framework for combating corruption in Serbia successfully follows contemporary trends in the fight against this form of crime and, with the latest legal interventions, makes a major step forward in combating corruption even more successfully. Serbia has enacted a considerable number of legal texts, ratified international documents, but also complied with European standards in the strategic field. Achieving the efficiency of detecting, proving and prosecuting ( Bejatovic, 2017 ) corruption offenses poses a major challenge for Serbia, not only because of the fact that Serbia needs to improve the normative framework ( Skulic, 2013 ), but also to properly implement it. Accordingly, the new Law on Organization and Competence of State Authorities in Combating Organized Crime, Terrorism and Corruption (hereinafter referred as LOCSACOCTC)<sup>6</sup> brings about significant novelties regarding the establishment of special departments of higher public prosecutor's offices for combating corruption, task forces, liaison officers, forensics accounting service – all with the aim of creating a more effective

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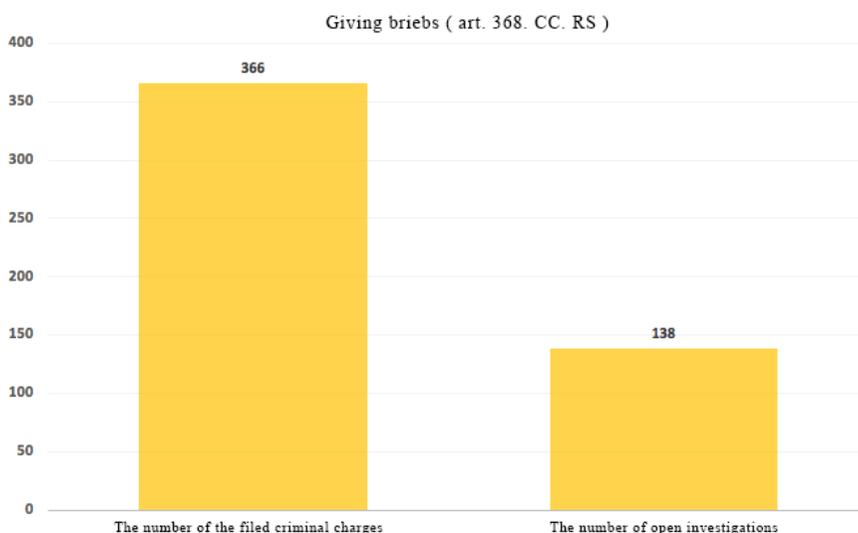
<sup>6</sup>Started with application on 1st March 2018

regulatory framework to counter this form of crime. Namely, international legal standard proposes fulfilment of a considerable number of instruments of increasing efficiency – the legal standard, adequate implementation of the legal standard and the mutual relations ( Sokovic, Cvorovic& Turanjanin, 2017 ) between the subjects of criminal proceedings in the field of combating corruption. Correlation of the relationship between the entities involved in criminal proceedings and the adequate implementation of the legal standard influences to a great extent the realization of the international standard, but also reduces the possibility of abuse of the legal standard, which is also one of the instruments of efficiency ( Mijalkovic, Cvorovic& Turanjanin, 2019 ). Accordingly, the legal text provides for the establishment of special departments of higher public prosecutor's offices for the suppression of corruption, an organizational unit competent for combating corruption and special departments of higher courts for combating corruption. It should be particularly emphasized that the legislator has envisaged special departments of higher public prosecutor's offices in Belgrade, Kraljevo, Niš and Novi Sad for dealing with the criminal offences of corruption and the establishment of special bodies for more efficient detection and proving of this form of crime. The work of the special department of the higher public prosecutor's office for the suppression of corruption is managed by the head of the department appointed by the higher public prosecutor. When appointing a department head, i.e. deploying or seconding deputy public prosecutors to a special department of a higher public prosecutor's office for combating corruption, special care is taken for them to have the necessary professional knowledge and experience in the field of combating white-collar crime and criminal offenses against official duty and corruption (Article 11 of the LOCSACOCTC). In addition to the professionalism and expertise of the heads and deputy public prosecutors in the special departments of the higher public prosecutor's offices, an important instrument for the effectiveness of combating corruption and adequate implementation of the legal standard is the mutual relationship and cooperation of state authorities ( Cvorovic, 2015 ), which is specifically provided for by the reformed legal text. Namely, the legislator provided for the possibility of establishing forensic accounting services in the organized crime prosecutor's office and special departments of higher public prosecutor's offices, while more efficient cooperation of state authorities is envisaged by the establishment of liaison officers and tasks forces. We can see that the contemporary tendencies of achieving the efficiency of detecting and proving criminal offenses in general, including corruption offenses, pay more and more attention to the mutual relations and cooperation of the key entities of criminal proceedings, through the establishment of special bodies. Accordingly, the tasks of forensic accounting services are performed by forensic accountants. A forensic accountant assists the public prosecutor in analysing cash flows and financial transactions for prosecution. The foregoing expertise and professionalism of a forensic accountant is manifested through the possession of specific expertise in the fields of finance, accounting, auditing, banking, stock exchange and business and completed specialized training in the Judicial Academy in the field of criminal law (Article 19 of the LOCSACOCTC). In addition to the forensic accounting service, the cooperation of state bodies is established through the formation of liaison officers in the Tax

Administration – Tax Police, Customs Administration, National Bank of Serbia, Administration for the Prevention of Money Laundering, Business Registers Agency, Central Securities Depository and Clearing House, The State Audit Institution, the Republic Geodetic Authority, the Anti-Corruption Agency, etc. The aim of having at least one liaison officer in the aforementioned institutions is to achieve cooperation and more efficient submission of data by these bodies and organizations to the Prosecutor's Office for Organized Crime and special departments of higher public prosecutor's offices for the purpose of combating corruption for prosecution. Also, if necessary, liaison officers may be temporarily transferred to the Prosecutor's Office for Organized Crime and the special department of the higher public prosecutor's office for the purpose of combating corruption (Article 20 of the LOCSACOCTC). Given the complexity of corruption offenses, the activities of multiple entities in the area of more successful detection and proving of this form of crime can greatly contribute to the realization of an international standard, and the formation of task forces is one of the more effective instruments for the implementation of the criminal policy of corruption offenses. The task force is formed by the decision of the prosecutor, i.e. the decision of the competent higher public prosecutor, upon obtaining the consent of the Republic Public Prosecutor, with the aim of more efficient detection, prosecution and proving of criminal offenses that are the subject of the work of the task force (Article 21 of the LOCSACOCTC). The members of the task force shall be appointed from among the employees of state and other bodies, depending on the subject of work determined by the decision on the formation of the task force (Article 23 of the LOCSACOCTC). We can observe that the aforementioned legal text has brought a considerable number of novelties and that in addition to the adequacy of the legal standard, it is extremely important to adequately implement the standard, which will more effectively respond to all the challenges faced by anti-corruption authorities. In line with the above, especially considering the importance of adequate implementation of the legal standard and the novelties made by the Law with regard to the establishment of special departments at higher prosecutors' offices, the authors conducted a research in a special departments for suppression of corruption at the higher public prosecutor's office in Belgrade, Novi Sad, Nis, Kraljevo, as regards statistical indicators of criminal charges filed, open investigations initiated for typical corruption offenses, receiving bribes and giving bribes, for 2019. Statistical indicators for 2019 will indicate the effectiveness of the new legal text, i.e. whether reform is necessary or a major step forward is already taken when it comes to the normative basis for more effective suppression of corruption and the adequate implementation of the legal standard as an important factor in more effectively combating this form of crime.



**Diagram 1** – Number of criminal charges filed and open investigations in 2019 by special departments for suppression of corruption at the higher public prosecutor’s office for the criminal offense of receiving bribes<sup>7</sup>



**Diagram 2** – Number of criminal charges filed and open investigations in 2019 by special departments for suppression of corruption at the higher public prosecutor’s office for the criminal offense of giving bribes

<sup>7</sup> Source: The Report of The Republic Public Prosecutor’s Office

In accordance with the presented statistical indicators, we can notice a large number of criminal charges filed for the criminal offenses of receiving bribes and giving bribes by special departments for the suppression of corruption as well as a substantial number of investigations initiated. We can conclude that the special departments for suppression of corruption are very efficient in the field of detecting, proving and prosecuting these criminal offences, as indicated by the presented statistical indicators and that the legal standard was adequately applied by specialized subjects which represents a very important factor of the realization of the efficiency of criminal proceedings and does not change the current legal solutions into declarative provisions.

## **CONCLUDING REMARKS**

There is a permanent tendency in all democratic societies to enhance public integrity and reduce corruption within the public sector. The key elements of an effective approach to prevent and combat corruption include measures for promoting awareness, particularly ensuring the clarity of norms, preventive mechanisms for safeguarding impartial as a liability of civil servants, clear provisions for disqualification of civil servants in case of actual conflict of interest and retroactive measures, legal protection through administrative self-correction, appeal and petition for review, ensuring transparency of the activities of state administration.

In order to enhance public integrity and reduce corruption, it has to be ensured that the appropriate legislative and institutional frameworks are in place to enable public-sector organizations to take responsibility for effectively managing the integrity of their activities as well as that of the public officials who carry out those activities.

Moreover, there has to be established clear expectations for the highest political and management levels that will support the public integrity system through exemplary personal behavior, including its demonstration of a high standard of propriety in the discharge of official duties. The integrity standards aim to assist public officials to better adapt their conduct, but also to make the broadest public in Europe aware of what type of conduct they can expect from public officials. In addition to establishing principles for regulating the conflict of interest, a necessary link in implementation of efficient conflict of interest resolution policy is the existence of adequate mechanisms that will enable these principles to be effectively applied in practice.

Serbian legal and institutional framework for governing the conflict of interest has been viewed as a part of broader strategy to prevent and combat corruption. This practice is influenced by EU institutions, during the accession negotiation process moving this problem forward and creating more effective integrity management frameworks. In addition to establishing principles for regulating the conflict of interest, there should be established effective mechanisms

that will enable adopted principles to be effectively applied in practice. It remains to be seen if European union and international discourse will give incentives for the fight against corruption and the domestic receptiveness for further development of public integrity.

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# **TECHNOLOGY TRANSFER OFFICE – BENEFITS, AND RISKS AND BRIDGES FOR SUCCESSFUL FUNCTIONING**

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## **Abstract**

Technology transfer offices are different types of organizational structures with main role to assist research organizations (including universities, faculties, research institutes, etc.) in managing their innovations, and to facilitate the transformation of innovation in the benefits for society. The purpose of this paper is to analyze benefits, risks and bridges for their successful functioning. The paper is composed of Introduction, two parts and Conclusion. It begins with a briefly description of the technology transfer process as a prerequisite for the existence of technology transfer offices, and the basic characteristics and role of technology transfer offices. The first part analyzes the benefits of these offices. Technology transfer offices produce and develop benefits for the universities, business as well as for society and region. But, technology transfer offices face risks on the way of achievement their vision, and therefore the second part of this paper is dedicated to risks and bridges for successful and effective functioning of technology transfer offices. The conclusion includes assessments of the analyzed questions and recommendations. Results in this paper are generated by analyzing official legal documents and political acts and using literature and studies connected with the issue. Also, statistical data, information in the on line resources and official web sites of different technology transfer offices were the subject of qualitative and quantitative analysis.

**Key words:** technology transfer office, technology transfer, benefits, risks and bridges.

## Introduction

The basic and necessary precondition for the existence of technology transfer offices (hereinafter: TTO) is the existence of the technology transfer process (hereinafter: TT). TT was defined in the McMillan report on good practice in technology transfer as: “the commercialization of university-owned research outputs through the licensing of intellectual property rights (patents, copyrights, know-how, databases and design rights) to existing companies and setting up new spin-out companies”(McMillan group 2016). Seen through the prism of this definition, the end users of this process are the citizens, and its ultimate goal is to facilitate and improve life. The TT typically includes a set of components: identifying new technologies; protecting technologies through patents and copyrights; forming the development and commercialization strategies, such as marketing and licensing to existing private sector companies or creating new startup companies based on the technology (European Union European Regional Development Fund, 2016). The implementation of each of these components requires the possession of expert knowledge in various fields and at the same time requires overcoming a number of obstacles. This context forms the basic need for TTOs. The TTO encompasses different kinds of organizational structures (Perry 2018) with mission to assist and lead the successful commercialization of innovations (Case Western Reserve University, 2020). Efficient mission means that TTO has the full capacity, first of all, human resources and capital to manage TT; and to protect the rights of the inventor, the research organization and the businesses. Starting from this point of view, TTOs could play leading role in connecting inventions with business. Therefore, the purposes of this paper are: a) to systematize key benefits, risks and bridges for successful functioning of TTO b) to show the positive and negative effects of TTO and c) to examine the potential impact of TTO. This paper aims to answer the question are the TTOs a worthwhile investment.

## Benefits of TTO

TTO offers, produces and develops numerous benefits for the inventors, research organizations, businesses as well as for the society and region. Numerous studies express the TTO`s abilities.<sup>1</sup> TTO`s benefits are causally related to its activities. The analysis of TTO`s activities points to the key benefits as described below.

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<sup>1</sup> See: George, Gerard. "Learning to be capable: patenting and licensing at the Wisconsin Alumni Research Foundation 1925–2002." *Industrial and corporate change* 14, no. 1 (2005): 119-151; Lockett, Andy, and Mike Wright. "Resources, capabilities, risk capital and the creation of university spin-out companies." *Research policy* 34, no. 7 (2005): 1043-1057; Markman, Gideon D., Peter T. Gianiodis, Phillip H. Phan, and David B. Balkin. "Innovation speed: Transferring university technology to market." *Research policy* 34, no. 7 (2005): 1058-1075; Rasmussen, Einar, and Odd Jarl Borch. "University capabilities in facilitating entrepreneurship: A longitudinal study of spin-off ventures at mid-range universities." *Research policy* 39, no. 5 (2010): 602-612; Alexander, Allen T., and Dominique Philippe Martin. "Intermediaries for open innovation: A competence-based comparison of knowledge transfer offices practices." *Technological Forecasting and Social Change* 80, no. 1 (2013): 38-49.

### ***TTO's impact on economy***

One of the biggest benefits of TTO is its impact on the economy. Well-functioning links between universities and firms can stimulate economic growth (Weckowska 2015, 62-74). Economists have agreed for decades that a large component of modern economic growth has to be driven by “innovation” — that is, the arrival of new ideas and technologies (Macilwain 2010, 682–684). It is worth noting that TTO's impact on economy is recognized by the politicians and largely depends on the political background i.e. state's national strategies.

According to the U.S. technology transfer Association of University Technology Managers (hereinafter: AUTM) 2018 survey academic research is fueling impressive economic gains (AUTM 2018): 1,080 start-ups were formed in 2018, making a direct impact on local economies, with more than 69 percent of the new businesses remaining in their institution's home state; 7,625 US patents were issued in 2018, the most-ever reported in the survey, as research institutions invest and protect intellectual property arising from academic research and consumers and businesses benefited from 7,947 new products created over the past decade. The impact of TT on the US economy has been enormous: from 1996-2013 technology transfer has contributed \$518 billion on the US gross domestic product, and \$1.1 trillion on the US gross industrial output. The impact of that has produced 3.8 millions jobs for the US economy (DJ Nag 2017).

The AUTM and the U.K. Association for technology transfer (UNICO), which have disseminated data and case studies of how technology and knowledge transfer can benefit society, emphasized that these positive economic effects indirectly influence research organizations-business partnerships, culture change and well-being of society (Campbell 2007). We agree with Campbell that these long-term returns supplement shorter-term, more tangible returns such as income, access to resources and expertise, and program delivery (Campbell 2007).

### ***Experienced professional staff***

As previously mentioned TTO comes in a variety of structures, but its goal is always the same: implementation of TT in the best interest of the innovator, research organization and society. Implementation of TT is, without exception, connected with laws, by-laws, institutional regulations and other specific regulatory requirements which may differ from state to state as well as international legislation. TT starts with innovation disclosure, which on basic level means a written description of the invention that is provided to TTO; evaluation of the size and growth of the potential market; then the process continues with commercialization of the innovation, which means protecting innovations through trade secrets, trademarks, copyrights or patents; marketing of protected technology; negotiating licensing agreements; making a decision for licensing agreement or establishing of a new company for commercializing intellectual property rights (hereinafter: IP rights) and a lot of sub-question crucial for the successful TT. Santoro and Bierly find that social connectedness, trust, university-research centers, TT-IP policies, technological relatedness and technological capability are significant facilitators of knowledge transfer (Santoro and Bierly 2006, 495-507). Actually, this system requires researchers to have specific knowledge in order to act

effectively and profitably. Debackere and Veugelers argue that among other critical elements in fostering an “effective” commercialization of the academic science base are the implementation of appropriate decision and monitoring processes within the TTO (Debackere and Veugelers 2005, 321-342). It is thus easy to conclude that TT in all its stages asks for design of appropriate decisions: starting from phone call, through frequently and appropriate agreement editing, ending with concluded obligatory agreements. Moreover, TT must be monitored all the way, especially its efficiency, because it is valued through money and time spent.

Swamidas and Vulasa see a considerable role of adequate trained staff and inventions processing capacity in TTO into the rate of commercialization of university inventions (Swamidass and Vulasa 2009, 343-363) and this rate has positive impacts on university aspects (for e.g. income, reputation etc). TTO has suitable experienced professional staff always available for discussion, advice and assessment, assistance in IP protection, sufficient technical capacity, as well as knowledge capacity in documents, and all of this in a timely and transparent manner.

### ***Support for the education, research, and public benefit mission of the universities***

TTO acts as a service centre to the university, faculty, staff and students, on all areas related to TT and especially IP, including providing seminars and consulting services as required (University of Pretoria 2019). The university with a TTO will have a higher expected number of patents than the university without a TTO, and the effect of the TTO increases over time (Bradley, Hayter and Link 2013, 571-650). We believe this influences the university’s reputation and public trust in the university.

Gulbrandsen and Smeby find that there is a significant relationship between industry funding and research performance: professors with industrial funding describe their research as applied to a greater extent, they collaborate more with other researchers both in academia and in industry, and they report more scientific publications as well as more frequent entrepreneurial results (Gulbrandsen and Smeby 2005, 932-950). The ways in which TTO manages the TT encourage growth of the researchers’ successes because researchers become aware about the utilization and financial outcomes of their research, and are free of unnecessary pressure. The university research community has always been under various forms of outside pressure – political, economic, and institutional – that has had the potential to impact, for better or worse, the nature and direction of academic research (Caulfield and Ogbogu 2015, 1). University researchers have long been exposed to a wide range of influences (Caulfield 2012). Therefore, this connection TTO-researcher seems to be successful, stimulus and supportive for both researchers and universities.

TTO provides assistance in applying for programmes supporting innovation (DISA Technology Transfer Program 2020). TTO, also, through its activities, generates interest and investment in emerging areas of research, with consequent gains or improvements in research funding (Caulfield and Ogbogu 2015, 3).

All previously described is actually benefit from university’s work for the society and a path of university’s serving to the community.

### **Boosting research organizations-firms partnership**

TTO activities encourage broad practical application of inventions which is directly connected to the private sector, industry, firms. This TTO's role showed as very important because successful innovation transfer from research to product faces numerous obstacles (Siegel et al. 2003, 111-133): different perspective on the desired outputs, culture clashes, bureaucratic inflexibility, poorly designed reward systems, and ineffective management. TTOs are designed to bring together a range of aspects of this collaboration. A complete list of all objectives and types of collaborations cannot be listed exhaustively (Abuja et al. 2019, 5). However, the most important reasons for entering a collaboration are: complementing competences, knowledge and technologies to advance research and development; obtaining access to resources that are available only from specific partners (e.g. clinical research); broadening the scope of the innovation process; exploiting existing IP through inclusion of specific competences; attaining critical mass to address complex projects (Abuja et al. 2019, 5).

Cohen, Guest, and Latham believe that researchers can and should do more to educate practitioners about research findings and processes (Rynes 2007, 1050). As Rynes notes research needs to be done to determine (1) why practitioners don't believe some of researchers' findings, in addition to (2) why they don't implement them, even if they believe them (Rynes 2007, 1049). In our view TTOs through TT make strong contributions exactly to this request. Namely, promotion of public availability of innovations; promotion of collaboration between the industry and research institutions and finding ways for its increase as well as facilitation of their relationship are TTOs main tasks.

Siegel, Wright, Chapple and Lockett argue that TTOs play a critical role in the diffusion of innovation and the development of new technology infrastructure (Siegel et al. 2008, 717-729). Thursby and Thursby suggest that increased licensing is due primarily to an increased willingness of faculty and administrators to license and increased business reliance on external R&D rather than a shift in faculty research (Thursby and Thursby 2002, 90-104). Respectively, trust is a very important link for boosting research organizations-firms partnership. TTO ensures that all the participants: research organization, researcher and businesses obtain sufficient rights and monetary benefits. Additionally, experienced and professional TTO staff minimizes the cost of the TT and maximize its pragmatic perspective.

### **Risks and bridges to successful operation of TTO**

TTOs face risks on the way of achievement their vision. This section describes key risks and bridges to successful operation of TTO.

#### ***Financial questions***

Financial risks relate to businesses, research organizations as well as to TTOs and play a critical role in TT. During TT, private sector deals with money lose and opportunity costs. Private-sector money is needed to both fund and translate research into applications (Caulfield 2012). Without industry involvement, many of the potentially beneficial basic science discoveries would never make it to

the clinic (Caulfield 2012). Diminishing this risk needs TTO`s staff to find relevant access to valuable appropriate and cost-effective process for each case of TT. Theotoky, Beath and Siegel find that funding initiatives aimed at promoting technology partnerships also stimulated university-industry collaborations (Theotoky, Beath and Siegle 2002, 6) which is also one of the dimensions for overcoming this risk.

According to Link and Siegel university administrators who wish to foster university-industry TT should be mindful of the importance of financial incentives (Link and Siegel 2005, 169-181). Budget and financial resources for TTO are very important issues. Universities are experiencing increased pressure to generate revenue from licensing and innovation activities. But, university leaders must recognize that successful economic engagement will not be focused on short-term income, but rather on longer-term work on relationship development and ecosystem building (Association of Public Land-Grant Universities 2017, 3). Some universities develop early stage proof-of-concept fund (Michigan State University Innovation Center 2020). On the other hand are government`s funding. Pace survey suggests that government funding provides an important means for expanding the technological opportunities open to firms (Salter and Martin 2001, 521). According to The European Commission, EU currently has a target of investing 3% of GDP in R&D, and the aim is by connecting R&D and innovation to get a broader range of expenditure which would be more relevant for business operations and for productivity drivers (European Commission 2020, 8).

### ***Risks related to the businesses***

The prevailing conviction throughout the private sector is that engaging in TT can be risky and too expensive. But, as Fray argue all companies deal with risk; there is risk in doing something, and there is risk in doing nothing (Frey 2009). Risk is a part of being in business, and how the organization is prepared to manage risk is a leading factor in its ability to move into new competitive arenas (Frey 2019). Diminishing this risk needs TTOs to develop powerful and user-friendly proofs about the real impact of TTOs on the private sector.<sup>2</sup> Today, firms are reluctant to take on the risk of commercializing unproven inventions (House of Commons Canada 2017, 18). Therefore, TTOs need to be more aggressive toward universities/research organizations in regard of their investment in money and efforts for prototypes and other appropriate proofs for invention`s effectiveness. Additionally, TTOs should be more aggressive toward universities in regard of their investment in disclosing all inventions to the TTO and build research capacity accordingly private sector`s opportunities. TTOs must assess a market`s readiness for the invention as well.

The failure of the private sector to recognize, absorb and turn into commercial success the inventions is the next risk. Diminishing this risk needs TTOs to take more aggressive initiative toward policymakers in order to improve the overall performance of TT. Besides, TTO should develop programs which bring

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<sup>2</sup> For example, see: "AUTM Better World Project" available at <https://autm.net/about-tech-transfer/better-world-project>.

together businesses, industry, universities, and government in ways to understand that they have the common objectives.

### ***Risks related to the research organizations***

The initial risk in this group is connected to the invention disclosure. Jensen, Thursby and Thursby find that the TTOs reported licensing objectives are influenced by their views of faculty and administration, which supports the assumption that the TTO is a dual agent (Jensen, Thursby and Thursby 2003, 1271-1300). One of the main risks is that academics do not share their findings to TTOs because of different reasons: lack of awareness of the researcher about the potential commercialization value of their research; or academics might bring the best ideas into commercial application outside the university, without reporting to the TTO (Jensen, Thursby and Thursby 2003, 1271-1300). According to Leyden and Link the inventor's decision to disclose is influenced by the university's reward systems and culture. If the university has a reward system in place that provides incentives for faculty to engage in commercialization activities, the inventor might be more likely to disclose and participate in the formal mechanisms of technology transfer (Leyden and Link 2015, 104). If there are too many perceived barriers and disadvantages to involving the TTO and going through official channels, the inventor might circumvent disclosure and adopt informal mechanisms of technology transfer (Leyden and Link 2015, 104). University faculty and students are also motivated by the potential income they may derive from commercialization of their inventions, as well as the satisfaction from seeing their inventions put to good use (often for the public good) (University of Pretoria 2020). These questions should be part of the TTO's initiative toward policymakers in order to improve the overall performance of TT.

The role of scientists employed at universities is the next risk. Scientists employed at many universities play roles of teachers and lecturers and have not enough time for research. Diminishing this risk needs changes in the universities' working model. These solutions should not take form of pressure of any type on the researchers and faculty staff to focus on rapid research commercialization.

### ***State policy questions***

Bureaucracy and complexity of regulations, unfriendly procedures, tax system requires a lot of time and money and this does not encourage research organizations and businesses to collaborate jointly. These questions should be part of the TTO's initiative toward policymakers in order to improve the overall performance of TT system.

Policies on IP and costs connected to IP protection are very tough questions for all participants in TT. Consequently, they must be coherent, transparent, clearly defined and applied consistently.

### ***Innovation culture***

Innovation culture seen as willingness for taking risks; openness to discovery and experimentation; readiness for new skills, should be created. TTOs should work on building atmosphere that inspire the society to seek out innovative opportunities through: courses and educational experiences, improvement of curriculum to better educate and develop entrepreneurs, trainings and courses related to innovation, places students with campus researchers to identify commercialization pathways, nationally-recognized programs for cooperative education, internships and experiential learning programs inherently build links with industry partners, government agencies and not-for-profit organizations (Memorial University 2015). In this regard, foundation of special TT course is a great way to develop a strong foundation for people linked directly or indirectly to TT. In the same time it develops the opportunities to learn and network, with benefit for TTOs and the society.

Knowing and “safe” handling risks associated to the TTOs require in dept understanding of the TT. This understanding helps guide decisions and manage risks while navigating the process of technology commercialization (Bashir 2014).

### **CONCLUSION**

This paper makes a conceptual contribution to the literature on TTO. The paper systematize key benefits, risks and bridges for effective TTO and thus, intends to contribute to the discussions and reforms aimed to increase the effectiveness of TTOs especially in developing countries. Our research showed that TTOs are the needed and useful link between innovation and industry which leads to different types of development in various areas, but always in favor of the people, state and regions.

We find that TTOs influence and are influenced by multiple factors related to the research organizations, businesses and state`s policies. We argue that TTO is a tool which unleashes the researchers` and businesses` potential to contribute to job creation, economic growth, cultural change and societal well-being, and it is worthwhile investment. There is no doubt that in modern world business benefits from technology. Therefore, research organizations and businesses should see TTOs as a place where they can make the future together.

A fully functioning TTO means expenses in money and time. But TTO also contributes multiple benefits which should take part when assessing TTO as a worthwhile investment.

The insights from our research allow us to make suggestions for policy and practice. Namely, state`s political solutions and legislation must be coherent, transparent, clearly defined and applied consistently. On the other side, universities` and other research organizations` management must try to make a balance between teaching and research. Strategic planning should be a roadmap for states and research organizations in achievement TTO effectiveness.

Having on mind the results of this paper we recommend the creation of networks of TTOs around the world with potential to share ideas and booster the research-industry interactions, with aim to improve the life.

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## MINORITY REPORT: AI CRIMINAL INVESTIGATION

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### **Abstract**

Eighteen years after the American cyberpunk crime film directed by Steven Spielberg and based on the 1956 short story "The Minority Report" by Philip K. Dick, the criminal justice system is facing SF: new investigation tools based on Artificial Intelligence are used during the criminal investigation phase, in order to ease the work of the State agents in their fight against crime. Due to the fact that these tools are meant to prevent the commission of the crimes and are not used in the post delictum phase, certain questions raise in regard with procedural rights of the suspect, the notion of "victim" and the limits of the State actions in the pre delictum phase. Sweetie is the new investigator, being created to obstaculate criminals in the area of child pornography and seems to be extremely efficient in identifying and catching child predators. But Sweetie is neither human nor victim of the crime and its compatibility with the legal procedural criminal frame is debatable. The present article deals with the challenges of this new investigation tools and aims to raise a debate on the necessity of using them.

**Keywords:** Sweetie, criminal investigation, victim, criminal procedure code, criminal investigation methods, Artificial Intelligence

### **General considerations on the notion of criminal investigation Artificial Intelligence tools**

The title of the present study may seem a little bit inadequate since the topic of the American movie "Minority Report"<sup>3</sup> does not deal with the issue of Artificial Intelligence but with the issue of premonition and the use of extrasenzorial experiences in criminal investigation. Nevertheless, I considered this movie as a

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<sup>3</sup> The American movie "Minority Report" was released in 2002, being directed by Steven Spielberg, based on the 1956 short story "The Minority Report" by Philip K. Dick. The main theme of *Minority Report* is the classic philosophical debate of free will versus determinism. In short, in the year 2054 A.D. crime is virtually eliminated from Washington D.C. thanks to an elite law enforcing squad "Precrime". They use three gifted humans (called "Pre-Cogs") with special powers to see into the future and predict crimes beforehand. John Anderton heads Precrime and believes the system's flawlessness steadfastly. However one day the Pre-Cogs predict that Anderton will commit a murder himself in the next 36 hours. Worse, Anderton doesn't even know the victim. He decides to get to the mystery's core by finding out the 'minority report' which means the prediction of the female Pre-Cog Agatha that "might" tell a different story and prove Anderton innocent.

source of inspiration based on a set of motives: firstly, the action takes place in the future; secondly, the free will vs. determinism of human criminal conduct is a well known topic in criminology; thirdly, if we replace the Pre-Cogs (characters in the movie) with Artificial Intelligence in the development of the action, we shall find the scenario of the present study; and fourthly, the present study and the action of the movie focus on the investigative criminal tools in a pre-delictum phase, a very sensitive topic of the criminal procedure nowadays.

The techniques of criminal investigation were, for a long period of time essentially reactive, the forensic sciences being preoccupied by their analysis and development. Undoubtedly science has significantly contributed to the fight against crimes and to the investigative acts of the actors involved in discovering and identifying perpetrators of the crimes and offenses. The doctrine has emphasized that an a posteriori point of view (understood as an a posteriori delictum intervention of the investigative bodies) is not sufficient today to face new forms of offences and offenders.<sup>4</sup> The appropriation of new technologies in the field of common crime as serious and organized crime requires an evolution of law enforcement to adapt their modus operandi to anticipation and proaction.<sup>5</sup> In this new light, the investigative bodies need to develop criminal intelligence integrating new methods of prediction.

Criminal intelligence was defined as a concept that regards investigation and public safety. The aim of investigation is to analyze individuals/groups involved in crime while the aim of public safety is a preventive one, by providing a "macro view" of crime and evaluating and explaining features at different scales (short, medium and long term). In crime investigation as in public safety, criminal intelligence consists in collecting, analyzing and valorising data to propose a way to reduce or decrease the number of offences by anticipation.<sup>6</sup>

In this context, Artificial Intelligence (AI) applications may be used in many dimensions of our lives, industry, communications, education, finance, government, service, manufacturing, medicine, transportation, and, obviously, in the public safety and criminal justice field. The doctrine exemplified this aspect, traffic safety systems identify violations and enforce the rules of the road, and crime forecasts allow for more efficient allocation of policing resources. AI is also helping to identify the potential for an individual under criminal justice supervision to reoffend.<sup>7</sup>

All research pointed out AI is being used as a public safety resource in various ways. For example, Facial recognition, one of AI applications, may be used both in the public or private sectors. "Examining the huge volume of possibly relevant images and videos in an accurate and timely manner is a time-consuming,

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<sup>4</sup> Patrick Perrot (2017), *What about AI in criminal intelligence? From predictive policing to AI perspectives*, in European Police Science and Research Bulletin, Issue 16: 65-76, Summer 2017, p. 66.

<sup>5</sup> Idem.

<sup>6</sup> Patrick Perrot, cited, p. 67.

<sup>7</sup> Christopher Rigano (2019), *Using Artificial Intelligence to address criminal justice needs*, in National Institute of Justice Journal, Issue No. 280, January 2019, p. 1, retrieved from [<https://www.ncjrs.gov/pdffiles1/nij/252038.pdf>], accessed on 2.09.2020.

painstaking task, with the potential for human error due to fatigue and other factors. Unlike humans, machines do not tire”<sup>8</sup>.

AI technologies proved better than humans and overcame human errors functioning as experts. AI video and image algorithms not only learn complex tasks but also develop and determine their own independent complex facial recognition features/ parameters to accomplish these tasks, beyond what humans may consider<sup>9</sup>.

AI tools proved extremely efficient at matching faces, identifying weapons and other objects, and detecting accidents and crimes wheather in progress or concluded.

In the Security and Law Enforcement field AI tools are currently used to detect patterns and suspect behavior, predict crowd behavior and crime patterns, protect critical infrastructure, uncover criminal networks, while in the safety and prediction field, AI proved indispensable to predict infrastructure disruptions with distributed sensor systems and pattern information and to adapt operations for minimal impact.

## **Types of criminal investigation Artificial Intelligence tools**

### **A) Expert systems**

A specific type of AI algorithms – expert systems – are of great help for investigators. An expert system is a computer program that uses AI technologies to simulate the judgment and behavior of a human or an organization that has expert knowledge and experience in a particular field. An expert system incorporates a knowledge base containing accumulated experience and an inference or rules engine which is a set of rules for applying the knowledge base to each particular situation that is described to the program. The system's capabilities can be enhanced with additions to the knowledge base or to the set of rules. Current systems may include Machine learning (ML) capabilities that allow them to improve their performance based on experience, just as humans do<sup>10</sup>.

An expert system is able to autonomously learn crime conduct which otherwise would be impossible to detect due to multiple interferences of the global environment.

The scholars<sup>11</sup> have shown three different cases of the use of AI:

- To model criminal acts;
- To model behavior and criminal way of reasoning;
- To model behavior and investigator way of reasoning;
- To model specific profiles of criminals.

The aim of using AI is to extract data and knowledge from these three sources and combine outputs.

These kind of AI applications could be instrumented to build a class model for specific criminals but also for victims, based on the analysis of the patterns formed by prolific offenders.

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<sup>8</sup> C. Rigano, cited, p. 2.

<sup>9</sup> Idem, p. 3.

<sup>10</sup> TechTarget (2016), *Definition of an expert system*, retrieved from [<https://searchenterpriseai.techtarget.com/definition/expert-system>], accessed on 2.09.2020.

<sup>11</sup> P. Perrot, cited, p. 72

There are many examples of software specifically designed to be used in the criminal investigation phase. Analyst Notebook by IBM<sup>12</sup> and HOLMES 2 (Home Office Large Major Inquiry System)<sup>13</sup> are both designed in 2006 and used in the UK, while the Netherlands experimentally used BRAINS to investigate crimes with some success in 2004. FLINTS (Forensic-Led Intelligence) System)<sup>14</sup> is another example that was first used by the British police in 1999 to manage forensic evidence.

Microsoft has created software that recognizes the identities of people in photos, even if they have been changed or altered, which is used to investigate child pornography to help investigators focus on new images that appear on the Internet. Another software, Adobe Systems Photoshop, is used to identify victims of child pornography with image-enhancing tools to reveal clues.

Other initiatives that use artificial intelligence are being developed in conjunction with Google, which blocks search terms associated with child pornography, and with *Thorn*, a Hollywood-backed foundation that has created a database for tracking known images with sexual content. extracting them offline.<sup>15</sup>

As the scientists pointed out, even though these software programs are extremely useful in the investigation phase, the results of criminal investigation are "totally dependent on human reasoning, and the structures resulting from this reasoning cannot be recorded and analyzed by software."<sup>16</sup>

## **B) Face recognition technologies**

Face Recognition (FR) technologies are, as shown above, increasingly used to ensure effective supervision by private or public actors. AI allows fast and accurate identification in cases where traditional recognition systems fail due to factors such as poor lighting and image obstruction. One of the most known technologies of Facial recognition is *FaceFirst*.<sup>17</sup>

*FaceFirst* is a facial recognition software platform designed to be scalable, fast and accurate, while maintaining the highest levels of security and privacy.

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<sup>12</sup> HOLMES 2 (Home Office Large Major Inquiry System) is an information technology system used by the UK Police to facilitate investigations of murders and fraud. It was developed by Unisys and supported by the Private Financial Initiative. The chosen name refers to the character of the writer Arthur Conan Doyle, Sherlock Holmes. More information can be found at [<https://www.ibm.com/security/intelligence-analysis/i2/law-enforcement>], accessed on 26.05.2020.

<sup>13</sup> <http://www.holmes2.com/holmes2/index.php>, accessed on 15.06.2020.

<sup>14</sup> E. Nissan (2012), *Computer Applications for Handling Legal Evidence, Police Investigation and Case Argumentation*, Vol. 1, Springer, 2012, pp.767-836. Regarding FLINTS (Forensic-Led Intelligence System) and its benefits, see also A.R.W. Jackson, J.M. Jackson (2008), *Forensic Science*, second ed., Pearson, 2008, p. 7.

<sup>15</sup> K. Schweizer (2014), *Avatar Sweetie exposes sex predators*, The Age, 26 April 2014, retrieved from [<https://www.theage.com.au/world/avatar-sweetie-exposes-sex-predators-20140425-379kf.html>], accessed on 15.06.2020.

<sup>16</sup> F. Bex, et al., Bex, F., Van den Braak, S., Van Oostendorp, H., Prakken, H., Verheij, B., Vreeswijk, G. (2007), *Sense-making software for crime investigation: how to combine stories and arguments?*, Law, Probability and Risk, vol. 6, Issue 1-4, March 2007, retrieved from [<https://doi.org/10.1093/lpr/mgm007>], accessed on 13.06.2020, p.146.

<sup>17</sup> [[www.facefirst.com](http://www.facefirst.com)], accessed on 25.05.2020.

*FaceFirst* provides surveillance, access control, facial recognition, biometric data, etc. The software is capable of impressive performance: it can identify a person by making up to 75 million comparisons in 0.1 seconds; receives positive alerts in real time; notifies any number of mobile systems and devices so that it can be used successfully in crime prevention. It can detect the figure of a person in video recordings, it can detect facial features, it can produce classifications (according to sex, age, ethnicity), it can identify several figures simultaneously, it can signal the danger that a person presents, etc.

### C) AI DNA Analysis

By forensic DNA analysis in a broad sense I mean the application of genetic testing to assess crime for legal purposes.<sup>18</sup>

The use of DNA as forensic material is a branch of forensic science that examines genetic material in criminal investigations. The most obvious reason why the judiciary would like to collect and analyze genetic material at the crime scene is the need to determine who was present when a crime was committed, what their role was in committing it, where it was committed, the crime and the quality of the involvement of a person in the commission of the crime (victim, witness or suspect).<sup>19</sup>

DNA analysis has a special utility for conducting forensic research. The same types of data that are used to analyze genetic differences between people for medical purposes are also used in the criminal investigation phase by the judiciary to determine the identity of offenders and victims. However, given the legal context and the rights and freedoms of citizens, DNA analysis can generate data that can contribute to the violation of rights and freedoms and perpetuate discriminatory patterns<sup>20</sup> (eg from DNA sequences can be deduced the race of the offender).

In the last 10 years, the availability of DNA samples and rapid DNA sequencing techniques have created a vast body of research into human genetic variation for forensic purposes. Standardized systems have been rapidly developed and adopted worldwide to determine whether DNA in a sample taken from a suspect matches that in a sample taken at the crime scene. "Although laboratory analysis errors may occur, the lack of a match between the genetic sequences extracted from the sample taken from the crime scene and those extracted from the DNA sample taken from the suspect removes that person from the list of persons suspected of involvement in the crime commission"<sup>21</sup>.

Artificial intelligence plays an important role in DNA analysis, due to its ability to significantly accelerate the comparison of genetic sequences, because the

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<sup>18</sup> Genetics Home Reference (2020), *What are the types of genetic tests?*, 26 May 2020, retrieved from [<https://ghr.nlm.nih.gov/primer/testing/uses>], accessed on 28.05.2020.

<sup>19</sup> Benoît Dupont, Yuan Stevens, Hannes Westermann, Michael Joyce (2008), *Artificial Intelligence in the Context of Crime and Criminal Justice*, Canada Research Chair in Cybersecurity, International Centre for Comparative Criminology – Université de Montréal, 2008, p. 84.

<sup>20</sup> Mildred K. Cho, Pamela Sankar (2004), *Forensic genetics and ethical, legal and social implications beyond the clinic*, *Nature Genetics* 2004; vol. 36 (11 Suppl): S8–12, doi: [10.1038/ng1434](https://doi.org/10.1038/ng1434).

<sup>21</sup> Idem.

DNA collected must be compared with the DNA contained in an extremely large database. In addition, there is an orientation of the judiciary to use DNA databases of commercial sites that collect samples in order to identify a person's genealogy against cost and on demand.<sup>22</sup> For example, the California Police decided to use such data in 2018 to capture 72-year-old Joseph James DeAngelo, a serial killer nicknamed the "Golden State Killer," who committed multiple murders and rapes between 1974-1986. The database used to identify the suspect was taken from *GEDMatch*, an unpretentious site used by amateurs and professionals to make family trees. This tactic has raised questions about the protection of personal data, since investigators used the DNA database to actually identify one of the suspect's relatives. Given that, when a person sends the sample in order to identify his DNA to such a site, the operating conditions of the sample impose the obligation to obtain the consent of the person to whom this sample belongs. However, the California Police obviously did not have such a consent. The police uploaded the samples from the crime scene on the GEDMatch site and thus obtained a match with the DNA of another person who was in fact a blood relative of the murderer. But California police did not have the consent of either the suspect or the other person to verify the DNA sequences, although an attempt was made to argue otherwise that the method met the requirements of legality because DNA "abandoned" at the crime scene does not enjoy the same protection as samples taken from ordinary citizens.

Another serious problem related to DNA analysis performed using the AI tools available to these sites and private companies is that the algorithms used in performing the analysis are the property of private companies, are not open-source and are not free of charge and are therefore not subject to rigorous technical and legal control<sup>23</sup>. Although there may be little legal protection over the confidentiality of DNA abandoned at the crime scene by a perpetrator, law enforcement agencies that may be interested in using AI-based DNA association and analysis tools should consider the issue of confidentiality. DNA data of all other persons whose DNA is stored in that database.

## **D) Other examples of AI Intelligence tools**

IANUS and BEST are the results of two research programs of the Office of the Director of National Intelligence platform IARPA - The Intelligence Advanced Research Projects Activity – USA.<sup>24</sup>

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<sup>22</sup> E.g. ADN My Heritage, <https://www.myheritage.ro/dna>; Ancestry DNA, [www.ancestry.com](http://www.ancestry.com); 23andMe, [www.23andme.com/test-info](http://www.23andme.com/test-info); FamilyTree DNA, [www.familytreedna.com](http://www.familytreedna.com) etc..

<sup>23</sup> Antonio Regalado (2018), *Investigators searched a million people's DNA to find Golden State serial killer*, MIT Technology Review, 27 aprilie 2018, retrieved from [<https://www.technologyreview.com/2018/04/27/240734/investigators-searched-a-million-peoples-dna-to-find-golden-state-serial-killer/>], accessed on 28.05.2020.

<sup>24</sup> See [<https://www.iarpa.gov/index.php/about-iarpa>] accessed on 5.09.2020.

IARPA's IANUS program aims to dramatically improve the current performance of face recognition tools by fusing the rich spatial, temporal, and contextual information available from the multiple views captured by today's "media in the wild". The program will move beyond largely two-dimensional image matching methods used currently into more model-based matching that fuses all views from whatever video and stills are available. Data volume becomes an integral part of the solution instead of an oppressive burden.

The program is seeking to fund rigorous, high-quality research which uses innovative and promising approaches drawn from a variety of fields to develop novel representational models capable of encoding the shape, texture, and dynamics of a face. Instead of relying on a "single best frame approach," these representations must address the challenges of Aging, Pose, Illumination, and Expression (A-PIE) by exploiting all available imagery. Technologies must support analysts working with partial information by addressing the uncertainties which arise when working with possibly incomplete, erroneous, and ambiguous data. The goal of the program is to test and validate techniques which have the potential to significantly improve the performance of biometric recognition in unconstrained imagery, to that end, the program will involve empirical testing of recognition performance across unconstrained videos, camera stills, and scanned photos exhibiting a broad range of real-world imaging conditions.<sup>25</sup>

BEST - The Biometrics Exploitation Science and Technology Program seeks to significantly advance the state-of-the-science for biometrics technologies. The overarching goals for the program are:

1. To significantly advance the Intelligence Community's (IC) ability to achieve high-confidence match performance, even when the features are derived from non-ideal data
2. To significantly relax the constraints currently required to acquire high fidelity biometric signatures<sup>26</sup>.

## E) Chatbots

A chatbot is a software application used to conduct an online conversation (text or speech) instead of a direct contact with a human agent.<sup>27</sup> The chatbot is designed to simulate human behavior in a conversation and usually requires continuous adjustment and testing. Chatbots are usually used for various purposes: customer service, making requests, collecting information, and lately, their area of use has expanded to investigate crimes and identify potential offenders.

The evolution of chatbots follows two phases: the total dependence of human behavior phase and the independence phase. Chatbots dependent on human actors are mere "puppets" manipulated by humans, so their "conduct" is, in fact, the

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<sup>25</sup> About IANUS see [<https://www.iarpa.gov/index.php/research-programs/janus>], accessed on 5.09.2020.

<sup>26</sup> About IARPA see [<https://www.iarpa.gov/index.php/research-programs/best>], accessed on 5.09.2020.

<sup>27</sup> V. Crăciun (2018), *Ce este un chatbot* [What is a chatbot?], Today Software Magazine, nr. 72, 2018, retrieved from [<https://www.todaysoftmag.ro/article/2645/ce-este-un-chatbot>], accessed 15.04.2020.

conduct of the human operator. Automatic chatbots act independently and learn from their own experience and could create new crime prevention strategies. By far, the Sweetie chatbot experiment conducted by Terre des Hommes Holland is a remarkable example of how an extremely simple idea can be applied in the fight against specific forms of crime, such as virtual child pornography<sup>28</sup>.

The researchers emphasised chatbots could be used as undercover agents. However, while the initial version of chatbots is perfectly compatible with the institution of the undercover agent, the advanced independent automatic versions are, unfortunately, incompatible with any procedural-criminal institution, as they are considered non-human agents. The legal framework for the online investigation of child sexual abuse should be amended to carry out such undercover operations without human agents.<sup>29</sup> The use of undercover agents is strictly provided by law, the legal framework being extremely restrictive regarding the characteristics, conditions and situations in which such an exceptional method of investigation may be used. The advanced version of Sweetie is actually a hybrid chatbot model, which is not completely independent of the human actor. In the future, there are plans to develop a fully automated chatbot that could eliminate the human factor, raising only serious questions about the legality of using such a method in criminal proceedings.

### **The particular case of Sweetie**

Sweetie is one of the most mediatized AI investigative tools. Sweetie is a chatbot designed to combat specific crimes committed online involving webcam sex with children. It proved dramatically efficient in identifying suspects, perpetrators and victims.

Sweetie was designed by the Dutch organization Terre des Hommes<sup>30</sup> in 2013. Since its first use in 2013, Sweetie helped to the conviction of different nationalities citizens for webcam sex with children.<sup>31</sup>

Sweetie has two versions. In its first version - Sweetie 1.0 – the chatbot appeared as a virtual 10-year old girl from Philippine and helped exposing pedophiles engaged in webcam sex tourism. The main practical problem was that it was operated by a human agent and could not deal with the increasing number of online predators. Despite its initial success, the use of Sweetie was limited by it being operated by a human actor who could conduct a limited number of online conversations at the same time.

The second version of Sweetie - Sweetie 2.0 - was more advanced, some of the scholars stating wrongly it was fully autonomous and could engage in a

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<sup>28</sup> See video of *Sweetie*: [<https://youtu.be/aGmKmVvCzkw?t=10>], accessed 13.04.2020.

<sup>29</sup> K.V. Açar (2017), *Webcam Child Prostitution: An Exploration of Current and Futuristic Methods of Detection*, International Journal of Cyber Criminology, January-February 2017, Vol. 11(1): 98-109, DOI: 10.5281/zenodo.495775, accessed on 13.04.2020, p. 103.

<sup>30</sup> Official site: [[www.terredeshommes.nl](http://www.terredeshommes.nl)].

<sup>31</sup> Terre des Hommes, *First conviction for child abuse in Belgium thanks to Sweetie*, 9/04/2015, [<https://www.terredeshommes.nl/en/news/first-conviction-child-abuse-belgium-thanks-sweetie>] accessed on 13.05.2020.

meaningful conversation with a suspect<sup>32</sup>. Sweetie 2.0 is a hybrid model of chatbot, not entirely independent of human actor.

The main advantage in using Sweetie is that investigators can directly interact with pedophiles without putting anyone in danger, in other words, there are no potential victims, but only potential suspects. It is almost like discovering a crime before it was committed. As enthusiastic as could be, someone could not but observe that there are serious legal issues in relation with the "criminal" acts discovered by Sweetie: there is no crime/offense, no victim, and thus criminal law could not be imposed to anyone! In order to punish "sex predators" as a result of using Sweetie, further legislative interventions are necessary, for example, interacting with Sweetie must be qualified by law as criminal behavior.

Sweetie as an investigative method has divided the public opinion into belligerent camps: the legal experts questioned the compatibility of this investigative tool with legal provisions and due process standards, while the rest of the world exulted in front of its practical use and its advantages in protecting potential victims. The main problem with Sweetie was it was designed by a non-profit organization, determining Europol to express reservations about its use: "(...) criminal investigations using intrusive surveillance measures should be the exclusive responsibility of law enforcement agencies"<sup>33</sup>.

A report drafted following a detailed legal analysis that took place in 2016<sup>34</sup> identified several questionable aspects of the use of Sweetie. First of all, if Sweetie 2.0 is no longer operated by a human, but an autonomous AI program one could not qualify it as an undercover agent, due to the lack of human operator. Criminal procedure legislations regulate undercover agents only as human beings.

Secondly, Sweetie cannot be qualified as a victim, being an avatar. The concept of victim is only understood in connection with a human being, since only human beings are subject for criminal protection, exercise rights and are holders of the social values protected by the criminal law. At the same time, Criminal procedure legislations do not recognize (yet?) the concept of virtual victim. From an ethical perspective, Sweetie's most important feature is the fact that it does not put actual children at risk<sup>35</sup> – but this feature is in the same time its main flaw: in most criminal law systems, a real victim is mandatory in order to indict a suspect for committing a criminal deed.

Thirdly, Sweetie does not involve in sexually explicit behavior or nudity acts, being a computer animation, thus the crime of child pornography is not committed while some may say does not exist at all.

Forthly, Sweetie is an AI tool developed to facilitate the investigative actions of the judicial bodies and would operate on public online platforms in an independent manner (Sweetie 2.0.). There are few legal frameworks which could allow the use of Sweetie as an investigation method in the criminal investigation, as

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<sup>32</sup> Schermer, B. W., Georgieva, I., Van der Hof, S., & Koops, B.-J. (2016). *Legal Aspects of Sweetie 2.0*. Leiden/Tilburg: TILT, 2016, p. 10.

<sup>33</sup> Crawford, A. (2013), *Computer-generated 'Sweetie' catches online predators*, BBC News, 5 November 2013, [<https://www.bbc.com/news/uk-24818769>], accessed on 13.06.2020.

<sup>34</sup> Schermer, B. W. *et al.*, *op.cit.*, note 21, pp. 82-86.

<sup>35</sup> Schermer, B. W. *et al.*, *op.cit.*, note 21, p. 29.

long as its application stays within the boundaries established by the law. As Sweetie is designed to identify and engage suspects in a manner comparable to undercover investigators, the rules regulating the latter will be decisive for its application. Further, the chatbot will collect certain information on the alleged offender and its devices and store the content of the communications between that person and Sweetie for investigation purposes. Consequently, the rules authorizing these different investigative powers would conjointly be applicable in the case of the chatbot<sup>36</sup>.

## Conclusions

New developments in technology have delivered a radical upgrade for criminal investigation, giving investigators tools to rapidly obtain information needed for an investigation—information that would be time-consuming or even impossible to find by traditional methods. At the same time, advances in technology have opened up new territory for the criminal element to exploit, and ways to hide illegal activity out of sight of the law<sup>37</sup>.

The criminal investigation is challenged by the features of our new digitalized and globalized society while the criminal phenomenon is gathering new features such as technology and transnational component or the Internet offering environment. All these new features push investigative bodies to be creative, to adapt and to respond with the same tool used sometimes by the offenders: Artificial Intelligence. Despite their obvious advantages and proved efficiency, AI investigative tools must be use carefully due to the lack of regulation and the peril of breaching human rights and due process standards.

The Council of the European Union has adopted recommendations<sup>38</sup> to persuade national legislators to adopt an "outside the box" way of thinking, reiterating the importance of timely reactions to the investigation and prosecution of criminals and the rescue of children victims of sexual abuse and sexual exploitation. National competent authorities were invited to make the widest possible use of existing legal instruments and mechanisms available at national and EU level, and in particular at Europol and Eurojust. The Council emphasized the need to have appropriate and specific tools to combat online child abuse, including the possibility for competent authorities to exploit the data collected during investigations. To this end, the Council recalled the conclusions of the JHA Council of 6 and 7 June 2019, stressing that data retention is essential for the effective investigation and

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<sup>36</sup> *Ibidem*.

<sup>37</sup> John Michael OHare (2020), *Machine Learning and Artificial Intelligence Increase Efficacy of Criminal Investigations* in Evidence Technology Magazine, vol 18, no 2, March - April 2020, retrieved from [https://read.nxtbook.com/wordsmith/evidence\_technology/april\_2020/machine\_learning\_and\_artifici.htm], accessed on 5.09.2020.

<sup>38</sup> EU Council, *Conclusions on combating the sexual abuse of children* – Council conclusions 12862/19, 8<sup>th</sup> October 2019, paras. 10-15, retrieved from [https://data.consilium.europa.eu/doc/document/ST-12862-2019-INIT/en/pdf], accessed on 15.04.2020.

prosecution of serious crime. In addition, legislative reforms should maintain the legal possibility of data retention schemes, in line with the principles set out in the EU Charter of Fundamental Rights.

In this regard, the Council encouraged Member States to develop and apply innovative investigative methods, as well as to consider the allocation of specialized law enforcement resources to combat child sexual abuse and exploitation. The exchange of good practice between Member States adds value to these initiatives.

Despite these encouragements, the only solution for using a chatbot or other AI investigative tools in the fight against crime phenomenon is a proper regulation which does not exist yet, a legislative intervention in the sense of introducing among the criminal procedural provisions new methods of supervision or criminal investigation on the one hand, and, on the other hand, the introduction of special norms in the criminal law providing that, in the situation of committing the deed against a virtual victim, this particular act would be assimilated to an attempt and sanctioned as such.

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# OLD PEOPLE AS A SOCIAL BURDEN AND SECOND CLASS CITIZENS DURING COVID-19 DISEASE IN ALBANIA

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## **Abstract**

Respect of human rights of old people in the context of COVID-19 disease requires application of proportional protective measures that guarantees their dignity and non-discrimination. But lack of age-friendly restriction measures taken by the Albanian government to control the virus highly deprived them. They were mostly perceived as a social burden and were treated as second class citizens. The main purpose of this paper is to assess to what extent measures taken by the Albanian government during COVID-19 pandemic affected human rights of old people. It used primary data collected through face-to-face semi-structured interviews with 60 old persons in Tirana city during March-May 2020. It concludes that response measures stuck in traditional stereotypes of numerical age aggravated inequalities and social exclusion while application of well crafted old-person-centered measures is necessary to guarantee decent treatment and suitable protection.

**Key words:** *old people, human rights, deprivation, social burden, COVID-19 disease, government response.*

## **Introduction**

The current COVID-19 is an infectious and acute respiratory disease caused by a new coronavirus (SARS-CoV-2) (Zhou, Yu, Du, et al. 2020). Transmitted from person-to-person (World Health Organization 2020d), global statistics show that as of May 8, 2020, there were 3,759,967 coronavirus confirmed cases and 259,474 deaths in 215 countries and territories (World Health Organization 2020d). Only in Albania, as of May 8, 2020, there were 850 coronavirus confirmed cases and 31 deaths (WHO 2020d). Research has found that all age groups are likely to be infected by COVID-19 (Kar, Yasir Arafat, Kabir, Sharma & Saxena 2020), but some are more at risk and disproportionately affected (WHO 2020). For instance, COVID-19 is a great threat for old people, in general, and for those who suffer from other medical conditions including diabetes, respiratory disease and cardiovascular disease, in particular (United Nations Population Fund 2020; WHO 2020). Risk rate differs by gender and older males are more at risk than older females (UNFPA 2020).

Nevertheless, COVID-19 complex emergency crisis remains a global challenge for all governments including that of Albania which has taken several protection measures to combat the virus and reduce its transmission (Friedrich Ebert

Stiftung 2020). As it struggles to find suitable ways to slow down the spread of COVID-19 disease, it is essential and remains a moral imperative to integrate the protection of human rights in pandemic responses (Council of Europe 2020; WHO 2020). From a human rights lens this requires application of measures that are shaped by human rights and demonstrate the promotion of health and rights of citizens (WHO 2020). This is very important for old people because immediate changes of their daily lives, new stressors, uncertainties and unprecedented fear caused by COVID-19 might have a negative impact on their health care access, social interactions, poverty and abuse creating more barriers for those who already have a poorly managed mental health, in particular. Since old people do not represent a homogenous group, unrealistic correlation of chronological age with biological age escalates age-based discrimination, ageism and stigma in public discourse, intervention and social media (United Nations 2020).

The main purpose of this cross-sectional qualitative study was to examine to what extent COVID-19 response measures taken by the government respected human rights of old people and guaranteed their healthy functioning in Albania during the period March-May 2020. The main research question was: Did government's pandemic response respect human rights of old people and guarantee their healthy functioning in Albania during the period March-May 2020? This study used primary data collected through face-to-face semi-structured interviews with 60 participants from Tirana city during March-May 2020.

This study is important for Albania because no research has been conducted so far about the impact of COVID-19 response approach on old people. It will shed light on challenges, new stressors and risks created by 'lifesaving' governmental interventions that were blind to old age nuances and unfairly triggered age-based discrimination. Listening to their voice is an important 'window' for policymakers and lessons learned contributing to discussion about the necessity of design of age-friendly measures to protect human rights of old persons ensuring their healthy functioning during crisis situation.

However, this study has four limitations. First, primary data were collected in Tirana city only because of travel restrictions and strict lockdown measures. Therefore, the voice of elderly people who reside in other cities and rural areas was not heard. Second, it recruited participants through naturalistic observation and purposive sampling which are mostly used in small scale studies. However, literature suggests that both methods have their limitations related to non-statistical sample selection that is why their findings can be interpreted with caution. Third, old people accommodated in residential institutions and care homes were not contacted or observed because visitors were not allowed to enter there. Fourth, the consistency of the findings of this study is hardly established because data were collected in short period and respondents were contacted only once. Therefore, it was not possible to contact them again and see whether there was any change on what they self-reported during the previous interview.

This study is organized in six parts. Introduction including study limitations and organization is presented in the first part while the second part provides a theoretical framework of old age based on Disengagement Theory followed by a brief profile of elderly people in Albania. The context of COVID-19 in Albania and

government's response is provided in the third part. Study methods, participants' profile, data collection instrument and process are described in the fourth part while findings are included in the fifth part. Finally, discussions, conclusions and implications are presented in the sixth part.

### **Theoretical Framework of Old Age and Age-based Discrimination**

This part reviews the features of old age and consequences of age-based discrimination within the framework of Disengagement Theory. It also provides a brief profile of old age population in Albania

#### **Old Age and Disengagement Theory**

The universal definition of old age in pure chronological terms lacks in literature (Sanderson & Scherbov 2008; Tinker 2008) because this construct is deeply seated in culture (Carstensen & Fried 2012; UN 2007) and it is tied to countries' socio-economic development. Most of researchers and UN agencies define old people "as those aged 60 or 65 years or over" (UN Department of Economic and Social Affairs [UNDESA] 2020, 2). In general, countries refer to retirement age as equivalent to old age threshold assuming that it corresponds with that period of life where sickness rate and death rate highly increase compared to their rates in younger age groups. In this study, old age is defined as population aged 65 years and above.

Old age is perceived as a "uniform stage of the end of life" (Rychtaříková 2019, 5) where biological processes have deteriorated human body and limited the functions of human brain. Age-based over-generalization of old age population neglects dynamics and differences among old people treating them as a homogeneous group rather than different individuals (Ayalon & Tesch-Römer 2018; Islam 2016). Even though global statistics document fast growing demographic trends of this age-group, it is surprising to see how discrimination in old age continues and it is manifested in various socio-economic and cultural contexts (Islam 2016).

Age-based discrimination is defined as unjust and less favorable treatment of someone because of his age (Islam 2016). Negative attitudes towards old age population have been articulated in Disengagement Theory. Cumming & Henry (1961, 211) postulated disengagement theory as "an inevitable process which many of the relationships between a person and other members of society are severed and those remaining are altered in quality". According to them, mutual severing of relationships between the aged person and society results in the reduction of the number of interactions with other people and withdrawal from social activities leading to an increased freedom from social norms that govern everyday behavior (Cumming & Henry 1961).

This theory views disengagement as a gradual and universal process where society transfers the power from old persons who are less absorbed with others to the younger ones. The initiation of this phase and its speed varies by countries. Nevertheless, some people might disengage earlier than they become old while others might resist (Rose 1964). Disengagement Theory distinguishes voluntary and involuntary disengagement. Voluntary disengagement refers to social roles' loss and old persons' withdrawal from activities they assess to be less important and

necessary for them while involuntary disengagement assumes that old persons are obliged to be less involved in social roles and activities because of certain conditions imposed to them (Cumming & Henry 1961).

However, abandonment of central roles they used to play in their life reduces the space of their social life, increases their self-centeredness and causes crises of their values (Cumming & Henry 1961). But the roles that old persons play in society determine their mutual expectations. Since they become less involved and engaged in small, secondary roles, the society as a whole expects very little from them 'legitimizing' their disengagement (Cumming & Henry 1961). Causes of age-based discrimination relate to physical, mental and social conditions of old persons including high prevalence and incidence of various diseases, reduced physical capacity, low mobility, mandatory retirement, low productivity, and low technological skills. Consequences of age-based discrimination are reflected in abuse, neglect and maltreatment of old people, isolation and loneliness, social insecurity, poverty and abandonment (Islam 2016). Even though Disengagement Theory garnered theoretical attention, it was criticized because it assumed that voluntary disengagement was advantageous for old people and society (Hochschild 1975). It disregarded individual variability (Maddox 1964) and was not supported in research evidence (Tallmer & Kutner 1969).

### **A Brief Profile of Old Age Population in Albania**

The share of old age population in Albania is on the rise and national statistics show that in 2018 it represented 13.8% of the total population (Institute of Statistics [INSTAT] 2019). Changes of population structure have been the result of combination of demographic and socio-economic factors (INSTAT 2015). Unparalleled demographic transformations that occurred in Albania during the last decades of its post-socialist transition to neo-liberal economy reduced young age dependency ratio from 53.6% in 1989 (the last census of socialist period) to 25.4% in 2018 and increased old age dependency ratio from 5% in 1989 census to 20.1% in 2018 (INSTAT 2015, 2019). Fertility rate significantly declined from 2.9 in 1989 census data to 1.67 in 2011 census data remaining below replacement rate (INSTAT 2015, 2019) while life expectancy increased reaching 80.5 years for women and 77.4 years for men in 2018 (INSTAT 2019).

Migration as a new dominating feature of post-socialist Albania intensively evolved after the change of its political system in 1991 pushed by a range of socio-economic and political factors. Formerly banned, the scale of international migration significantly increased after the failure of country's self-isolation policy (United Nations Development Program 2002). Strict policies for internal movement of population mostly rural-urban migration were removed while sudden unplanned and uncontrolled rural-to-urban exodus changed spatial distribution of population (Meçe 2017; Prato 2017; UNDP 2002). As a result, the total population of Albania decreased from 3,182,417 in 1989 census data to 2,866,000 in 2018 while the size of the urban population significantly increased from 35.7% in 1989 to 53.5% in 2018 (INSTAT 2019).

These rapid socio-demographic transformations impacted family and household arrangements reducing the number of multi-generational households and

weakening traditional support networks (Albanian Network of Older Persons [ANOP] 2017; Meçe 2015). Inter-census data show that the share of old persons who live in multi-generational families decreased from 30% in 2001 to 19% in 2011 while the share of old persons who live in their own in one-person household increased from 5% in 2001 to 8% in 2011 (INSTAT 2015).

Even though remittances play an important role in family economy for those left behind, results of the 2018 Income and Living Conditions Survey revealed that at-risk-of-poverty rate in Albania was 23.4% while for the old age group it was 14.2%. At-risk-of-poverty rate was higher among old females (about 15.4%) than old males (12.5%) (INSTAT 2019). Research conducted in 2017 with old people in Albania found a positive association between material poverty and poor health. On average, 65.4% of old respondents self-reported that suffered from cardiovascular disease, 36.5% from chronic lung disease, 31.5% from stomach disease and 24.6% from diabetes (ANOP 2017). Limited mobility and serious difficulty in walking have hindered their access to health care services. On the other hand, low level of networks and the growing numbers of socially isolated old persons have negatively impacted their mental health increasing their life stressors (ANOP 2017).

### **The Context of COVID-19 in Albania and Governmental Response**

The first COVID-19 case was reported in Albania in March 8, 2020 (WHO 2020). The disease was manifested as a cluster-based transmission and a community transmission mostly in the main cities (UN 2020b). On 11th March 2020 the Albanian authorities imposed strict lockdown measures to avoid overstretching of fragile health system and control pandemic prevalence (UN 2020b). Borders were closed; public and private transport were banned; schools, kindergartens, gyms, shopping centers, restaurants and non-essential retails were shut; several services were suspended including planned surgery interventions (Official Gazette 2020d, e). Mandatory stay-at-home hours were amended several times without prior warning and justification (Friedrich Ebert Stiftung 2020). A 16 hours curfew was imposed on all citizens starting from 6 pm excluding those with permit and health emergencies. Retired people were strictly prohibited to leave their homes. Mobility hours were modified from 6am – 10am and from 4pm – 6pm followed by another amendment from 5am – 1pm and mandatory temporary mobility permit through application in Albanian government portal (e-Albania) or by phone for all adults (one person per family) who wanted to exit home for one hour only (retired persons were not allowed to apply). It was extended to one hour and a half. Citizens had to apply one day in advance in order to receive permit approval (Official Gazette 2020d).

Albanian government decided to aid vulnerable groups including retired persons, people with disability and beneficiaries from the social protection scheme by delivering at home monthly economic aid in cash, pension allowance, reimbursable drugs, food and non-food items (Official Gazette 2020c). Fines and penalties were foreseen for all wholesalers and retailers in case of price increase for food items, drugs and services during this period (Official Gazette 2020a).

‘War’ metaphor dominated this situation while COVID-19 was labeled as “an invisible life-threatening enemy for the country”. Citizens were asked to obey

“war’s orders” to stay at home in order to win this battle. Disobeyers labeled as “war traitors” were subject to zero tolerance measures. Other “war orders’ breakers” mainly from vulnerable groups including old persons were threatened with the denial of reimbursable drugs or the monthly economic aid in cash. Main streets were patrolled by police forces, military troops and land vehicles. All these extraordinary measures including the limitations of human rights and freedoms were taken not in conformity with the Albanian Constitution because no state of emergency or natural disaster was declared. The state of ‘natural disaster’ was declared later (in March 24, 2020) for a period of 30 days and was extended until 23rd June 2020 (Organization for Economic Cooperation and Development [OECD] 2020). The Albanian Parliament also amended the Criminal Code by introducing harsh prison sentences for violators of COVID-19 measures (Official Gazette 2020g). An Inter-ministerial Committee was established to deliver food packages and other support items to vulnerable persons identified by local government units. In addition, emergency legislation was amended with financial compensation for those who were directly affected by this pandemic including self-employed along with subsidies for small scale businesses in order to pay their employees (Official Gazette 2020c).

## **Methods**

Participants of this qualitative study were 60 inhabitants of Tirana city aged 65-82 years. 80% of them self-reported to be within 65-75 age-group while the majority was females (about 70%). Half of the participants self-reported to be widow, 30% married, 15% divorced and 5% single or never married. Half of them self-reported to have completed up to 12th years of schooling, 35% had up to 8th years of schooling and 15% had university degree. Almost 60% of the respondents self-reported to live on their own in one-person household, 30% lived with their old spouse only and 10% lived with other family members.

Since no previous study was conducted in Albania with particular focus on old age population during COVID-19 pandemic, the researcher applied two methods for recruitment of participants respectively, a) naturalistic observation, and b) purposive sampling. Naturalistic observation is a technique used in small scale studies to observe behavior of participants in their natural settings (McLeod 2015). Observations were conducted early morning from 5:45 am to 7:30 am in the small open shops for fruits and vegetables, small groceries, small neighborhood markets, drug stores, post offices and health clinics. It was a ‘good time’ to spot old persons who went to shop or meet other basic needs for services because police officers who were supposed to patrol the main streets were ‘busy’ with their morning coffees, informal talks, and meetings. Purposive sampling is a non-probability sample that is used when participants are recruited to fit the purpose of the study and research question posed (Patton 2015). Keeping in mind study’s inclusion criteria, the researcher applied it to recruit participants.

A short culturally and socially sensitive introductory guide was developed to invite old persons to participate in this study ensuring their voluntary decision to participate, keeping their confidential information and respecting their privacy. Oral consent was duly taken. Data were collected during the period March-May 2020

through a short paper-and-pencil semi-structured interview which lasted 10-15 minutes. It included two groups of questions: a) basic questions about socio-economic and demographic profile of the respondents; b) questions related to the study purpose mainly about their daily arrangements during the period of strict lockdown; strategies they used to meet their basic needs; their caregiving tasks; social contacts and interactions; etcetera. Each interview started with free listening to let participants express themselves and establish confidence. Then it became more organized and focused to the research question. Interviews were carried out near the houses of old respondents when they were back from shopping or other services.

## **Findings**

This part presents the main findings from face-to-face semi-structured interviews held with old respondents in Tirana city in Albania and discusses them in line with pandemic measures taken by the Albanian government to mitigate the impact of COVID-19 escalation. It highlights some of their weaknesses and challenges faced by old people to cope with their problems.

‘Stay-at-home’ violation to meet basic needs. Respondents of this study found themselves being caught between rocky stay-at-home restrictions and difficulty to maintain their livelihood and put their food on the table. They broke mandatory confinement rule to meet their basic needs because they were “living alone” or “had no relatives to help”. Going out very early in the morning to vegetable shops, groceries, drug stores and post offices was perceived as “the sole alternative to escape police officers and ensure their necessary ingredients for their daily home-cooked meals”. Even though it was dangerous, they thought that “it was a good approach for zero risk COVID-19 infection because there were limited customers”. But not all old people wore face masks and used protective gloves. Some of them said that they had hearing disability or visual impairment that is why wearing masks could reduce their communication power. Others said that drug stores suddenly increased the price of simple face masks from 10 Albanian Leks to 100 Albanian Leks. This increase was assessed as an extra cost for their ‘small pocket’.

Caregiving power for older parents and relatives became difficult due to limited possibilities to adopt different resources and physical tiredness of old caregivers. One respondent said “I am 68 years old and care for my 90 years old mother who lives alone 500 meters far from my home. She cannot live with me and my 75 years old husband because he suffers from psychiatric disorders and does not get well with her. Therefore, I must go every morning to see her, give medicine, send home-cooked meal and give a bath. I am very tired”.

Some respondents said that they were obliged to go to the post office to withdraw their monthly pension due to lack of door-to-door allowance delivery. One respondent said “They delivered it in March but not in April that is why I decided to go to post office and take it”. Another respondent said “Even reimbursable drugs were not delivered at home as government promised. I have to go to the drug store to pick them”.

In general, respondents were upset about age-based discriminatory, unethical and non-inclusive COVID-19 measures. They perceived themselves as being stuck in “old age trap” which overemphasized their chronological age to make mandatory their confinement at home. According to them, public discourse during pandemic in Albania uniformly framed them as vulnerable group and was mostly focused on virus’ fatalities on old age population rather than on infection per se triggering negative stereotypes and stigma. Respondents with physical disabilities declared that stay-at-home restrictions had disproportionately increased their risk for survival. Others said that no specific lockdown policy was tailored for healthy old persons.

Poverty and exclusion. Restriction measures taken to cope with COVID-19 disease in Albania and protect old people from this life-threatening virus did not save them from poverty and deprivation. Support for food services was weak while information sharing about food package distribution was poor. Depreciation of Albanian currency, ALL, by about 7% since the beginning of the pandemic increased food prices causing the change of Consumer Price Index inflation from 1.4% in 2019 to 2.1% in March 2020 (OECD 2020). According to Food and Agriculture Organization (2020), poor people with low financial capacity tend to have limited food consumption and less diversified diets.

Forced stay-at-home measures with poor monthly pensions as the main source of income were a real challenge. Not all respondents received remittances. They declared that it was difficult to eat nutritious and balanced meals. One of them said “I cannot afford buying fresh fruits and vegetables because of their high price that is why I usually buy them in the afternoon when they are not fresh anymore and their price goes down. But during this period I cannot choose cheap vegetables because I have to go to the shop very early in the morning where price is high that is why I buy less and eat less”. Some respondents also expressed their concern about lack of purchasing power to store food at home for “the worst”. Their modest budget did not allow them to buy food items in large quantities.

Fragile inter-generational solidarity and weak family networks negatively impacted in-kind support for old persons. Informal groups of volunteers were mobilized by the local government units to deliver food packages to vulnerable people including retired persons but the process of their identification was poorly coordinated while the spectrum of vulnerability was unclear. Therefore most of the respondents declared that they did not benefit from them. One respondent said “Nobody has knocked at my door so far to ask whether I need something even though I live alone”. Few respondents said that food package was small and could feed them for one week only. One respondent said “Can we call food package one that does not have flour to prepare daily bread? It can have another fancy name but not food package”.

But old people in Albania remained disproportionately offline and did not benefit from online grocery shopping, mobile communication and banking. Digital knowledge deficit and lack of age-friendly technology (mainly related to interface usability) hindered their ability to access online services and made internet use less comfortable. One female respondent said “My daughter who lives in Canada applied for me to online grocery sales in Albania. Initially I was happy because of

home food delivery, but few days later I found out that it was expired food or food with changed expiration dates... they cheated me”.

Limited access to health services. Public health services at inpatient level (with suspension of a range of services) and at out-patient level (through minimization of patient-health care personnel contact) were significantly affected in Albania during this crisis (UN 2020b). Respondents of this study felt themselves “set aside” from health care personnel just because they were old. One respondent said “It makes no sense to go to the health clinics because the first question that medical doctor asks is: Why did you come here? Go home! Health clinics are not immune from COVID-19 virus!” But, there were no home-based visits for those who had health needs. Since all transportation means were banned and some health clinics were far, old people with mobility impairment were not able to go to the medical doctor that is why they went to neighborhood’s drug store to see the pharmacist. One respondent said “I eat crow because I have no other choice. I know that the pharmacist is different from the medical doctor”.

Discriminatory attitude towards old people was reported not only in face-to-face contact with medical staff but also on the phone when they called free medical emergency line 127. One respondent said “It is sufficient for them to hear your age and their advice is that your health situation is psychologically affected. There is nothing to be worried... But I do not understand why we are perceived as a ‘drain’ on resources when we have contributed during all our life. Should we be differently treated because of our chronological age?” Moreover, respondents said that access to dental care facilities was denied because they were totally closed. They were concerned about their oral health care because their dentures were damaged or they were in need of root canal treatment because of decayed teeth.

Mental health concerns and social isolation. In general, respondents were disappointed with reduced social networks, contacts and interactions because “there were less people to talk about their concerns and no listening ear about their worries”. But research shows that social contacts are important to improve chances of survival (Hawkey & Cacioppo 2010) while in this study most of the respondents self-reported increased emotional distancing, stress, anxiety, insecurity, irritability and somatic disorders. Some of them said that the fear of losing their older spouse, relatives or other loved family members dominated their life during this challenging period while they were pessimistic and unable to adapt their lifestyle to this new situation. One respondent said “My shoulders are strong enough to support me for 77 years but are too small for this disease... I think it will take me”.

But the level of stress and anxiety was higher among old caregivers because they were struggling to fulfill this task while they were strictly prohibited to exit their homes. One respondent said “I am not trained in caregiving but I try to ensure the best loving care I can for my mother. I feel psychologically challenged from this situation because every morning I have to think how to hide myself from police officers who patrol on the streets in order to go to my mother’s home”. Moreover, lack of counseling services for old people increased their vulnerability and exposure to abuse by other family members. One female respondent said “My 34 years old alcohol addicted son lost his job due to COVID-19 disease but he threatens me for money to buy alcohol. My modest monthly pension only hardly feeds us”.

Moreover, the bulk of information about this disease had confused respondents with poor health literacy. Some of them were panicked while some others were neglected. One respondent said “Eh... life is what it comes and not what I want it to be”.

### **Discussions, Conclusions and Implications**

Findings of this study show that restriction measures taken in Albania to protect the health of the population were not guided by age-friendly interventions. They were challenged by traditional stereotypes that unfairly perceived old persons as a ‘burden’ or ‘drain on resources’ and disproportionately increased their protection gap affecting their human rights. But scholars argue that not all old people “fit neatly into traditional categories” (North & Fiske 2013, 38). They distinguish youngest-old (aged 65-74 years), middle-old (aged 75- 84 years) and oldest-old groups (aged 85 years and above) (Lee, Oh, Park, Choi & Wee 2018). Different from the oldest-old who are perceived to be less active, youngest-old are active agents with contributive abilities for societal reciprocation (Neugarten 1974). Lack of understanding of this distinction and disproportionate focus on the pity and burden of oldest-old-related issues uniquely targeted all old people, prejudiced them together in Albania and negatively affected their autonomy.

Moreover, insufficient and uncoordinated material support exposed them to poverty and deprivation. Compared to March 2019, in March 2020 the rise in the price of food and non-alcoholic beverages in Albania was 4.6%. Only within this group, high increase was recorded for fruits (24.3%) and vegetables (including potatoes) (8.2%) (INSTAT, 2020). Compared to February 2020, price increase for the group of food and non-alcoholic beverages was 1.8% (INSTAT 2020). Furthermore, old people were excluded from new online services which became available during the period of pandemic because of digital gap. Scholars argue that old people are usually slow to adapt to modern technology that is why they have low access (Vaportzis, Clausen & Gow 2017). The 2019 Survey on Information and Communication Technologies Usage showed that 64.1% of people aged 65-74 years in Albania self-reported that they never used internet (INSTAT 2019). Therefore, this ‘window’ was not exploited by them while they were deprived to benefit from its advantages during harsh stay-at-home restrictions.

Low access of old people in health care services during COVID-19 crisis in Albania is not in conformity with Article 3 of the International Health Regulations (2005) and does not respect their human dignity, rights and freedoms (WHO 2020). This recommendation is very important for Western Balkan countries including Albania because their health systems are weak and poorly funded (The World Bank Group 2020b). No less worrisome is the denial of treatment of non-communicable diseases or conditions unrelated to COVID-19 because they may require additional out-of-pocket expenditure, marginalize old people and increase their barriers to obtain quality health services (UN 2020). On the other hand, underestimation of health literacy of old people has been disadvantageous for their wellbeing taking into consideration that Albania has the lowest ratio of physicians per capita in Europe while public spending in health sector represent only 3.1% of its GDP (INSTAT 2019).

Scholars argue that depending on duration of restriction measures, they are likely to alter social norms, interactions and desire to reconnect (Banerjee 2020). But this is very dangerous for old people in Albania because tremendous demographic shifts of the last post-socialist decades have changed family living arrangements and social support networks. According to the previous research, 32.5% of old people in Albania self-reported that they did not meet friends on daily basis (ANOP 2017). On the other hand, fragile social and psychological arrangements produced a heavy toll for old people making neglected ones serve as ‘hidden pockets’ of viral load contributing to virus spread (Banerjee 2020). Lack of holistic measures combined with well-crafted psycho-social support negatively impacted mental health of old people exposing them to social isolation. Finding of this study have implications for policy makers because lockdown measures can work and are feasible at household level when governments have capacity to craft and provide rapid, necessary, and well thought-out support to minimize their consequences on people in need for assistance ensuring proper coordination among involved actors and structures.

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## SEASONAL PATTERNS OF FEMALE OFFENDERS IN THE PELAGONIA REGION IN REPUBLIC OF NORTH MACEDONIA

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### **Abstract**

Seasonality and crime has been a subject of criminological research since its foundation and a way to explain when certain types of crime are most likely to occur. Temperature fluctuations and seasonality are intertwined and interact with each other and the different crime rates from one season to another are not defined only by the environmental component, but by the social one as well.

Whether crime rates have predictable cycles and when the crime rates are on their highest or lowest levels by month are some of the questions that can be answered through the research of seasonality of crimes. Research generally concludes that offenses do differ with the seasons (homicide being a possible exception). Quetelet (1969/1842) concluded that the peaks for property crimes occurred in the winter and for violent crimes in the summer and his claims heavily influenced later thinking.

Crimes committed by women can be inserted in several groups of the crimes from the Criminal code of RNM, and a large number of them are from the group of crimes against the property and crimes against the person and body. The collected data refer to convicted women offenders in the two biggest cities in the Pelagonia region – Bitola and Prilep, for a 5 year period from 2011-2015.

**Keywords:** *female offenders, crime seasonality, patterns, Pelagodina region, Republic of North Macedonia.*

### **INTRODUCTION**

The first book that explored crime seasonality was published in the mid-19<sup>th</sup> century, "A treatise on man and the development of his faculties" by Belgian statistician Adolphe Quetelet. He stated the following: "*The seasons, in their course, exercise a very marked influence: thus, during summer, the greatest number of crimes against persons are committed and the fewest against property; the contrary takes place during the winter*" (Quetelet, [1842] 1968: p.90). He argued that during winter months people encountered more difficult conditions, which resulted with criminal activities of necessity, such as stealing goods. During

summer months he believed that violent crimes were mostly affected by higher temperatures that create increased discomfort and aggression (a decrease in reasoning powers because of the heat – mental alienation), as well as more encounters with other people outside (personal collisions), (Quetelet, [1842] 1968: p.56).

Sutherland has restated this finding in his book “Principles of Criminology”, as follows: “*Statistical studies show very uniformly that crimes against property reach a maximum in winter months, and crimes against the person and against morals in the summer months*” (Sutherland, 1947: p.82).

Through research of crime seasonality researchers have tried to explain at what times of the year, week or days are certain types of crime more likely to occur and why, but so far the results “have produced inconsistent and paradoxical results” (Yan, 2004, p. 276). But, the notion that violent crimes are committed during summer months and property crimes during winter months, needs to be addressed carefully since the results of these type of research are dependent on which type of crime is being investigated and the geographical area of research.

There have been findings that oppose these primarily statements (Farrell and Pease, 1994), but also some findings have shown no seasonal fluctuations of some of the violent types of crime (Lamb, 1983, Cheatwood, 1988, etc.). Moving from broad investigations to individual offences has given somewhat different results. Some research finds seasonal patterns in rape rates, for example, (e.g., Anderson 1989; Michael and Zumpe 1983), but other research does not (e.g., Deutsch 1978). Robbery has summer peaks in some studies (e.g., Cohn and Rotton 2000), and winter peaks in others (e.g., Field 1992).

## **THEORETICAL EXPLANATIONS OF CRIME SEASONALITY**

Research of crime seasonality is done with the use of temperature aggression theories or routine activities theory. From previous research it can be stressed out that temperature aggression theories are more limited and through their use they try to convey the idea that people become more irritable as heat and humidity levels rise (Anderson, 1989). Hot temperatures affect people in a way that they have higher aggressive motives and tendencies. Hotter years, quarters of the years, seasons, months and days all produce more aggressive behavior such as murders, rapes, assaults, riots etc. All versions of the temperature aggression theories more or less predict the same that higher rate of criminal violence will be present in summer months due to the greater frequency of hot weather. This is the only general claim made through these theories; otherwise they have little to say about seasonal fluctuations in violence and they have no straightforward application to property crimes.

In contrast to the previous theoretical explanation, routine activities theory offers a more comprehensive approach to crime seasonality and applies and helps explain the patterns in both violent and property crimes. This theory helps us understand how temporal cycles affect and structure individual behaviors through the changes that are present in the physical environment.

The weather during spring and summer is more pleasant and encourages people to spend more time outdoors. That can have an impact in both property and

violent crimes. For example, when people are away from their homes it reduces their ability to guard their homes and also they can be placed in settings with higher risks of assaultive violence (Cohn, 1990). The daytime hours can also be an influencer of the contact between victims and offenders, but this indicator varies with the season (Van Kopen and Jansen, 1999). Miron (1996) in his research stresses out that the seasonality in the economy is due to summer vacations and Christmas related shopping. These socially influenced patterns may also influence outcomes such as crime.

Some of the authors (Cohn and Rotton 2000) use this theory to explain summer peaks for robbery, and others (Landau and Fridman 1993) to explain robbery peaks during winter. This shows that the routine activities theory is flexible and can be compatible for both outcomes. That means that the authors used this explanation of crime seasonality to organize their findings, but not as a source of testable hypotheses.

### **PELAGONIA REGION IN REPUBLIC OF NORTH MACEDONIA**

The Pelagonia Region is located in the south of the Republic of North Macedonia and comprises the Pelagonia basin and the Prespa Lake basin. This region is the largest, covering 18.9% of the total land area of the country, but also one of the most sparsely populated, having a population density of 48.2 people per km<sup>2</sup>. In 2019, 10.9% of the total population of the Republic of North Macedonia lived in this region (State statistical office of RNM, 2020).

The population in the Pelagonia region is 231,500, or 11.2% of the whole population in North Macedonia, from which 115 268 are women. The number of criminally liable women is 91 837.

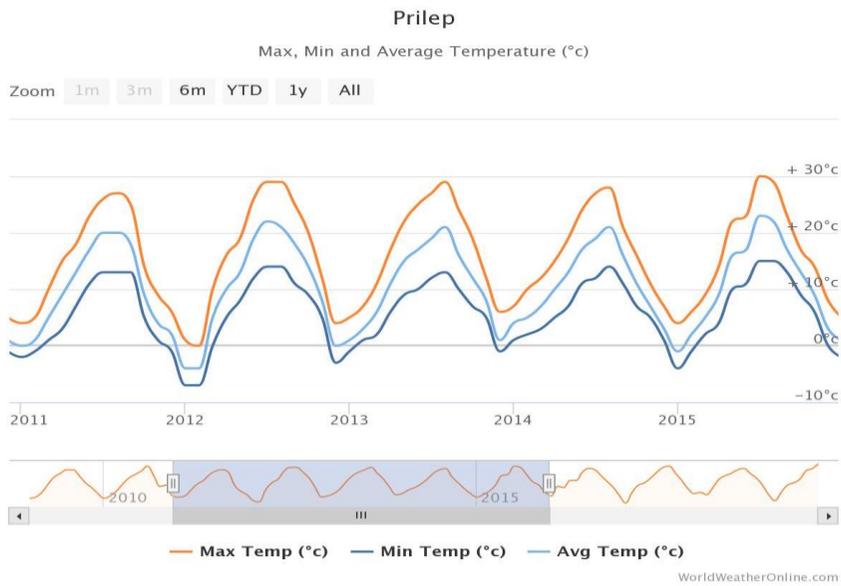
Figure 1. Statistical regions in North Macedonia



Source: State Statistical Office of RNM

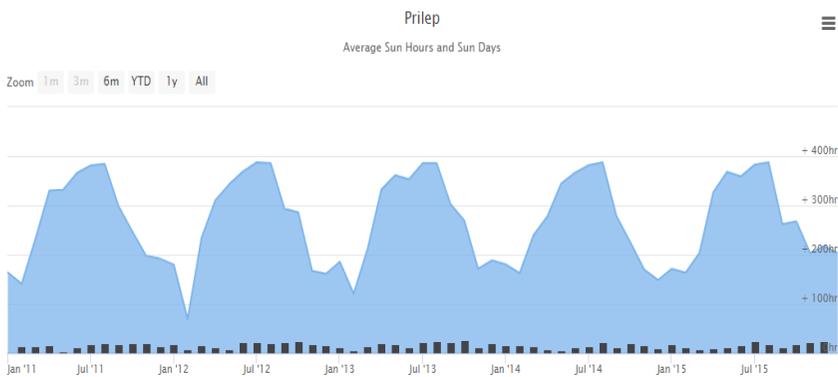
Pelagonia has a predominantly moderate continental climate, but then in the winter months it is penetrated by cold influences from the north, which really lower the temperature and give it the character of a continental climate. Due to the proximity of the Aegean Sea and the geographical latitude, the Mediterranean climate should prevail, but due to the high altitude, the moderate-continental climate prevails. The average annual air temperature in Prilep and Bitola is 11.2 ° C [4]. The average rainfall is around 640 mm, in Prilep it is 556.7 mm, and in Bitola 602 mm.

Figure 2. Maximum, Minimum and Average Temperature in Prilep



Source: Prilep Monthly Climate Average, 2020

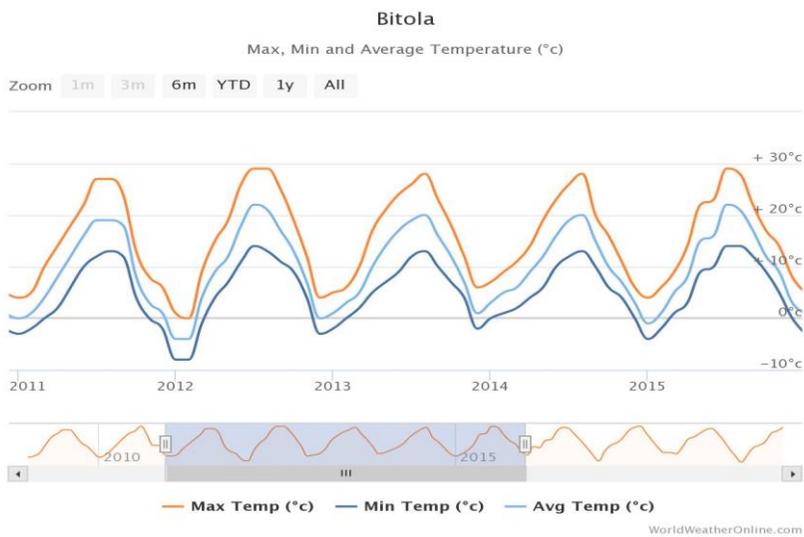
Figure 3. Average Sun hours and Sun days in Prilep



Source: Prilep Monthly Climate Average, 2020

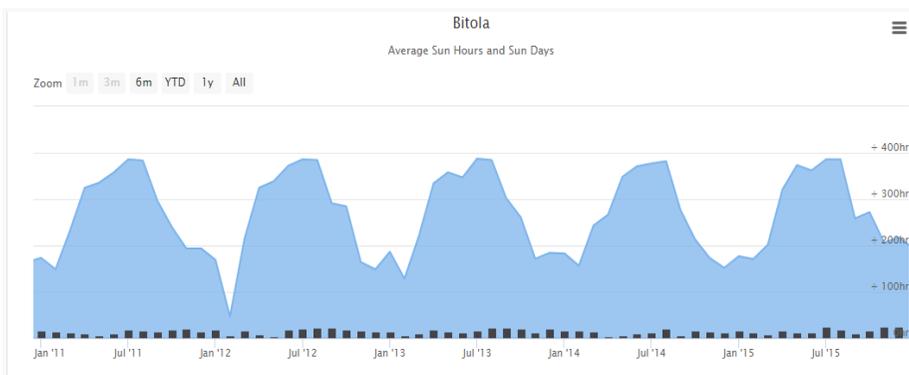
From Figure 2 we can see the fluctuations in the temperature during the four seasons in Prilep and through Figure 3 we can see the number of sun hours and sun days in the municipality of Prilep during our research period from 2011 to 2015. The Sun days and hours are at their lowest during winter months, average during spring and fall and at their highest during summer. Due to the openness of the Prilep field to the south Mediterranean climate is felt in the city. The city of Prilep has a moderate continental climate with little impact from the Mediterranean climate. Summers are very hot and dry, and winters are cold with snow. Spring is colder and richer in rainfall, autumn lasts longer, is warmer and drier than spring. The city Prilep and the surrounding area have four seasons.

Figure 4. Maximum, Minimum and Average Temperature in Bitola



Source: Bitola Monthly Climate Average, 2020

Figure 5. Average Sun hours and Sun days in Bitola



Source: Bitola Monthly Climate Average, 2020

According to meteorological data, Bitola has an average annual air temperature of 11.1°C, but with large deviations in certain years from 10.1°C in 1975 to 13.1°C in 1952. The coldest month is January, with an average monthly temperature of 0.6 °C, but with an absolute minimum temperature of -30.4°C. The warmest month is July, with an average monthly temperature of 22.2°C and an absolute maximum temperature of 41.2 ° C. The absolute annual variation of the air temperature is 71.6°C, which is specific to the areas with continental climate.

The spring and autumn months have pleasant air temperatures, but they can also get specific in the extended winter or extended summer. Therefore, in Bitola, the climate is basically of moderate continental character, with a pronounced continental component, with a dynamic and unstable climate of dry very hot summer and winter divided into shorter, dry and cold. In other words, the temperature has the specifics of a continental climate, and the precipitation, of a dry modified Mediterranean or steppe climate which, at times, has breakthroughs of hot air masses from North Africa - Sahara.

This data are visible in Figure 4 and Figure 5 which show the maximum, minimum and average temperatures in the municipality of Bitola and the number of sun days during our research period from 2011 to 2015.

## **FEMALE CRIMINALITY IN PELAGONIA REGION**

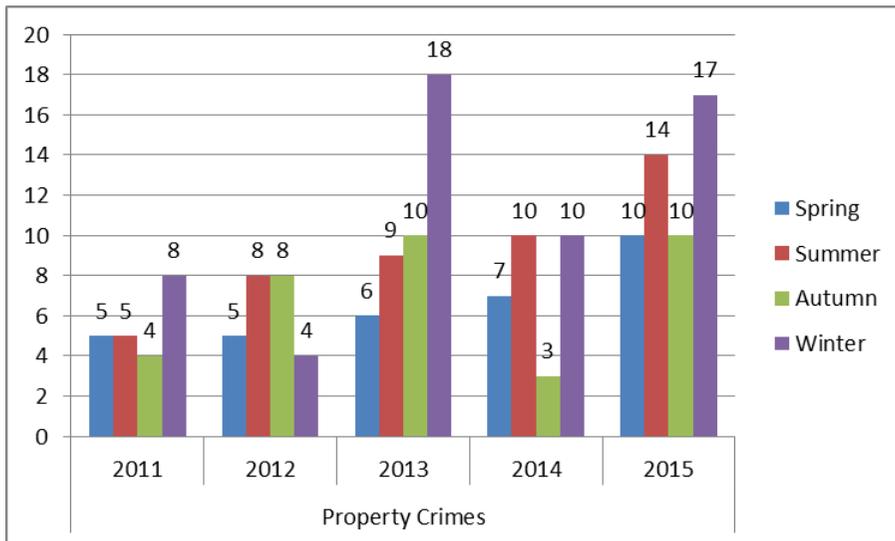
In the time period of 2011 to 2015 the total number of convicted women goes from 624 in 2012 as the lowest number of convictions and 1126 in 2014 as the highest number of convictions. If we look at the percentage from the total number of convictions on the territory of the Republic of North Macedonia we have 6.7% in 2011, then 6.9% in 2012, 7.3% in 2013, 10.5% in 2014 and 8.4% in 2015.

When we compare the numbers from the two Basic Courts in Prilep and Bitola to the total numbers of convictions we have the following percentage representation. In 2011 we have 12.9% with the number of total convictions of 85 from the total number of 661 in North Macedonia. In 2012 we have 10.6%, from 66 convictions out of 624. In 2013 we have 12.7%, which represented in numbers is 89 out of 701 convictions. Then in 2014 we have 9.5%, which represented in numbers is 107 out of 1126 convictions and in 2015 we have 20.1%, 174 convictions out of 865.

In the next figures we will present data regarding violent and property crimes committed by women and their temporal cycles on the territory of the Pelagonia region.

In Figure 6 are presented data regarding property crimes during the four seasons from 2011 to 2015. As we can see the data show that we have more property crimes committed by women during winter months, which is correlation with previous research findings which show that property crimes have their peak during winter.

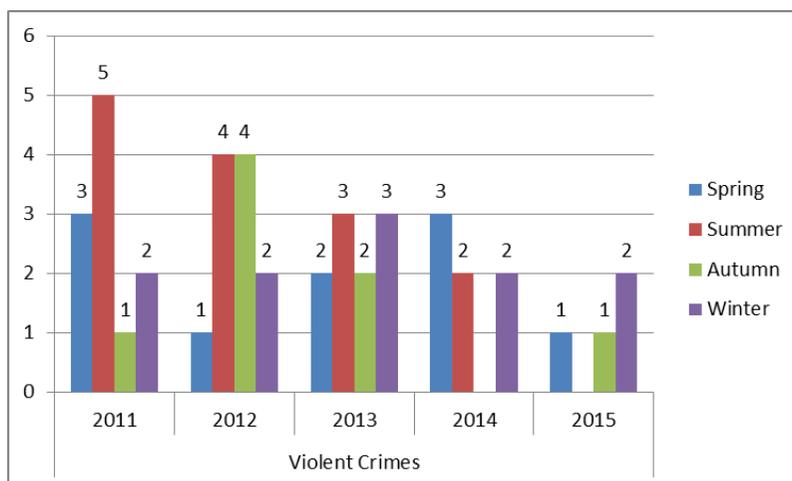
Figure 6. Number of property crimes during each season.



Source: Final court decisions from the Basic Courts in Prilep and Bitola

In Figure 7 the data regarding violent crimes shows mixed numbers regarding in which season these crimes were committed. We can say that most of the violent crimes committed by women were during summer, which as well is in correlation with previous research findings regarding violent crimes overall.

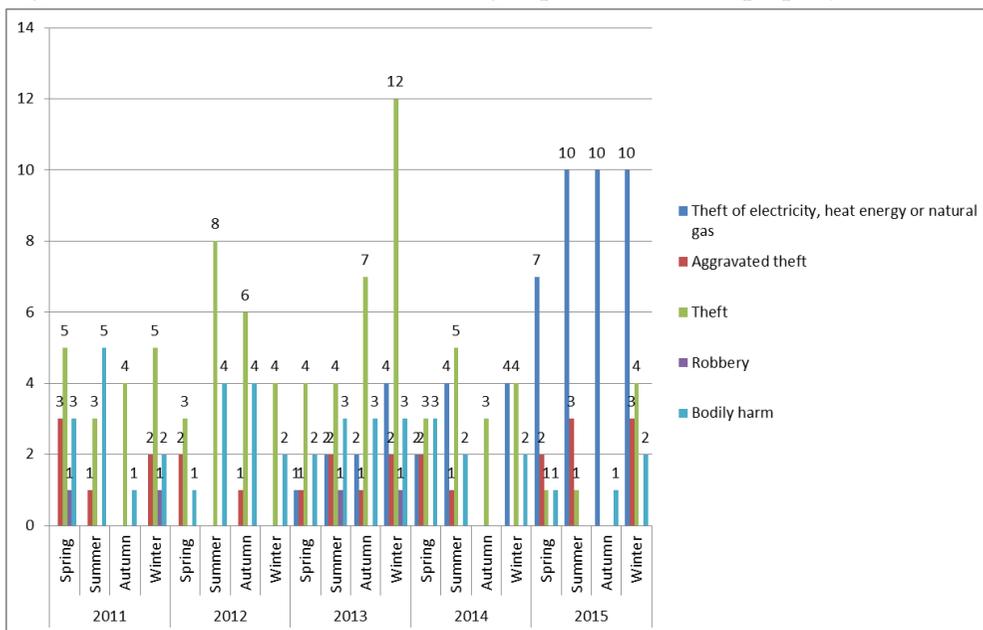
Figure 7. Number of violent crimes during each season.



Source: Final court decisions from the Basic Courts in Prilep and Bitola

Figure 8 we have presented the data on crimes for which women are mostly convicted, and as we can see from the data from the group of property crimes the crimes with highest numbers of convictions are: Theft of electricity, heat energy or natural gas, aggravated theft, theft and robbery. And from the group of violent crimes are Grievous bodily harm and Bodily harm. From this numbers we cannot give a certain conclusion that violent crimes are mostly committed during summer, since the two crimes are evenly distributed with smaller oscillations in each season. The same can be concluded regarding the four most common property crimes.

Figure 8. Most common crimes from the groups of violent and property crimes.



Source: Final court decisions from the Basic Courts in Prilep and Bitola

## DISCUSSION

Since property crimes are the once that have the highest number of convictions in our country, we tried with the data we had to see if we can predict when do some of the most typical crimes are committed. From the data presented we cannot conclude for certain the temporal fluctuations of violent and property crimes. Even though they suggest that the routine activity approach can be applied, still we need to continue this research, make comparison with the other statistical regions in North Macedonia and maybe then we can be certain of the seasonal patterns of female criminality.

Property and violent crimes are 1/3 of the total number of committed crimes by women in the Pelagonia region. Property crimes have their picks in the winter and violent crimes in the summer. We could not present more data from the whole territory of the Republic of North Macedonia, because we did not have access to the

court files, since the data presented in the annual publications about criminal offenders from the State Statistical Office do not contain data regarding the date when the crime was committed. That means that we need to change in the methods of gathering data about criminal activity and also change the patterns of their public presentation.

Determining seasonal cycles of female criminality in Macedonia will take some time because of the lack of information on female criminality and crime overall.

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# COVID-19 CRISIS AS AN ACCELERATOR OF DIGITAL TRANSFORMATION AND DIGITAL ECONOMY

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## ABSTRACT

The unprecedented global health crisis has transformed the macro landscape of economic activities worldwide. "Going digital" has become one of the remedies for economies and a "survival strategy" for businesses since the outbreak, as offline activities were almost shut down. The crisis has forced countries to react quickly and find new solutions: companies should rethink and accelerate their digitization strategy to increase resilience and optimize business processes and at the same time put measures in place that establish sustainability for the future challenges to come. The purpose of this paper is to point out that immediate action is needed especially to leverage digital to respond to challenges presented by COVID-19, from governments and regulators around the world, supported by the private sector and the digital development community.

**Key words:** digital economy, digital transformation, Covid-19 crisis, global economy

## INTRODUCTION

The COVID-19 pandemic is far more than a health crisis: it is affecting societies and economies at their core. While the impact of the pandemic will vary from country to country, it will most likely increase poverty and inequalities at a global scale, making achievement of Sustainable Development Goals (SDGs) even more urgent (*United Nations, 2020*).

The Covid-19 pandemic has plunged the world into economic crisis, with the World Bank projecting a 5.2% decline in global gross domestic profit (GDP) in 2020. This would be the deepest recession since World War Two, and nearly three times as bad as the one caused by the global financial crisis of 2008-2009 (*World Bank, 2020*).

The Covid-19 pandemic continues to impact people's lives, families, communities and the global economy and its evolution remains uncertain. Country impact assessments have shown that while the pandemic's socio-economic impact is expected to be sizable globally and affect all countries simultaneously, it will be felt differently across countries depending on their underlying economic, demographic and governance structures with deep impacts at the local level urgent (*United Nations, 2020*).

As the world tries to find effective solutions to the COVID-19 pandemic, governments and businesses are becoming increasingly reliant on digital

technologies to support their communities and citizens. In order to keep life going and ensure business continuity, national digital agendas have been implemented rapidly, with new electronic modalities established quickly for responding to specific crisis-induced demands. Countries worldwide responded to the outbreak not only by implementing quarantines, closing borders and public spaces but also with the mobilisation of resources to sustain the infrastructure systems and digital services and created new and innovative digital solutions.

Across the world, governments have brought forth some mitigating effects such as utilizing remote learning to manage and cope with the crisis (*World Bank, 2020a*). During the last months, many countries have indeed observed acceleration of the transition process towards the digital economy and the adoption of digital solutions. Telecommuting has become the norm for most offices in the public and private sectors; home-based learning through video conferencing platforms is keeping students engaged; more and more companies have replaced entire roles with digital solutions, tools and services; restaurants and retailers' incomes have been depending on for months only on take-outs and delivery services through online ordering systems. Mobile apps were introduced in several countries to track infections. The pandemic has also induced parliaments to change their rules of procedure to ensure remote working and limit physical meetings.<sup>1</sup>

The purpose of this paper is to point out that immediate action is needed especially to leverage digital to respond to challenges presented by COVID-19, from governments and regulators around the world, supported by the private sector and the digital development community. It is still possible to turn this challenge into an opportunity to build stronger societies that can withstand devastating social, economic and political emergencies. This can be done by using innovative digital solutions.

## **CORONAVIRUS: THE ECONOMIC IMPACT**

The COVID-19 outbreak has led to revised growth forecasts for the global economy. Every aspect of our lives has been affected by the COVID-19 outbreak. Its impact on economic activity is extremely broad: from dramatically diminished consumer discretionary spending to a freeze on business activities including capital budgets, hiring, and reduction of everything but essential operational expenses (ITU, 2020).

The economic crisis unleashed by the outbreak of COVID-19 is hurting economies, regardless of income level. The most recent data from UNIDO's seasonally adjusted Index of Industrial Production (*April 2020 vs December 2019*) indicate that both lower- and upper middle-income countries have been significantly impacted by COVID-19 (*Table 1*).

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<sup>1</sup> See more at: <https://www.neweurope.eu/article/is-covid-19-accelerating-digitalisation-or-exposing-the-digital-divide/>

Table 1. Average loss in % in the Index of Industrial Production (IIP) across countries. April 2020 vs December 2019

High-income (30 countries)	Upper middle-income (13 countries)	Lower middle-income (6 countries)
18%	24%	22%

Source: UNIDO elaboration based on [UNIDO Statistic Data Portal](#).

The World Bank forecasts that 92.9% of countries will fall into recession this year, and dropping back below 20% in 2021. However, any recovery will depend on how quickly governments can ease lockdown restrictions and increase spending, which may prove difficult for the second wave of coronavirus (*World bank, 2020*). Industrial production across the globe deteriorated further in April 2020 compared to March 2020. It continued declining in 90 per cent of the countries, with an average drop of 15 per cent within one month. Monthly reductions were further observed in India (-55 percent), North Macedonia (-35 percent), Malaysia (-34 percent), Turkey (-33 percent) and Slovakia (-32 percent). Countries that registered an increase in industrial production were Senegal (+9 percent), Canada (+7 percent) and Singapore (+4 percent) (*UNIDO, 2020*).

A study finds that the direct costs of the COVID-19 pandemic associated with illness and mortality are lower than the indirect losses caused by the crisis (*Noy et al. 2020*). A low impact of COVID-19 in terms of case numbers and deaths does not necessarily translate into a low economic impact. Many countries are experiencing a recession, even though COVID-19 has not had a serious effect on them in terms of health. Even minor public health events can severely affect firms in lower-income countries due to their poor socio-economic conditions (vulnerability) and their weak capacity to respond to crises (resilience). Moreover, in a globalized world, many countries are suffering indirect consequences from value chain disruptions and lower international demand for goods due to widespread recession (*UNIDO, 2020*).

## DIGITAL TRANSFORMATION IN PANDEMIC AND POST – PANDEMIC ERA

The concepts of “digital technologies” and “digital economy” were introduced into the scientific dictionary due to the technological changes of the 21st century regarding the “merging” of telecommunication, information and communication technologies and innovations. Information and communication technology (ICT) enables globalization, as the opportunity to promote local products globally, i.e. equal participation in the global networked economy (*Tosheva, 2020*). Participants in the business operation are governed by the general rules, but the business technology changes. Computers are used for the easy and smooth realization of a growing number of business transactions; they replaced paper, pens, and stamp. The one who wants to be successful at the local level must also meet the criteria of global competitiveness because the new knowledge-based

economy does not know the geographical barriers or the boundary (*European Commission, 2003*).

The advantages of using digital technologies are: better delivery of government services through fully coordinated and integrated public administration activities, improved interaction with the business sector and industry, quality and rapid response to civil needs and demands, citizen participation in building an information society, efficient government management, increased number of ICT experts and increased level of ICT literacy in public administration, open, participatory and democratic government, reduced corruption, increased transparency, increased revenues and reduced costs, new forms of evaluation and improvement of the public administration and the creation of value for society in general (*Tosheva, 2020*).

During the global pandemic, digital technologies have become a critical enabler of connectivity facilitating continuity of our regular lives and connecting people more than ever before. Hence, the importance of the reliable digital infrastructure to our lives has become increasingly important, and certain aspects of ICTs are benefitting from health concerns in a period of self-isolation, such as increased ICT opportunities from telework, telemedicine, food delivery and logistics, online and contactless payments, remote learning and entertainment.

The COVID-19 pandemic shows that digital connectivity is critical to societal resilience and business continuity in times of crisis. Since the onset of the COVID-19 crisis, internet usage has risen by 70%, the use of communication apps has doubled, and some video streaming services have seen daily usage raise 20-fold (*WEF, 2020*). Without any doubt, the COVID-19 pandemic has a catalyzing effect on the digitization of businesses as well as government related services and internet usage by consumers. Business models are being disrupted while the digitalization of the economy is accelerating as new technologies and services serve a reshaped workforce. As a result, the competitive landscape has changed already - new businesses have been founded, some small players have grown their influence, some went down-and-out.

Now more than ever business is looking to technology to be agile in the face of disruption and create new digitally enabled business models for the post-COVID “new normal.” Diverse domains such as telecoms, digital media, healthcare, e-commerce, banking and contactless payments are experiencing dramatic changes. Within this context, digital technology has the transformative potential to maintain a functioning economy and allow people to access the basic services needed for everyday life, such as education, health, work, access to information, and communication with competent authorities during this time of pandemic. It, however, must be applied in a manner that respects the digital rights of all (*UCLG, 2020*).

Digitization is keeping society and businesses afloat during the pandemic by:

**Remote Work:** The data show a widespread expectation that remote work will continue, full-time or in part, after the coronavirus crisis has passed. Only 35 percent of workers expect to return to their old workplaces on a full-time basis after the pandemic ends; 29 percent expect to continue working remotely on a full-time

basis, and another 27 percent expect that they will be working from home part-time.<sup>2</sup>

***Omnichannel Commerce:*** As many physical business locations are shut down, consumers are turning to online shopping to meet their needs, even those who had historically been reluctant to do so. Businesses are blending the physical and the digital to provide for their customers through delivery methods such as curbside pickup and contactless delivery. Physical-digital integration is more important now than ever before.

***E-learning:*** Initiatives to develop training and education platforms and opportunities for employees and managers to learn about digital tools.

***Electronic payments:*** Initiatives to accelerate the uptake of electronic payment methods.

***Digital Content Consumption:*** Homebound consumers are turning to digital content providers to meet their entertainment needs.

***Platformification:*** Institutions and organizations of all types are trying out digital platforms to stay above water during the pandemic. While some businesses will revert to their traditional models when the crisis abates, others may opt for a hybrid approach as they recognize the benefits of recurring revenues (*BDO, 2020*).

***E-commerce, on-line business models and market access:*** Initiatives to help firms engage in e-commerce and on-line business models or to access new markets through digital tools.

***Access to finance and government support for digitalisation:*** Initiatives using digital tools to help firms access finance or government support to help firms engage in digital activities for their business continuity.

Equitable access to digital infrastructure has never been more important than now. Technology has proved a useful and necessary tool to help ensure that local and regional governments on the frontline of the emergency continue to provide essential public services during the COVID-19 crisis. Our high dependency on digital infrastructure and increased reliance on secure online services has never been greater. However, many of those who remain unconnected to digital services risk being left further behind in these times and beyond: Today there are 3.9 billion internet users globally, leaving almost 50% of the world's population still excluded from digital technologies. In addition, there is also a "usage gap" with 3.3 billion people covered by mobile broadband networks but who are not using mobile internet services. Of the 25 least connected countries in the world, 21 are in Africa (*World Bank, 2020b*).

Local and regional governments on the frontline of the COVID-19 crisis have resorted to digital technologies to monitor, anticipate and influence the spread of the disease, as well as to provide education for students. E-governance makes public services available remotely and constantly, therefore helping people and businesses carry on their activities during the crisis. More broadly, e-governance supports efficient, accountable and inclusive public institutions that are vital for addressing the long-term effects of the pandemic. It also improves the business climate and saves time and money.

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<sup>2</sup> See more: [The State of Remote Work 2020: The Age of the Pandemic](#)

## **COVID-19 IS ACCELERATING THE RISE OF THE DIGITAL ECONOMY**

The digital economy goes beyond e-commerce and e-business and includes doing business, conducting communications, and providing services across all sectors including transport, financial services, manufacturing, education, healthcare, agriculture, retail, media, entertainment, and business using digital technologies. The digital economy plays a significant role in accelerating global economic development, enhancing the productivity of existing industries, cultivating new markets and industries, and achieving inclusive, sustainable growth. *Albertin and Moura, (2004)* state that the benefits of IT can, therefore, be defined as cost savings, productivity, flexibility, quality, and innovation; these benefits can be understood as “a present” that this technology gives to the organizations. At the same time, the digital economy is becoming a powerful catalyst and a driver of inclusiveness, by linking communities to each other in a sort of “global village”, sharing information, ideas and products, and allowing countries to rise up the value chain.

While digital technologies can significantly aid in containing the pandemic and minimizing the social and economic impacts, with special reference to women and men who are frontline health workers, self-employed and careers, the unfolding crisis will have a bearing on the global economy and reinforce the significance of the digital economy. This requires a swift and coordinated response on a number of important policy issues across the entire spectrum of the digital domain. Governments could take the opportunity to invest in large scale-up and re-skilling programs in digital technologies and digital literacy. Local authorities should identify the exact needs and develop effective training in collaboration with business associations, businesses, chambers of commerce, educational institutions and training providers.

The pandemic is a reality check for businesses that have been reluctant to embrace digital transformation and now find themselves not fully unprepared. On top of the stress of potentially health-compromised employees, a sudden and dramatic drop-off in demand, and total economic uncertainty, these digital laggards are now scrambling to migrate their operations and workforce to a virtual environment.

The lockout measures during the pandemic and the need to reduce direct social contacts have also opened up new potential for digital commerce and the digital economy. Due to the development of virtual platforms and digital supply networks, it has been possible to bring together the supply and demand in die rent sectors of the economy and to provide security of supply for both parties. Therefore, it is necessary to improve the e-commerce environment globally and enhance the capacity of all stakeholders to take advantage of its possibilities. Digitalizing health data, telemedicine, digital patient portals, electronic prescriptions, electronic health records, using robots, modern information systems of hospitals etc. would help take health systems to a new level. Distance learning platforms, digital databases and digital textbooks, e-learning materials and digital examination solutions would enable the continuation of normal communication between students, teachers and parents.

Addressing the long-term impact of the COVID-19 crisis requires redirecting the focus of international cooperation to the implementation of digital transformation and application of digital services. Particular consideration should be given to most vulnerable societies to avoid a further widening of the digital divides.

It is important for countries to undertake structured efforts to create and harness the benefits of digital economy in order to realize greater job creation, increase country competitiveness, allow for greater diversification and catalyze innovations in service delivery to improve the lives of their citizens.

For the enterprises, an unforeseen byproduct is an even greater urgency for agility, adaptability and transformation. Business models are being disrupted while the digitalization of the economy is accelerating as new technologies and services serve a reshaped workforce. Going digital in and of itself isn't a panacea to all that ails businesses in the current economic environment.

Among the many trends that COVID-19 has accelerated, two stand out: calls are rising for companies to lead in addressing societal challenges, and the marketplace is indicating that companies must adopt digital business models at their core to compete. So, in a few years, it is possible that no one will be speaking of "digital transformation" because the term will have become irrelevant: Non-digital businesses will simply not exist. To avoid becoming one of those dying businesses, organizations must embrace digital transformation now.

Five important takeaways emerged from the discussion:

1. ***Deploying adequate infrastructure*** to support the development and use of various digital platforms in the public sector to accelerate service delivery and citizen engagement is absolutely critical.

2. ***Developing at a national level digital content and services***—such as eHealth, e-Education and digital government applications—to create a culture of digital transactions, and an understanding of data-driven development, is just as important.

3. ***Skilling up and re-skilling the workforce***, particularly civil servants, educators, private sector employees, and IT workforce, in order to adapt to the 'new normal' is imperative. Robust curriculum must be designed as well as targeted learning paths to develop competitive sector-specific skills, through schools, universities, private sector and public service academies. Inclusion of women and vulnerable youth in digital skills programs is a key. Digital skills are indeed critical to ensure uptake of digital content and services.

4. ***Realigning digital economy strategies with local contexts*** to harness the full power of technology in the Fourth Industrial Revolution is essential. Countries must consider contextual use of data science, cloud computing, artificial intelligence and advanced digital analytics.

5. ***Overall growth in digital services can serve as recession proof and growth opportunity*** in resource constrained macroeconomic conditions (*World Bank Blog, 2020*).

Digital technology offers this potential: new ways to create new value for all stakeholders, while making business models more inclusive, sustainable and trustworthy. With innovation come new technologies and complexity, raising the

profile of the best service and support partners for companies looking to re-establish themselves in a new, post-COVID competitive landscape.

## **CONCLUSIONS**

As COVID-19 cases have risen, social and economic uncertainty has increased, generating economic crisis. The COVID 19 crisis has affected every segment of life and all vital systems, ranging from healthcare, security, education and training, the judiciary, economy and movements in the world markets, commerce, energy and transportation, to culture and sports. In this unprecedented fight against COVID-19, digital technologies offer the only opportunity for governments, individuals and businesses to cope with social distancing, ensure business continuity, and prevent service interruptions.

This digital mandate is not new; it's simply been brought into sharp focus. Prior to the pandemic, a paradigm shift towards digitization and servitization of the economy was already underway. Current events have accelerated the paradigm, as evidenced by the marked shift in spending towards digital businesses.

Digital transformation is more necessary during this crisis, not less. But that doesn't mean it will look the same as it did before the pandemic. Resources, both in terms of talent and money will likely be constrained. Digital initiatives may need to be reprioritized based on relevance in the current environment. New problems and opportunities may come to light with greater urgency. For some businesses, the forces of disruption may be so great that the long-term strategic vision will need to be re-examined. And any digital transformation roadmap that does not deliver value at every increment will need to be reimagined. The key is continuing to experiment and innovate with digital solutions front and center. With the right approach, businesses can come out of the crisis stronger, more agile, and more customer-centric than before.

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## **DISTINGUISHING TORTURE FROM ILL-TREATMENT: CONSEQUENCES FROM PSYCHOLOGICAL TORTURE**

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### **Abstract**

Interpretation of Article 3 of the European Convention on Human Rights (ECHR) “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*” has shown to be quite complexed due to the lack of torture definition and distinction between torture and other forms of ill-treatment. Many Governments would consider it to be a much more serious stigma if they are found guilty of torture than if the finding is one of inhuman or degrading treatment. Nevertheless, although they all fall under the scope of Article 3 ECHR, the borderline between them matters to the victims. This paper will try to explain the distinction between torture and ill-treatment through the landmark cases of the European Court of Human Rights in Strasbourg – Denmark, Norway, Sweden and the Netherlands v. Greece (1969), Ireland v. the United Kingdom (1978) and Selmouni v. France (1999). Moreover it will emphasize psychological torture as a form of torture which does not leaves scars or visible marks, thus it is extremely hard to detect as torture.

**Keywords:** torture, ill-treatment, degrading punishment, inhuman treatment, psychological torture and long-term effects.

### **INTRODUCTION**

Prohibition of torture and other forms of ill-treatment has been considered in the framework of Article 3 ECHR without addressing the fact that there is difference between torture and inhuman or degrading treatment or punishment. Mainly, this is due to the lack of torture definition in the ECHR and lack of jurisprudence. This paper will try to explain and to set the borderline between torture and other forms of ill-treatment through the landmark cases of *Denmark, Norway, Sweden and the Netherlands v. Greece, Ireland v. the United Kingdom and Selmouni v. France*. Moreover, it will explain the meaning of psychological torture is lacking clear signs of abuse, without visible marks which makes it especially difficult to establish and extremely complicated to document torture, the recovery of torture victims and their reassessment in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Istanbul Protocol). Furthermore, the paper will discuss the effects of psychological torture especially those that produce long-term effects and touches the mind and soul of the torture victim. The most important is to emphasize the need for condemnation of all forms of ill-treatment

especially torture as most severe and psychological torture where mental suffering is much more pervasive and likely to persist compared to physical injuries.

### **INTERPRETATION OF ARTICLE 3 ECHR**

Article 3 of the European Convention on Human Rights (1950) which states: *“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”* enshrines one of the most important inviolable human rights, a customary international norm from which derogation is impossible. However, it does not give explanation of torture, nor to other forms of ill-treatment. According to Cassese it is one of the most difficult norm of ECHR to explain and interpret due to the fact that it prohibits in very strong terms torture and in the same breath two other classes of misbehavior: inhuman treatment or punishment and degrading treatment or punishment and because it provides no clue as to the meaning and purport of the proscribed action (Cassese 2008, 225). Thus defining phenomena like torture and other forms of ill treatment is being a challenge especially for the former European Commission of Human Rights and the European Court of Human Rights (ECtHR, the Court). Specifically the lack of torture definition has created a gap in interpretation of Article 3 ECHR, the consequences of its violation and difference between torture and other forms of ill treatment. The jurisprudence of these two bodies throughout the years has gradually enlarged the scope of Article 3 ECHR and tried to explain the borderline between torture and inhuman or degrading treatment or punishment. However, their opinions in some cases clashed with completely contradictory explanations, but in that ways they shaped the interpretation of Article 3 and occasionally admitted its own ‘errors’ or ‘misjudgments’ in particular cases which will be elaborated bellow in this paper.

The field of torture prohibition, prevention and redress has been explained by the first most important definition of torture given in the UN Convention against Torture which cited the conceptions of torture and ill-treatment. Article 1.1 defined the terms ‘torture’ as: *“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions”* (UNCAT 1984). This definition of torture points when ill-treatment amounts to torture and in the same time explains the borderline between torture and other forms of ill-treatment

#### ***Distinction between torture and other forms of ill treatment***

The distinction between torture and inhuman or degrading treatment or punishment enables the simultaneous pursuit of the two fundamentally different modes of international norm implementation, combining a narrow exposure of individual official to criminal prosecutions in foreign courts with a broad state responsibility for the decent treatment of all detainees under all circumstances (Roth 2008, 219). Nonetheless, although torture and other forms of ill-treatment have been

largely interpreted synonymously, their concepts may be defined in various ways. The prevalence of constitutional provisions prohibiting torture and its cognate concepts has acted as an invitation to courts to engage in cross-jurisdictional judicial dialogue. This dialogue is often strongly influenced by the developments in public international law, the evolution and considerations of ECHR as a living instrument.

Consequently to the fact that ECHR does not give definition of torture nor explains the difference between torture and other forms of ill-treatment, the Commission and the Court have developed a complex and extensive body of jurisprudence to determine the constituent elements of these form of abuse. They first stated that the category of inhuman treatment or punishment is more general than that of torture: torture constitutes but one instance - a particularly serious and aggravated one – of inhuman treatment or punishment. While these two classes can in a way be grouped together, degrading treatment or punishment constitutes a category by itself (Cassese 2008, 229). According to Evans and Morgan there is a hierarchy between torture, inhuman and degrading treatment or punishment. They refer to a progression, starting with degrading treatment. Once ill-treatment reaches a certain threshold, it becomes inhuman. Torture is the most serious form. It is ‘at the apex of a pyramid of suffering’. Torture is an aggravated form of inhuman or degrading treatment and has a purpose, such as obtaining information or a confession, or to punish the victim (Evans and Morgan 1998). According to the Commission at least three elements are required for there to be a breach of Article 3 ECHR such as: the intent to ill-treat, a severe suffering (physical or psychological) and the lack of any justification for such suffering.

The ECtHR in developing its own jurisprudence, reiterated that an act of ill-treatment, whether is torture, inhuman or degrading treatment or punishment must attain a minimum level of severity. The assessment of this threshold of severity is made in regard of the specific circumstances of the case which the Court considers as following: duration of treatment; physical effects of treatment; mental effects and sex, age and state of health of the victim (*Ireland v UK 1978*). Making distinction between torture and inhuman or degrading treatment or punishment is exceptionally complex because all these forms are prohibited. There does not exist such a situation in which torture would be prohibited but another form of ill-treatment allowed. They are all sanctioned, but the borderline between them matters to the victims and especially this nuance if the prohibited act is considered as torture or other less aggravated form. Once the Court has determined that an act falls within Article 3 ECHR, it will then define whether the treatment is ‘severe’ enough to constitute torture. Actually, the first problem appears in identifying the level of severe suffering, whether it is constituted of physical or psychological suffering or combination of both of them. Physical signs of torture can be easily detected, while the psychological suffering is more complex because at the beginning is not manifested with external marks. In most of the cases of psychological torture, effects and ‘mind injuries’ appear after the suffering and many medical experts and psychiatrists define psychological torture as ‘*an assault on the mind*’.

Having in mind the above mentioned, it’s not just hard to make distinction between torture and inhuman or degrading treatment or punishment in the

framework of Article 3 ECHR, but it is exceptionally difficult to distinct forms of torture, whether it is physical or psychological and how we can determine the suffering in psychological torture. How we can ‘measure’ psychological torture when we cannot see the wounds or the duration especially when it can last for years after the act of torture has been committed – known as long-term effects of torture?

### **STRASBOURG JURISPRUDENCE IN MAKING DISTICTION WITHIN ACTS CONTAINED IN ARTICLE 3 ECHR**

Cases of actual torture are the gravest violations of Article 3 ECHR, but the protection is against many different types of assault on human dignity and physical integrity. The Commission and the Court through the past decades has carefully built a jurisprudence in respect of Article 3 ECHR making distinctions between these forms, but in the same time confronting its opinions over the gravity of the committed act.

The intensity of pain or suffering caused by torture first received attention in a 1969 inter-state case brought by Denmark, Norway, Sweden and the Netherlands against the Greek military government. There the Commission divided Article 3 overall prohibition into a three-part typology, defining ‘inhuman treatment’ as covering ‘at least such treatment as deliberately causes severe suffering, mental or physical, which in particular situation is unjustifiable’. Treatment was degrading if it ‘*grossly humiliates a person before others or drives him to act against his will or conscience*’. Finally, the Commission continued ‘*torture is often used to describe inhuman treatment, which has a purpose, such as obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment*’. (Denmark et al v. Greece, 1969) Consequently, the finding of the Commission beside torture are related to inhuman treatment or punishment inflicted by the Greek authorities in some instances. It held in particular that in the Athens Security police premises in Bouboulinas Street, the conditions of detention in the basement – where persons arrested for political reasons were held – were contrary to Article 3 ECHR. In fact the Commission accepted that the severity of pain or suffering could distinguish inhuman treatment from other, potentially justifiable treatment, but it was the purpose of the conduct that was of paramount importance in distinguishing between torture and inhuman or degrading treatment or punishment. Both involved suffering, but whereas ‘severe’ suffering might, in certain instances, be justifiable – for example, shooting a fleeing suspect in the leg if it was the only way to apprehend him – torture could never be justified since it contained an additional purposive element i.e. ‘the obtaining of information or confessions or the infliction of punishment’ The commonest form were severe beatings and kicking on all parts of the body, including the head and the genital organs. “*Falanga*” (beating of the feet with a stick or bar) was also used. (European Commission on Human Rights Decision 1970).

The Greek case shall be remembered as a model for demonstrating both the possibilities and the political limitations of the international protection of human rights. On the one hand, the existence of the ECHR enabled the violations of Article

3 and the other provisions to be investigated and established by explaining the meaning of Article 3 and making distinction between torture and inhuman or degrading treatment or punishment.

The second inter-state case *Ireland v. UK* underlined the different points of view of the Commission and the Court regarding the issue of what constitutes torture and what conduct amounts to torture. Actually the case concerned the use of the so-called five techniques (wall-standing; hooding; subjection to noise; deprivation of sleep and deprivation of food and drink) by the Royal Ulster Constabulary on Irish Republican Army (IRA) suspects in Belfast (Northern Ireland) in 1971 (Stefanovska 2019). The Commission considered that the purpose of using the five techniques was to obtain information. Moreover, the Commission viewed that the combined use of the five techniques unanimously amounted to torture (European Commission on Human Rights Report, 1976, §167). The Commission was triggered by the nature of sensory deprivation and the practice of all five techniques as a sophisticated method of breaking their willpower (ibid, § 792). Paradoxically, the ECtHR (by a 13:4 vote) disputed that the five techniques amounted to torture. Eventually, they were classified as a practice of inhuman and degrading treatment (European Court of Human Rights, 1978, §167-8). According to Rodley and Pollard, that was unsatisfactory reasoning and a distinction should have been made between torture and other ill-treatment; the Court found a lack of evidence for any “special stigma” attached to the interrogation techniques, therefore the threshold to determine the practices as torture was not met (Stefanovska 2019).

Furthermore, Judge Zekia expressed doubt regarding whether the Court was justified in disregarding the unanimous conclusions of the Commission in respect of torture, which had not been contested by the representatives of both states. He stated that the word “torture,” included in

Article 3 ECHR, is not capable of an exact and comprehensive definition (Neziroglu 2007). Judge Fitzmaurice stated, “*Article 3 ascribes no meaning to the terms concerned and gives no guidance as to their intended scope*” (European Court of Human Rights, 1978: *Ireland v. UK*). However, Judge Zekia also disagreed with the view that the intensity of physical or mental suffering is a requisite for a case of ill-treatment to amount to torture.

Notably, it is important to indicate that Istanbul Protocol did not exist at the time of the initial hearing. It is likely that this influenced the Court’s original judgment, which was based on the consideration of the severity of the methods and speculative assumptions regarding the severity of suffering in the absence of thorough medical and psychiatric documentation. However, in the request for revision in 2018, the Court could have reassessed their original verdict, based on assessments of the victims using the Istanbul Protocol, to evidence long-term permanent damage suffered by the Hooded Men. They elected not to do so. With this, the ECtHR missed a historic opportunity to: establish a clear distinction between ill-treatment and torture by giving full consideration to the intentionality criterion; consider the suffering criteria according to present day conditions; and to clarify its position in relation to the use of the five techniques and other torture techniques. (Stefanovska 2019) One important question that remains unanswered is whether the decision not to re-open the case will influence on an ongoing basis,

other state governments to rely on this judgment as a basis to validate acts that are now considered as torture?

In 1999 the decision brought in the case of *Selmouni v. France* changed the perspective in respect of the distinction between torture and other forms of ill-treatment. The Commission found medically certified trauma on various parts of the body as proof of torture in the form of beatings over a period of days, involving punches, kicks, and blows with a truncheon and a baseball bat (ECtHR, 1994: *Selmouni v. France*). The Court unanimously agreed, using diction that marks a departure from the language used in the *Ireland v. the United Kingdom* case; it was observed that these acts were violent and would be heinous and humiliating for anyone, irrespective of their condition. It also found that all injuries, when taken together, established the existence of physical and mental pain and suffering. Moreover, the Court reiterated that sustained beatings leaving evidence of physical injury (acts it would have previously categorized as only “inhuman”) now constitute torture. The Court stated: *having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present day conditions” . . . the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future.* (Ibid, § 101) It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

## **DEFINING PSYCHOLOGICAL TORTURE**

The crucial component which makes distinction between physical and psychological torture is the lack of visible abuse or marks on the torture victim thus making psychological torture extremely hard to detect and establish. Unlike its physical variant, psychological torture is elusive, lacking clear signs of abuse and greatly complicating any investigation and prosecution. With no visible marks to indicate the degree of severity, psychological torture is particularly vulnerable to the definitional challenges inherent to any findings of torture. (McCoy 2012) However the absence of physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars (Istanbul Protocol 2004).

Even psychological methods which do not amount to ill-treatment when considered in isolation, amount to inhuman or degrading treatment or torture, when applied in conjunction with other techniques, cumulatively and/or over a long time. According to Reyes, psychological torture can relate to two different aspects of the same entity. On the one hand, it can designate methods – that is in this case the use of ‘non-physical’ methods. While ‘physical methods’ of torture can be more or less self-evident, such as thumbscrews, flogging, application of electric current to the body and other similar techniques, ‘non-physical’ means a method that does not hurt, maim or even touch the body, but touches the mind instead. (Reyes 2007, 594) The starting point in defining torture is having in mind the severe pain and suffering of the victim. This lead us to the physical and psychological torture which

both contain physical and mental suffering thus making it quite difficult to put a borderline between physical and psychological torture. However, the starting point between them should be the needed time for healing. While in physical injuries produced by torture are likely to heal, mental suffering is much more pervasive and likely to persist.

Nora Sveaass, a prominent psychologist and former member of Committee against Torture, has written that psychological torture or ill-treatment is *'the process by which psychological pain is transformed into humiliation and dehumanization, where the essence of being human-namely personal agency, values, emotions, hope, relations and trust – is under attack'*. (Sveaass 2008). Moreover, psychological methods which are used in order to achieve the above mentioned 'attack' include: sleep deprivation; solitary confinement; fear and humiliation; severe sexual and cultural humiliations; the use of threats induce fear of death or injury and many other techniques.

Both physical and psychological effects of torture are elaborated in the Istanbul Protocol. (IP 2004) The Istanbul Protocol considers virtually all aspects of torture and its consequences and establishes a procedure for governments or independent bodies to conduct a standardized investigation of the use of torture and in the same time pointing that torture, to be qualified as such, need not leave any visible scars.

### ***Consequences from psychological torture***

Psychological torture can be more damaging and cause more severe and long-lasting damage than the pain of physical torture. Therefore, long term physical effects of torture include scars, headaches, musculoskeletal pains, foot pains, hearing loss, dental pain, visual problems, abdominal pain, cardiovascular/respiratory problems, sexual difficulties and neurological damage.

Unlike other forms of trauma, the primary aim of torture is to effect a specific psychological change in each person. The desired effect will vary for different people in different situations. This also means that the effects of torture may differ from short to long-term effects. The psychological symptoms which are reported in torture may be divided into three groups: cognitive, psychological and neurovegetative symptoms. Psychological symptoms include confusion/disorientation; memory disturbance; impaired reading and poor concentration. Psychological symptoms refer to anxiety; depression; irritability/aggressiveness; emotional lability and self-isolation/social withdrawal. While neurovegetative symptoms indicate to lack of energy; insomnia; nightmares and sexual dysfunction. (Turner and Gorst-Unsworth 1993)

Both physical and psychological torture compromise the mind-body integrity and produce physical and functional changes in the brain that can be identified through neuropsychological testing and neuroimaging. (Fields 2008) According to Leach, assaults on the mind can be divided broadly into three categories: psychological (isolation; sensory deprivation; sensory overload; sleep deprivation and temporal disorientation); psychophysiological (thermal and stress positions) and psychosocial (cultural humiliation and sexual degradation). (Leach 2016). This means that depending from the type of psychological torture, the effects

may vary and depend not only from the circumstances of each torture case, but also from the victim imposed to torture. For example, stress positions can lead to long term or permanent damage to nerve, joint and the circulatory system, causing chronic pain and restriction in movement. Furthermore positional torture involves being stressed such as having wrists bound and being suspended from hooks in the ceiling (Fields 2008). In some aspects of psychological torture, the important factor is not the pain itself, but the person's perception of that pain. This means that some victim may resist longer being subjected to torture, while other in the first instance of torture may be 'destroyed' and faced with long-lasting effects from torture or even never forget the acts of torture.

The common psychological harm of significant durations in many torture cases has been identified to be the post-traumatic stress disorder (PTSD). This diagnosis however, can only be made if the symptoms have been present for more than one month and requires suitable conditions and sufficient time for interviewing the person. Specifically for this manner, the Istanbul Protocol is critical for evidencing torture and covers not only explanations regarding different torture methods, forensic documentation of torture, but also emphasizes the process of recovery of torture victims and their resocialization. (IP 2004 §142). The presence of psychological sequelae in torture survivors, particularly the various manifestations of PTSD, may cause the torture survivor to fear experiencing a re-enactment of the torture experience, thus careful approach and medically supported documents are essential in identifying psychological torture and its effects.

Psychological consequences from torture occur in the context of personal attribution of meaning, personality development and social, political and cultural factors. Thus, the intensity of suffering also depends from many factors. Indeed, it has been proven that psychological torture may produce physical and mental suffering, but the effects of torture are related to several segments – curing the mind and soul from psychological torture which in some cases have long term consequences.

## **CONCLUSION**

Torture and ill-treatment are still all too widespread across the globe, very few people are still held to account for its infliction, and survivors are all too often, despite the best efforts of many activists and professionals, denied the support, protection and rehabilitation that they need. Even in the XXI<sup>st</sup> century we are faced with problems such as lack of accountability especially when torture is used as justification in the 'war of terror'. Moreover, we should be worried with the evolution of torture techniques specifically those one that leave no physical marks, but instead break the mind and soul of the victim. Perpetrators often attempt to justify their acts of torture and ill-treatment by the need to gather information. However, there is a great difference between techniques which are allowed in interrogations with the techniques which are meant to produce physical and mental suffering on the torture victim. Specifically for this manner, it is important to draw distinction between torture and inhuman or degrading treatment or punishment, because the nuances matter to the victim beside the fact that all these acts fall under

the scope of Article 3 ECHR. Due to these reasons, torture and especially psychological torture should be punished without any possibility of derogation or lack of impunity by torture perpetrators.

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## THE RULE OF LAW PRINCIPLE THROUGH THE PRISM OF THE CORRUPTION PERCEPTION INDEX: NORTH MACEDONIA VS. EU-28

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### ABSTRACT

The Rule of Law (RoL) is a condition sine qua non for the democratic capacity of modern states. Specifically, the principle of the Rule of Law is articulated through several elements: constraints on government, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.

**Subject:** The subject of this paper is to examine the Rule of Law principle in the Republic of North Macedonia and the member states of the European Union through the analysis of the corruption perception index during the period 2010 - 2019.

**Method:** The study of this paper's subject will be primarily realized by applying the method of normative analysis, as well as the methods of comparison, analogy, and case law method. Besides, the study employs descriptive statistical analysis, regression analysis, five-number summary statistics, as well as an evaluation of the Weighted Euclidean (statistical) distance.

**Aim:** The purpose of this paper is, throughout a comparative analysis of CPI data for North Macedonia and EU-28 member states, to determine the tendency of this index in these states over the last decade.

**Conclusion:** In the conclusion of the study, we provide guidelines and propose mechanisms for improving the CPI ranking and score of North Macedonia, as one of the important preconditions for respecting the Rule of Law in the country.

**Keywords:** *Rule of Law, CPI, corruption, North Macedonia.*

## INTRODUCTION

The concept of the Rule of Law is founded on the idea that governmental decisions should be made by applying known legal principles, and that every citizen is subject to the law and nobody stands above it (Thematic Evaluation of Rule of Law, Judicial Reform and Fight against Corruption and Organized Crime in the Western Balkans – Lot 3 Service Contract Ref. No 2010/ 256 638, Final Main Report, EU, 2003, p.6). The enforcement of the Rule of Law can be measured and observed through three major issues in a certain state:

- a) judicial reform;
- b) fight against corruption, and
- c) fight against organized crime.

These are seen as particularly important challenges across the Western Balkans that need to be successfully addressed for these states to become members of the EU (Thematic Evaluation of Rule of Law, Judicial Reform and Fight against Corruption and Organized Crime in the Western Balkans – Lot 3 Service Contract Ref. No 2010/ 256 638, Final Main Report, EU, 2003, p.6).

The fight against corruption was also a NATO membership and the Council of Europe membership essential requirement for the Western Balkans states.

Corruption is an international phenomenon that has particularly negative implications for the democratic capacity and economic development of modern states.

Specifically, corruption has a destructive impact on the democratic systems, as it distorts the democratic decision-making process and undermines the legitimacy and the credibility of governments. As Heywood has observed, corruption attacks “some of the basic principles on which democracy rests – notably, the equality of citizens before institutions ... and the openness of decision making” as well as “... corruption undermines the democratic rule of law” (Szarek-Mason, 2010, p.20, 137).

On the other hand, the economic costs of corruption can be seen in both individual transactions and their extended consequences (Johnston, 2005, p. 26).

Until the nineties of the last century, corruption was considered a national issue, which did not require international intervention. But, in the 1990s, as Szarek-Mason has pointed out, it attracted considerable attention and turned into a truly global political topic (Szarek-Mason, 2010, p.21). According to her, this can be explained by four key factors:

- a) the end of the Cold War;
- b) globalization;
- c) the rising influence of NGOs and;
- d) a wave of bribery scandals worldwide (Szarek-Mason, 2010, p.21).

When observing corruption as a serious legal, economic, social, political, and moral blight (Argandona, 2006, p.2), the consideration of the term integrity should be taken into account. Integrity and corruption are two opposing phenomena, i.e. any corrupt action implies a violation of integrity (National Strategy for Prevention of Corruption and Conflict of Interests of the Republic of North Macedonia, 2020, p.3). The concept of integrity may be analyzed from the

individual and institutional aspects. Institutionally, “the integrity pillars” of the state are as follows:

- a) political willingness;
- b) administrative reforms;
- c) “watchdog” agencies (Anti-corruption agencies; Ombudsman; Auditor general)
- d) parliaments;
- e) public awareness/involvement;
- f) the judiciary;
- g) the media;
- h) the private sector (Andrei, Matei, Rosca, 2009).

In this context, some authors emphasize the institutional roots of corruption under the presumption that changes in institutional structures will change the incentives for self-dealing (Kornai, Matayas, Roland, 2009, p. 57).

## DEFINING THE CORRUPTION

The etymological origin of the term corruption comes from the Latin word “*corrumpere*”, which means mar, bribe, destroy. It is composed of the syllables of the words: “*cor*”(altogether) and “*rumpere*” (to break) (Oxford Learner’s Dictionary).

Defining corruption is a very complex and intriguing task. It is an indisputable fact that corruption has two dimensions: moral and legal. For the purposes of this paper, only the legal dimension of corruption will be subject to normative analyses.

Tiihonen points out that “*corruption is a disease of public power and an indication of bad governance; it undermines the rule of law and weakens the institutional foundation of political stability, social cohesion and economic growth of the country*” (Tiihonen, 2003, p.1).

Grenberg considers that “corruption” and “evil” are words with moralistic overtones, most often equated with the universal attribution to the human species of pride, arrogance, and a crass self-interest (Grenberg, 2005, p.43).

Elliott gives a broad definition for corruption: “...as the abuse of public roles or resources or the use of illegitimate forms of political influence by public or private parties” (Elliott, 1997, p.26). Morris considers that “*corruption is the illegitimate use of public power to benefit a private interest*” (Morris, 1991).

Kaufmann and Vicente propose a new explicitly micro-founded definition of corruption: “*it is viewed as a collusive agreement between a part of the agents of the economy who, as a consequence, are able to swap (over time; we present a repeated game) in terms of positions of power (i.e. are able to capture, together, the allocation process of the economy)*” (Kaufmann and Vicente, 2005, p.3). Chen points out that “*corruption is dishonest behavior by those in positions of power, such as managers or government officials*” and it can include giving or accepting bribes or inappropriate gifts, double-dealing, under-the-table transactions,

manipulating elections, diverting funds, laundering money, and defrauding investors (Chen, 2020, p.1).

The OECD, the Council of Europe, and the UN Conventions do not define “corruption”. Instead, they establish the offenses for a range of corrupt behavior. Hence, the OECD Convention establishes the offense of bribery of foreign public officials, while the Council of Europe Convention establishes offenses such as trading in influence, and bribing domestic and foreign public officials. In addition to these types of conduct, the mandatory provisions of the UN Convention also include embezzlement, misappropriation, or other diversions of property by a public official and obstruction of justice (OECD, A Glossary, 2007, p.19).

The European Parliament (EP) provided its first definition of corruption in 1995 as “*the behavior of persons with public or private responsibilities who fail to fulfill their duties because a financial or other advantage has been granted or directly or indirectly offered to them in return for actions or omissions in the course of their duties*” (Szarek-Mason, 2010, p. 7). On the other hand, when defining corruption for EU policy, the European Commission (EC) distinguished a narrow criminal law definition and a broader concept of corruption used for purposes of prevention policy (Szarek-Mason, 2010, p. 9).

In this regard, Transparency International promotes a frequently-used definition of corruption, with a broad range of activities: “*as the abuse of entrusted power for private gain*” (<https://www.transparency.org/en/what-is-corruption#>).

## **MEASURING THE CORRUPTION**

Generally, the incidence of corruption can be measured in three basic ways: (a) by the number of prosecutions, (b) by the perception, and (c) by the experience. Each way has its shortcomings (Szarek-Mason, 2010, p.12). The literature of specialty uses a series of indices and ratios for corruption levels measuring, each of them expressing a certain aspect of the corruption phenomenon, for a number of selected countries and for different lapses of time. One of the first indices used in corruption measuring was published in the International Country Risk Guide (ICRG). The second index used in measuring the level of corruption is the Corruption Perception Index, published yearly by Transparency International (TI). The third index, Corruption Control (CC), was proposed by Kaufmann, Kraay, and Mastruzzi (2003), and proposes other strategies of aggregating indices measuring corruption, than those used by Transparency International. It should be also notified the fact that other institutions or organizations use some other methods for measuring corruption, rather than those mentioned above (Andrei, Matei, Rosca, 2009).

### **Data and methodology**

Transparency International is a global independent and politically non-partisan movement created in 1993 with a single vision to set the world free of corruption (<https://www.transparency.org/en/what-is-corruption#>). By giving voice to the victims and witnesses of corruption, its members work together with

governments, businesses, and civil society to stop the abuse of power, bribery, and secret deals. Now present in more than 100 countries worldwide, Transparency International has achieved much to stop corruption, including:

- a) The creation of international anti-corruption conventions;
- b) The prosecution of corrupt leaders and seizures of their illicitly gained riches;
- c) National elections won and lost on tackling corruption;
- d) Companies are held accountable for their behavior both at home and abroad.

First launched in 1995 by Transparency International, the Corruption Perceptions Index (CPI) has been widely credited with putting the issue of corruption on the international policy agenda. Each year, Transparency International assesses countries and territories on how corrupt their public sectors are seen to be. As the Corruption Perceptions Index sends a powerful message throughout the world, national governments have been forced to take notice and act correspondingly. CPI represents a powerful, yet effective framework intended to provide direction for national policymakers on the factors they need to consider in their national strategies for building up societies free of corruption.

Besides the fact that the Corruption Perceptions Index is an integer value, it is a composite measure calculated based on a number of surveys that assess a specific country's performance vis-à-vis the corruption issues. A country/territory's CPI score relates to perceptions of the degree of corruption as seen by business people and country analysts. It indicates the perceived level of public sector corruption on a scale of 0 to 100, where 0 means that a country is perceived as highly corrupt and a 100 means that a country is perceived as very clean<sup>1</sup>. On the other hand, a country/territory's CPI rank indicates its position relative to the other countries/territories included in the index. Ranks can change merely if the number of countries included in the index changes.

This paper uses the relevant data sets<sup>2</sup> provided by the Transparency International annual reports (Transparency.org, 2019b) as a secondary data source, referring to the last decade (i.e. the period from 2010 to 2019). The aim is to carry out two types of analyses utilizing the CPI ranks and scores. The first one refers to an analysis of the CPI ranks for North Macedonia to assess the country's overall position and performance relative to those of the EU-28 countries. The second type of analysis estimates the performance of North Macedonia's CPI scores vis-à-vis the EU-28 member states.

The analysis of the CPI ranks is based on the utilization of descriptive statistical methods, including visualization of the Macedonian CPI rankings over time, along with the minimum and maximum ranks (EU-28 + MKD), and visualization of the absolute changes in global rankings of EU-28 member states, including North Macedonia (2019 v.s. 2018).

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<sup>1</sup>It should be notified that starting from 1995 to 2011 the CPI score has been measured on a scale from 0 (highly corruptive country) to 10 (very clean country).

<sup>2</sup>The full set of datasets, encompassing annual CPI ranks and scores from 1995 on, are publicly available, and can be freely accessed at <https://www.transparency.org/research/cpi/overview>.

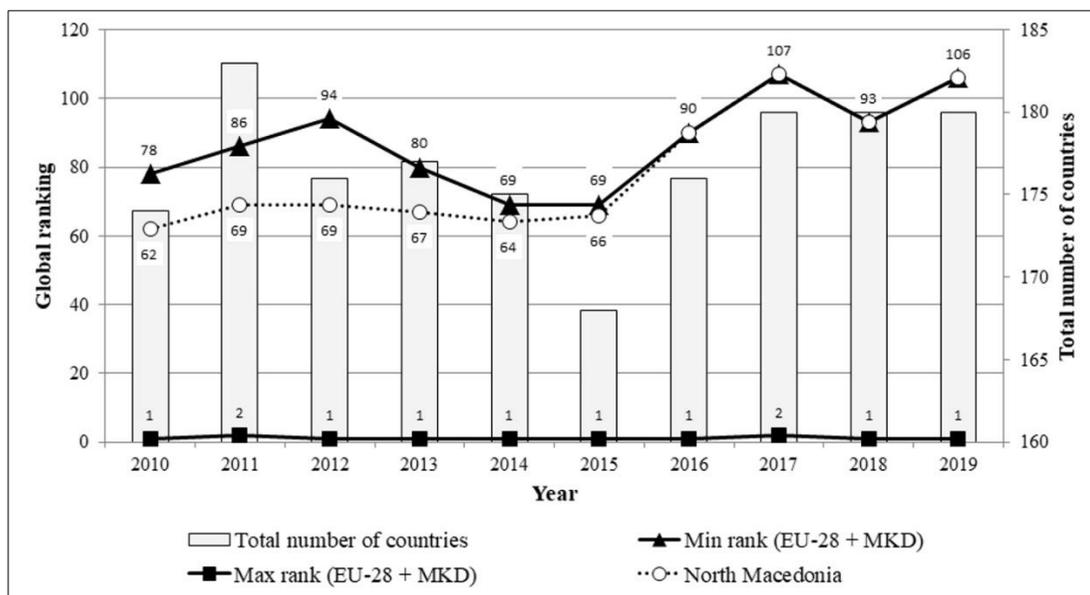
The analysis of the CPI scores starts with the best fit line regression analysis. To visualize the best and worst performers and the inter-quartile range (from the 75th down to the 25th percentile) by particular years, the paper further implements a five-number summary statistics accompanied by a corresponding Box & Whisker plot. Moreover, the article also includes the evaluation of the Weighted Euclidean (Statistical) distance to measure the country's CPI score 'distance' from each EU-28 member state within the temporal dataspace.

## Results

### 1. Analysis of country rankings

Based on the individual CPI scores, Transparency International provides information about countries' global rankings on an annual basis.

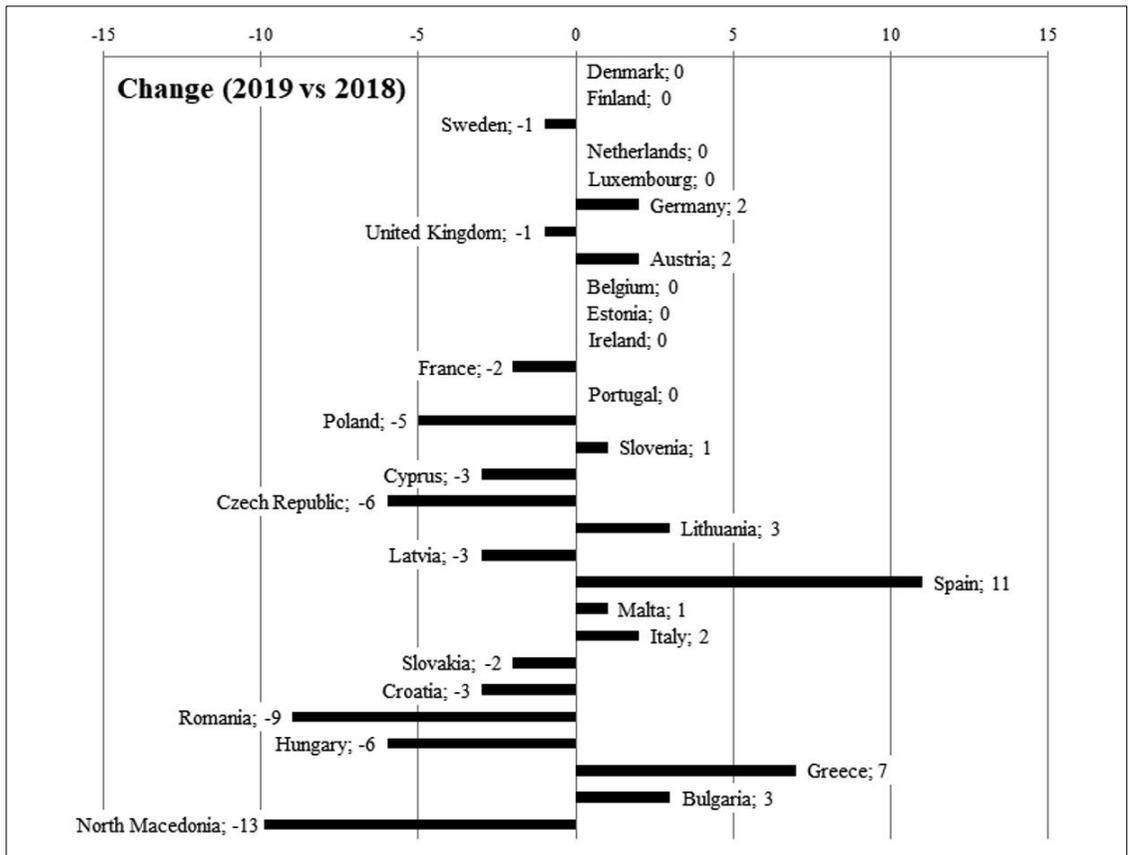
The analysis of North Macedonia's global ranking in the last decade (2010 - 2019) shows that, after the period of relatively stable rankings (2010 - 2015), belonging to a range from #62 to #66, North Macedonia's global ranking becomes worst among the EU-28 members starting from 2016 on (ranks #90, #107, #93, and #106 respectively), as depicted in *Figure 1*.



**Figure 1:** Global rankings of EU-28 countries, including North Macedonia during the last 10 years (2010 - 2019) (Source: Transparency International CPI Dataset, 2010-2019; Authors' calculations and representation)

The last three annual reports take into account an equal number of countries (180), which is a fair base for making comparisons. In 2017, North Macedonia was ranked #107, whilst EU-28 countries' rankings were dispersed from rank #2 (Denmark) to rank #71 (Bulgaria). In 2018, North Macedonia has exhibited great progress of 14 rank points and was ranked #93, whereas EU-28 countries' ranks

range from #1 (Denmark) to rank #77 (Bulgaria). In 2019, North Macedonia's ranking sharply declined from rank #93 to rank #106, while Denmark and Bulgaria persisted to be the best (rank #1) and worst (rank #74) ranked countries among EU-28 members (Figure 2). Such a decrease of 13 ranking points in 2019 is the biggest one among the observed countries. However, it should be notified that such a decrease, despite its high absolute value, is not statistically significant.



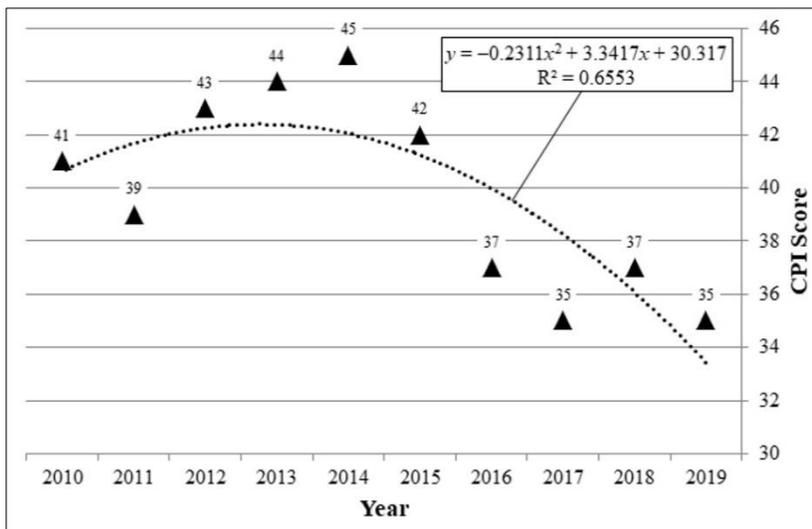
**Figure 2:** Absolute change in global rankings of EU-28 member states, including North Macedonia (2019 vs 2018) (Source: Transparency International CPI Dataset, 2018-2019; Authors' calculations and representation)

## 2. Analysis of CPI scores

The visual inspection of North Macedonia's performance vis-à-vis the CPI scores over the period 2010 – 2019 reveals a dispersion that can be best approximated by a polynomial trendline of a second degree ( $y = -0.2311x^2 + 3.3417x + 30.317$ )<sup>3</sup>, thus presenting a regression model with a highest R-squared

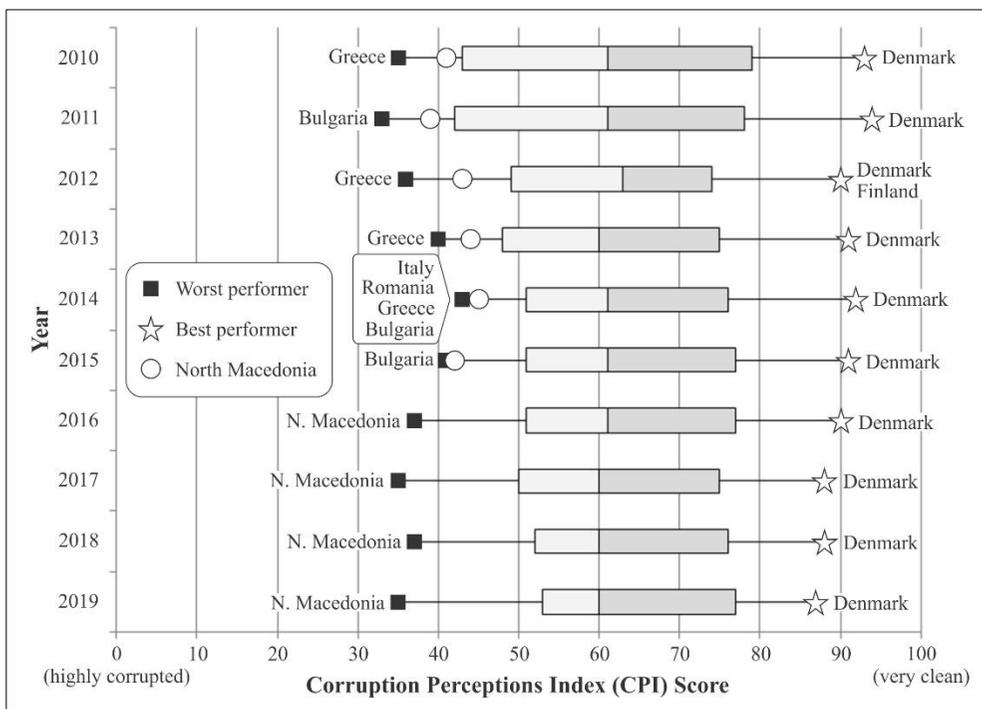
<sup>3</sup>In this equation, the y-axis measures the CPI score, whilst the x-axis measures particular time instances, ranging from  $x = 1$  (refers to 2010) to  $x = 10$  (refers to 2019).

value (65.53%) among all others (e.g. exponential, linear, logarithmic, power, moving average). This means that this model takes into account 65.53% of the variations of CPI scores, which is a relatively high percentage. After reaching the peak CPI score of 45 (on a scale from 0 to 100) in 2014, the country's CPI scores go downwards in the following years, reaching the minimum value of 35 in 2017 and again in 2019 (*Figure 3*).



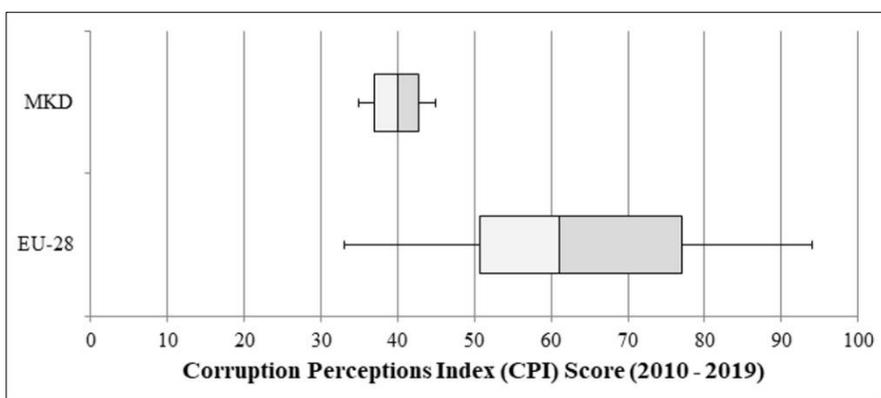
**Figure 3:** North Macedonia's achieved CPI scores (2010 - 2019) (Source: Transparency International CPI Dataset, 2010-2019; Authors' calculations and representation)

To identify the worst and best performers (i.e. the countries with the minimum and the maximum PCI score, respectively), as well as to identify the inter-quartile ranges, we provide a five-number summary statistics of the distribution of PCI scores regarding EU-28 member countries including North Macedonia, by particular years (2010 – 2019). The Box-and-Whisker plot, shown in *Figure 4*, suggests that both North Macedonia and the rest of EU-28 countries are always outperformed by the Nordics (Denmark, Finland, and Sweden), West European countries (Netherlands, Luxembourg, Germany, United Kingdom, Austria, Belgium, Ireland, and France), and Estonia, which all belong to the fourth (Q4) and the third (Q3) quartile in the observed period. Contrary to these, the first quartile (Q1) is mainly comprised of the East European countries (Bulgaria, Hungary, Romania, and Slovakia) and South European countries (Greece, Croatia, and Italy). Besides, it can be noticed that North Macedonia is the worst performer among the group of observed countries during the last four years, i.e. from 2016 onwards.



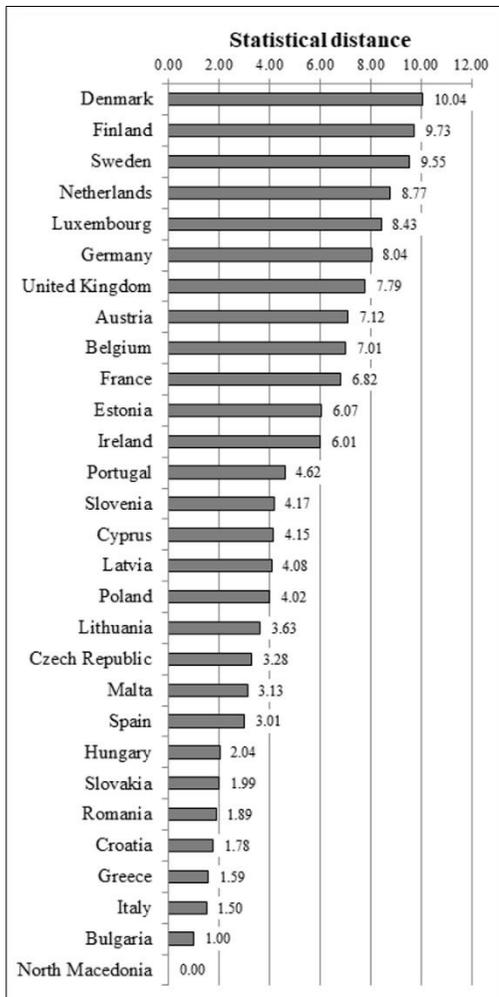
**Figure 4:** Box and Whisker plot resembling the five-number summary of the EU-28 member states and North Macedonia, by particular years (2010 – 2019) (Source: Transparency International CPI Dataset, 2010-2019; Authors' calculations and representation)

Yet another Box-and-Whisker plot, depicted in Figure 5, shows the unparalleled discrepancy in the performance between the group of EU-28 member states and North Macedonia regarding the CPI score during the period from 2010 to 2019. Even North Macedonia's best achieved CPI score (CPI = 45) is far below the value of the first quartile (Q1 = 51) corresponding to the EU-28 member states.



**Figure 5:** Box and Whisker plot resembling the five-number summary of the CPI scores all over the period 2010 – 2019 (Source: Transparency International CPI Dataset, 2010-2019; Authors’ calculations and representation)

To investigate how ‘far’ is North Macedonia’s CPI score performance from each of the EU-28 member states in the observed period, the Weighted (Standardized) Euclidean distance, also known as a Statistical distance, has been used (Figure 6).



**Figure 6:** Statistical distance between North Macedonia and each EU-28 country regarding CPI scores (2010 - 2019) (Source: Transparency International CPI Dataset, 2010-2019; Authors’ calculations and representation)

Visual inspection of the distances confirms previous findings obtained by the five-number summary statistics. The EU-28 countries with the shortest statistical distance from Macedonia are Bulgaria, Italy, Greece, Croatia, Romania,

and Slovakia. Quite the opposite, the Nordics (Denmark, Finland, and Sweden) and Western Europe (Netherlands, Luxemburg, Germany, and the UK) are the most 'distant' countries from North Macedonia.

## CONCLUSION

There is increasing evidence that corruption, defined in general terms as "*abuse of public or private office for personal gain*" (OECD, A Glossary, p.10) undermines the Rule of Law, democratic institutions, and economic development.

The above analyses clearly show that the problems of corruption appeared to be seriously acute in the Republic of North Macedonia, comparing to the EU Member States. At the same time, it can be concluded that the "old" EU Member States have more effective anti-corruption standards and policies as compared to the "new" EU Member States, where corruption remains an ongoing challenge. Namely, the analysis of North Macedonia's global ranking in the last decade (2010 - 2019) shows that, after the period of relatively stable rankings (2010 - 2015), belonging to a range from #62 to #66, North Macedonia's global ranking becomes worst among the EU-28 members starting from 2016 on (ranks #90, #107, #93, and #106 respectively), as depicted in Figure 1. In 2019, North Macedonia's ranking sharply declined from rank #93 to rank #106, while Denmark and Bulgaria persisted to be the best (rank #1) and worst (rank #74) ranked countries among EU-28 members (Figure 2). Such a decrease of 13 ranking points in 2019 is the biggest one among the observed countries. However, it should be notified that such a decrease, despite its high absolute value, is not statistically significant.

The EU's founding values include the rule of law and respect for human rights. An effective (independent, quality, and efficient) judicial system and an effective fight against corruption are of paramount importance, as is the respect for fundamental rights in law and practice (EU Progress Report, p.16).

According to the 2020 EU Progress Report, "*North Macedonia has some level of preparation/is moderately prepared in the prevention and fight against corruption. Good progress has been made as the country consolidated its track record on investigating, prosecuting and trying high-level corruption cases*" (p.21). So, respectively, "*the country has some level of preparation / is moderately prepared to apply the EU acquis and European standards in this area*" (p.16).

In this context, the State Commission for the Prevention of Corruption in its National Strategy for Prevention of Corruption and Conflict of Interests of the Republic of North Macedonia points out the following: "*The risk assessment covered several horizontal areas where strong corruption risks are generated, and at the same time, an assessment was made within several sectors. The assessment covered the following horizontal areas:*

- a) *Public procurement;*
- b) *Employment in the public sector;*
- c) *Inspection;*
- d) *Issuance of various approvals, decisions, licenses, and permits;*
- e) *Awarding grants, subsidies, and other state aid.*

*In addition to these five horizontal areas that are elaborated in the assessment, the working group discussed the following areas that have an impact on the emergence and practice of corruption:*

- a) Financing of political parties;*
- b) Political influence on the process of drafting and adopting legal regulations; and*
- c) Financing of media and civil society organizations.”(p.6).*

In the upcoming period, North Macedonia should undertake serious, complex, and multidimensional anti-corruption reforms to reduce the level of corruption and ensure public confidence in the exercise of power by strengthening integrity, transparency, and accountability in all sectors of society, such as strengthening the integrity and accountability in the public sector, strengthening the supervisory and control mechanisms and digitalization in all sectors of public services.

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## MANAGEMENT OF HUMAN RIGHTS AND FREEDOMS IN TIME OF EPIDEMY COVID 19

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### **Abstract**

The International Law Framework on Human Rights and Freedoms provides opportunities to limit certain human rights in emergencies, especially when it comes to protecting human health. The outbreak of the pandemic with the Covid-19 virus worldwide is one of the reasons that can lead to violation of the Human Rights and Freedoms, which are part of the democratic society.

Some restrictive measures adopted by EU member states may be justified on the basis of the usual provisions of the European Convention on Human Rights concerning the protection of health, however, for exceptional measures it may require derogation of laws regarding the obligations of states under the Convention. Article 15 of the European Convention on Human Rights provides the possibility for derogation for certain obligations arising from the Convention for a specified period of time and under certain conditions, i.e. if there is a "state of emergency", war or other general danger that endangers the lives of citizens.

This paper will analyze the situation in the Republic of N. Macedonia as a consequence of Covid 19 in terms of restricting human rights, according to the European Convention on Human Rights.

**Keywords:** pandemic, freedoms, rights, restriction.

### **INTRODUCTION**

Respect for Human Rights and Freedoms is one of the principles that cannot be waived by countries that have accepted the principles of the European Convention on Human Rights and Freedoms. Although all categories of rights should generally be respected, some of them do not allow any derogations: the Right to Life, except in the context of lawful act of war (Article 2), Prohibition of Torture and Inhuman or Degrading Treatment or Punishment (Art. 3), Prohibition of Slavery and Service (Article 4, paragraph 1) and the rule "There is no punishment without law" (Article 7). There can be no derogation from leaving the death penalty or the right not to be tried or punished twice (Protocols No. 6 and 13 as well as Article 4 of Protocol No. 7).

Even in times of need, the Council of Europe emphasizes that there must be a clear basis for any derogation in domestic law, there must be protection from arbitrariness and it must be strictly necessary to combat the public emergency.

Derogation is a reason for increased oversight of the measures taken by the country for the duration of it and the Secretary General of the Council of Europe, as a depositor of the Convention, must be fully informed of the taken measures, the reasons for those measures, and the moment the measures ceased. to apply. <sup>1</sup>Also, any derogation will be assessed by the European Court of Human Rights ex-post in cases that will be brought before him.

On April 2, 2020, the Republic of N. Macedonia activated the clause of Article 15 of the European Convention on Human Rights.<sup>2</sup> It has become one of the ten countries in addition to Albania, Armenia, Estonia, Georgia, Latvia, Romania, Moldova, San Marino and Serbia.<sup>3</sup>

The fact is that state of the act emergency derogation gives governments the flexibility to deal with emerging threats and use all the power given in the state to alleviate the situation even when certain rights could be restricted as a result. measures. On the other hand, it should be born in mind that most of the measures are taken to prevent the spread of the Coronavirus as part of the deviations provided by the European Convention for the Protection of Human Rights and other international human rights instruments in order to preserve public safety and public health. The bottom line is that absolute human rights are not a subject to derogation under Article 15, not to any other deviations under international agreements.

### **CONSTITUTIONAL RESTRICTIONS IN MACEDONIA**

The Constitution of the R.N.Macedonia<sup>4</sup> in Article 54 stipulates that the Human Rights and Freedoms for people and citizens may be restricted during a state of war or emergency according to its provisions. Restrictions on freedoms and rights may not be discriminatory on the grounds of sex, race, skin color, language, religion, national or social origin, property or social status. Restrictions on freedoms and rights may not apply to the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the legal certainty of criminal offenses and punishments, as well as the freedom of belief, conscience, thought, public expression and religion.

These constitutional standards explicitly state that it is imperative to ensure respect for the rule of law and democratic principles that must prevail in times of emergency. When adopting any measures, it is necessary to respect the principle of legality, the principle of proportionality, the principle of necessity and the principle of non-discrimination.<sup>5</sup>

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<sup>1</sup>Council of Europe, Collection of Tools for Member States, Respect for Democracy, Rule of Law and Human Rights in the Sanitary Crisis Related to KOVID-19, 2020, Available at <https://rm.coe.int/covid-toolkit- ms-mkd / 16809e3c21>

<sup>2</sup>Unfortunately, this procedure was rarely emphasized in public by the relevant institutions.

<sup>3</sup>Its validity was until May 3, 2020. More at <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354>

<sup>4</sup>Constitution of RSM, No. of the Official Gazette: 52/1991, Date of proclamation: 17.11.1991.

<sup>5</sup>Council of Europe, "Respect for Democracy, the Rule of Law and Human Rights in the Contextual Crisis Related to KOVID-19

## **A. The principle of legality**

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The principle of legality obliges each new Regulation with legal force “in state of emergency” to be in accordance with the Constitution and the law, to be subject to re-examination by relevant bodies (in this case- the Constitutional Court.) It is especially important that judges can examine possible human rights restrictions introduced by Legal Powers. We must also mention the mechanism provided by the Council of Europe, which is that there is a possibility of delay, acceleration or group action with certain categories of cases and the preliminary jurisdiction in some cases can be replaced by ex-post judicial control.<sup>6</sup>

### **b. The principle of proportionality**

The principle of proportionality presupposes the adoption of measures that would adequately achieve their legitimate aim. Acting in times of crisis presupposes making quick decisions that, although made with good intentions, do not preclude the possibility of unintended negative consequences. Therefore, before resorting to any measures, the Government is expected to reconsider the existence of an appropriate legal basis and assess whether measures leading to the restriction of human rights and freedoms are strictly necessary in the face of some less stringent alternatives. Although increased restrictions on certain rights may be fully justified in times of crisis, severe criminal sanctions are a matter of concern and must be subject to strict control. Exceptional situations should not lead to over-expression of criminal means. A fair balance between coercion and prevention is also an appropriate way to meet the requirements of proportionality.

### **c. The principle of necessity**

The principle of necessity means that urgent measures can achieve their goal by minimizing the usual rules and procedures of democratic decision-making.<sup>7</sup> Given the rapid and unpredictable development of the crisis, relatively broad legislative delegations might need, however, in some circumstances they should be formulated as closely as possible to reduce the potential for abuse.

### **d. Principle of non-discrimination**

The principle of non-discrimination is very relevant in the current context. When examining the observance of this principle, it is examined whether the measures unjustifiably discriminate different categories of people.

## **Government regulations and their application**

An important aspect of the Regulation with legal force is their application of an intersectional approach which presupposes the provision of solutions that is

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<sup>6</sup>For more see: Council of Europe, "Respect for Democracy, the Rule of Law and Human Rights in the Covid-19 Sanitary Crisis" Collection of Tools for Member States, 2020

<sup>7</sup>The principle of necessity is not directly called in the context of institutional emergency measures, but can be deduced from the requirement of proportionality and the need for urgent measures in the field of human rights - see Venice Commission, Opinion on the draft constitutional law on "Protection of the Nation France's CDL-AD (2016) 006, paragraph 71

measures, which will take into account all aspects of the needs of the citizens. In any case, after the adoption of the Regulations with legal force, the Government should ensure that they are properly communicated to the public with a clear and precise explanation for the adoption of relevant measures, their purpose, reasons for bringing and the expected consequences, which would rule out the arbitrariness of the Regulations.

Legislative regulations and measures taken by the Government should generally be lawful, proportionate, necessary and non-discriminatory, have a limited duration and take the least coercive approach that can protect human health.

### **CHARACTERISTICS IN NORTH MACEDONIA AS A STATE WITHOUT AN ACTIVE PARLIAMENTARY COMPOSITION**

The Regulations with legal force are enacted in order to deal with the causes and consequences of the pandemic. What is specific in the Macedonian society is that everything happens in absence i.e. with no supervision by the Assembly. For these reasons we need to overview the rule of law and the democratic values controlled by other relevant bodies.

It should be emphasized that the importance of the Constitutional Court as only domestic controller whose constitutional competence is the protection of the constitutionality and legality of the adopted Regulations with legal force. In this regard, in addition to several initiatives, the Constitutional Court of R.N. Macedonia for the first time acted on its own initiative (*proprio motu*) assessing the constitutionality and legality of five of the Regulations with legal force and decided to initiate a procedure for assessing the constitutionality and legality of three of disputed Regulations.<sup>8</sup> Also, the Constitutional Court informed that before the Court were submitted initiatives for assessing the constitutionality and legality of all adopted Regulations with legal force and they will be considered by the Court at future sessions. It is important to note that any intervention and attempt to influence the decisions of the Constitutional Court means undermining the single government that is the controller of the executive in this situation.

Another body of the state that must not be neglected is the Ombudsman. He is obliged to act in conditions of disproportionate and discriminatory restriction of human rights, but also of civil society organizations that closely monitor the situation with respect for the human rights in emergency situations and justification of the Regulations with legal force issued by the Government.

Despite the fact that the scope of the measures taken in response to the current threat from Covid-19 and the manner in which they are applied differs significantly from state to state, exceptional measures taken to combat the spread of the virus are likely to raise questions about their potential discriminatory consequences. Due to the low standard of living, poverty and inadequate housing, part of the population faces greater vulnerability, challenges and risks in dealing with the new situation.

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<sup>8</sup>More at: <http://ustavensud.mk/?p=19001>

For example, the right to education as provided for in the Convention (Article 2 of Protocol No. 1) and the European Social Charter (Article 17) should in principle be ensured, although the method of provision requires some adaptation. In our case, it's teaching online tutorials. However, special attention must be paid to ensuring that members of vulnerable groups have the right to education and have equal access to education that is the means and materials to follow such an adapted teaching.<sup>9</sup> In addition to providing funds and materials, it is necessary to provide appropriate conditions for attending online classes, both for students and teachers. Teachers should receive specific guidelines for online teaching from relevant sources with specific recommendations, as well as short training on the proper use of online tools, which would unify the teaching method so that teachers have the opportunity to perform their duties effectively. Persons with disabilities must not be excluded from the educational process that is performed through the use of online teaching, and such an educational approach needs to be inclusive and accessible to all.<sup>10</sup>

Certain forms of discrimination that may be subject to "degrading treatment" are also visible in the provision of appropriate levels of health care to persons deprived of their liberty. This applies to the right to life (Article 2 of the Convention) and the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), as well as the right to health care (Article 11 of the revised European Social Charter).<sup>11</sup> The Convention repeatedly calls on signatory countries to ensure adequate levels of health care for persons deprived of their liberty. The European Committee for the Prevention of Torture (CPT) has issued a Statement of Principles regarding the treatment of persons deprived of their liberty in the context of the Covid19 pandemic.<sup>12</sup> They cover a variety of locations, including police detention facilities, penitentiaries, migrant detention centers, psychiatric hospitals and welfare institutions, as well as various quarantined facilities or zones where people are quarantined in the context of pandemics from Covid-19. Unhygienic and substandard conditions, insufficient medical care, ineffectiveness of legal aid, are just some of the problems that indicate the inhumane and inappropriate treatment of convicts and persons deprived of their liberty. Hence,

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<sup>9</sup>The media reported that more than 800 students from Suto Orizari who attend classes at the "Ramiz and Hamid Brothers" Primary School do not attend classes due to the lack of computers and internet for most children, so the school itself does not conduct classes. The state, by not providing appropriate conditions for all to exercise the right to education, violated this right and caused discrimination against this group of students.

<sup>10</sup>Parents complain that there is no inclusion in the educational process. Looking to get home assistants. There are also no didactic materials in schools, nor appropriate training staff. Statistics show that schools are looking to provide 334 educational assistants, which is 4 times more than the current figure.

<sup>11</sup>3.1 [https://rm.coe.int/covid-toolkit-ms\\_mkd\\_/16809e3c21?fbclid=IwAR2QL9IormKGqNDMW8PJKE XmK0aTKLI8Uq7Zln-HI-94E1C2UpJ74dtZq28](https://rm.coe.int/covid-toolkit-ms_mkd_/16809e3c21?fbclid=IwAR2QL9IormKGqNDMW8PJKE XmK0aTKLI8Uq7Zln-HI-94E1C2UpJ74dtZq28)

<sup>12</sup>See *Hudobin v. Russia* no. 59896/00, 26 October 2006; As stated by the CPT in the Declaration of Principles regarding the treatment of persons deprived of their liberty in the context of the coronavirus pandemic (KOVID-19), "Inadequate level of health care can quickly lead to situations involving the notion of 'inhuman and degrading treatment or punishment'. action "

the question arises as to what measures have been taken to ensure the right to life and the prohibition of torture and inhuman or degrading treatment or punishment. In order to derogate from the convention, the full transparency of the process and a detailed explanation of the need, the basis, the goals, the scope and duration of the state of emergency and the limitations of certain rights are extremely important. In doing so, it should be born in mind that proportionality and necessity are elements that should be observed for the entire duration of derogation.

## CONCLUSION

The comparative analysis for the way in which European countries have restricted the right to move in order to prevent infection and the situation in Macedonia, shows that in our country they are the most drastic,<sup>13</sup> both, in terms of duration and too much restrictive provision for certain categories, such as young people under the age of 18 and adults over the age of 67. The different periods of restoration at weekend and holidays often caused confusion among citizens who had trouble adjusting their behavior to restrictive measures. This is proven by numerous cases of punished citizens for violating the measure for prohibition of movement.

The question remains: whether such strict restriction and prohibition measures were necessary to achieve the goal – to stop the spreading of the virus Covid-19 and whether the same results would have been achieved if the measures were taken in accordance to the rights of the citizens. There is also the dilemma of whether the Government (State) has acted legitimately in accordance with or contrary to the Constitution and International law?

If we make a brief analysis of what has been derogated in this period in terms of Human Rights and violations during the state of emergency caused by the epidemy from the virus Covid-19, the following situation arises:

Violated right	Legal basis
Right to free movement	Constitution of R.N. Macedonia Article 27
Right to liberty and security of person	Constitution of the R.N. Macedonia Article 12, 13
Prohibition of movement and mandatory quarantine	European Convention on Human Rights Article 9

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<sup>13</sup>Similar measures were taken in Macedonia only in Albania and Serbia. Other countries in Europe and the Balkan Peninsula have introduced less restrictive bans during the health crisis with Covid 19

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# THE IMPACT OF THE ADVERSALIZATION OF CRIMINAL PROCEEDINGS ON THE PROCEDURAL POSITION AND THE RELATIONSHIP BETWEEN THE POLICE AND THE PUBLIC PROSECUTOR

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## **Abstract**

The current Criminal Procedure Code of Serbia came into force on 6 October 2011. He began to apply in full from 15 January 2013. With the adoption of this law significant changes occurred in the organization of previous criminal proceedings, since the investigation was entrusted to the public prosecutor. The author tried to present the relationship between police and public prosecution in the so-called. prosecutorial investigation. This paper presents the necessary conditions to the independence of public prosecutors from the legislative and executive power, and the necessary standards of professionalism and de-politization, on the side of the police. The author calls for examples of good practice in comparative law, with respect to the formation of the judicial police and the investigative centres, which is a shield from conversion of prosecutorial investigation into the clean police investigation. In concluding remarks other suggestions for effective coordination of these two government bodies at the preliminary investigation and at investigation have been given, and an assessment of the concept of the preliminary proceedings, which is offered in a new CPP.

**Key words:** The prosecutorial investigation, judicial police, the investigating centers, Criminal Procedure Code

## **Introduction**

With adoption of the current Criminal Procedure CODE ("Official Gazette of Serbia", nr. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019), which implementation started on 15th February 2013, the reform of criminal procedure, which began more than a decade, has been finally completed. During this process, the previous CPC from 2001. has undergone several revisions, with the last major operation conducted on 2009. During that period, on 2006. an entirely new legal text was also adopted, which coming into force was postponed for several times, and then three years later it was finally putted in the basket.

All of the reform activities over one decade ago had the same goal: increasing the efficiency of the procedure, while preserving the most important standards of the protection of fundamental rights and freedoms, especially of the defendant, and then

of the other participants in the proceedings. Besides the indisputable impact of changed socio-political situation, the reform process is strongly influenced by the Euro-integration in our country, mainly by the accession to the Council of Europe on 2003., and ratification of the European Convention of Human Rights and Fundamental Freedoms, a year later. In addition to the "day political situation," the influence of some broader trend of European - continental criminal procedure reform, is also undenied . In all of the transitional countries, but in many Western European countries too, the new or amended regulations in the field of the criminal justice, have been adopted (Pavasic, 2008, 489- 602).

Summarily, the reform of continental criminal procedure is characterized by a reception of the facilities and institutes which are typical for Anglo - American (adversarial) type of criminal procedure. It is noticeable effort for more efficient criminal proceedings, in the light of one of the standards which belongs to a fair trial - a trial within a reasonable time. Therefore, a lot of modified and simplified forms of the criminal proceedings are introduced, the investigation submits to a public prosecutor's hands, and the trial is being organized as a debate between the parties, with the passive role of the judge in evidence presenting. The system of the legal remedies are also trying to make it more efficient and easier.

These leading point of the reform characterize the current CPC of Serbia. But it seems that the most attention though the reform of the pre-trial proceedings, and the issue of transition the so-called. prosecutorial investigation was attracted. Modification of the concept and the role of the investigation subjects are necessarily entail a redefinition of the pre-trial procedure. The changes are included the position and the role of these entities of this stage of the proceedings, especially of the police and the public prosecutor. That's the reason why we decided to handle this issue, in order to make a difference between these two state authorities in the investigation, in light of the current legal text.

However, because we believe that effective implementation of the entire criminal procedure depends on the institutional framework in which his actors act, the first part of the paper deals with the question of the organization of the public prosecution and the police, as state authorities. The second part is a presentation of the procedural status of the subjects of the pre-trial and the investigation, and the third and the final part deals with the proposals in order to achieve these objectives of the criminal justice reform, which is enriched with the comparative law examples.

## **ORGANIZATION AND POSITION OF THE PUBLIC PROSECUTION AND THE POLICE IN THE SYSTEM OF THE STATE POWER**

The scope of the organization, position and the authority of the the public prosecutor's office is arranged firstly by the Constitution of Serbia („Official Gazette of Serbia“, 6p. 83/2006) and by The Law on Public Prosecutor's Office from 2008 ("Official Gazette of Serbia", nr. 116/2008). Public Prosecutor is an independent state agency with an authority to prosecute the perpetrators of criminal acts (criminal and other offenses) and to take measures for the protection of constitutionality and legality by investing of the remedies (Stevanovic, Djurdjic, 2006, 148) from Art. 156 of the Constitution of Serbia. The structure of this state

body constitutes the Public Prosecutor's office, then more appeals, and the higher and basic public prosecutor's offices. At the head of public prosecution's office is Republican Public Prosecutor and appeal Public Prosecution, higher Public Prosecution and basic Public Prosecutor. There are also public prosecutor's offices with special jurisdiction: The Public prosecutor's office for organized crime and the Public Prosecutor's office for war crimes (Art. 13, par. 2 PPC).

Arrangement of this state authority is based on the certain principles. These are: the principle of unity and indivisibility, the principle of hierarchy and the monocratic principle. The principle of unity and indivisibility is reflected in the pyramidal structure of the judicial authority, which together form a single unit with Republican Public Prosecutor on the top. The unity of the state authority is reflected in mutual vertical relationship of different ranks of the public prosecutors. Internal unity and indivisibility (within individual public prosecutor's office) is the fact that when the exponent of the Public Prosecutor's Office performs in the court, or in other governmental authority, he/she represents the public prosecutor's office.

The principle of hierarchy indicates the superiority of the directly superior public prosecutor over the lower. Thus, the Republican Public Prosecutor (or the Republican Public Prosecutor's office) is superior to the appeal, to the higher and the basic public prosecutors. Appellate public prosecutor is superior to the higher or the basic public prosecutor, and the higher public prosecutors are superior to the basic prosecutors. This principle is expressed in the authorization of the directly superior public prosecutor to take over the performance of certain actions under the jurisdiction of the lower public prosecutor (the principle of devolution or avocation). Directly senior public prosecutor also has the right take over a performance of the certain actions from the jurisdiction of the lower public prosecutor, and to entrust the other subordinate public prosecutors of the same rank to do this action, which is the principle of delegation or substitution (Grubac, 2009, 148). The Republic Public Prosecutor is also authorized to give the lower public prosecutors issued mandatory instructions of a general nature, when there is doubt in the effectiveness and legality of the treatment (Art. 25 PPC). Directly senior public prosecutor has the right to issue mandatory instructions to be followed in this case, to the directly subordinate public prosecutors (Art. 18 PPL).

Monocratic principle means that all power in the individual public prosecution is in the hands of the public-prosecutor. Consequently, the public prosecutor manages by the public prosecutor's office, represents it, and do disciplinary power of the deputies and professional associates. Deputy of the Public Prosecutor may conduct activities entrusted by the public prosecutor, and is responsible to the public prosecutor for their work (Art. 23 PPC).

In addition to these, one of the most important principles for the realization of the role of the public prosecution (especially the function of prosecution) is, of course - its independence. This stems from the Article 156 of Serbian Constitution, where the public prosecution is established as an independent state authority that has jurisdiction to prosecute perpetrators of the criminal offenses and other offenses, and for the protection of the constitutionality and legality. The characteristic of independence imposes a determination the level of independence of the public prosecution from other state authority, especially from the executive. From the

constitutional definition of the public prosecutor's office it can be concluded that it enjoys autonomy in exercising their functions, in relation to the executive authority. Any kind of interference in the work and making decisions of the public prosecution by the executive and legislative authorities and the media is prohibited (Art. 5 PPC).

For evaluation of the independence of the public prosecutors, it is necessary to look at the issue of the public prosecutors election. According to Art. 158 of the Constitution, the Republic Public Prosecutor shall be elected for time period of six years by the National Assembly, based by a reasoned proposal of the government. The same rules apply to the choice of the other, lower ranking public prosecutors. In contrast, the deputy of the public prosecutors shall be elected by the Parliament, by the proposal of the State Council of Prosecutors. If it is the first time election, it lasts 3 years. After that, the deputy of the public prosecutor can be elected to the permanent function by the State Council of Prosecutors. By this rule partial tenure of prosecutor is introduced (Ilic, 2009, 516) which enjoy only deputy of the public prosecutors, after the first election for a period of 3 years. The question is, what happens to the public prosecutor which, after the expiry of the term (6 years), is not re-elected to the same position? Article 55 of the PPC gives the answer, according to which the public prosecutor after the six-year mandate, unless reappointed, be sure to elect like a deputy of the public prosecutor.

The solution according to which the prosecutors are elected by the Parliament on the proposal of the Government, is the subject of harsh criticism. Opponents believe that this solution creates a real opportunity for the excessive influence of the executive power on the public prosecution, but also the impact of the ruling majority combinations, and because of it the election procedure receives a political connotation. With this attitude we can agree for several reasons. First of all, although the Law on Public Prosecution in somewhat has been corrected the Constitutional regulation of the public prosecutors election procedure, the rule according to which the State Council of Prosecutors shall submit a list of candidates for the election of public prosecutors (Art. 74, par. PPC), though the last word is on the the Government and the National Assembly. This cause that the election of the public prosecutors is only policy instrument of the ruling majority. Also, the estimated electing system of the State Prosecutorial Council members, according to which the majority of members (8 of 11) elect by the National Assembly, opening the possibility that this body can be just an expression of the political will of the ruling coalition, not a profession (European Commission for the democracy through Law, The opinion about the Serbian Constitution, no. 405/2006, CDL-AD (2007) para. 65, 70). In connection with, it can be commended the length of the mandate of the State Council of Prosecutors members, which lasts for 5 years. Due to the longer mandate duration of the National Assembly and Government members, this reduces the impact on its independence and autonomy.

The decision about the termination of public prosecutor function is on the National Assembly, and the deputy of the Public Prosecutor, is on the State Prosecutor Council. The public prosecutor or the deputy of public prosecutor may appeal to the Constitutional Court (Art. 161 par 4 CS). Prevails the opinion that this remedy is not effective, mostly because of the fact that the Constitutional Court decides only after the function of the public prosecutor has already ceased. It have

to be mentioned that appeal procedure of the first composition of the State Prosecutor Council decisions, about the re-election of the prosecutors and deputy of the public prosecutors is ongoing. Although the official position of the European Commission is that Serbia has made a major step in reforming the judiciary, in the public we could hear the opposite view. The essence of the complaint review procedure amounts to a right to defense violation of non-elected public prosecutors and his deputy, by disabling to become familiar with the evidence that stand against them, and to the violation of the presumption of innocence.

Since the reform of the criminal procedure in Europe characterizes by strengthening the role of the public prosecutor, who becomes *dominus litis* of the investigation, we believe that it is important to give a brief overview of comparative solutions on the organization of state authority (Lukic, 2010, 153 – 170). In France, the Public Prosecutor's Office is organized by the principle of hierarchy, with the Minister of Justice at the top. The Minister of Justice have a disciplinary authority over the public prosecutors and issue mandatory instructions. The situation is similar in Belgium and the Netherlands, with lower or higher frequency of intervention in the practice of the Minister of Justice in the prosecution. Although in all three States the public prosecutor's Office is similar to court, according to the guarantees of independence and impartiality, nevertheless such a position is most pronounced in Italy. Public prosecutors's function is permanent. Supervision of the Public Prosecutors is on the Magistrate Council, where profession is predominantly represented. That authority, and the entire organization of public prosecution ensures genuine autonomy and independence of this body from the impact of legislative and executive powers. It is consider that just such an organization of the public prosecution provides an effective fight against the mafia. In England, the public prosecution (Crown Prosecution Service) has been established in 1985. Control over it is on the Director of Public Prosecution, to whom is superior Attorney General, which is a member of the government (Delmas, Marty, Spencer, 2005, 420). However, the independence of the Crown Prosecution Service in England is derived from the tradition and from the self government principle. In the USA, public prosecutor's office was organized at the local level, and it is not devoid of the political influence, but of the local authorities (Vujovic, 1993, 136).

The Police is a part of the executive authority (of the Ministry of Interior), which is responsible for the protection of the state and its citizens, for the detection of the criminal offenses and the offenders, and for ensuring basic human rights and freedoms, which all makes the support to the rule of law. The organization, jurisdiction and powers of the police, is regulated by the Police act from 2005. In Serbia, therefore, the Police is a part of the administration, namely of the Ministry of Internal Affairs. Control over the work of the administration authorities, and therefore of the police, is on the National Assembly and Government. It could be concluded that in the exercise of control an important role is on political factor.

In comparative law we can find different concepts. The police in England is organized on the local level, and it is almost not controlled by Assembly. The Police consists of 43 local police force. Head of a local police service is police chief, who is responsible for its operation (Delmas, Marty, Spencer, 150). The point is to reduce the political influence on state bodies which are involved (manage) in the

investigation, through the decentralization of the administrative authority, to strengthen transparency in their work. In France, the Police is divided into the judicial Police and the administrative Police (The Public Prosecutors, The Police, the criminal courts and a crime prevention, 2008, 220). The role of the judicial Police is to detect crimes and their perpetrators. It is organized on the local level, for each of the appellate courts, and it is responsible to the court. In Switzerland, there is a judicial Police (Polizei gerichtliche), and in Belgium the judicial Police (Police des judiciaire parquets) which is the part of the Public Prosecution office.

### **LEGISLATIVE FRAMEWORK OF RELATIONS BETWEEN THE PUBLIC PROSECUTOR AND THE POLICE**

Although the Public Prosecutor's Office and the Police are two separate and independent State authorities, for successful achievement of the aim of criminal proceedings and of the fight against crime, in general, they must be in collaboration and cohesion. Since the main role of the police, in relation to criminal proceedings, is the detection of crimes and their perpetrators, and of the public prosecutor - a criminal prosecution, it is clear that the close cooperation of these two authorities most commonly occurs in the pre-trial proceedings and in the investigation.

In order to determine the relationship between the police and the public prosecution in our criminal procedure, it is necessary to look at an existing models in the major legal systems. In simple terms, a rough classification could be made to the two types of the criminal proceedings. In continental criminal proceedings, the public prosecutor ménages and directed the work of the Police, which is a relationship of subordination.

In France, the obligation for the police to immediately inform the prosecutor about the commission of the offense, he has discovered, is clearly established. Also, the public prosecutor instructs the police to act and determine the period within they must report on him about the action which have been taken (Lukic, 163). In Germany, the police also have an obligation to inform the public prosecutor of the action which have been taken, without delay. However, of crucial importance is the possibility that the public prosecutor is entrusted to undertake certain investigative actions to the Police in the pre-trial investigation, and throughout the investigation (Sulovic, 2010, 302). Having in mind the stage of the investigation, which is in Germany formally in the hands of the prosecutor, in practice, the decisive role is on the Police, especially for crimes where there is possibility to conclude bargain plea agreement. The Police can take a lot of actions independently (detection crimes, defining of identity, etc..). Some, actions, however, can be taken with the consent of the court (searching of flat or person, monitoring of the telephone communications of the suspect). Police also can arrest a person caught at the scene of the crime, and to hear witnesses and experts, which means to take a number of evidentiary activities. The examination of the defendant is evidentiary action that can be made by the public prosecutor, or the police. The decision about the initiation of criminal proceedings and an indictment in on the public prosecutor. In the Netherlands has formally been accepted the solution to which the investigation of minor offenses could be conducted by the Police. Long-standing practice whereby in the "easy" cases police ends an investigation is legalized by the procedure code reform in 2008.

In Italy the situation is somewhat different. After conducting a total reform of the criminal proceeding in the direction of accepting adversarial model of the criminal procedure, Italy first created the institutional conditions for ensuring the independence of the public prosecutors, giving them a position almost identical to the position of the judiciary. It, however, was not the end. In order to ensure effective implementation of the so-called prosecutorial investigation, the judicial Police is formed. The judicial Police is team which is consisted of the Carabinieri, the State Police and the financial Police, which is associated with the public prosecutor. Members of the judicial police are under the supervision and control of the public prosecutor, who has a decisive influence on their professional career. The model very similar to Italian, there is also in the criminal procedure code of Macedonia. The establishment of the research centers is envisaged, which are a separate body of the public prosecution, consisted of the criminal police, financial police and customs authorities members. The public prosecutor assigns investigating centers members and conducts disciplinary authority over them. The public prosecutor investigates the deployment of officers center and disciplinary authority over them (Kalajdzijev, 2010, 99 – 112). The concept which is very similar to Italian and Macedonian, was adopted in the new Croatian criminal procedural law. The idea is to reduce or even to eliminate the political influence of the ministry of internal affairs, and of the executive power to the police.

It is also necessary to define the position of the public prosecutor in the system of the state power. Italians decided to move closer the prosecutors to the judiciary, while in Macedonia there is a lack clearly defined the position of the public prosecutor's office somewhere between the executive and the judicial power. The difference is that every prosecutor in Italy has its own investigative team, while in Macedonia there are research centers established in the territorial principle. It is worth mentioning the possibility of delegating public prosecutor's authorization to conduct the investigation to the police, according to the anti-mafia law from 1992., which is widely used. The similar is the position of the judicial police in Belgium, or of the judicial police in Switzerland, which has been discussed.

In the second type of modern criminal procedure (the Anglo - American, adversarial), which belongs the common law-countries a leading role in investigation has the Police. In England and Wales, the police is the one who decides about the initiation of prosecution, on its own initiative. Police power is defined by the Police and Criminal Evidence Act. Upon completion of the investigation documents has been submitted to the Crown Prosecution Service to decide the fate of daylight prosecution (Ilic, 2011, 317). While for taking the largest number of the actions, the police have an exclusive jurisdiction, however, for taking actions that restrict fundamental human rights requires the consent of the court (detention, arrest, search of the secret surveillance and observation of the suspect communication).

The comparative models which are exposed show that the prosecutor role in the type of the continental procedure is to lead an investigation, and that the Police appears mostly as an executive authority in conduction of pretrial actions. Some of the police actions can be executed by order or pursuant to a delegation of the public prosecutor. A number of police actions can be undertaken independently (investigating activities), and some, due to the urgency of taking, with the obligation

for immediate notification to the public prosecutor about the undertaking of them. Finally, the actions that interfere with a fundamental human rights can be taken by the court approval. In contrast, in adversial type of the criminal procedure, the Police have the authority to undertake an independent investigation, in addition to operations that interfere in human rights, which can be taken with the consent of the court. The practice shows that in many European countries the investigation, although a formal is prosecutorial, practically is in the hands of the Police. As the factors that most often referred are the police operationality, because it is equipped with an adequate human and the material resources, then the passivity of the public prosecutor, and the lack of fulfillment of the obligation to inform the public prosecutor about taking an action on the formation of the criminal charges (Mathias, 459 – 461). It is actually about the widespread practice whereby the Police informs too late or simply not informed the Public Prosecutor about the committed crime, but after gathering of information they simply does not make a record time and in fact rejects the charges (Ilic, 317). A similar situation occurs when the police put pressure on the victim to withdraw the charge. So, the police takes over the prosecution from the Public Prosecutor and it de facto becomes the dominant figure of the previous criminal proceedings.

## **RELATION BETWEEN THE PUBLIC PROSECUTOR AND THE POLICE IN THE SERBIAN CRIMINAL PROCEDURE**

At the beginning of explanation the relationship between the Public Prosecutors and the Police in the serbian Criminal Procedure, it is necessary to recall the normative framework of the Criminal Procedure Code from 2001. which was applied till 2013. In fact, since 1953., in Serbia the investigation, according to the so-called. French model, have been entrusted to the investigating judge. The investigating judge is dominus litis of the pretrial proceedings and the Police is in relation of subordination and serves as the executive authority. In Art. 46, of The CPC from 2001., it is clearly defined that for certain ex officio criminal offenses one of the responsibilities of the public prosecutor is to conduct the pre-trial proceedings. On the same line is also a provision in par. 3 of the same article, to which all entities required to the pretrial proceedings inform the public prosecutor of any undertaken action, and to act according to his each request. The sanction for failure on these obligations is the right of the public prosecutor to inform the commanding authority, and even the responsible minister, the government and parliament. But, there is no additional guarantees with regard to feed-back, about the epilogue of the complaints of the public prosecutor. Thus, this provision get just a proclamational character. According to the Art. 225 Par. 1 of CPC from 2001. the role of the police is to collect information about the enforcement of the criminal and the other offenses, then to collect and provide the traces of a crime, and an information useful for conducting the criminal proceedings. The public prosecutor is a public authority competent to undertake the prosecutions for the criminal and the other punishable offenses. The investigating judge is the head of the investigation, and a guarantee of the basic human rights of the suspect.

The Police alone can do the most specific investigating activities: gathering information from the citizens (the questioning), review of transport vehicles and luggage, call warrants and announcements, an overview of the facilities and the premises of the state bodies, the enterprises and the other legal entities. In addition, the police, under certain conditions can take a number of investigation actions. They are search of the apartment and the face, the seizure, the investigation and the emergency evaluations, except an examination and autopsy of the corpse. The police has the right to interrogate the suspected. If this act is done in a lawful manner, the statement of the suspect could be evidence in the criminal proceedings. In doing this action, the public prosecutor may, but need not attend. The police may also take some actions that restrict the fundamental human rights. They can keep people on the scene of the crime (Art. 231, Par. CPC), they can arrest a person who was caught on committing a crime or if any of the grounds for detention exists (Article 230 CPC), or determine the extent of the Police detention up to 48 hours. The result of the police activity is reflected in the availability of criminal charge.

A number of actions the police undertakes upon the approval or the request of the public prosecutor. The police can gather the necessary information on the request of the public prosecutor, which is necessary for acting according to the criminal charge which is filed (Art. 235 CPC). There was a duty to the Police to immediately inform the public prosecutor about the measures which were taken, which its leading role is emphasized. The Police can take fingerprints, upon the approval of the public prosecutor (Art. 231, par. 3 CPC). Upon prior approval of the investigating judge the police can take action in order to determine the identity of the suspect (taking a picture and publishing photos, par. 2 of Art. 231 CPC). On the order issued by the investigating judge, at the suggestion of a public prosecutor, the Police can access and control the measures of secret telephone recording and the other communications of the suspect (Art. 232, par. 1 CPC). Finally, the Police may, with the approval of the investigating judge, collect an information from persons in custody.

According to Criminal Procedure Act from 2001. investigation was assigned to the investigating judge. The public prosecutor is a dominant subject in the preliminary proceedings, with the Police, which has an operational role. However, in practice the work method of the public prosecutor was quite passive and it was mostly an office work. As a rule, the prosecutors relied on the actions made by the Police, so the Request for an investigation was usually copy of the criminal charge, and it can be said about the indictment, too. This factor, and many other factors, from which it would be opportune to mention the ambivalent and ambiguous role of the investigating judge, led to the need for redefinition the role of procedural subjects in the previous criminal proceedings, which has been done in the new CPC - from 2011.

Most striking feature in the adoption of Criminal Procedure Act from 2011. was a question of the transition to the concept of the prosecutorial investigation. According to the basic duties of the public prosecutor - to prosecute the offenders, the investigation is a natural stage of the proceedings in which this body should have a leading role. According to Art. 43 CPC from 2011. the public prosecutor, manages over the pre - trial procedure, and an investigation, too. The obligation to

inform the public prosecutor of the heuristic activity in detecting of crimes and their perpetrators, and responding on the request of the public prosecutor, was determined in the same manner as in the CPC from 2001. The penalty system for the police and other state authorities remained the same (informing the heads of the bodies, the minister, the government and the Parliament). However, authority to seek disciplinary procedure against the state authorities who was ignored the request of the Public Prosecutor is new provision (Art. 43, par. 3 CPC from 2011.). This solution is certainly a step ahead in the direction of control of the Police, although that does not provide real guarantees that the public prosecutor actually could implements this control effectively.

The public prosecutor, in the capacity of head of the preliminary investigation, during the treatment by the criminal charge which is filed, may invite a citizens in order to gather necessary information (Art. 288 par. 1 of the new Criminal Procedure Code). The public prosecutor can collect items by himself, and to order the implementation of these actions to the state authorities and the legal entities. Sanction for the failure of the public prosecutor request is imposing of fines up to 150 000 dinars. In the case of non-compliance to the request of the public prosecutor, it the imposition of fines may be repeated (Art. 288, par. 3 new CPC). The provision which envisages the possibility of imposing "fines" by the public prosecutor, is at least debatable. This in a direct way violates the principle of separation of power, according to which there is no doubt, that punishing is imposed solely by the Court. Even if it comes that it is a kind of the misdemeanor sanction, it could be authorized only by the misdemeanor court, not by the public prosecutor. When the public prosecutor took over the management of the investigation, he has not been transformed into an investigating judge! The solution according to which about the appeal against the public prosecutor decision to impose "punishment" to the state authorities decides the Judge for the previous procedure, is also dubious. It is clear that the legislator's intention in this case was that the Judge for the previous procedure plays role like as a guardian of the fundamental human rights. In addition to the state bodies and the legal entities, the public prosecutor may requests collection of information from the Police. About handling the request, the Police shall notify the public prosecutor within 30 days. The sanction for the failure of this obligation is entirely different, and consists of informing the superiors or the executive and the legislative branches.

In Article 285. of the new Criminal Procedure Code, it is re-emphasized the role of the public prosecutor which is to manage of the pre-trial proceedings. In this context, the public prosecutor can take all of the seeking actions himself, or order the police to carry them. In case of breach the police duty to inform the public prosecutor about the action which have been, two measures were predicted. First of them, in terms of informing superiors state authorities, and the other, to take into account the execution of the entrusted activities.

As in the previous Criminal Procedure Code from 2001., the division of actions that the police can take could be made to: actions that can be taken independently, actions to be taken by the public prosecutor order and actions undertaken with the approval of the Court. In the first group are included the seek activities (activities to find the offender, to prevent acts of perpetrator's concealing or escaping, discovery

and providing of the clues and collection of information). These actions the police could be taken on the basis of the delegation of the public prosecutor, too. The Police, with this objective, may collect an information from the citizens, to review the vehicles, passengers and the baggage, to issue a warrant and publication, and to inspect the business premises (Art. 286, par. 2 of the new Criminal Procedure Code). After taking of these actions, the police are obliged to immediately inform the public prosecutor, or no later than 24 hours. As the public prosecutor, the Police also has the authority to call the citizens to so called. questioning (Art. 288, par. 1 of the new Criminal Procedure Code). The maximum duration of four hours is determined, with the possibility for a longer duration, (with no restrictions!), with the consent of the person who provides an information. Such provision as dangerous by fundamental human rights, as the consent of the longer questionig may be subject of abusing those who perform that action.

In addition to the search actions, the Police is authorized to take evidence actions. In the Code does not, however, specified what evidence action they can take, which implies that they may themself, take all of the evidence actions (crime scene investigation, interrogation of the suspect, witnesses, experts ...). It is necessary to recall that at that time the criminal procedure still formally haven't been initiated, and that the result of the activities undertaken can be used in the procedure as the factual basis of the judgment.

One of the existing evidence actions is especially separated. It is the provisions which relate to the hearing of the suspected (Art. 289 of the new CPC). Police could hear the person who was invited as a suspected, but also a person who is invited to gather information, and who during the conversation becomes a suspected. About the execution of these actions, the police shall immediately notify the public prosecutor. The public procesutor has three possibilities: to conduct a hearing himself, to delegate it to the police, or to attend in a performance of such acts by the police. It's not hard to conclude that in practice the ability to delegate execution of this action will prevail, which has so far been a rooted practice (Sulovic, 300). The statement of suspected given at this stage can be used as evidence in procedure, if it has been given in the presence of the counsel.

The police can independently take some of the procedural constraints actions. First, they can keep the persons on the scene of the crime in a maximum duration of 6 hours, or deliver them to the public prosecutor, if they could provide information relevant to the proceedings (Art. 290, of the new Criminal Procedure Code). Also, the police may arrest a person for whom there is any of the grounds for detention, or a person caught in flagranti, with a duty to conduct that person to the public prosecutor immediately and no later than eight hours (Art. 291 of the new CPC). Unlike the interrogation of the suspected, which can be done by the police, hearing of the arrested is in exclusive jurisdiction of the public prosecutor (Art. 293 par. 1 of the new Criminal Procedure Code). Also, the former police custody to 48 hours (Knezevic, 2010, 353 – 372), has now become a public prosecutor's custody. The obvious intention is to establish the actual prevalence of the public prosecutor in the pre-trial, but it is done, it seems, on the wrong way. There is less danger to give the police permission to interrogate and the right to hear arrested persons, if a valid

safeguards is established, but give them the power of performing an evidence actions!

The second group includes the actions that the police can do on behalf of the public prosecutor. Here, above all, are a searching actions, which the police can do independently, but also on the assignment of the public prosecutor. Related to the aim is act of obtaining the telephone communications list of the suspect and his location with help of GPS device (Art. 286, par. 3 of the new Criminal Procedure Code). This action the police can do only by order of the Public Prosecutor. According to Art. 299 Par. 4 of the new Criminal Procedure Code, the public prosecutor could delegate the performance of the individual (without specifying them?) evidence actions in the investigation. This provision opens the possibility that investigation is factually in the hand of the police, and that the public prosecutor in the future remain passive and authority office. Whether it was the idea of reforming the criminal procedure legislative? Judging by the statements of the of the Law Drafting Commission members - no. Only one of the actions is considered that the police carry out with the approval of the Judge for the previous procedure (or of the presiding judge or a sitting alone judge). It is about collecting an information from the detainees in order to detect other offenses or offenders (Art. 288, par. 8 of the new Criminal Procedure Code).

From the above it can be concluded that, formally, in the previous criminal procedure the division of the role of the subjects is performed as follows; The public prosecutor is dominus litis of the preliminary investigation and the authority in whose hands is investigation conducting. The police have a role of executive authority and it is subordinate to the public prosecutor. The judge for the previous procedure acts as a guarantee of the human rights. However, a systematic interpretation of these statutory provisions, appears that the intention of the legislature was to establish a solid legal framework, which provides the leading role of the public prosecutor. However, it opens the possibility that in the level of implementation this intention could convert into its opposite. Bearing in mind the ingrained habits of the work in office, which exist in the public prosecution, which were created for a long-standing practice of treatment in the judicial model of investigation, there is concern that the possibility of delegation performing an actions to the Police will be widely used. If we take into account the police ability to perform evidence actions, it could easily happen that the court decisions will be based mainly on them. Whether it will be like that, practice could give the answers.

## **FINAL REMARKS**

For the effective realization of the proclaimed goals of the of criminal justice and criminal procedure reform, it is necessary, above all, to establish an adequate institutional framework. This means a strictly observing of the separation of the power and the principle of rule of the law. In addition to the indisputable standard of the judicial independence, it is equally important to provide an independently and autonomous work of the other government agencies, the criminal procedure participants. In the light of transition from the judicial model of investigation to the prosecutorial investigation, it is necessary to provide a functional autonomy and the independence of the public prosecutors. In this regard, the legislative changes and

the formation of the State Prosecutorial Council, certainly represents a significant step forward. It remains, however, issue of the State Prosecutorial Council members election, and then the public prosecutor's election themselves. We could not talk about the real independence and the functional independence of the public prosecutors if on their choice the legislative power has a decisive influence, ie. the will of the ruling majority. As a positive example of comparative law, we can take Italy, where the public prosecution in the system of government by virtue is almost equal with the court.

Bearing in mind that with the transition to model of the investigation with the public prosecutor as a leading subject of it, a need for active cooperation with the police, which has a high activity is more intensive, it is necessary to establish an adequate and effective system of control by the public prosecutor's office. As a model we can use example of Macedonia, which is simultaneous with the transition to the prosecutorial investigation envisaged the establishment of the research centers, that is, the judicial police. The idea is that the parts of the criminalistic and the financial police and the customs authorities deprive of the impact of the executive power and actually become addicted to the Public Prosecution. Only in this way it can be created a *conditio sine qua non* for the efficiency of the criminal proceedings, as well as effective fight against the corruption and the other forms of criminality, which are inherent to the state power.

Some of the solutions in the new Criminal Procedure Code, are certainly commendable. An attempt was to made strengthen the role of the public prosecutors, as the head of the pre-trial proceedings, and the subject in whose hands is the conduct of the investigation. On the other hand, to the police the operational role is assigned, in the relation of subordination between the public prosecutor. However, police and public prosecutors remain an independent and separate state authorities, and a mechanisms for achieving leadership roles of the public prosecutors could remain a dead letter. It seems to be that basic problem is in the wrong conception of the adversial model of the investigation, which was adopted. In its original conception, it is largely an informal stage of the proceedings, in which only so-called. an incidental evidence can be performed. All other evidence must be presented only at trial. The new model of the exploration phase in Serbia can be called a formal investigation. The broad possibility of the presentation of evidence by the Public Prosecutor, and police which was provided, in later procedure could served as a basis for the judgment. In addition to this the remarkable ability of the delegation for conducting any investigation action from the public prosecutor to the police, there is concern that in practice it will turn into the police investigation. It is not a unknown phenomenon. On the contrary in Germany the same happened. But the key difference is in that the German police is to a lesser extent dependent of the executive power and, therefore, of the political influence. We should not forget the identified problem of rooted understanding of the role and working methods of the certain criminal procedure subjects. It is traditionally passive position of the Public Prosecutor, in the current model of the judicial investigation. The prosecutorial investigation requires the active involvement of the public prosecutor, and the relationship of the cooperation and the coordination with the police, which is based

on constant communication (Cvorovic, 2010, 265 – 293). Therefore, the transformation from predominantly work in office, to field work is needed.

Changes in the concept of criminal procedure are not revolutionary. It should be understood that it is a living matter, which must be accompanied by changes in society. Adherence to trends in Europe, does not mean the loss of the authenticity. However, it should start from the foundation, ie. first to establish an adequate institutional framework, and then to prepare the actors of the criminal proceedings, the state authorities for new roles, and only then to activate the reformed legislation. Just such a sequence achieves the goals of the reform - more efficient criminal procedure, and, at the same time preserving of the human rights, first of standards that make up the right to a fair trial.

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# THE ROLE OF THE ADMINISTRATION IN THE REALIZATION OF THE PUBLIC INTEREST IN REPUBLIC OF NORTH MACEDONIA

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## **Abstract**

A normative framework, guide, guideline and basic postulate in the functioning of the administration is the realization and protection of human rights and freedoms, as a primary category that makes up the existence and substrate of the state organism. But in addition to the individual rights of citizens, the administrations primordial mission is to enliven and effect public interest. Public interest is, in fact, identified with the generally accepted good. It has the role of blood flow in the physiology of the state organism.

It is an indisputable fact that the citizens should unimpeded realize their constitutional and legally established rights. Nowever, care must also be taken that the realization of their rights is not in conflict with the public interest, nor does it infringe on the rights of others. In an extraordinary constellation of relations, some rights of the citizens are restricted to a certain extent in accordance with the law, with an emph on the wider public interest of the community.

In the paper, the author notes the identity features that make up the core of the public interest, vis-à-vis personal rights and individual interests that are subject to certain restrictions in the face of a global pandemic threat, such as COVID 19.

**Key words:** human rights, public interest, administration, officials, COVID 19.

## **INTRODUCTION**

In the social community framework, in the life of every individual there are needs, that the individual can fulfill them by himself/herself. Everyone can feed him/herself, can get dressed, can maintain basic hygiene and satisfy some other personal needs. On the other hand, there are many more needs that can be fulfilled only through institutional form. For example, every person needs roads, electricity, medical treatment etc. But, no one can build roads, a railway or power stations on his/her own, nor can perform a surgery on oneself. The role of the institutional mechanism points out in the normal, everyday life, especially in a state of emergency caused by a global pandemic, such as COVID 19. Namely, in situations like this, citizens, diagnosed with the corona virus, which have severe clinical picture, need to be hospitalized and get appropriate medical treatment, some will

need oxygen support, and some will need to be put on a respirator for mechanical ventilation etc. Even in a state of emergency, women give birth in hospitals, under special health safety protocols; people diagnosed with malign, cardiovascular or neurological disease need urgent health care, also, citizens, who have other pathologies, need medical examinations, diagnoses, treatments and surgeries; individuals who have become part the existential risk category not by their fault, need social protection; children need raising and education; economic subjects, who face collapse due to the state emergency closing of the production process, need help from the state to overcome the crisis etc. These needs represent “a parent and a midwife” for public administration and a basic reason for its functioning.

Public administration, as a collective organized structure, a set of qualitative differentiated institutional entities has been constituted in the social milieu framework to serve when individuals cannot do so well on their own. Actually, this point consists of Abraham Lincoln’s opinion about “the legitimate object of government ... to do for the community, all that people in the community should do, but cannot do at all or cannot do so well for themselves with their individual capacities" (Shafritz, Russell, Borik 2009, 34).

## **PUBLIC ADMINISTRATION AND ITS PUBLIC INTERES**

There is not a single way to define public administration by one definition since public administration is such a wide field. It can be defined by political, juristic, managerial or professional perspective.

Leonard White believes that public administration comprises of all the operations that aim at realizing public politics. According to him, the administrative system is a set of laws, regulations, practices, relations, codexes and customs that prevail in any time or any jurisdiction of performing public politics. The ability of conducting, according to this author, comprises in directing, coordination and control of the people so they can realize particular goal (White 1956, 3, mentioned by Vitanski 2020, 44).

According to Clark and Dyar, public administration is „a social event implemented in the substratum of the society that draws its logic from the society as a whole.” All members of the public or society spend an essential part of their lives in direct contact with the public sector to receive some services.

Public administration spends its professional time in a context that can be measured, whether directly or indirectly, through its link to „the public”. Public administration is a state act of intervention which is „implemented in the social tissue and is structured of social relations, material as well as cultural” (Managing local authority, public administration in practice, 2009, 7).

Barkley and Rose treat public administration as a process, whose engine are people, that are united together and by performing their work tasks affect the common interest of all citizens (Vitanski, 2012, 8).

Pier Laurent Frier determines the notion public administration in a functional and organic meaning, as a whole of activities performed by public bodies and private subjects in accordance to the law and whose aim is achieving common interest (Fromont 2010, 5).

In the contemporary and functionally established democratic states, administration consists of institutions profiled as a civil service in fulfilling their rights and obligations, guaranteed by law.

The public administration implements and materializes public interest. Public interest is defined by the widespread good. In this context, Walter Lippmann wrote: „It can be assumed that the public interest could be what people would choose if they saw things clearly, thought rationally and acted objectively and in good faith" (Shafritz, Russell, Borik 2009, 33 ).

„The public interest is a social value that is the antipode of private interests, but it is not contrary to them, because it should encompass and satisfy them" (Dimitrievih, 2000, quote from: Filipovih 2017, 333).

The concept of public interest absorbs in itself individual needs and interests of all citizens. For example, every citizen's need and interest is an existence of a contemporary road infrastructure, railway infrastructure, electricity supply, clean water, clean air, healthy environment, good health care, modern education etc.

In the research literature circulates specific opinion, according which, the public interest comprises of the majority interest in a democratic society framework. Thus, the question of ignorance and disavowing of the minority rights and needs is raised. For example, the fact that people diagnosed with rare disease, whose treatment is expensive, and are a minority in a state should be invisible for the system and be left on their own? Should vulnerable people, who cannot satisfy basic existential needs and obtain minimum decent life, be left without help of the social protection system, because they are a minority? Should autistic children, people with special needs, people with different addictions, and victims of physical, mental of sexual harassment be left aside because they belong to minority groups and the state should not build accommodation centers, provide treatment and help these categories to become part of the society and have normal life? Normally, the society and the state should establish institutional mechanism for articulation, aggregation and coordination of the interests of one particular form- public interests. Public interests and individual and group interests should be pointed out as legitimate requests for the public service workers. Public and individual welfare should be normative rule for the administrative work.

Public interest is not one dimensional. It includes many aspects: human rights, health care, security, economic growth, prosperity, life standard, quality of life and welfare, religious value and so on, but, it is still difficult to find its wide – ranging and final definition (King Stephen, Chilton Bradley, Roberts Gay 2010, 957). King et al. (2010) claims that pluralistic definition of public interest means formulating the „golden middle”, the balance between the interest of the opponent affected sides, as representatives of certain public and its different agendas, plans and goals (ibid, 955). Consequently, the public administrator's task is to identify the same and different values and characteristics of each of the affected sides (ibid, 956). In this context of defining the notion and the size of public interest, the question of the meaning of PUBLIC is raised. In addition to this, Geoffrey Edward gives one functional definition according to which, „the public includes the permanent residents of a country, not the interests of citizens as individuals or in

private life, but includes helping in the personal sphere so that individuals can prosper” (Edwards 2007, 16).

The basic substrate of the public interest consists of human rights and thorough freedom, such as, freedom of gathering, freedom of speech and thought, right to education, right to social protection, right to health care, culture, science, right to a life in a clean and healthy environment etc. However, public interest includes some certain citizens’ obligations: paying taxes, taking care of one own health, and the health of others, participation in the structures of safety and protection, obeying traffic rules, state loyalty etc.

Even in a state of emergency, public administrators do tasks that affect citizens’ everyday life, such as, giving health care, collecting trash, fighting fires, taking care of public peace and order, giving social services to the vulnerable category of citizens etc. Some of the administrators, during their work, risk their own life in the service of public interest. For example, health workers risk their own lives during the struggle with the epidemic COVID 19; fire fighters enter buildings on fire to save residents’ lives; also they help in car crash accidents and arrive first at the scene to pull out the victims; police officers risk their lives too for higher cause, during arresting or neutralizing bandit’s group. So, there are jobs in public administration in which death hangs like Damocles sword. There are jobs where it is not a question of life and death for workers but still they do one sublime and noble mission, without which we cannot imagine life, for example, social workers take care of victims of family violence and orphans, left without parental care; teachers educate children, workers in the economy department make different plans for creating favorable sphere for private companies, to invest and keep job positions; other administrators supply citizens with electricity of drinking water etc.

## **THE ROLE OF PUBLIC ADMINISTRATION IN REALIZATION AND RESTRICTION OF HUMAN RIGHTS AND FREEDOMS IN THE REPUBLIC OF NORTH MACEDONIA**

The fact that realization and protection of the human rights and freedoms is of a supreme public interest, administration should put all its capacity in the function of fulfilling this primordial mission.

The state and the administration exist for the citizens and not the citizens for the state or administration.

The most important citizens’ right that takes a priority place, especially in a situation of an escalating health crisis is the right to health care.

*Right to health care* is the right of every person to seek and get health care service in health care institutions for protection of their own health regardless of whether they are employed or unemployed. In order to protect life and health, as the ultimate good for the individual, also as the most sublime and noble value for the community, all available human resources as well as primary, secondary or tertiary infrastructure should be put in function of accomplishing this primordial goal. The first on the health “war” field who have to fight the invisible and dangerous enemy are primary health care family doctors. If a person develops symptoms typical for COVID 19 he/she should contact the family doctor on time and without delay. The family doctor, following the strict medical protocols will organize taking a swab and

testing of the person in the Public Health Care Institute. Also, the family doctor should carefully conduct the epidemiological survey with the suspected patient in order to determine the factual situation. In this process, the patient has the most important role, he/she should give objective and reliable information for the people he/she had a direct contact with in the recent period, so they can be isolated and tested thus preventing spread of the virus. The patient diagnosed with corona virus, should be under constant observation by his/her family doctor. If he/she has a mild clinical picture he/she should be isolated in his/her home and take the prescribed therapy. If over time he/she develops a severe clinical picture, he/she should be hospitalized to get appropriate treatment in the Infectious Diseases Department of a particular general hospital or the Clinic for Infectious Diseases and Febrile Conditions. In these institutions, an interdisciplinary team of epidemiologist, internist and anesthesiologist will summarize the overall health condition of the patient, the clinical manifestation as well as the presence of other chronic diseases or comorbidities and then will decide on the further treatment and the need of oxygen support or intubation etc.

When the corona virus appeared, the health works were surprised to some extent, which is understandable, given the fact that not just the health system in our country but also the worldwide health system faced such a challenge for the first time, an enemy that is mystical and difficult to understand. It cannot be denied the fact that the health system, taking into consideration the specific circumstances and available resources, organized and mobilized itself relatively well, putting all its capacities into function of dealing with the epidemic. Many doctors and nurses have shown courage, sacrifice and professionalism. The answer to the question whether they deal with the corona virus effectively and efficiently, is not the intention of the author of this paper, given the fact that it is not in the domain of his professional vocation, but also an answer to such a delicate question is a serious challenge that needs thorough and in-depth analyses, study and research.

Any generalization or relativization of the things, especially when it comes to the life and health of the citizens is ungrateful and irrational. What can be stated for certain is that the health system put all its capacities into the function of neutralizing the virulent effect of the corona virus. That means that citizens who asked for help received their treatment. How successful was (is) the treatment it is not the subject of interest of this scientific research paper.

The absence of a vaccine or any other effective medicine to cure corona virus, the most effective measures, that the health authorities recommend almost every day, are wearing a protective mask, gloves, keeping distance, personal hygiene, disinfection etc. These measures are protected by sanctions for non compliance. In this context, strict and rigorous sanctions are obligatory in case of non compliance to the measures that will put public health at risk. The penalty policy should be dimensioned in ways that will enable prevention and repression. However, despite the existence of these sanctions, still the compliance of the measures depends on the good will and conscious awareness of the individuals for protection of their own health as well as the health of the others. Thus, there are citizens who comply with the measures, but there are citizens who do not comply with the prescribed measures.

Citizens' negligence is more dangerous than the corona virus itself. Consciousness is a category that can be possessed or not. Those subjects that possess it should cultivate it all the time like a gentle plant. However, consciousness should not be hidden in a cell of a metal structure; instead, the citizen should talk to his/her self consciousness and re-examine it if necessary. Consciousness is being rarely manifested if the person is ruled by passion. The consciousness, in these cases, is being suppressed by passion. Passion cannot be linked to rules, scruples or moral considerations. It obscures mind (Vitanski 2020, 689).

The problem in the functioning of the health care system gives the impression as if only COVID diagnosed patients are being treated and no other diseases exist, and people do not die from other illnesses, too. In this corona epidemic situation, specialist and subspecialist examinations have been canceled by the system, "moj termin" (my appointment) for several months in row, only emergency cases were surgically treated. This practice is the Achilles' heel of the health care system, which, if not overcome, it will generate far more negative implications, that will have fatal outcome in some cases. Therefore, besides treating COVID infected patients, in future, health care workers should completely commit themselves to treating other diseases far more dangerous than the corona virus. There is no such thing as mild diagnose, every pathology has its own specifications and its own weight, and citizens have the right to seek and receive health care anytime when their health is impaired and at risk, regardless of the disease.

In conditions of global pandemic caused by the ill fate infective disease such as COVID 19, in a state of emergency, some rights and freedoms should be restricted due to primordial public interest. During state of emergency, the Republic of North Macedonia Government executes restriction of rights and freedoms by issuing regulations with legal force. The restrictions must not be discriminatory on the basis of gender, race, skin color, language, religion, national or social origin or property and social status. However, the Government cannot put restrictions on the following rights and freedoms: the right to life, the right to protection of the physical and moral integrity of the person, legal determination of the punitive actions and penalties, the freedom of thought and belief, the freedom of public expression of thought and the freedom of religion.

The Republic of North Macedonia Government obligation is to inform the UN Secretary General, timely, of the reasons for declaring state of emergency, the scope and duration of the restrictions on the rights and freedoms declared in the international pacts and conventions. Also, the Government is obliged to inform the Secretary General of the Council of Europe, especially when it comes to restriction on the rights and freedoms declared in the European Convention.

*Freedom of movement and occurrence* means freedom of moving and occurring of the citizen on the entire territory of The Republic of Macedonia, including the right of the citizen to leave the territory of The Republic of Macedonia and return whenever he/she wishes. But, this freedom may be limited if that means protection of the people's health. Thus, when the corona virus started to spread exponentially, and to become destructive, a decision of imposing curfew was made i.e. limitation of the movement of people outside their homes, during weekends, from 7 pm to 5 am. Even during the days when there was no curfew, there were

movement limitations in an open air areas for certain vulnerable categories of people. For example, older people could move freely from 9am to 11 am, and younger people from 1pm, to 3pm. Also, Macedonian citizens, who were in other countries at the time of the virus break out, were prevented to return, freely, in their own country because of borders closure. For this category of people, the Government General Secretariat and the Ministry of Foreign Affairs organized state transport in order to bring back the Macedonian citizens. However, one condition for returning on the territory of The Republic was, the person to sign a statement, initially, and voluntarily agree to spend 14 days in isolation in a state quarantine.

The freedom of movement limits people suspected or infected with the corona virus. Namely, the person that will develop certain symptoms, typical for the disease, will be tested by the Public Health Care Institute or any other accredited institution in order to determine possible presence of the corona virus. If the test is positive, the State Health Inspectorate issues isolation decision that obliges the COVID diagnosed person to stay isolated in his/her home, and must not move in public area due to public interest. This is done in order to prevent the spread of the virus and thus protect the health and life of other people.

Imposing restrictions by ordering curfew and limiting the movement are justified and worthwhile measures in a state of emergency for protection of the public interest, protection of the life and health of the citizens. However, these measures can be of short-term or medium-term. In this period, the country needs to mobilize and put in function all available resources in order to neutralize the virus and make the epidemiological curve of infected bearable for the capacity of the health care system. The limitation of movement and keeping people in home quarantine cannot last indefinitely, because the virus can be present for years. In a situation like this, does it mean that people should be put in “shackles and chains?” If such a stupid and absurd practice is established, following that logic, arises the questions whether the state should, due to the fact that there are many traffic accidents, ban road traffic? Should the state, due to the fact that there is no cure for HIV Aids and millions die from it, ban love and sexual relations between people? Absolutely and categorically–no. The human is a social being, in whose bloodstream, permanently, runs the urge to make relationships, relations and connections to other people and institutions for realizing certain goals, rights, interests and needs. Restrictions on the movement and actions on long term will become nebulous and irrational measures. That will lead to complete freezing of everyday normal life, collapse of the economy, and to complete disorder of the social life. If the operators of the economy cannot conduct production, they will face illiquidity and collapse of their business in short time. This will generate a large number of workers layoffs, who will be in an existential abyss, a shortage of consumer goods, economic stagnation and social decadence. Restrictions on the movement will have negative impact on the educational process of the youth, as the basic resource and the most important capital of the country, causing far - reaching and dramatic negative implications on the educational level of the population.

Isolation of the citizens and the inability to move freely for longer time will cause fear, depression, anxiety, and other psychological diseases, which will have long term consequences on the mental health. In addition to this, practicing such a

measure is on the edge between Scylla and Charybdis, i.e. running from one evil toward the other.

*Freedom of information* is a right of the citizen to be informed of the events in the country and the world. The Constitution of the Republic of North Macedonia guarantees the access to information, as well as freedom of receiving and transmitting information.

The citizens have the right to receive timely and objective information on the events happening in every sphere of the social life, and the public administration and officials are obliged to provide appropriate information. For example, when the government spokesman holds a press conference, he/she informs the public of the decisions, conclusions, programs and strategies approved at the Government meeting. When the Minister of Health holds a press conference with the journalists, his/her aim is to inform the citizens of the COVID 19 factual situation, newly diagnoses cases, the number of dead and healed patients, the protective measures that need to be implemented etc. (Vitanski 2020, 153). Informing the citizens, on daily bases, on every aspect of the corona virus, is the brightest side of the Macedonian institutional grayness.

*Right to peaceful gathering* is the right of citizens to gather peacefully and express public protest before previous announcement, and without permission from the state authorities. Citizens can express public protest through demonstrations, marches, boycotts, petitions or any other forms of direct civil action. This right can be limited during war or state of emergency in the Republic of Macedonia. In addition to this, the right of mass gathering can be banned in state of emergency, to limit the spread of the virus and to protect life and health of the population.

*Right to vote* is the right of every citizen, over 18, to elect the members of the Parliament of the Republic of North Macedonia and the members of the city hall councils as local autonomy authorities. The election right is equal, general and direct and it is fulfilled through free elections and secret ballot. Citizens who do not have right to vote are those who are deprived of legal capacity by court.

Parliament elections in the Republic of North Macedonia were held under specific circumstances due to corona virus, under special strict health protocols, prescribed by the Infective Diseases Commission on 15<sup>th</sup> July, 2020. The ballot was held three days: COVID 19 diagnosed patients and people in isolation voted on 13<sup>th</sup> July; sick and infirm and people in prison voted on 14<sup>th</sup> July, and on 15<sup>th</sup> July vote all the rest citizens from the electoral register.

People infected with the corona virus and people in isolation could fulfill their right to vote in their homes only if they registered at the State Election Commission until 8<sup>th</sup> July, 2020, 24:00. This means that SEC closed the register one week prior to the election days for COVID 19 diagnosed patients. In a situation like this, when the epidemic is spreading and there is a three-digit number of newly infected patients every day, but also patients who lose the fight, closing the register one week prior the elections means that a large number of people who will be infected in the days before the elections or will be put in an isolation because they were in a contact with infected person, lose the right to vote, a fundamental democratic right of every citizen, guaranteed by law. As stated before, this right is a

constitutional category with a strong legal regime and can be deprived only from people who do not have legal capacity.

People infected with the corona virus at the time of the elections or in isolation must not be left without fulfilling their right to vote. If this happens, the constitution is flagrantly violated and the election process is compromised. Therefore, in this state of emergency, the state must have Solomon solution and establish institutional mechanisms for accomplishing this democratic right. One of the possibilities, that need serious consideration, is electronic voting by these people.

*Freedom of religion* means the right of every citizen to freely profess his/her religious belief. And this belief represents his/her personal belief. Every citizen is free to express his/her faith or belief, as an individual or as a group, publicly or privately, through worship, moral, sermons, religious rites and rituals. This freedom means that every person can tell or not what his/her beliefs are, regardless whether he/she is a believer, agnostic or atheist.

Freedom of expressing religion, only by exception, can have certain limitations by law, only if these measures are in the interest of public safety, order, health and moral or protection of the rights and freedoms of others, essential in a democratic society.

The public interest, expressed through protection of human life and health is a priority vis-à-vis the personal interest. Indisputable fact is that the state should not be involved in religion and should have a subtle approach towards the freedom of religion. This means that it should not deal with the intimate sphere, religious feelings and religious beliefs that arise from the inner court of conscience. Even in a state of emergency caused by the pandemic COVID 19, the state cannot enter in this sphere, directly or indirectly by dictations or forced solutions. That means that the government or any other state institutions cannot forbid believers from visiting the churches, monasteries, mosques etc. during religious holidays. But, because of the public interest the government can act indirectly. Thus, if the deadly virus spreads exponentially and poses a serious threat to human life and health, the government may impose curfews, restrict the movement of people, and thus indirectly prevent them from visiting religious sites in mass. If the government is indifferent in this constellation, then a lot of people would gather in the religious temples, which would mean lighting the wick of a destructive epidemic bomb. In this context, the Government of the Republic of North Macedonia, as a preventive measure to prevent spreading of the virus, imposed three-day curfew during Easter, the biggest Christian religious holiday. However, the government did not act in compliance with this measure and backtracked its initial intention on restrictions of movement during the Muslim holiday of Eid, allowing Islamic believers to gather in their homes for Iftar dinners, and on the day of the holiday to gather in the mosques and perform rituals until 11 am, which, according to me, was a reckless and hazardous move that, in fact, opened “Pandora’s box” and caused galloping increase in the number of newly infected in the areas where Muslim population is concentrated.

As already mentioned, restriction of the movement should be an exceptional measure that is of short term character, and can be imposed if the situation is alarming and the health crisis is resulting in high tax of human lives and it cannot be

put under control. In addition to this measure, the government may decide to ban grouping of more than three people on public areas. Such a measure was in force when “Struga Procession” was organized and believers joined the procession in mass in Struga streets, disobeying the measure. The decisions brought by the government in state of emergency circumstances aim at protection of the public interest, embodied, among other things, through protection of life and health of citizens. Humans, as rational beings, apart from the personal needs, should have sense for the wider public interests, too. The state, with its institutional mechanism, initially, should act preventively, advisory and indicatively. If this has no result, it should act authoritatively and repressively. But, that was not the case during “Struga Procession”, when the ban on grouping in public areas was fragrantly violated. What strikes the most and leaves bitter taste is the passivity and indolence of the police officers who, instead of preventing the mass grouping and protecting the public interest, were silent observers of the procession. In fact, the impression was as if the police officers have forgotten their service duty and uniform for a moment. The picture captured and broadcasted on TV indicated them as part of the procession of walking on the relics of the saint and not authority officials in whose sight should be primordially the public interest.

*Right to education* means right of every citizen to acquire and gain knowledge and professional training at every level of education under equal circumstances, determined by law.

According the Constitution of the Republic of Macedonia, primary education is obligatory and free. The intention for such constitutional solution is to provide citizens literacy and elementary knowledge, which is of individual interest as well of the state, too, and presents *condition sine qua non* for further education and cultural rise. In addition to primary education, the Government of the Republic of Macedonia introduced obligatory secondary education in 2008, in order to raise the educational level of the population.

The right to education is constitutionally established with firm legal regime. It cannot be limited or abolished. However, in a state of emergency caused by COVID 19, in order to prevent the spread of the virus, the Government, as a preventive measure, may bring decision to close the primary and secondary schools and faculties. That is a rational and suitable decision for certain time, when the health situation requires it. This decision disables the classical, conventional course of the educational process. But, that, absolutely, should not cause paralyses of the educational system and endanger the right to education. It is a fact that the classroom, direct and interactive relation between teachers and students has not a suitable replacement by its effect. However, that does not mean that there are no alternative solutions for continuous and quality development of the educational process, especially in circumstances of fascinating developing information-communicative technologies, which horizons are limitless. In this context, the Government, the Ministry of Education, educational institutions should not “invent hot water”, but they should put in operation and use the benefits of information technologies. That means selecting the most suitable tools and platforms for online teaching that will ensure quality and will prevent compromise and devastation of the educational system.

## CONCLUSION

Public administration is one of the key elements of the social system mosaic. It comprises the “spinal column” of the state.

Public administration is a complex organism whose anatomy is formed by more entities, which in a symbiotic and synergic relation complete the physiognomy of the administrative organism.

Public administration and public interest, in a metaphorical connotation, are like Siamese twins. Public administration embodies the public interest, and the public interest is identified by the universal good. It has widespread horizons. It is difficult to mark the limit to where these horizons of public interest spread. They are far wider and more flexible than it can be imagined and assumed even by those with the most vivid fantasy and lucid imagination. Due to the fact that, the public interest is substantial element that comprises the essence of the administration, administrative bodies and public services should qualitatively reflect and successfully affect the wider public interest.

Public interest can be defined as a concept that includes a set of rights and obligations of the individuals towards the state, as well as obligations of the state institutions to protect and promote certain rights of the legal acts (constitution, laws, bylaws, international agreements etc.). Public interest can also be seen as an interest of the community as a whole, which takes primordial place and has priority over the special needs and rights of the individuals, including the rights and freedoms as well as duties.

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## **TRANSPARENCY OF THE MACEDONIAN PUBLIC ADMINISTRATION AS A HUMAN RIGHT**

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### **Abstract**

Transparency is one of the key principles on which lies every democratic society and each democratic state. Having in mind the fact that public administration is one of the caryatids of the society, the importance of examining and analyzing the transparency as a human right in the Macedonian case is very important. The main goal of this paper is to describe and analyze why transparency of the Macedonian public administration should be considered as a human right. The main methods which will be used in this research are descriptive method, comparative method and content analysis method. The conclusions which will be drawn from the paper will be directed to detection of the level of transparency in the Macedonian public administration and sublimation of the available theoretical and empirical data, but also to giving some critical views, opinions and suggestions for an increase of the transparency in the Macedonian public administration, i.e. the modalities and practices which should be implemented in the realization of this goal.

**Keywords:** transparency, Macedonian, administration, human, right

### **Introduction**

Public administration in every democratic state functions not only on a legal base, by conformation with the Constitution, laws and by-laws, but also respecting some basic principles which are common for all democratic states, such as: effectiveness, efficiency, openness, transparency, etc.

Transparency is considered as one of the most important principles which should be fulfilled by each democratic government. For these reasons, the main ‘target’ in this paper will be actually the implementation of the principle of transparency in the Macedonian public administration.

This principle is present in the programs of all governments and institutions in Europe and all around the world. The difference is in the level of the implementation of the transparency principle in practice, but also in the different modalities of 'definition', i.e. interpretation of the transparency principle.

Macedonian public administration is a relatively 'new phenomenon' (around 30 years old), if we don't consider the Macedonian administrative experience in the Yugoslav Federation (from 1945 - 1990). It means that the 'administrative legacy' of the country is very poor and modest.

The European Administrative Space (EAP), i.e. all principles which outcome from EAP are very good guidelines for the Macedonian public administration. The real challenge actually lies in the big discrepancy among the nominal acceptance of all these principles from one side, and their concrete implementation and animation in practice, from the other side. There are many documents accepted by all Macedonian governments from the independence till now, but almost none of them are completely fulfilled through the activities of the Macedonian public administration.

So, using all the above mentioned methods, we will try to detect the anomalies and problems which Macedonian public administration is facing with implementing the principle of transparency, but we will also suggest concrete modalities for improvement of the dissemination of information by the institutions, agencies and bodies in the country, which will be delivered to the final users, the public and the citizens. Of course, we will also confirm the 'theory' that the transparency represents also a human right, connected with the other human rights which are at citizen's disposal in each contemporary state.

### **Transparency as an important 'administrative postulate'**

Transparency is nowadays considered as a key tool of good governance and a prerequisite to any democratic regime. According to Joseph E. Stiglitz, judicious use of transparency has the power to create a virtuous circle where legitimacy, citizens' participation and trust could together lead to a dynamic political change (Worthy, 2010) This circle actually means a common interaction of all 'stakeholders' involved in the creation of the final output, i.e. transparency.

Two societal developments have contributed to the strong appeal of transparency nowadays. First, the rise of the Internet and communication technologies has greatly increased the amount of government information accessible to the public (Meijer, 2009). Compared to half a century ago, when the information were available only for an inner circle of officials, today with the new technological tools all the information are spread around the world.

The information technology revolution and the consequential vast increase in the amount of information stored and gathered by government has also increased the importance of transparency: if more information can be stored, there is more potential for disclosure and increased transparency. This partly coincides with a second development: the rise of New Public Management - NPM as way of organizing governments (Hood, 1991). Public sector reforms inspired by NPM urge a greater degree of transparency of government services and activities, with the idea that increased visibility of how these services operate will improve their

performance. In addition, it is commonly agreed upon that a certain extent of transparency is essential for democratic accountability to flourish: without information about political or administrative decision making it is impossible to keep office-holders to account (Roberts 2006; Florini 2007).

Nevertheless, there are critics of increased government transparency. First, scholars argue that although transparency leads to a great deal of available information, this does not necessarily result in increased levels of trust. Indeed, O'Neill argues that transparency may even erode trust. She states that the Internet makes it possible to disclose a great deal of information, which not only leads to a cascade of information but also to a flood of misinformation. (O'Neill, 2002). So, there should be very strict selection of the relevant information, but also detection and removal of the misinformation. Furthermore, public officials could 'massage' or 'spin' the messages. Second, transparency pessimists stress that increased transparency could lead to increased and unjustified blaming of government. A third 'dark side' of transparency might be that when people can see everything behind the scenes of government, they may become disenchanted with it. Governing is often a messy and uncertain activity, and exposing this may erode citizen trust and legitimacy of government operations.

Despite the explosion of transparency literature, there appears to be no dominant conceptual definition of transparency. However, we must recognize that transparency's definition is dispersed. Further, given the disparity of definitions of the concept of transparency, we would argue to discern and hold open at least three aspects of our enquiry into the right to information and transparency. First, we should recognize that transparency itself can be instrumentally rational towards other values. Transparency can promote, for instance, the values of accountability and participation (Peled and Rabin, 2011). This potential relationship of transparency with respect to other values seems worth recognizing, especially in light of the relative paucity and relative lack of clarity on the definition of transparency. Holding onto the possibility of broad definitions of transparency allows for transparency in narrow definitions to play an intermediating role in promoting values or concepts that might be seen to reside in more fulsome definitions of transparency (yet outside a narrow definition). It is of course also the case that the relationship between transparency and other values may not always be a positive one. To take one example, there may be a negative relationship between transparency and privacy. Indeed, this is undoubtedly true in some contexts. For instance, greater public access to information about an individual – greater transparency of that individual's personal information – may allow for and facilitate an invasion of that individual's privacy (*ibid*). Especially nowadays there are many examples in practice which demonstrate the misuse of public information, combined with rumors, misinformation and fake news. The relationship of privacy and transparency is better seen as complex rather than a zero-sum relationship, the example of privacy should serve to remind us that transparency is not an unalloyed universal public good. Second, we should recognize the critical importance of the normative angle in any investigation of the right to information and transparency. Transparency is the fifth human rights principle. This principle is more explicitly recognized in the most recent human rights treaties, most notably the Convention on

the Rights of Persons with disabilities (Haugen, p. 431). Still, we have to note that there are very big differences on the level of implementation of the Convention articles, not only in the different categories of the states, regarding the level of democracy and freedom, but also inside a same group of countries (democratic or less democratic).

Access to information acts are grounded in the recognition that information in the control of public authorities is a valuable public resource and that public access to such information promotes greater transparency and accountability of those public authorities, and that this information is essential to the democratic process. The purpose of these acts, also known as access to information laws, is to make a government more open and accountable to its people. In transitional democracies, laws that give effect to the right to information are part of the process of transforming a country from one with a closed and authoritarian government to one governed by and for the people. (Kocaogly and Figari, ed.)

However, the correlation between the level of the state development and the transparency of the administration in the state is not always positive. There are also some examples where the state can have excellent economic performances and overall development, but very low level of transparency and democracy.

### **Transparency of the Macedonian public administration**

Many documents, announcements, attitudes, etc. speak about the ‘dedication of the Macedonian public administration’ towards the implementation of the principle of transparency.

For instance, in the last Government Strategy for Transparency it is written that: The effective accomplishment of the citizens’ rights and freedoms through the enhancement of the responsibility of the institutions is one of the government’s basic commitments (Strategy for Transparency of the Macedonian Government 2019-2021, p.8).

Anyway, the real challenge of the Macedonian institutions is how to ‘bring in life’ what is written on paper. And that, as a consequence, means well informed citizens able to interact with the public administration and to participate in the decision – making process. Unfortunately, this is utopia for all the Balkan countries, not because of the bad strategies or other documents, but because of ‘lack of will’ to effectuate them.

If we take as an example the citizens’ right for getting public information, i.e. their right for free access to information which have public character, then we can note that the situation is very bad. Namely, one of the obligations of the Macedonian public administration is giving information to the public, i.e. to the citizens. This is not only a second element of the administrative activity, but also a legally binding rule incorporated in the Law for free access on information with public character.

Another challenge in correlation with the free access on information with public character is the case of ‘silent administration’. The following table shows that in the time period 2009-2018 there is a big number of appeals generated by the ‘silent administration’:

**Table No. 1 - Silence of the administration as a reason for submission of appeals to the Commission for free access on information**

Year	Submitted appeals to the Commission for free access on information because of 'silent administration'	Total number of appeals
2018	366	622
2017	569	758
2016	411	619
2015	874	960
2014	785	849
2013	428	564
2012	907	1225
2011	324	409
2010	368	540
2009	273	340

Source: Strategy for Transparency of the Macedonian Government 2019-2021, p.22, translated by the author

We can see from the table that number of submitted appeals due to 'silent administration' consists very large percentage (above 50% in each year) of the total number of appeals, given by the citizens in the period 2009-2018. It means that the citizens' right for free access on public information is broken by the Macedonian institutions very often. This problem can be resolved only in one way, and that is by strong monitoring of the institutions by the Macedonian government and of course, imposing sanctions for those who are not responsive.

When we consider the transparency in the Macedonian public administration, very important component is the perception of the citizens via the fulfillment of the transparency principle by the public administration.

Openness and transparency in the public administration are very important for establishing a concept of a modern public administration based on merit system. This access strengthens the democratic process and diminishes the chances for corruption. Unfortunately, the research made by the Center for Change Management has shown that only 33,6% of the Macedonian citizens consider the institutions of the public administration as open and transparent (Center for Change Management, p.28).

The lack of clear criteria for classification of the information additionally restricts the access to information which don't have a character of a security classified information, which results in misuse of this determinant for exaggeration of the definition for certain confidential information, which are dependent by the autonomous and free-will decision made by the 'owners of the information' (Strategy for Reform of the Macedonian public administration 2018-2022, p. 44).

This absence of concrete criteria complicates the access to information by the citizens, but also ‘speaks’ about the low level of transparency in the Macedonian public administration, despite the fact that there are many strategies, action plans and other documents which are in favor of existence of a transparent and open public administration.

### **Interrelations transparency – human rights**

One way of understanding the relationship between the human right to information and transparency is to see the human right to information as a vehicle for increasing a certain amount of transparency or (stated somewhat differently) as a vehicle for furthering the ends or some of the ends contained within the concept of transparency. Another way of understanding the relationship between the two concepts would be to explore the logical relationship: is the right to information necessary for transparency and is it sufficient for transparency? The right to information is assumed to be neither necessary for nor sufficient for transparency. (Kingsbury and Donaldson, p.225)

This means that human right to information and transparency are not synonyms, although there is a big level of similarity among them. Of course, there is no doubt that transparency means not only allowing citizens to get the information they need, but also fulfillment of the social role and responsibility in the society, i.e. in the state.

Human rights either for philosophical account or for simplicity are categorized in different ways depending upon different parameters. One of such classifications is grouping rights into negative, active and positive rights. A negative right is a right not to be subject to interference by others. These constitute the classical liberal rights as articulated in the philosophy of John Lock (International relations and security network in Gebeye, p.16). Active human rights imply the right to participate in the political process as outlined by Jean-Jacques Rousseau. Positive rights on the other hand impose duties on the part of the duty bearer to do positive actions. These are economic, social and cultural rights for which one find basis in the philosophy of Karl Marx. The classification of rights into negative, active and positive is based on the duty they impose on the duty bearer ( Gebeye, p.16).

There was a wide agreement among participants that corruption is one of the biggest obstacles for an effective implementation of civil and political rights, as well as economic, social and cultural rights. It was however argued that more data and analytical work is needed to measure the impact that corruption has on human rights, with a view to foster a deeper understanding of, and provide an evidence-based argument for, the interrelationship between corruption and human rights violations. With this relationship further clarified, such analysis could also contribute to support the argument for applying a human rights-based and victim-oriented approach to the fight against corruption, meaning for example an increased use of the human rights system as a tool in the fight against corruption. (Anti – Corruption and Human Rights Report, p.5)

When we discuss about the transparency of the public administration as a human right for the citizens, we think about the active human rights defined in the text above. Citizens’ participation and given feedback by the citizens to the

institutions of the public administration actually means confirmation of the democratic achievements regarding transparency and openness. Still, one more very important element here, is the awareness of the Macedonian citizens and their political culture, which can lead to very ‘modest’ results.

## Conclusion

As a conclusion, we can note that although nominally, transparency of the Macedonian public administration should be a human right for the citizens, i.e. the clients of the public administration, still, in practice we have to declare with regret that this is not a real situation.

We can ‘blame’ many factors and determinants for this situation, but anyway, the most important ones are the lack of institutional control, the ‘obeying and passive political culture’ of the Macedonian citizens who do not recognize and declare their legal rights and the behavior of the political elites, which *de facto* guide the activities of the public administration. The main question is: How can we get out of this magic circle – inferior citizens, powerful and influential politicians and bureaucratic public administration? Probably, there is not unique answer to this question, but one of the modalities which we can suggest is: the increase of citizens’ awareness of their constitutional and legal rights. This can be achieved through additional education of the Macedonian citizens about their rights for free information, but also for political participation in the society. Other instrument is the strong external monitoring by relevant institutions and entities like: European Union, OSCE, Transparency International, Council of Europe, etc. This measure can be achieved through implementation of many international documents, declarations, agreements, etc.

Finally, if we want to have an increase of the transparency of the Macedonian public administration, a common action is needed by the citizens, politicians, public servants, media and international organizations which directly or indirectly participate or control the activities of the Macedonian public administration.

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## THE APPLICATION OF THE PRINCIPLE OF PUBLICITY IN MACEDONIAN PROCEDURAL LAW

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### **Abstract**

**Subject:** The subject of this paper is the application of the principle of publicity in Macedonian procedural law, through a normative analysis, in particular, the Law on Litigation Procedure, the Law on Non-contentious Procedure, the Law on Criminal Procedure and, the Law on Administrative Disputes.

**Method:** The study of this paper's subject will be primarily realized by applying the method of normative analysis, as well as the methods of comparison, analogy, and case law method.

**Aim:** This paper aims to give an overview of the Macedonian legislation regarding the application of the principle of publicity in the above-mentioned court proceedings, as one of the most important principles that reflect the principle of just and fair trial in modern democratic states.

**Conclusion:** In the paper's conclusion, we will try to provide recommendations and guidelines for a more effective application of the principle of publicity, having in mind the practice of the European Court of Human Rights.

**Keywords:** *the principle of publicity, litigation, non-contentious procedure, administrative-court procedure.*

### **INTRODUCTION**

The values of democracy are the fundamental elements of the rule of law, which does not imply strict formalism but implies justice based on the recognition and full acceptance of the highest values of human rights and human dignity. The principle of publicity is an essential principle of democracy and the rule of law in modern states. Therefore, the transparency, publicity, and openness of court proceedings and the work of the courts in the general sense of the word, contribute to strengthening the rule of law and its full realization. In this context, Bentham

pointed out that: “*publicity is the soul of the law and through publicity alone law becomes the mother of security. It is an essential part of the infrastructure of the rule of law.*” (Postema, 2014, 42).

Among the Romans, the witnesses were heard publicly, in the presence of the accused, who could reply to them himself, or employ an advocate to do so. That procedure was noble and frank; it breathed Roman magnanimity (Summers, 2007, 40). However, in the course of history, the principle of publicity obtained two – at first glance disparate – meaning: one refers to individual's freedom (or right) to form, express and, publish opinions; the other denotes the social need to prevent or hinder abuses of power (Splichal, 2001, 5-26).

The principle of publicity gained its affirmation at the end of the 18th and the beginning of the 19th century. So, in England, in this period *publicity was seen as an integral characteristic of the English trial*, while in France *the principle that trials be public was adopted, for both civil and criminal cases and was included in the Code d’instruction criminelle of 1808*. In Germany, the principle received German-wide recognition in 1849 when it was enshrined in the Constitution (*Reichsverfassung*): *das Gerichtsverfahren soll öffentlich und mündlich sein* (Summers, 2007, 41).

The principle of publicity allows an unlimited number of persons to be present in the procedure before the court, who are not individually determined in advance. In process theory, a distinction is made between two types of public: general public and parties (clients) public. The principle of publicity, according to Janevski and Kamilovska and Garašić, is realized through the following elements: 1. the presence of the citizens in the procedure before the court; 2. announcing the composition of the court; 3. publishing court decisions 4. publishing reports on the work of the courts; 5. publishing the remarks on the work of the court and 6. the possibility to review and rewrite documents (Janevski, Zoroska-Kamilovska, 2010, 27). Garašić emphasizes that the principle of publicity in court proceedings is fully affirmed through the principle of orally, the principle of immediacy, and the principle of contradictory (Garašić, 2019, 2).

## **THE LEGAL FRAMEWORK OF THE PRINCIPLE OF PUBLICITY**

The principle of publicity is a part of international and national (domestic) legal acts. In this context, Article 10 of the Universal Declaration of Human Rights, as the milestone document in the history of human rights, provides:

*“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him.”*

The relevant provision, Article 14 of the International Convention on Civil and Political Rights read as follows:

*“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”*

Article 6 of the European Convention on Human Rights is worded as follows:

*“1. In the determination of his civil rights and obligations or 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.”*

Article 102 of the Constitution of the Republic of North Macedonia provides:

*“Court hearings and the passing of verdicts are public. The public can be excluded in cases determined by law. “*

Therefore, according to the Macedonian Constitution, the public trial - the trial *in foro* is the rule, and the exclusion of the public - the trial *in camera* - is an exception to that rule. The public can be excluded in cases determined by law (Janevski, Zoroska-Kamilovska, 2010 p. 27).

Macedonian Law on Litigation Procedure regulates the principle of publicity by several provisions. Thus, Article 292 stipulates that:

*“(1) The main contention shall be public. (2) Only adults can be present at the hearing. (3) The persons present at the hearing cannot carry weapons or dangerous arms. (4) The provision of paragraph (3) of this Article does not refer to members of the court police and security of persons participating in the procedure.”*

The principle of publicity is also regulated by Macedonian Criminal Procedure Law. Thus, Article 126 provides as follows:

*“(1) All judicial verdicts shall be publicly available and accessible in electronic or printed copies, except in cases when the public has been excluded under the Constitution of the Republic of Macedonia, this Law and ratified international agreements in accordance with the Constitution of the Republic of Macedonia.*

*(2) All other judicial decisions shall be available for inspection and transcription to any interested person, except in cases when the public has been excluded pursuant to paragraph 1 of this article.”*

The principle of publicity of the main hearing is determined by Article 353:

*“(1) The main hearing shall be open to the public.*

*(2) Only persons of age may attend the main hearing.*

*(3) Any persons attending the main hearing shall not be allowed to carry weapons or dangerous utensils, other than the members of the judicial police, the police, and the service for escort and security of the defendants from the penal and correctional institutions.”*

The principle of publicity is implicitly regulated by the Law on Administrative Disputes. According to Article 51:

*“If this Law does not contain provisions regarding administrative dispute procedure, the provisions of the Law on Litigation Procedure shall apply respectively.”*

So, because this Law does not contain an explicit provision that regulates the principle of publicity, the provisions of Law on Litigation Procedure will apply in this context.

## **EXCLUSIONS OF THE PRINCIPLE OF PUBLICITY**

Article 14 of the International Convention on Civil and Political Rights provides certain deviations of the principal of publicity application:

*“The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”*

Article 6 of the European Convention on Human Rights just like the ICCPR determines exclusions of the principal of publicity:

*“Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”*

According to Article 293 of the Law on Litigation Procedure, the court (the council) can exclude the public during the whole main contention or during one part of it, if so requested by:

- a) the interests of keeping an official, business, or personal secret;
- b) the interests of the public order or
- c) moral reasons.

The council can exclude the public even in a case when the measures for keeping the order, anticipated by this Law, would not be able to provide incessant holding of the contention.

Excluding the public does not refer to parties, their legal representatives, attorneys-in-fact, or intervenors. The council can allow the presence of certain official persons, as well as scientific and public workers at the main contention from which the public has been excluded if it is in the interest of their service, i.e. scientific or public activity. Upon a request of the party, the court can allow presence at the contention of at most two persons it appoints. The president of the council shall remind the persons present at the contention, from which the public has been excluded, that they are obliged to keep as secret everything they learn during the contention and shall be reminded of the consequences of revealing a secret (Article 294).

Article 295 stipulates that “the council shall decide upon the exclusion of the public with a determination, elaborated and released in the public. A special appeal shall not be allowed against the determination of excluding the public.”

While, Article 325 paragraph 3 explicitly provides that: *“If the public was excluded from the main contention, the pronouncement of the verdict shall always be read in public, and the court shall decide whether and to which extent the public shall be excluded when announcing the reasons for the verdict.”*

According to Article 11 of the Macedonian Law on non-continuous proceedings, the proceedings in which status issues and family relations and conditions are decided shall be closed to the public.

Criminal Procedure Law also contains several provisions that regulate the exclusion of publicity. So, Article 354 stipulates as follows:

*“At any moment, from the beginning of the session until the end of the main hearing, ex-officio, or upon a motion by the parties or the injured party, the Trial Chamber may exclude the public from a part of the main hearing or during the entire main hearing, if that is necessary to protect a state, military, official or an important business secret, preserve public order, protect the privacy of the defendant, witness or injured party, protect the safety of the witness or the victim and/or, to protect the interests of a juvenile person.”*

On the other hand, according to Article 55, victims of crimes against gender freedom and gender morality, humanity, and international law as well as have the right to ask for the exclusion of the public at the main hearing.

The Trial Chamber shall rule on the exclusion of the public with a decision, which has to be elaborated and publicly pronounced.

According to Article 405 paragraph 4: *“If the public was excluded from the main hearing, the verdict shall always be read at a public session. The Trial Chamber shall decide whether and for how long it shall exclude the public during the explanation of the reasoning behind the verdict.”*

The Criminal Procedure Law in Article 355 contains the very same provision as Article 294 of the Law on Litigation Procedures.

## **ESSENTIAL VIOLATIONS OF THE PROCEDURE PROVISIONS THAT REGULATES PRINCIPAL OF PUBLICITY**

Article 343 of the Law on Litigation Procedure provides that:

*“(1) Actual violation of the litigation procedure provisions exists, if the court during the procedure has not applied or has incorrectly applied a provision of this Law, and that has affected or might have affected reaching of the lawful and correct verdict.*

*(2) Actual violation of the litigation procedure provisions always exists, if: 12) the public was, against the Law, excluded from the main contention.”*

Revision according to Article 375 can be announced in several situations and one of them is if contrary to the law the public was excluded from the main contention.

In the same line with the previous provision is Article 415 of the Criminal Procedure Law:

*“(1) There shall be an essential violation of the criminal procedure provisions, if:*

*4) the public was excluded from the main hearing contrary to the law.”*

## **THE PRINCIPLE OF PUBLICITY THROUGH THE ECtHR CASE LAW**

The European Court of Human Rights has decided in many cases concerning violations of the principle of publicity. For this paper, the following cases will be analyzed: *Case of Pretto and others v. Italy*, *Case of Werner v. Austria*, and *Case of Boshkoski v. North Macedonia*.

In the application lodged with the Commission on 27 July 1977, **Mr. Pretto** and the other members of his family relied on Article 6 § 1 of the ECHR, and among others, also made the following complaint:

...

(e) By not pronouncing their judgments publicly, the Court of Appeal and the Court of Cassation had failed to satisfy a further requirement of Article 6 § 1 (para.16).

In its report of 14 December 1981 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion:

- by twelve votes to three, *that there had also been no breach* of Article 6 § 1 (art. 6-1) as regards the requirement that judgment is pronounced publicly (para.17).

The Commission had made clear that *by rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention”* (para.21).

So, considering this breach alleged, Commission has stated as follows:

*“25. The terms used in the second sentence of Article 6 § 1 (art. 6-1) - "judgment shall be pronounced publicly", "le jugement sera rendu publiquement" - might suggest that a reading out aloud of the judgment is required. Admittedly the French text employs the participle "rendu" (given), whereas the corresponding word in the English version is "pronounced" (prononcé), but this slight difference is not sufficient to dispel the impression left by the language of the provision in question: in French, "rendu publiquement" - as opposed to "rendu public" (made public) - can very well be regarded as the equivalent of "prononcé publiquement". At first sight, Article 6 § 1 (art. 6-1) of the European Convention would thus appear to be stricter in this respect than Article 14 § 1 of the 1966 International Covenant on Civil and Political Rights, which provides that the judgment "shall be made public", "sera public".*

According to the facts of this case, the Court of Cassation took its decision after holding public hearings and, although the judgment dismissing the appeal on points of law was not delivered in open court, anyone may consult or obtain a copy

of it on application to the court registry (para.27). In the opinion of the Court, the object pursued by Article 6 § 1 (art. 6-1) in this context - namely, to ensure scrutiny of the judiciary by the public to safeguard the right to a fair trial - is, at any rate as regards cassation proceedings, no less achieved by a deposit in the court registry, making the full text of the judgment available to everyone, than by reading in open court of a decision dismissing an appeal or quashing a previous judgment, such reading sometimes being limited to the operative provisions. (para.27)

So, the absence of public pronouncement of the Court of Cassation's judgment did not contravene the Convention in the present case (para.28).

Mr. Werner applied to the Commission on 16 March 1993. Relying on Article 6 § 1 of the Convention, he complained that when ruling on his claim for compensation for his detention, the Vienna Regional Court and Court of Appeal had not held a public hearing and had not pronounced judgment publicly (para.25).

In its report of 3 September 1996 (Article 31) the Court expressed the opinion that there had been a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing (twenty-five votes to four), the Austrian courts' failure to pronounce judgment publicly (twenty-seven votes to two) (para.26).

The Government maintained that the applicant had not exhausted domestic remedies in respect of his complaint concerning the lack of a public hearing as he had not expressly asked for such a hearing. He had accordingly waived any right that he might have had in that connection (para.30).

But, the Court stated that *it is true that Mr. Werner did not expressly ask for a public hearing to be held, but the Court must examine whether he thereby waived his right* (para.47). The Court also noted that neither the Vienna Regional Court nor the Vienna Court of Appeal held a public hearing of the applicant's compensation claim and the applicant was in principle entitled to a public hearing as none of the exceptions laid down in the second sentence of Article 6 § 1 applied (para.46).

The case of *Boshkoski v. North Macedonia* concerns the alleged unfairness of criminal proceedings against the applicant on account of the courts' reliance on the testimony of a protected witness and the exclusion of the public from several hearings (para.1). Namely, the trial court decided to exclude the public from the hearings of 20 and 25 October 2011 in spite of protests by the defence, holding that it would examine evidence gathered through special investigative measures (para.14). The public was also excluded from a hearing of 15 November 2011, despite protests by the defence that that would run contrary to domestic law. At that hearing, at which the protected witness was present, the trial court heard witness 3-1 after rejecting an objection lodged by the applicant about his being heard as a protected witness (para.15). The applicant appealed that the trial court had not provided any reasons for excluding the public from a part of the trial (para.17). On the other side, the Government argued that the exclusion of the public had been limited to three hearings and that it had been strictly necessary for the interests of justice and to prevent the identity of the witness from becoming known to the general public and the media (para.36).

The Court reiterates that before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling public interest and limit secrecy to the extent necessary to preserve

such an interest (para.50). The Court observes that the trial court excluded the public from the hearings of its motion, despite protests from the defence. It justified this decision both by reference to the examination of the protected witness 3-1, as well as the examination of evidence gathered using special investigative measures... (para.51). So, considering the previously, the Court held that in the circumstances of the instant case there were no good reasons for keeping the witness's identity a secret (para.44) and that witness 3-1's face and voice were distorted when he was giving his testimony (para.52). Accordingly, the Court does not find that in the circumstances of the case, it was objectively justified that the public is excluded from the hearings of 20 and 25 October and 15 November 2011 (para.53).

## CONCLUSION

The principle of publicity is a fundamental principle for the rule of law full realization. From the above text, it can be concluded that the principle of publicity is a constitutional and conventional principle, which is elaborated in detail with the legal provisions.

The principle of publicity is not set in absolute terms. International and national legal acts in an explicit manner determine the conditions when the courts may deviate from the application of the principle of publicity. In this context the ECtHR emphasises as follows:

*“The holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. It is relevant when determining whether a decision to hold criminal proceedings in camera was compatible with the right to a public hearing under Article 6, whether public interest considerations were balanced with the need for openness, whether all evidence was disclosed to the defense and whether the proceedings as a whole were fair”* (para.39, Boshkoski v. North Macedonia).

According to Jayawickrama, the duty to hold a public hearing is imposed upon the state and is not dependent on any request, by the interested party, that the hearing is held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending if members of the public so wish. The courts must make information on time and venue of the oral hearings available to the public and provide adequate facilities for the attendance of interested members of the public, within reasonable limits. (Jayawickrama, 2002, 509-509).

Griffin is in the same line with Jayawickrama, when he is concluding that *in our actual societies we need institutions to make laws, to keep track of and publicize them, to lay down procedures for dealing with the accused, to defend participants in these procedures from intimidation, and so on* (Griffin, 2008, 105).

With the application of the principle of publicity, the proceedings before the courts will be more efficient, responsible, and of high quality (Dika 2008, 25). As Beccaria wrote in his *On crimes and punishment*: *“Let the judgments be public, let the proofs of the crime be public, and public opinion, which can be the only social restraint, will keep violence and passion in check”* (Summers, 2007, 42).

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# GLOBAL SOLUTIONS TO GLOBAL CHALLENGES LESSONS TO BE LEARNED FROM THE CLASSICAL ANTIQUITY

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## **Abstract**

The plague of Athens represented the beginning of the end of the “Periclean Golden Age” in Athens and Hellas, but it brought in the city an ideological revolution lead by Socrates that have challenged Athens’ cultural and moral particularism and empowered the creation of the classical world. Socrates and his student Plato condemned the earlier dominant ideas that every person lives in a separate word of personal truths and lies, and reunited the world into a universal truth, that would later transform into a united world of shared values propagated by Zeno’s stoics. Almost a millennium later during another great crisis, “the fall of the city of Rome”, Augustin of Hippo praised their ideas, claiming that the “cities created by men will fall”, which is less important as long we keep the shared government of the good among all men.

Pandemics have been attributed, by many contemporary scholars, with roles in important episodes that triggered, shaped, challenged and crumbled the classical world. However, the challengers of these theories, underline that pandemics’ impact, if significant, was certainly rivaled by other major factors, such as migrations and demographic changes, and social and ideological transformations. Despite the contested algorithms and factor analysis models, recent scholarship has underlined the connection between the globalization process and its numerous side effects in both antiquity and modernity. This paper approaches the global challenges of the contemporary world through a comparative model with the antiquity and searches for curious patterns of redefining the globality in times of crises.

**Key words:** pandemics, globalization, shared values, classical antiquity

## INTRODUCTION

*„What we may be witnessing is not just ...passing of a particular period of history... but the end of history, as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government “<sup>1</sup>*

Francis Fukuyama

When at the end of the Cold War, and at the very end of one long millennium, the great American political scientist and intellectual, Francis Fukuyama, optimistically and triumphantly declared the end of the history, very few believed that ‘the end’ would look like this.

Today, many intellectuals, political and economic leaders, and citizens of the Western world, as well as the ones throughout the world that have embraced and shared their ideas and ideals with nostalgia, look upon this long-sunk modern Atlantis as a utopia for the world that ‘almost’ didn’t become it.

Instead of having such vision, today, European elites, and many across the Atlantic Ocean, panic to see how the deep changes and enormous challenges created or augmented from the fast track of the economic and cultural globalization, endanger not only their economic and political axioms, but the moral imperatives of the civilization as we understood it. The mass migrations, demographic changes, institutional anemia and instability, as well as the ideological transformations aimed not so uncommonly to radical ideas and movements, often shake the western societies in their core structure and intensely reduce the confidence of the citizens in the sustainability and the future of such system. In such upfront prepared scenery and setting, the pandemic in 2020 shook the world with its apocalyptic scenes of empty megacities and disfigured mass funerals. It further ‘froze the blood’ of those who fear the ‘punishment’ for deserting the God’s commandments and canons, the localism and traditions, and those who fear the ‘punishment’ for deserting the humanistic principles, universal rules, and the progress.

In the era of disbelief in the traditional institutions and elites, many leaders of diverse political and ideological backgrounds, by deeply pathetic requiems, save or disperse the western civilization and its humanistic values. For some, this ‘end of civilization’ is connected to the influx of foreigners, for others with the influx of different ideological and religious systems, and for some with the fall of the ideals of the democracy and the principles of the individuality and the human rights.

It seems that the common concept of all this idealistically profound and diffuse political visions is their eschatological dimension. Seeing as a whole and with dose of cynicism, this modern discourse appears as swan song of the ‘last people’ who recovered for a moment from their own apathy, only to send ‘message in a bottle’ from this to some future civilization from this or other planet.

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<sup>1</sup> Francis Fukuyama, The End of History?, *The National Interest* 16, Summer 1989, pg. 3 - 18

## WHICH CIVILIZATION WE SAVE OR MOURN?

*„The survival of the West depends on... reaffirmation of the western identity and the acknowledgment of the people from the West that their civilization is unique, (but) not universal“<sup>2</sup>*

Samuel Huntington

When only after one year from the epochal work of Fukuyama, full with idealism, his former teacher and prominent American political scientist Samuel Huntington ‘lectured him’ on theory of international relations in the prestigious ‘Foreign Affairs’, many looked on this reaction as ‘relapse of the old’ and deeply conservative view on the world.

However, the experienced scientist and political advisor, Huntington, unlike his student Fukuyama, lived in the period before the Cold War, and as student of Yale, he must have closely followed the early optimism of the period that arose after the fall of fascism. His warnings that ‘the expectations should not always be mistaken for reality, because one can never know when will be disappointed’, in means of idealistic 90s, sound cynical. However, in light of today’s ‘civilization’s’ challenges for many, this and other of his views are considered for some as scientific empiricism, and for others a prophecy.

In the years of victory of USA in the world’s biggest competition, the Cold War, the visions for multipolar and multicivilizational world of Huntington were not as appealing, even for many ‘non-Western’ elites, and the need to defend the ‘survival of the West’ was completely outlived. For a moment, or to say historic momentum, there was an impression that the idealistic traditions in the theories of international relations are much more suitable in the ‘new world’, and as much desirable for the interests and the visions of the winners of the Cold War, than the ones of the realists.

Today, opposed to that, according to many parameters we live in the realistic ‘world of diverse civilizations’ of Huntington. This diverse reality is not reflected only in the prolonged misunderstandings of the leaders of the great forces, regional instability, and war conflicts, or the growth of ethnic and religious intolerance, and fundamentalist ideas among people, but also by the conceptual capitulation in this ideas of the divided world of institutions and the core representatives of the universalism and the idealism.

For example, the Organization of United Nations (UN) and UNESCO, in the dawn of the new millennium intensified the commitments and efforts for dialogues of different civilizations. In that direction followed the declaration of 2001, the first year of the millennium, as the ‘Year of Dialogue Among Civilizations’ with consensus of the member states of UN and with great enthusiasm and support by many international organizations and groups, as well as important

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<sup>2</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon&Schuster Publishing, New York, 1996, crp.21-22

intergovernmental institutions and bodies.<sup>3</sup> The enthusiastic initiatives of individuals started even in the 70s, in the new millennium produced serious global movements which reflected in the spirit of Millennium Declaration of UN, in the Global agenda for dialogue among civilizations and mid-term plan for implementation of UNESCO (2002-2007), as well as numerous global initiatives as “Dialogue for co-existence of cultures and civilizations” from 2002, “Dialogue among civilizations” from 2002, “Alliance of civilizations of United Nations” from 2005, and up to the international “Forum of antique civilizations” from 2017.

All these initiatives contain the ideas for tolerance and understanding of the differences and the culture of peace, as solution for many global, regional, and local challenges initiated or pointed with the fast tempo in which today’s intensely globalized world lives in and is transformed.

However, this deep devotion towards the “Dialogue among different civilizations”<sup>4</sup>, opposed to its solid determination to defy the famous, and for plenty, controversial concept of Huntington for “clash of civilizations”,<sup>5</sup> basically confirms, reaffirms, and promotes its basic principles. For example, by the Convention of children’s rights, UN obliges all educational systems in the world to motivate the child’s ‘respect toward his or her identity... and to civilizations different than his/hers’.<sup>6</sup>

Today, it seems UN, the most important international organizations and intergovernmental initiatives, doesn’t defy the views of Huntington, that, for example, ‘Arabs, Chinese, and people from the West, are not by any means part of any wider (unique) cultural entity (or space)’, but agree that ‘they constitute (fundamentally different) civilizations’.<sup>7</sup>

Seen through the prism of ideas and arguments of Huntington, plenty global initiatives for “dialogue of civilizations”, that marked the first decades of the new millennium, represent a fundamental scientific, cultural, and social capitulation of the concept for uniform ‘human civilization’, in front of the deep, historical, and perceived differences of numerous cultural groups and sub-groups of the world.

At last, what is the dialogue among civilizations, if not an application of the Huntington’s theory that ‘the world will be shaped, in larger amount, from the interactions between seven or eight main civilizations’.<sup>8</sup>

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<sup>3</sup> Resolution adopted by the General Assembly, United Nations, 53rd plenary meeting, 4 November 1998

<sup>4</sup> Mark B. Salter, *Barbarians and civilisation in international relations*, Pluto Press, London, UK, 2002, pg.128-155

<sup>5</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon&Schuster Publishing, New York, 1996

<sup>6</sup> *Convention on the Rights of the Child*, Adopted by General Assembly resolution 44/25 of 20 November 1989, article 29

<sup>7</sup> Samuel P. Huntington, “The Clash of Civilizations?”, *Foreign Affairs*, Council on Foreign Relations, pg.22-49

<sup>8</sup> Samuel P. Huntington, “The Clash of Civilizations?”, *Foreign Affairs*, Council on Foreign Relations, pg.22-49

## CIVILIZATION OR CIVILIZATIONS

*“Western belief in the universality of Western culture suffers three problems: it (assurance) is false, it (assurance) is immoral, and it (assurance) is dangerous.”*<sup>9</sup>

Samuel Huntington

The visions of Fukuyama and Huntington represent a foundation for main scientific, ideological, and political polarizations in the Western world and broader, and as part of idealistic and realistic tradition of theories for international relationships, they are only significant forms of two polarized tendencies of century old debate, with fundamental influence over the world’s development. Versus such opposites, the two views share their complete foundation over the ideas, theories, and symbols of identity of the Western men, as part of the world dominant “Western Civilization”. The only way to understand this unity of two opposites is to understand the origin and meaning of the main idea of which the two originate – ‘idea for the existence of the Western civilization’.

That Western civilization, and civilization in general, is so omnipresent in the political, social, and even scientific discourse, that we often accept them as timeless axioms of the history and the world. In that context, Huntington will point out that ‘the wider explorations of the human history represent the history of civilizations.’<sup>10</sup>

However, even by conscious or subconscious tendency to transcend civilizations through different epochs and contexts, them, or at least, the history of the affirmation of their existence, we cannot follow them earlier than the nineteenth century.

On the contrary, when the neologism ‘civilization’ was created in the world of the Bourbonic kings of the 18<sup>th</sup> century, it existed only as a noun in singular. For the ideology of the Bourbonic king’s court, the civilization was an expression of their total cultural, social, political, economic, and technological development of the world, which was constantly developed by the lead of Egyptians, Assyrians, Persians, Macedonians, Romans, and, of course, it triumphed in the era of the French Bourbons.

Such definition of civilization is completely opposite of the modern determinants of Huntington, who doesn’t define the civilization as a level of social development, but as its cultural characteristics. This and such modern tendency in theory is founded on a notion that today is very close and often used in common context with civilization – culture. However, in the past centuries these terms were not always compatible. Culture as notion or its implications in a broader collective and global identities, is a product of the German intellectual traditions from the era of the European “Spring of the Peoples”, from the middle of the 19<sup>th</sup> century. That German novel concept, Kultur, used as conceptual contradiction of the French

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<sup>9</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon&Schuster Publishing, New York, 1996, p.310

<sup>10</sup> Samuel P. Huntington, “The Clash of Civilizations?”, *Foreign Affairs*, Council on Foreign Relations, сtp.22-49

universal imperialism from the era of Napoleon, pretended to become new and alternative understanding of the history and the world.

This new global ideology, once and for all, should substitute the many-centuries dominant place of France as civilization center, and accordingly as a political center of Europe and the world. The new “German” idea of the world, releases ‘different cultures’ from the obligation to be civilized and included in the global competition for acceptance and further development of the inheritance of the unique human civilization.

If in the 18<sup>th</sup> century Ferguson defined the civilization as antipode of the primitivism<sup>11</sup>, the definition of ‘culture’ of the German romantics, was a celebration of the natural and the primitive. In that way, the German culture, and afterwards other European and non-European cultures, are self-defining through their diversity and authenticity, and their resistance from the influence of the global civilization, which according to ‘Bourbonic definitions’ and one before them, came from Europe from the Middle East and the Mediterranean.

These new, different cultures, according to the new German theorists and romantics, represented separate wide and natural units of people, and communities, which shared authentic culture, language, and philosophic beliefs throughout the centuries and millenniums of their development and transformation. These conserved capsules in the time, share the exact characteristics of the civilizations of Huntington. Even so, in the ideological and scientific ground in the 19<sup>th</sup> century in Germany and wider, those were not called civilizations, but simply cultures. During the 19<sup>th</sup> century, when the “European Concert” defeated the French imperialistic ideal in Europe and the world, the cultures, as were thought in Germany, became much more universal view of the history of human communities, which were seen as separate, long-term divided and authentic cultural units.

At last, the transformation of the human civilization in its new plural identity, and the form civilizations dominant even today in the world relations, is a product of global socio-political transformations of the first half of the 20<sup>th</sup> century.

In 1905 in the USA the first generation of the family of the American political scientist Francis Fukuyama is settled. They leave Japan in the time of military conflict with Russia and depart to East to meet the West. In that same year 1905, Japan wins the war with the great Russian Empire, and Europe and the West are obliged to meet and acknowledge the East in a whole new light.<sup>12</sup>

In the new global context, the European colonial forces and civilizators of the world needed to, unwillingly, step aside in the international relations of the non-European forces, which, by then were qualified as ‘less civilized’, or simply ‘wild’. The American religious leader Gerrit Gong, whose ancestors, same as Fukuyama’s,

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<sup>11</sup> Во „Есејот за историјата на цивилното општество“ од 1767та година, Фергусон го нагласил важноста идејно единство помеѓу развојот на личното и колективното, аргументирајќи дека „не напредува само индивидуата од детството кон зрелоста, туку и видовите од примитивизмот кон цивилизираноста“.

Ferguson, Adam. *An Essay on the History of Civil Society 1767*. Edited by Duncan Forbes. Edinburgh University Press, Edinburgh, 1966, стр.1

<sup>12</sup> Julie Reeves, *Culture and International Relations: Narratives, natives and tourists*, Routledge, London & New York, 2004, стр.27-29

met the West by heading East, illustrates this process with the worlds: new 'practice that someone bothers with law contracts with 'uncivilized' countries was justified as nuisance with aim to keep the law and order of 'civilized' in the international society.' Exactly this nuisance and 'diplomatic wit' regarding the reception of the non-European countries, mainly ones from Eastern Asia and South America, to the club of the civilized, will harden the new understanding of the world as a conglomerate of civilizations.

So, in the new European version of the civilization, full with cultural characteristics of the romantic 19<sup>th</sup> century, but also the imperial traditions and racial stereotypes created in the past centuries, there was no place for former 'savages' and 'barbarians. That is why if the relations with them should have been regulated in the boundaries of civilized, the only solution was to be proclaimed as other, thinking of less worthy, civilization.

### CLASSIC CIVILIZATION

*"It is needed to 'accept it as starting point principle the fact that there exists hierarchy among races and civilizations, and that us (Europeans) belong to the superior race and civilization, admitting that, while the superior gives rights, requires and implies rigorous obligations in return...The legitimacy of submission of the local people lies in the confidence of our superiority, but not only our mechanical, economic and military superiority, but our moral superiority as well. " Our dignity and the dignity of this act 'lies (exactly) in my quality, and adjusts our right to lead the rest of the humanity."*

Colonial rhetoric from 1910, quotes from Edward Said<sup>13</sup>

The ideas for dividing the world into different civilizations, where the members of the 'West', European concert, should have kept the dominant role in world's relations, created the need of existence of the concept 'classical civilization'. It had means to define and conserve the ideals and principles 'according to which (Europeans as self-proclaimed long-term arbiter) would judge which non-European societies are enough civilized to be accepted as members of the Europe-dominated international system."<sup>14</sup>

Such new, separate, European civilization, by example of the German concept Kultur, should have its own ideas, values, symbols and achievements throughout history, which are timeless, and as such to continue to preserve the piety of dominant civilization that 'rules and ennobles' the rest of millenniums. This view, dominantly in intellectual areas of the West in the 20<sup>th</sup> century, the British scientist in the theories of international relations Gilbert Murray illustrates with sincere and deeply personal words. He says: "For the people in the time when I was young, the Western...Civilization was simply the right way of human development:

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<sup>13</sup> Edward W. Said, *Culture and Imperialism*, Vintage Books, New York, 1994, crp.17

<sup>14</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon&Schuster Publishing, New York, 1996, crp.41-42

the other civilizations, if anyone can name them civilizations, were just wrong ways or mistakes.”<sup>15</sup>

By those means, the idea for the end of history of Fukuyama, in which the brilliance of the ‘classic’ West is universalized as value and unites the world, is not novel at all. On the contrary, it is a logical conclusion and expected result of the ideas on which the world order was founded at the beginning of the 20<sup>th</sup> century.

These ideas were founded and found deep root in the European intellectual and scientific thought in the 19<sup>th</sup> and 20<sup>th</sup> century, that the two critical points by which the global civilization, through the Mediterranean, came closer to the ‘unique’ European soil, transformed into fetishized symbols of the ancient ‘authentic’ traditions of the West. They were proclaimed for starting points of the European civilization built on the particularistic principles of the German concept for Kultur. Same as the 19<sup>th</sup> century Germans, they didn’t need to prove themselves with their technological achievements and traditions with the rest of the ‘ancient civilizations’, but are instead proclaimed for morally superior, and predisposed for world domination.

Significant base for this modern ideology will be the works of the Roman late-republican authors, who defending themselves from the splashing influence of the antique globalization and its values, will try to justify the survival in their system of social relations as an alternative toward the imperial model, which with millenniums was dominant in the Middle East, and across the Mediterranean spread in Europe, taking over Rome, and dominating until the modernity. This late-republican roman narrative, idealistically supported with its example – ‘Athenian democracy’, especially from the time of Pericles, will additionally be adjusted with elements of late-medieval propaganda of Roman popes, that tried to emancipate from the influence of Constantinople, will transform in identity basis of the western civilization. In that manner, the dominant Europeans, even so almost significantly divided in ‘different’ nations and cultures, through the ‘classic civilization’ should have their shared, and using the words of Huntington, ‘the widest identification’,<sup>16</sup> which explained their natural dominant place in world relations

During the 19<sup>th</sup> and 20<sup>th</sup> century, Athena between the 5<sup>th</sup> and 4<sup>th</sup> century BCE, and Rome between the 2<sup>nd</sup> and 1<sup>st</sup> century BCE, two realities, whose ideas and social relations represent almost insignificant irregularity in the principles and directions in the millennium social and cultural development of Europe from antique time to modern, will be conserved from European elites in timeless capsules of the ‘western identity’. As such, from being peripheral points of the world’s civilization, became imagination of the European intelligence in historical and geographic centers of moral and effectively dominant western civilization and culture.

That is why, such civilization, although younger than the civilizational development of Egypt, Mesopotamia, and parts of eastern Asia, represented, in the European imagination and self-perception through the past, higher level, different

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<sup>15</sup> Julie Reeves, *Culture and International Relations: Narratives, natives and tourists*, Routledge, London & New York, 2004, ctp.31

<sup>16</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon&Schuster Publishing, New York, 1996, ctp.41-44, 57-58

quality of human and interpersonal relations. In that context the word classical is used. It naturally finds its root in the Latin adjective 'classicus', which the republican Rome used for 'higher (social) class', and later for 'higher 'literature', or literature with greater quality than the rest.

Such 'classical civilization' by the educational process, public commemorations and architecture, museums, scientific institutions and popular culture became alter-ego of the modern Western world. According to Huntington, the classic is the core value, by which rediscovery and further promotion of political and philosophical concepts the West will self-discover and distinguish from the rest of the civilization, and by those means it will survive. For Fukuyama, these classical notes of democracy, freedom, individualism and entrepreneurship, which are ideal basis and historical verification of the success of the Western liberal democracy, are so morally superior, 'classical', for which it is normal to be universalized, to rule, and reshape the modern world.

### **CLASSICAL MESSAGE IN A BOTTLE**

Against the dominance of the classical civilization in the Western narrative, the French universal traditions, the restored and rediscovered orientalism and post-colonial tendencies of the second half of the 20<sup>th</sup> century challenge the meaning and emphasize the burden of the 'classical traditions'.

However, if we are thinking of the modern scientific development and the social and cultural transformations and challenges of the last decades, encouraged from the strong globalization waves which pushed the classical traditions and narratives from the center of the modern political and social discourse, we are probably fooling ourselves. It is sufficient to think of the numerous European politicians in Brussel and throughout the continent that defend the democracy, as specific tradition of Europe and the West, while referring to the Roman republicanism and the Athenian democracy. Or, even so, to look upon the growing and popular radical right party, that by shouting paroles for 'oriental invasion' and protection of our 'traditional values' in the squares and in the social media unconsciously paraphrases the propaganda paroles of the late-republican and Augustus's Rome. At last, for many connoisseurs of the classical era it is not hard, in expressive horror of a multitude of American intellectuals, and some brilliant minds of today, in the politics and manner of ruling of the president Trump, to recognize elements of shocking plagiarism from the works of Cicero and Tacitus.

All this leads us to thing of the argument of the classical philosopher Parmenides from Elea, who claimed that even if we convince ourselves in something that is not real, that lie already created a new reality. In that direction, the words of Huntington that the Western civilization lies on the classical traditions and Christianity, should not be analyzed as historical truth, but as a dominant perception that creates reality of one specific geography in the present. This is why we are obliged, once more, in the 'mythological' classical era to search for the global challenges and their solutions, or even the 'messages in a bottle', that their contemporaries have left us. Regardless whether our 'idealized' ancestors faced issues similar to ours, or our centuries-old commitment of imitating their ideas and solutions connected us before the gains and before the challenges, the short

experiment of comparison of, according to Huntington, the original philosophical views of the Western civilization in the antique and the modern, a solutions of the modern problems can be offered, which are more acceptable, because, they are of course ‘our’ – Western.

In this context, one of the most recognizable figures who merges the western traditions of the classical philosophy and Christianity, which Huntington cites as the main markers, is Augustine of Hypo. Although he himself is not of European descent, like many other important ancient symbols of the West, writing in Latin in Rome at the end of the classical era, and connecting classical philosophy with Christian theology, Augustine transformed into symbol of the unique ‘Western identity’, built in the classical world through which we recognize each other again and again for centuries.

After all, some of Augustine’s many works represent a true classic ‘message in a bottle’ sent to future civilizations that he prophetically foresaw. A typical example is one of his famous works ‘For the City of God’. Written in the decades following the ‘fall of the city of Rome’, it is a true manifesto of the future. The fall of the ‘eternal Rome’ in 410 under the attack of the ‘barbarians’, according to many western historians marked the end of the ‘classical world’, and in antique period the fall of this city had symbolic significance. Although Rome for almost one century slowly, but surely, turned from a center into a province of the empire, its symbolic name will still continue to live in the empire for another millennium, as a theoretical conception of world rule even after the fall of Constantinople.

However, the ‘message in a bottle’ of Augustine of Hypo, written in ancient Rome, is very different from the expected pathos of the elites of the old and once dominant capitol, that robbed, raped, and disenfranchised, watched in horror for the time to come. Augustine comforts his fellow citizens with profound moral lessons, but he is also stern in his assessment that if the ‘city of people’, Rome, and the civilization as they knew it falls, they should not mourn but rejoice the ‘city of God’, as a world and government in which people are not connected through traditional affiliation to a political or cultural entity, but through universal values and truths and shared goodwill.

Considering this ‘message in a bottle’, dating in one of the monumental ‘ends’ and ‘falls’ of the Western civilization, definitely, in Huntington’s words, ‘restores and preserves’ the uniqueness of our civilization. However, the classical teaching of Augustine of Hypo does not seem to direct us to preserve this ‘our civilization’ from the various other civilizations, but to make it resistant of the challenges by discovering the most universal and shared values which it carries within itself, and which have capacity to outlive and renew the traditional institutions, and even the morals of society in face of any challenge. The Christian aspect of Huntington’s authentic Western traditions seems to be transformed into a typical idealism in Augustine’s messages before the end of the civilization, which does not lament the old, but finds optimism, energy, and shared values to step into the new and he unknown.

Moreover, the Christian element is not the only one at Augustine that calls for universal and shared values. The deep knowledge of classical philosophy of this philosopher, who in his maturity will accept the faith, leads him to an in-depth

analysis and evaluation of the ‘fundamental philosophical values’ which constitute the classical, and thus the Western world. However, Augustine does not refer to the Athenian sophists of the 5<sup>th</sup> century BCE, but on the contrary, to the moral traditions of the philosophy of Socrates and Plato. This philosophical tradition is, after all, another classic ‘message in a bottle’. Namely, when the separatist Athens at the end of the 5<sup>th</sup> century BCE is finally defeated by Persia, through its allies in the Aegean, and its ‘small Aegean world’ disintegrates economically, socially, and politically, that is when the idealism and the moral philosophy of Socrates and Plato was born. The decadence of the society, the epidemic of the ‘Plague of Athens’, the growing power of external factors and the attempts and internal support to abolish ‘democracy’, mark the beginning of the end of the legendary ‘Athens of Pericles’. However, the philosophical revolution that this crisis will bring will create the united world of antiquity, which we still admire and call a classic.

### **INSTEAD OF CONCLUSION**

In their philosophy, Socrates and Plato break the traditions of the Athenian sophists, who saw their role as ‘sellers of skills of dialogue’ among people, in order for them to impose their truth and their values, above those of others. In contrast, Socrates’ moral revolution plunged the philosophers above positions of local artisans, and turned them into ideologues in search of the common truth and common good.

The philosopher Plutarch, living in the Roman Empire at the turn of the 1<sup>st</sup> to the 2<sup>nd</sup> century, represents the ideals of the classical world, through the ideas of the philosopher Zeno, who in the 3<sup>rd</sup> century BCE became founder of the philosophical school and tradition of the stoics. Plutarch reminds that the core idea of Zeno was

„the way of organizing the human life should not be based on cities or tribes, which differ in their separate way of justice, but we should consider all people for citizens and members of the (single) people, and that there should be one (common) way of life and order, as the one of the flock that grazes together, and is encouraged by common law (for all).“

Zeno’s messages, linked to the so-called era of dominance of the European elites over the world of antique, are not words of particularism, and even less of ‘Western domination’. They seem to represent true global visions of the challenges we face today. His and similar messages were dominant voice of the globalizing ‘classical world’, and as such are interesting lectures for the contemporary challenges of the globalizing reality. Nevertheless, we are obliged to recall the messages of the antique, that confirm the historical foundation of capitalist ideas, which in a long period of modernity have been important spiritus movens of the global processes. For example, Diodorus of Sicily, in one of his universal studies of the past, will critically note that:

„...the barbarians, always sticking to the same things, do not miss (to define) any detail, while Greeks, on the other hand, aiming at the earnings to be made from work, continue to establish new (philosophical views) schools and to debate between themselves for the most important questions of interest, that lead to their

scholars to cling to opposite views, and their minds to hesitate all their lives and not to be able to build a stable opinion at all, but simply to wander in confusion...<sup>17</sup>

The classical period has left us many different ‘messages in a bottle’, and the decision to choose the most universal or the most profitable, and which of them we will declare as the most reasonable, remains with us.

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<sup>17</sup> Stephen R. L. Clark, *Ancient Mediterranean philosophy: an introduction*, Bloomsbury Publishing, London&New York, 2013, сtp. viii

## **PROTECTIVE SECURITY IN THE FUNCTION OF THE TERRORIST ATTACKS PREVENTION**

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### **Abstract**

The private security system has a very important role in preventing and dealing with critical incidents, including terrorist attacks. Private security personnel is the first to be able to assist in incident and therefore need to upgrade their knowledge, skills, and abilities to protect property, facilities and people from any modern forms of threat. They must be able to recognize, warn and point to suspicious activities they observe during their work, as well as to take appropriate measures and activities to prevent incidents, as well as to undertake suitable protective measures and activities. The most effective security response for preventing terrorist activities should include a combination of physical, information and personnel security measures. Together, they help in deterrence and detection or help minimize the consequences of any attack. Physical, information and personnel security measures need to complement and support each other. But all facilities/locations are different, so the appropriate mix of measures will depend on the nature of the security assessment based on the threats and vulnerabilities of each site.

In this paper, the authors present and analyze protective measures that have proven to be most effective through comparative good practices. It starts with the thesis that security in an organization should be developed according to a "multilayer" principle, where each layer supports the next and all work together seamlessly.

Security measures can be resource-intensive, costly and, if not carefully managed, can disrupt routines and alienate staff members. This is why careful thinking and planning is needed when choosing the right response.

Factors such as the size of the organization, the resources available, and the type of tasks to be undertaken will determine which are the most appropriate and effective security responses for the organization to prevent terrorist activities.

**Keywords:** protective security, physical security, information security, personnel security, terrorist attack

## **INTRODUCTION**

The new threats to the security of the countries create new needs for security of the people and the property. The contemporary terrorism as one of those threats has created a need for new way of thinking and acting in direction of prevention and suppression. The shifting of the methods of terrorist action towards softer goals has shifted the fight in the private sector too. The trends of terrorism threats point out the need of investing in the private security sector which is essential in the prevention of the terrorism's risks.

The evolution of the terrorism reflects its complexity, dynamics and intensity, as well as its huge threat to the national security of the countries, as well as the whole international security. Today, the international relationships are characterized with emergence of new more dangerous forms of terrorism with a possibility to cause mass consequences, which makes the world a hostage.<sup>1</sup>

The private security system plays a very important role in the preventing and dealing with the critical incidents, including the terrorist attacks. They are the first who are able to provide assistance after an incident. That is the reason why the private security personnel should upgrade their knowledge, abilities and skills for protection of the property, the facilities and the people from any modern forms of threat. They must know to recognize, to warn and to point out to the suspicious activities that they notice during their work, as well as to know how to take appropriate measures and activities to prevent incidental situations, as well as protection in their occurrence. This means that their work tasks should be focused on before and after the incident.

The physical, informational and personnel security measures should complement and support each other. The most effective security answer should include combination of physical, informational and personnel security measures. Together, they refer to securing the business, the company and the organization through a mix of deterrence and detection, or by helping in minimizing the consequences of any kind of attack.

But, all the organizations are different- as well as the places and the locations where they are located- so the appropriate mix of measures will depend on the nature of the security assessment based on the threats and the vulnerability of every location.

## **ATTACKS WITH IMPROVISED EXPLOSIVE DEVICES**

The physical security is an integral part of the broader security strategy and incorporates a few components such as: access control, surveillance and security testing in order to make the facility provided more secure.<sup>2</sup>

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<sup>1</sup> Bockstette, C., Jihadist Terrorist Use of Strategic Communication Management Techniques, George C. Marshall European Center for Security Studies, Number 20, December, 2008

<sup>2</sup> Terrorist threats, taken from [https://www.fema.gov/media-library-data/20130726-1455-20490-3893/fema427\\_ch2.pdf](https://www.fema.gov/media-library-data/20130726-1455-20490-3893/fema427_ch2.pdf)

The access control can start from the outer edge of the security perimeter. A fence and video surveillance can be used to monitor access to the facility and secure the outdoor area. The comprehensive access control system also includes the use of advanced locks, access control cards or biometric authentication and authorization.

When a certain incident or a disaster occurs, it should be acted fast and in accordance with the adopted procedures. Therefore, the disaster recovery plan should be tested regularly. The exercises should test the abilities of the security personnel and the employees of the organization/company about the way of reacting in case of natural catastrophes and emergencies caused by internal or external threats. The weak spots in accessing the critical business resources, such as server rooms, data centers, production lines, energy equipment etc., should also be checked.

### ***Bomb threats***

The most of the bomb threats are made by phone and many of them are fake, very often they are result of malicious jokes, even though the terrorists can make fake phone calls with an intension to cause alarm and disruption.

There are two types of calls:

1. Fake calls intended to disrupt, test the reactions or divert of the attention.
2. Warning threats of a real bomb: these can be attempts to avoid casualties or to allow the terrorist to blame others if there are casualties. However, the original threats may provide inaccurate information about where and when the device may explode.

The basic procedures for dealing with a bomb threat are according to the following principles:

- The whole personnel who may get a bomb threat should be trained how to act or to have prepared access to the instructions. This refers especially to the courts, the banks, the hotels, the hospitals, the news agencies, the public transportation organizations and the ones that offer any kind of service in case of emergency. The switchboard operators should be familiar with the procedures.
- Preparing a clear list of activities that will follow after the received call. Even though the personnel can't assess the accuracy or the origin of a threat, their impressions could be important.

The member of the personnel who receives the threat may not be prepared and therefore general advices for the employees for dealing with a threat should exist, for example:

1. In such situation to stay calm and to listen.
2. To get as many information as possible- regarding the location of the bomb, the activation time etc.
3. To make sure that a call recorder is turned on.
4. To report the incident immediately to the appropriate manager or the security team so that the best course of action can be taken and the police should be informed. If the security manager cannot be notified, and even if they consider the call to be fraudulent, they should report it to the police immediately. The most important thing is to share the impressions of the caller and the correct information about what was discussed.

5. If they failed to record the call, notes should be made for to security personnel or the police. No action should be taken - unless ordered to evacuate - until the police or the security teams arrive

### ***Vehicle bombs***

The vehicle bomb is one of the most efficient weapons in the terrorist's arsenal due to the potentially large amounts of explosives that can be aimed at the target with reasonable accuracy. The explosive device is usually prepared in advance and hidden in the vehicle.

The vehicle security threats can occur in a variety of ways:

- Parked – where the vehicle is parked near or under the goal (in an underground garage)
  - In movement – when the vehicle enters through any incomplete or incorrectly deployed existing security barriers or follows a legitimate vehicle and then enters through the active barrier system in the premises.
  - Portable – when the vehicle is hit in its goal.
  - By fraud - when the perpetrators use a false story, false documentation or a "Trojan vehicle".
  - By force - when the guard controlling the checkpoint is forced to let the vehicle or the driver of the legitimate vehicle is forced to carry an improvised explosive device.

Several tons of explosive can be loaded in bigger vehicles used to cause casualties and structural damage within a range of hundreds of meters.

There are three levels for protection from vehicle bombs: low, middle and high level.<sup>3</sup> The primary differences between the levels of protection are reflected in the degree of permissible damage to the protected building as well as the degree of damage to the assets in the building.

Low level - The building or the protected area will be severely damaged, but will not be completely destroyed. It may not be able to be reused.

- Middle level - The building or the protected area will suffer a significant degree of damage, but the structure will be reusable.
- High level - The building or the protected area will suffer only superficial damage and can be used immediately.

When opposing a vehicle bomb it is necessary to be paid attention on the distance of the vehicle bomb from the protected object, the barriers that should be set to prevent the vehicle bomb and the speed of the vehicle that must be taken into account.

Regarding the distance of the vehicles from the object being secured, should be determined the perimeter that will guarantee protection of the facility from the use of explosives. For that purpose, all vehicles should be parked outside that perimeter except the necessary vehicles that should be let after they have been inspected and searched.

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<sup>3</sup> Taken from <https://www.globalsecurity.org/military/library/policy/army/fm/3-19-30/ch3.htm>

In the practice are used two types of obstacles or barriers that protect the facilities from the vehicle bombs. The type of the barrier used depends if the vehicle bomb is in movement or parked nearby. The barriers used for the parked vehicle bombs have a goal not to let access in the protected zone and to register all the movement in that zone. The barriers used for the vehicle bombs in movement should stop the vehicle's movement and they must be much more substantial. These barriers must be able to be raised and lowered or moved to the side.

In the countering to the vehicle bomb of great importance is the restriction of the movement of vehicles in the perimeter that is being protected. The best way to limit the speed of the vehicle approaching the perimeter barriers is to place or keep obstacles in the possible access paths. Placing snake-shaped obstacles on the road forces the vehicle to reduce its speed. Sharp turns or roundabouts can also be foreseen.

### ***Threat of couriers***

The device the person/courier carries usually is hidden under the clothes of the person or is carried in bag or purse. In order to remain portable its weight is less than 15 kg (a quantity that is still adequate to cause serious structural damage).

These devices are used in suicide missions, but also they are designed to be left unattended, hidden behind the furniture or the screens and to be activated without a warning. In each case, the impact is enhanced by packing the device with fragmentation materials: screws, nuts, nails, screws, bearings, and similar shrapnel-like objects, which can have a devastating effect on a small space.

The detonator - which is intended to ignite, not explode - is usually a smaller object that, because it does not require explosives, is simpler. They are usually intended to cause damage and disruption, by causing a re-strike or, for example, by activating the spray system, instead of causing casualties.

### ***Postal items***

The letters, the consignments or the packages containing explosive, flammable or chemical mean, can be constructed in different shapes and sizes. They are designed to look quite ordinary, but there are still some signs that suggest when extra care should be taken when handling them:

- The package is from an unexpected or unknown sender.
- It is poorly written, incorrectly addressed or written in an unusual style and has more than adequate mark value for its size and weight.
- It is a wrapped envelope or bulky object that is unusually heavy for its size (most letters weigh up to about 30 grams, while threatening letters weigh 50-100 grams).
- There are one or more needle holes on the envelope or the package.

Even though every suspicious parcel should be treated seriously, the most cases are false alarms and therefore the procedures for handling such suspicious items should be conducted in a way that doesn't cause any disturbance.

Some large private companies and corporations do not allow delivery of personal shipments to the employees at the workplace in order to reduce the number

of deliveries. They also practice using the services of a delivery company that will be verified. The authorized consignors need to be in the access control system in order the companies to be able to identify the person and the consignment.

Depending on the risk assessment and the frequency of receiving mail and shipments, without affecting the work dynamics, it is necessary to check the shipments manually and to recognize any of the key signs when identifying suspicious items.

The following signs should be considered:<sup>4</sup>

- **Package shape:** The improvised explosive devices and the incendiary devices may have an irregular shape due to the presence of power supply, explosives, detonators, fragmentation material, etc. The weight may also cast doubt on the contents of the package.

- **Smell:** Certain explosives have a characteristic odor and a specific aroma that can produce a strong odor. Such odors should be treated as suspicious.

- **Greasy stains:** The explosives can leave greasy marks and stains on the packages they are delivered in when the temperature changes. If such signs are noticed, you should react in a timely and careful manner.

- **Addressing and stamp:** First you need to check where the package comes from and to pay attention to the use of the brands that are used depending on the weight. Attention should also be paid to the originality and authenticity of certain seals and stamps that exist on the outside of the shipment.

The need for a written action plan in case of detection of an improvised explosive device is also emphasized here. Such a plan should be known to employees at all levels in case of need for reaction and evacuation.

### ***Threat of using chemical, biological and radiological weapons***

The mass destruction weapon is a threat for the global security. The danger of the terrorist groups and their supporters to get access to the mass destruction weapon is a serious risk for the international peace and security. The traditional methods are no longer psychologically efficient and sufficient to attract the public attention, so the new terrorists recognize the mass destruction weapon as a new possibility and real threat. The impact of attacks using chemical, biological, radiological, and nuclear weapons depends to a large extent on the success of the chosen method and the weather conditions at the time of the attack.

The motivating factors for terrorists to use mass destruction weapons are the provocation of one or more goals:

- mass casualties;
- overloading of the emergency response systems;
- disruption of the normal life in the cities;
- closure and pollution of the buildings
- panic and confusion;

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<sup>4</sup> Postal threats, City of London Police, преземено од: <https://www.cityoflondon.police.uk/advice-and-support/countering-terrorism/Pages/postal-threats.aspx>

- causing a loss of confidence in the state authorities that it can protect the population and prevent terrorist activities;
- causing a loss of confidence in the emergency response system.

The first indicators of a weapons of mass destruction (chemical, biological, and radiological) attack may be the sudden onset of dust, liquids, or odors in the building, with or without an immediate effect on the people present at the scene.

In case such an attack comes from outside, the following measures should be taken:<sup>5</sup>

- stay inside the building;
- notify and assist in the evacuation of other persons in the facility;
- close and seal the doors and the windows with a damp cloth;
- Turn off the air conditioning, the ventilation and close the other air vents.

The protection from the possibility of using chemical, biological and radiological weapons in terrorist activities<sup>6</sup> is a priority goal of every country. The greatest attention should be paid to:

- Prevention: it refers to understanding and implementing measures to reduce potential accidents or safety incidents. This includes protection against theft of chemical, biological and radiological agents as well as deliberate release into the environment.

- Detection: it refers to systems and processes that enable early detection of certain losses in the system or determination of the degree of suspicion of intentional release of certain agents.

- Response: it refers to the timely response at the facility level or nationally to an incident of this magnitude. The response system includes engaging, equipping and training all stakeholders who respond first.

## **INDICATORS FOR PREPARATION OR EXISTENCE OF TERRORIST ACTS**

Like the organized crime groups, the terrorist organizations need to plan and prepare, purchase, and store materials and find ways to fund their activities. Many of these activities are done in front of the public. Therefore, if the private security personnel notice or hear anything unusual or suspicious, they should report it to the local police station. Any information that may be directly or indirectly related to certain terrorist activities can help the security authorities prevent the commission of a terrorist act and save certain lives.

To this end, there are certain indicators for recognizing the signs and behavior of suspicious persons that may be related to terrorist activities:<sup>7</sup>

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<sup>5</sup> Procedures in case of emergency and terrorist attack, Преземено од: [https://www.ed.umed.wroc.pl/sites/default/files/jan.wojna/files/PROCEDURE\\_IN\\_CASE\\_OF\\_EMERGENCY\\_AND\\_TERRORIST\\_ATTACK\\_wersja\\_angielska\(1\).pdf](https://www.ed.umed.wroc.pl/sites/default/files/jan.wojna/files/PROCEDURE_IN_CASE_OF_EMERGENCY_AND_TERRORIST_ATTACK_wersja_angielska(1).pdf)

<sup>6</sup> CTED and UNOCT, The protection of critical infrastructures against terrorist attacks: Compendium of good practices, CTED, UNOCT and INTERPOL, 2018, p.137, [https://www.un.org/sc/ctc/wp-content/uploads/2019/01/Compendium\\_of\\_Good\\_Practices\\_Compressed.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2019/01/Compendium_of_Good_Practices_Compressed.pdf)

- **Storage:** Certain facilities such as garages, barracks, basements, etc. can be used by terrorists to store weapons and equipment. If you suspect and notice someone renting such facilities, it is necessary to report.

- **Chemicals:** If someone buys specific chemicals in large quantities over a period of time for no apparent reason then they may be on the list of suspects.

- **Protective equipment:** Handling chemicals or making improvised explosive devices is dangerous without protective equipment. If you notice abandoned or scattered protective equipment it can be used for just such a purpose.

- **Funding:** Carrying out terrorist attacks requires funding that terrorist organizations provide in a variety of ways. The credit card fraud is one of those ways. In case you notice suspicious transactions by certain persons it is necessary to report it.

- **Identification documents:** Terrorists often use fake IDs. If you know someone who has several personal documents with different names and photos, he automatically enters in the circle of suspicious people.

- **Surveillance:** When planning and preparing terrorist attacks, the terrorists often monitor potential targets. If you notice someone photographing certain protected objects or objects of critical infrastructure, you need to report them.

- **Traveling:** The meetings, the training and the planning of a terrorist attack can be at different locations in one country or in several countries. For that reason, if you see someone who travels frequently, but has a dubious job and earns money, it can cause some suspicion.

- **Communication:** The communication between the members of a terrorist organization is usually done by telephone, but often it is prepaid telephone numbers or stolen telephone devices. In case someone frequently changes their phone number or owns more telephones for no particular reason, he enters into suspicious activity. Also, if someone frequently visits websites that are related to or share certain content with terrorism or actively promote or promote terrorist activities, there is a danger of falling under certain influences.

Also, when performing the daily routine tasks, the private security personnel should notice certain suspicious behaviors such as:

- People in parked vehicles monitoring certain critical infrastructure facilities.
- Vehicles moving slowly near certain objects and parked in suspicious areas.
- People using photographing and recording equipment or make certain notes or sketches about certain security details of an object.

- People who are suspicious and use specific entry and exit points such as stairs, corridors or evacuation sites.

- People who stay in a certain facility for a long time for no reason and record staff, visitors, deliveries, etc.

People who ask detailed or unusual questions about the building layout, the security plans, the parking usage, etc.

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<sup>7</sup> Taken from: <https://www.globalsecurity.org/military/library/policy/army/fm/3-19-30/ch3.htm>

## CONCLUSION

The fight against the terrorism is highly dependent on the efficiency of the measures and the activities undertaken by law enforcement agencies, their speed in detecting terrorist organizations, their preparatory actions and the action after a terrorist attack. The fight against terrorism requires close cooperation between such entities for the exchange of information and timely detection of illegal activities that are precursors to terrorist acts.

The terrorist attacks can include use of armed attacks, explosives, and flammable substances, biological and chemical agents that cause harmful effects in many areas. The side effects on the health of those present at the scene can be catastrophic and depend on the type of attack, and private security personnel need to be trained to respond to these types of attacks.

In case of a terrorist attack on the facility being secured, the response of the private security personnel should be the most severe and by all available means. The most important thing is to announce an alarm, ie the person in charge of securing the facility should be informed as a matter of urgency and the police should be informed immediately.

To this end, it is necessary to be raised the awareness of the important role of the private security sector and strengthen its well-deserved position together with other security bodies in the functionality of the fight against terrorism.

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# RELIGIOUSLY MOTIVATED EXTREMISM AND TERRORISM DURING THE COVID-19 PANDEMIC

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## **Abstract**

This paper analyzes the impact of COVID-19 pandemic on extremist and terrorist actors with special focus on the “Islamic State” (IS), “Al Qaeda” (AQ), their affiliates and other active groups. The first aspect is the religious and ideological approach to the pandemic, misuse of religious scripts and portraying the pandemic within extremist ideology. This is transferred in propaganda and inspiration and recruitment of new fighters and supporters, mainly via social media. The second aspect is the operational level, how extremists took the opportunity to implement a new strategy, “*modus operandi*”, and even use the virus as a weapon. There was significant increase of activity especially in countries with previous presence of those groups. The pandemic has also affected prisons and refugee camps as especially vulnerable, as well as the repatriation of foreign terrorist fighters (FTFs). These aspects are analyzed through a comparative view from different countries and regions.

**Key words:** *Islamic state, Al Qaeda, COVID-19, pandemic, terrorist attacks*

## **INTRODUCTION**

The COVID-19 pandemic brought new reality and significantly challenges the existing political, security, economic, health and social systems. In the new created context, extremist and terrorist groups recognized the opportunity to develop new operations strategies, using the distraction of the Western governments, relocation of resources and reduced attention on counter-terrorism. The pandemic also imposes a threat to those groups making them continue their activity while trying to protect their own members.

## **ISLAMIC STATE**

The IS has followed the outbreak since January 2020. Its al-Naba newsletter was reporting on the situation expressing concern and criticizing China about the spread of the virus.<sup>1</sup> In early March, IS took measures to protect its followers,

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<sup>1</sup> Bridget Johnson, “ISIS ‘Lockdown’ Magazine Urges Using Kids to Spread COVID-19, Attacks with Scissors”, June 23, 2020, <https://www.hstoday.us/subject-matter-areas/counterterrorism/isis-lockdown-magazine-urges-using-kids-to-spread-covid-19-attacks-with-scissors/>

ordering them not to travel to Europe, "the land of the epidemic"<sup>2</sup> and shared recommendations in a form of "Sharia directives, how to deal with epidemics".<sup>3</sup> It urged its followers to stay at home quoting a hadith from Mohammed al Bukhari that Muslims who quarantined during a pandemic would achieve martyrdom in the afterlife.<sup>4</sup>

The IS has developed the following narratives:

- COVID-19 is one of God's soldiers" reserved for "infidels" and "non-Muslims" and Muslims won't die.<sup>5</sup>

- COVID-19 is "divine punishment for crimes against Muslims."<sup>6</sup>

- COVID-19 has been paralyzing the Western countries, distracting them from the Muslims lands and making them live in fear of new attacks.

- Western countries are still responsible for the suffering of the Muslims, kept in prisons, detention camps or being bombed in Syria, Iraq, Libya Afghanistan and West Africa.

- It is Muslims' "duty" to protect themselves from COVID-19, but also their "duty" to act, to liberate Muslims from prisons and camps, and show no mercy to the "infidels" in their moment of crisis.<sup>7</sup>

For the purpose of new recruitments, online presence and propaganda, especially on social media platforms (Facebook) and Telegram channels increased. IS supporters used pandemic related hashtags in Arabic and published attractive media and footage promoting the pandemic as "Allah's wrath" on the "infidels".<sup>8</sup> They took the advantage of the internet companies' lack of prevention by during the pandemic.<sup>9</sup>

The IS backed media also advised followers how to conduct attacks. "Al-Faqir", re-released a 2018 video discussing an undetectable bio attack on the West, by contaminating drinking water, public foods or air in crowded places.<sup>10</sup> "The Voice of Hind," encouraged spread of coronavirus and attacks with simple weapons and tactics against military and police officers deployed during the pandemic. Its

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<sup>2</sup> Economic Times, "ISIS advisory warns terrorists to be off coronavirus-hit Europe", March 16, 2020, <https://economictimes.indiatimes.com/news/defence/isis-travel-advisory-warns-terrorists-off-coronavirus-hit-europe/articleshow/74638096.cms>

<sup>3</sup> Pieter Van Ostaeyen, "The Islamic State and Coronavirus, Time for a Comeback?", May 15, 2020, <https://www.ispionline.it/en/publicazione/islamic-state-and-coronavirus-time-comeback-26166>

<sup>4</sup> Andrew Hanna, "ISIS Offensive Exploits Pandemic", June 8, 2020, <https://www.wilsoncenter.org/article/isis-offensive-exploits-pandemic>

<sup>5</sup> "Wives of ISIS members: Coronavirus is for infidels and non-Muslims", April 9, 2020, <https://www.rudaw.net/english/middleeast/syria/090420202>

<sup>6</sup> Pieter Van Ostaeyen 2020

<sup>7</sup> International Crisis Group, "Contending with ISIS in the Time of Coronavirus", March 31, 2020, <https://www.thenigerianvoice.com/news/286549/contending-with-isis-in-the-time-of-coronavirus.html>

<sup>8</sup> Dalia Ziada, "Terrorism Thrives on COVID-19 Crisis", April 29, 2020, <https://www.egyldi.org/post/terrorism-thrives-on-covid-19-crisis>

<sup>9</sup> Hollie McKay, "How ISIS is exploiting the coronavirus pandemic", May 20, 2020, <https://www.foxnews.com/world/how-isis-is-exploiting-the-coronavirus-pandemic>

<sup>10</sup> Bridget Johnson, "How Terrorists Are Trying to Make Coronavirus More Friend Than Foe", April 14, 2020, <https://www.hstodav.us/subject-matter-areas/counterterrorism/how-terrorists-are-trying-to-make-coronavirus-more-friend-than-foe/>

June “lockdown special” edition urged its followers, even children, to spread the disease, as means for the “enemies of Allah to obey its rule.”<sup>11</sup>

In May, IS spokesman Abu Hamzah al-Quraishi urged fighters to prepare terrorist attacks especially in Arab states, particularly mentioning Qatar from where antiterrorist operations are launched in Afghanistan, Iraq, Syria, and Yemen.<sup>12</sup> In August, the IS warned humanitarian organizations working in Muslim countries in Middle East and Africa.<sup>13</sup> In a new “Al-Hayat Media Center” video in August, “Incite the Believers”, the IS encouraged followers to commit fire attacks.<sup>14</sup>

In Syria and Iraq, IS took the opportunity to expand its zones of operations. In April, IS launched 151 attacks in both countries, a 50% increase over the previous month.<sup>15</sup> Many Western countries had withdrawn their troops from Iraq referring to the spread of the pandemic. By the end of March, France and the UK had withdrawn most of their training troops<sup>16</sup>, followed by Spain, Germany and the Netherlands. The United States have also withdrawn from frontline operating bases in March.<sup>17</sup>

In Iraq, IS shows signs of regrouping. Iraqi armed forces have prioritized the enforcement of preventive measures and counter-terrorist operations have been pushed aside.<sup>18</sup> The IS uses the terrain in the border area to its advantage, has better planning attack strategy, make use of road bombs, advanced explosives, heavier arms, kidnapping of local officials, car bombs, roadside ambushes, sniper attacks and suicide bombings of police and military forces.<sup>19</sup> Yet, it is estimated that its capacities remain far lower than before and has yet to show major tactical changes. IS fails to recruit militants due to insufficient resources and social exclusion. It tries to improve the morale of its operatives by increasing terrorist attacks, particularly increased in Kirkuk, Mosul, Anbar, Salahuddin and Diyala.<sup>20</sup> During the first quarter of 2020, there were 566 attacks, twice the total from the first quarter of 2019. In Kirkuk, operations were increased by 200%. Similarly in Syria, the IS

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<sup>11</sup> Bridget Johnson, June 23, 2020

<sup>12</sup> The Arab Weekly, “Under assault, ISIS gasps for air through propaganda”, May 29, 2020, [https://the arabweekly.com/under-assault-isis-gasps-air-through-propaganda?utm\\_source=iterable&utm\\_medium=email&utm\\_campaign=1257042](https://the arabweekly.com/under-assault-isis-gasps-air-through-propaganda?utm_source=iterable&utm_medium=email&utm_campaign=1257042)

<sup>13</sup> Bridget Johnson, “ISIS Declares Humanitarian Aid Workers Are Legitimate Targets”, August 18, 2020, <https://www.hstoday.us/subject-matter-areas/counterterrorism/isis-declares-humanitarian-aid-workers-are-legitimate-targets/>

<sup>14</sup> Bridget Johnson, “ISIS Video Urges Arson as ‘Five-Star’ Terror Tactic”, Shows California Burning, August 4, 2020, <https://www.dw.com/en/albania-transfers-islamic-state-terror-suspect-to-germany/a-54433596>

<sup>15</sup> Andrew Hanna 2020

<sup>16</sup> Maywadee Viriyapah, “How COVID-19 has Emboldened the Islamic State Part 1: ISIS Operations”, April 17, 2020, <https://www.crisisgroup.org/global/contending-isis-time-coronavirus>

<sup>17</sup> Kareem Salem, “ISIS looks to prosper in a world distracted by the virus”, April 2020, <https://www.lowyinstitute.org/the-interpretor/isis-looks-prosper-world-distracted-viru>

<sup>18</sup> Maywadee Viriyapah 2020

<sup>19</sup> Andrew Hanna 2020

<sup>20</sup> Idiris Okuducu, “Daesh/ISIS increases attacks in Iraq amid virus, Political instability, security gap in country also pave way for terror group to strengthen its operational capability”, May 07, 2020, <https://www.aa.com.tr/en/middle-east/daesh-isis-increases-attacks-in-iraq-amid-virus/1832517>

stepped up attacks against the U.S.-backed Syrian Democratic Forces (SDF) and Syrian Arab Army. The IS gained more freedom after restriction on movement and focus on the pandemic took place. Activity was registered around Badia and Raqqa. On April 9, more than 30 Syrian troops were killed near Palmyra.<sup>21</sup>

IS affiliates also performed significant terrorist acts. In Mozambique, Islamic State Central Africa Province (ISCAP), in April massacred 52 villagers.<sup>22</sup> In the Maldives, in April the IS took responsibility for the attack on harbor of Mahibadhoo island, which coincided with the first cases of COVID-19.<sup>23</sup> In the Philippines, militants took advantage of the quarantine measures to recruit members especially in depressed rural areas. In April, with the Army re-focus on the pandemic and enforcing the quarantine, IS linked Abu Sayyaf killed 11 soldiers. In May, the ISIS-affiliated Bangsamoro Islamic Freedom Fighters (BIFF) killed two soldiers implementing quarantine.<sup>24</sup> In Chad, Boko Haram in March has carried out its deadliest attack killing 92 soldiers. Over 20,000 people fled their homes making them vulnerable to COVID-19 threat. The group initiated a disinformation campaign claiming that only evil people could be infected and social distancing is anti-Muslim.<sup>25</sup>

In Europe, there was limited activity. In Germany, in April, four IS members from Tajikistan were arrested for planning an attack on American military facilities. They have been in contact with high level IS figures in Syria and Afghanistan.<sup>26</sup> In May, Spanish police arrested Britain's most wanted IS fugitive, Abdel-Majed Abdel Bary. He is thought to have reached Spain by boat from Algeria taking advantage of Spain's lockdown and hiding behind a face mask. The second case was a Moroccan suspected of plotting a 'lone wolf' attack in Barcelona. His process of radicalization culminated during the state of emergency.<sup>27</sup> In August, Turkey has arrested a IS militant, illegally arrived from Syria, suspected of planning "a sensational attack" in Istanbul.<sup>28</sup>

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<sup>21</sup> Andrew Hanna 2020

<sup>22</sup> Joseph Hincks, "With the World Busy Fighting COVID-19, Could ISIS Mount a Resurgence?," April 29, 2020, <https://time.com/5828630/isis-coronavirus/>

<sup>23</sup> Azim Zahir, "Islamic State Terror in the Maldives as COVID-19 Arrives", April 18, 2020, <https://thediplomat.com/2020/04/islamic-state-terror-in-the-maldives-as-covid-19-arrives/>

<sup>24</sup> Bong Sarmiento, "ISIS thrives in Covid-19 shadows in Philippines", May 22, 2020, <https://asiatimes.com/2020/05/isis-thrives-in-covid-19-shadows-in-philippines/>

<sup>25</sup> Alexandra Lamarche, Arden Bentley, Rachel Schmidtke, Sahar Atrache, "The Coronavirus Has Become Terrorists' Combat Weapon of Choice", June 09, 2020, <https://nationalinterest.org/feature/coronavirus-has-become-terrorists%E2%80%99-combat-weapon-choice-162091?page=0%2C1>

<sup>26</sup> AP, "Germany arrests four ISIS suspects in alleged plan to attack US bases", April 15, 2020, <https://www.stripes.com/news/europe/germany-arrests-four-isis-suspects-in-alleged-plan-to-attack-us-bases-1.626110>

<sup>27</sup> Gerard Couzens, "Counter terrorism police fear ISIS cells are being reactivated to plot attacks across Europe after second terror arrest in Spain, May 9, 2020, <https://www.dailymail.co.uk/news/article-8302571/Counter-terrorism-police-fear-ISIS-cells-reactivated-plot-attacks-Europe.html>

<sup>28</sup> Amberin Zaman, Islamic State operative planning 'sensational' attack nabbed in Istanbul, August 25, 2020, <https://www.al-monitor.com/pulse/originals/2020/08/turkey-islamic-state-attack-istanbul-syria-gaziantep.html>

## AL QAEDA

In March, the senior leadership of AQ blamed the West for triggering the pandemic. The virus was named a “punishment” from God for the Western injustice and oppression against Muslims. AQ also took preventive actions. It called Islam a “hygiene-oriented” religion, and cited Quranic verses that referenced the importance of cleanliness, covering face when coughing, self-quarantining during the epidemic and offered “immunity booster” recipes.<sup>29</sup> AQ took advantage of the pandemic with religious rhetoric:

- It defined the coronavirus as a result of God’s wrath and calls for Western countries to turn to Islam in response.
- It described its followers’ circumstances as those of all people - bad economic conditions and the inability to pray in mosques or make Hajj and Umrah.
- It called upon businessmen to donate to the organization and its followers.
- It didn’t call on its followers to carry out terrorist operations during this period.<sup>30</sup>

In other leadership message, AQ named COVID-19 “a powerful tsunami” that strikes the U.S. economy and lifestyle. It focused on the economic consequences from the pandemic - closed businesses and paralyzed global economy. This crushes the entire state system including army and security and redefines the social system.<sup>31</sup>

## AL-SHABAAB

In Somalia, the Al-Qaida-linked Al-Shabaab in March held a five-day leadership meeting where they discussed the virus,<sup>32</sup> established a prevention and treatment committee and opened a COVID-19 centre.<sup>33</sup> Al Shabaab blamed the disease for invading “crusaders” and the “disbelievers” and rejoiced in the suffering of the U.S. and its European allies.<sup>34</sup> Since the pandemic, there have been about 75 terrorist incidents every month, most of which against the African Union Mission. In August, Al Shabaab attacked civilians at Hotel leaving 8 dead and 30 injured.

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<sup>29</sup> Andrew Hanna, “What Islamists Are Doing and Saying on COVID-19 Crisis”, May 14, 2020, <https://www.wilsoncenter.org/article/what-islamists-are-doing-and-saying-covid-19-crisis>

<sup>30</sup> Mohamed Mokhtar Qandil, “Terrorism and Coronavirus: Hyperbole, Idealism, and Ignorance”, April 20, 2020,

<https://www.washingtoninstitute.org/fikraforum/view/Terrorism-Extremism-Coronavirus-ISIS-Al-Qaeda-Resurgence-COVID-19>

<sup>31</sup> Bridget Johnson, “How Terrorists Are Trying to Make Coronavirus More Friend Than Foe”, April 14, 2020, <https://www.hstoday.us/subject-matter-areas/counterterrorism/how-terrorists-are-trying-to-make-coronavirus-more-friend-than-foe/>

<sup>32</sup> Alice Cachia, “ISIS tells its followers to show no mercy and launch attacks during coronavirus crisis amid fears counter-terror efforts will be weakened by the outbreak”, April 2, 2020, <https://www.dailymail.co.uk/news/article-8180683/ISIS-tells-followers-no-mercy-launch-attacks-coronavirus-crisis.html>

<sup>33</sup> Abdi Sheikh, “Somalia's Islamist group al Shabaab says sets up COVID-19 treatment centre”, June 12, 2020, <https://www.nasdaq.com/articles/somalias-islamist-group-al-shabaab-says-sets-up-covid-19-treatment-centre-2020-06-12>

<sup>34</sup> Jason Burke, “Opportunity or threat? How Islamic extremists are reacting to coronavirus”, April 2020, <https://www.theguardian.com/world/2020/apr/16/opportunity-or-threat-how-islamic-extremists-reacting-coronavirus>

Yet, COVID-19 caused split in its leadership, undermined loyalty and has reduced radicalization and recruitment.<sup>35</sup>

### **HAYAT TAHRIR AL-SHAM (HTS)**

HTS has its stronghold in Idlib, Syria, where nearly three million civilians live in extremely poor conditions,, almost half of which are displaced and more than two-thirds depend on humanitarian assistance. Idlib lacks a strong and legitimate authority capable of effective implementation of preventive policies.<sup>36</sup> HTS referred to the WHO guidance, offering advice on how Syrians could protect themselves.<sup>37</sup> It closed down markets, public spaces, schools and mosques and transported suspected coronavirus patients to Turkey. It advised followers to refrain from movement, keep distant from gatherings and avoid hand-shaking.<sup>38</sup> HTS lacked the capacity to enforce its order to close mosques and suspend prayers. Sheikhs, imams and jihadi leaders challenged the group's authority and religious legitimacy.<sup>39</sup> Yet, HTS instructed its followers to continue the fight against Shiites and other non-believers, because the virus had been sent by God to kill disbelievers who kill Muslims around the world.<sup>40</sup>

### **SITUATION IN CAMPS, PRISONS AND REPATRIATIONS**

In Syria, Kurdish forces are holding about 12,000 IS fighters and 70,000 of their family members, mostly women and children. Camps are vast and unhygienic where social distancing is impossible.<sup>41</sup> In Al-Hawl camp there are more than 67,000 captives from around the globe. It has 21 health facilities that receive around 40 patients each every day. Medical personnel didn't have the equipment for coronavirus tests, which were sent to Damascus.<sup>42</sup> There isn't enough water for regular hand washing and there are days without access to a doctor or basic medications.<sup>43</sup> Due to the IS propaganda many women don't believe there is a virus

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<sup>35</sup> Aggrey Mutambo, "Weakened in battle, Shabaab now opts for softer targets", August 30, 2020, <https://nation.africa/kenya/news/africa/shabaab-now-opts-for-softer-targets-1925258>

<sup>36</sup> Alexandra Lamarche, Arden Bentley, Rachel Schmidtke, Sahar Atrache, 2020

<sup>37</sup> Colin P. Clarke, "Yesterday's Terrorists Are Today's Public Health Providers, April 8 2020, <https://foreignpolicy.com/2020/04/08/terrorists-nonstate-ungoverned-health-providers-coronavirus-pandemic/>

<sup>38</sup> Kabir Taneja, Raffaello Pantucci, "Beware of terrorists offering COVID19 aid", April 17, 2020, <https://www.orfonline.org/expert-speak/beware-of-terrorists-offering-covid19-aid-64731/>

<sup>39</sup> Alexandra Lamarche, Arden Bentley, Rachel Schmidtke, Sahar Atrache, 2020

<sup>40</sup> **Andrew Hanna**

<sup>41</sup> Brian Glyn Williams, "Islamic State calls for followers to spread coronavirus, exploit pandemic and protests", June 23, 2020, <https://theconversation.com/islamic-state-calls-for-followers-to-spread-coronavirus-exploit-pandemic-and-protests-136224>

<sup>42</sup> Lamija Grebo, "Virus Keeps Bosnian Families Of Islamic State Fighters In Syrian Camps – Analysis], April 29, 2020, <https://balkaninsight.com/2020/04/28/virus-keeps-bosnian-families-of-isis-fighters-in-syrian-camps/>

<sup>43</sup> International Crisis Group, "Virus Fears Spread at Camps for ISIS Families in Syria's North East", April 7, 2020, <https://reliefweb.int/report/syrian-arab-republic/virus-fears-spread-camps-isis-families-syria-s-north-east>

and share group's stances that COVID-19 is reserved for "infidels" and "non-Muslims".<sup>44</sup>

More than 10,000 IS prisoners held in crowded facilities in Syria and Iraq are also at significant risk of infection. They are in poor physical condition because of overcrowded prisons where social distancing and exercise is impossible. Tuberculosis and other diseases are already present. In April, in order to combat the spread of the virus, the Coalition forces provided the SDF face masks, hand washing stations and sanitizers.<sup>45</sup> There were growing concerns about riots and uprisings and the coronavirus spreading in the prisons<sup>46</sup> due to the IS appeals to free the prisoners. In March, IS prisoners rioted and overran a prison in Hassakeh, partly by fear of the virus<sup>47</sup> and in May, they took control over a prison holding 5,000 detainees.<sup>48</sup>

The pandemic has disrupted the process of repatriation of the foreign terrorist fighters (FTF's) which is still a great challenge within global counter-terrorism efforts. As of mid-March, COVID-19 has halted repatriations for at least two countries that had active repatriation plans, one for a significant number of detainees.<sup>49</sup> It is estimated that no foreign citizen will be repatriated from the camps until the pandemic is over.<sup>50</sup> Turkey, also holds FTFs prisoners, and had to halt its efforts after the borders closure. However it continues the process and in May deported twelve FTF's to Finland.<sup>51</sup>

## CONCLUSION

Extremist and terrorist groups exploited the conditions created by the pandemic to restore their status, launch new operations and recruit new supporters. The highest increase of activity is notable in areas where those groups have ground presence and control territory. They have used government's distraction on preventive measures to expand zones of operations and perform deadly attacks. Deployed army and police became vulnerable targets, in addition to previous focus on "soft targets". However, COVID-19 is a threat to its followers which makes them plan and implement preventive strategies. Borders closure constrains overseas operations and

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<sup>44</sup> Rudaw, "Wives of ISIS members: Coronavirus is for infidels and non-Muslims", April 09, 2020, <https://www.rudaw.net/english/middleeast/syria/090420202>

<sup>45</sup> Bryan Bender, "The Pentagon's big problem: How to prepare for war during a pandemic", April 02, 2020, <https://www.politico.com/news/2020/04/02/us-military-fears-isis-resurgence-coronavirus-pandemic-162046>

<sup>46</sup> Al-Monitor, "CENTCOM: No sign of coronavirus in Syria's IS prisons as riots raise concern", July 14, 2020, <https://www.al-monitor.com/pulse/originals/2020/07/centcom-coronavirus-isis-prison-syria-riots-mckenzie.html>

<sup>47</sup> International Crisis Group 2020

<sup>48</sup> Brian Glyn Williams 2020

<sup>49</sup> International Crisis Group 2020

<sup>50</sup> Alexandra Phelan, "COVID-19 and violent extremist groups: adapting to an evolving crisis", April 28, 2020, <https://lens.monash.edu/@politics-society/2020/04/28/1380103/covid-19-and-non-state-armed-groups-adapting-to-an-evolving-crisis>

<sup>51</sup> Daily Sabah, "Turkey departs 12 foreign terrorist fighters with suspected Daesh-links to Finland", May 31, 2020, [https://www.dailysabah.com/politics/turkey-deports-12-foreign-terrorist-fighters-with-suspected-daesh-links-to-finland/news?utm\\_source=iterable&utm\\_medium=email&utm\\_campaign=1257042](https://www.dailysabah.com/politics/turkey-deports-12-foreign-terrorist-fighters-with-suspected-daesh-links-to-finland/news?utm_source=iterable&utm_medium=email&utm_campaign=1257042)

IS and AQ presence is mainly through their affiliates. Growing propaganda and lockdown consequences might radicalize and inspire new “lone wolf” attackers.

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## HUMANITARIAN INTERVENTION – LEGAL, POLITICAL AND MORAL ASPECTS

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### **Abstract**

Humanitarian intervention is a debatable issue among politicians and academics, mostly because of its relation with the dilemma between the principle of state sovereignty and protection of basic human rights. It is defined as a threat or actual use of force by a state or group of states in the territory of another state with the aim of ending human rights abuses or violations. The concept of humanitarian intervention has lost its value mainly because of the transformation of humanitarian intervention into military and forcible technique used by powerful states, mostly permanent member states of the UN Security Council, to pursue their geopolitical and strategic interests. The paper focuses on the legal, political and moral aspects and perspectives of humanitarian intervention, concerning the question of the circumstances under which the states can resort to humanitarian intervention. The debate on the legitimacy of humanitarian intervention will continue, in order to explain whether this kind of military interventions can be justified by international humanitarian law.

**Keywords:** humanitarian intervention, non-intervention, human rights, Security Council, United Nations.

### **INTRODUCTION**

The use of force is forbidden by international law, except for self-defence purposes or as a collective action which is authorized by the Security Council of the United Nations (UNSC). This means that the concept of non-intervention is commonly accepted in international law and society, but still remains the question of permissible military intervention in a case of massive violations of human rights by the governments or if the governments themselves are not in a position or do not have the ability to prevent such violations during anarchy or civil war. During the Cold war era, states valued the principle of sovereignty much more than the enforcement of human rights, which led to a situation where the military humanitarian interventions were not considered a legitimate practice. During the 1990s, this attitude changed, not only among democratic states, but in the United Nations, too. Kofi Annan, from a position of United Nations Secretary-General, in his speech to the General Assembly in 1999 recognized the need of an international norm for forcible protection of civilians and citizens who were at risk from human

rights violations, genocide and mass killing. However, this kind of military intervention remained controversial, particularly in the domain of forcible intervention without UNSC authority.

On the other hand, the UNSC has never authorized such intervention against a sovereign state. In that manner, there was a concern that humanitarian intervention was designed to legitimate the interference of the strong states in the affairs of the weak. (Bellamy and Wheeler 2008, 514) In the meantime, some liberal democratic states and NGOs made an attempt to create a consensus around another principle – the principle of the responsibility to protect. This principle creates primary responsibility for the states to protect their own citizens. If they have no will or ability to do so, this responsibility transfers to the international community. This will make harder for states to abuse humanitarian interventions as a justification for armed actions. As a concept, it was adopted in 2005 by the General Assembly of the United Nations in a formal declaration at the UN World Summit in 2005.

In accordance with the changing international environment, there are many definitions of the humanitarian intervention. Seybolt (2007, 6) defines humanitarian intervention as a “short-term activity with limited political objectives”. Humanitarian intervention defined by Adam Roberts (Roberts 1993, 429) is a “military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants”. On the other hand, Tony Brems Kundsén describes this concept as “a dictatorial or coercive interference in the sphere of jurisdiction of a sovereign state, motivated or legitimated by humanitarian concerns” (Kundsén 1997, 146). Holzgrefe (2003, 18) defines it as a “threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied”.

Although there are many definitions for humanitarian intervention, that define this concept from different aspects, there are some typical characteristics that can be found in many of them. Kardas (2001, 2) emphasizes four characteristics of humanitarian intervention: the absence of the state’s permission; the use of military force; the aim to help non-nationals; and to help agency of intervention.

Humanitarian intervention for protection purposes characterizes with a hostile environment, where the state’s authorities do not have the will or capacity to respond to the basic needs of people for safety and human rights protection. The humanitarian intervention differs from peacekeeping and it distinguishes the relation between civil and military parties involved in the actions. It can establish a ground for peace-building, by making safer environment in which citizens can think beyond their concerns about survival. Therefore, humanitarian intervention is not meant to protect or promote civil or political rights, but rather to protect fundamental human rights in extreme circumstances (Kwiatkowska 2014, 360).

This paper will present the complexity of the humanitarian intervention and the challenges it brings in legal, political and moral aspect.

## **HISTORICAL AND LEGAL DEVELOPMENT OF THE HUMANITARIAN INTERVENTION**

The concept of humanitarian intervention dated back to 16<sup>th</sup> and 17<sup>th</sup> century, but the modern concept of it is more related to 19<sup>th</sup> century when states began to use humanitarian reasons as a justification of their military interventions. The concept of human intervention is associated with early international law and natural law. Hugo Grotius' ambition, as the "father" of international law, was to regulate international relations by creating new political and moral standards with respect for agreements and sovereignty. He revised the "just war" doctrine emphasizing that war is allowed if based on specific legal reasons and in extreme cases of tyranny. His idea of humanitarian intervention was related to the doctrine of legitimate resistance to repression, taking into consideration that a prohibition on the use of force was non-existing until 20<sup>th</sup> century. His idea was supported by other eminent legal scholars. During the 19<sup>th</sup> century the principle of non-intervention was gradually developing and by the end of that century many legal experts acknowledged the right of humanitarian intervention. The doctrine of humanitarian intervention disappeared from state practice and international law in the 20<sup>th</sup> century. The legitimate use of force, after World War I was related only to cases of self-defence and collective defence to preserve international peace and security, as determined in the Charter of the UN of 1945 and the Pact of Paris of 1928. (Danish Institute of International Affairs 1999, 11-12).

From legal perspective, this concept was first mentioned in the basic documents of International Humanitarian Law: the Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949. Later, these types of norms were part of several articles in the Charter of the United Nations. Furthermore, a new interpretation of the use of force in international relations was included in the Charter: the doctrine of non-intervention was extended and confirmed as a universal norm and the use of force was allowed only in a case of self-defence of a state or in a case when UN Security Council takes collective security measures to preserve international peace and security (Kardas 2001, 3).

During the Cold War period the norms of non-intervention and state sovereignty were in conflict with the promotion of human rights initiated by the United Nations. The global acceptance of human rights came after the end of the Cold War era, especially among the western countries. Kak (2008, 1235) emphasizes this development at the end of the Cold War as "an increasing trend towards willingness of states to intervene militarily in the internal affairs of other states, ostensibly in response to civil war conditions, gross human rights violations or ethnic cleansing".

The following period, the 1990s is known as a decade or a "golden era" of humanitarian activism, because of the increased number of authorized interventions by the UN Security Council, emphasizing that sovereignty and non-intervention are fragile.

The first attempts of the UN to end massive human rights abuses, massacres or genocides in Somalia, Rwanda and Bosnia and Herzegovina were unsuccessful. In 1999, the intervention in Kosovo was later described by the Independent International Commission on Kosovo as "legitimate, but not legal" (Evans 2006,

706-07), because the international community represented by NATO intervened, but without the authority of the UN Security Council.

### **LEGALITY AND LEGITIMACY OF HUMANITARIAN INTERVENTION THROUGH THE DOCTRINE OF RESPONSIBILITY TO PROTECT**

The above mentioned doctrine of responsibility to protect concentrates on the legitimacy of civil or military humanitarian intervention within the framework of five identified criteria. These criteria should be applied by the UN Security Council to confirm the validity of any case made for a forcible humanitarian intervention.

Those criteria are: the justified cause for intervention, the right intention, last resort, proportional means and the reasonable prospects. The justified cause means that intervention should be used only in cases of serious violations or harm to human beings in form of ethnic cleansing, genocide, losses of human lives (actual or expected). The right intention means that primary intention of the proposed military intervention is to prevent or end human suffering. Last resort emphasizes other options of non-military interventions for prevention or peaceful resolution, before starting the military intervention. Proportional means refer to the duration and intensity of the military intervention adjusted to minimum necessity in order to secure human lives. Reasonable prospects refer to the chance for the intervention to be successful (Kwiatkowska 2014, 363). Other authors, such as Finnemore (1996, 15), include multilateralism as a necessary condition for legitimacy of the military action.

Even if all five criteria for legitimate intervention are fulfilled, there remains the problem of legality. In a situation when it is clear that military intervention need to be used, but the members of the UN Security Council refuse to vote to authorize it, the intervention cannot be employed. The legality in such cases focuses on mobilizing the necessary political will to vote, particularly in the UN Security Council and its five permanent members (Evans 2006, 711-12). However, the concept of responsibility to protect for many countries has a moral force, not a legal one. It is considered more as a political commitment and less as a legal one (Brown 2008, 5).

### **THE LEGAL ASPECTS OF HUMANITARIAN INTERVENTION**

The legal aspect for a right of humanitarian intervention is related to the so-called counter-restrictionist. Their case rests on two arguments: the first one is about the right of humanitarian intervention in customary international law, and second, the Charter of the UN and the commitment of states to protect fundamental human rights.

According to some counter-restrictionists there is no legal basis for unilateral humanitarian intervention in the Charter of the UN, but humanitarian intervention is permitted by customary international law. They claim that customary right to humanitarian intervention dominates over the Charter of the UN. For a rule to be considered as customary international law, states must use the practice that is claimed to have the status of law, because they believe that the law permits this.

They claim that in the Charter of the UN, protection of human rights is as important as maintaining peace and security. A few articles in the Charter highlights

the importance of human rights and their protection as one of the key purposes of the UN, such as article 1 (3), articles 55 and 56, as well as the Preamble of the Charter. That was the reason for counter-restrictionists to interpret an exception to the ban on the use of force in the Charter if it is related to humanitarian reasons. The fact that UN Security Council failed to fulfill the legal responsibility to use force against states that committed genocide and violated human rights during the Cold War era, means that there is a necessity for legal exception to the ban on the use of force in Article 2 (4) of the Charter of the UN that would permit states to use force on humanitarian ground. Some international law experts claim that humanitarian intervention does not mean a breach of Article 2 (4) of the Charter of the UN, because this article refers to a ban on the use of force against the territorial integrity and political independence of states which is different from the meaning of humanitarian intervention (Damrosch 1993, 219).

Chapter VII of the Charter of the UN enables the UN Security Council to authorize military intervention only in cases if there is a threat to international peace and security. The expanded list of threats included human suffering, refugee movements, overthrow of democratic government, state failure and ethnic cleansing. The attempt to justify the intervention on the grounds that human suffering was a threat to international peace and security was controversially used in the cases of Somalia and northern Iraq (Wheeler 2000, Wheeler 2004, 32-41).

## **THE MORAL ASPECTS OF HUMANITARIAN INTERVENTION**

The moral argument for humanitarian intervention, regardless of the law and legal arguments, is related with the moral duty to intervene in order to protect the civilians from violation of their human rights, mass killing and genocide. The argument of many authors, as Tesón (2003, 93) claims, regarding the moral argument is related with the sovereignty and the responsibility of the state to protect its citizens. If a state does not succeed in it, it loses its sovereign rights. This argument is linked with numerous explanations. One of them is the idea of “common humanity”, which means that all individuals have basic human rights and duties to support the rights and freedoms of other individuals (Caney 1997, 34). The other explanation is related to the theory of “justifiable war” and the universal obligation to offer charity to those in need (Ramsey 2002, 35-36).

Other argument is related with the globalization of the world and the moral obligation to protect human rights, because human rights violations in one part of the world can affect other parts of the world.

However, these perspectives are problematic, because giving the states this type of moral permission to intervene can be used in the wrong way or for the wrong purposes: the humanitarian intervention can be used by the states to justify wars that are anything but humanitarian. On the other hand, the supporters of the humanitarian intervention are facing questions about how bad a humanitarian crisis has to be before force can be used or whether force should be used in order to prevent a humanitarian crisis.

The critics disagree with the moral principles of humanitarian intervention, arguing that it is difficult to identify which moral principles can support the

intervention. In the absence of consensus about these principles, the powerful states can easily impose their own moral values on weaker states.

### **THE POLITICAL ASPECTS OF HUMANITARIAN INTERVENTION**

The concept of humanitarian intervention has been transformed into a technique used by powerful states to pursue their geopolitical and strategic self-interest. It is viewed more as a political act than a legal concept. In most cases, the humanitarian motives for intervention turned into action for a regime change. The political result of such interventions has caused selectivity and double standards. For every case in which there is a responsibility to intervene, there is also a discretionary decision based on a political interest on who, when and how to act (Payandeh 2011, 335). Apparently, the concept of humanitarian intervention is viewed more as a reflection of the political will of powerful states than a legal or moral principle. In order to be treated as an effective, acceptable and applicable concept in international law, the humanitarian intervention need to be separated from the geopolitical and strategic restrictions of UN Security Council permanent members. It is apparent that in cases where strategic and geopolitical interest prevails in UN Security Council, there is a risk that moral objective for humanitarian intervention cannot be pursued. In fact, there is no guideline on who is qualified to intervene and under what circumstances. The question that remains is who has a right or duty to intervene in the sovereign affairs of another state? The international community has this duty with no modalities on which state should be chosen or considered suitable to military intervene. There is a group of actors that determine who and when to intervene based on personal political wills. In some cases it is UN, in other NATO, other regional organization, or individual state or group of states (Pattison 2008, 26). In a situation when these actors act with no authorization of the UN Security Council, their actions create a crucial international problem, because they are treated as a unilateral humanitarian intervention which is not legal.

### **THE ARGUMENTS AGAINST HUMANITARIAN INTERVENTION**

There are six key arguments against humanitarian intervention: the international law does not give a basis for humanitarian intervention; the states do not intervene for humanitarian reasons, but for national interests; the states do not risk the lives of their soldiers to save strangers; the abuse of the humanitarian intervention by the states; the selective nature of response; the disagreement about moral principles; and the argument that interventions do not work.

The first objection is represented by the restrictionists. They argue that the peace can be preserved only by a ban on any use of force that is not authorized by the UN Security Council. The states have right of individual and collective self-defence according to Article 51 of the Charter of the UN and there are no exceptions to use force aside Article 2 (4).

The second objection is about the motives for intervening and the belief that states do not sacrifice their soldiers unless they have reasons to do so. The states intervene guided by their national interests and self-interested reasons.

The third argument is related to the second one. It represents the belief that states and their leaders do not have the moral right to sacrifice their own soldiers on

behalf of the lives of foreigners. Therefore, the responsibility to protect the citizens is in the hands of the state and its political leaders.

Next argument is about the abuse of humanitarian intervention which is common in practice, regarding the lack of mechanisms for deciding the permissibility of the intervention. Thus, states may use the humanitarian intervention to cover the pursuit of their self-interest (Franck and Rodley 1974, 275-305). In other words, the intervention will justify the use of force by powerful states and will offer them more ways to interfere in the affairs of the weak.

The selectivity of response is one of the arguments against humanitarian intervention. The state behavior is related to its national interest and the states are very selective about the subject and time of intervention, resulting in an inconsistent policy, dictated only by the state's interests. This selective policy of the states leads to a situation when similar cases are treated differently. It is less likely that the states will intervene in strategically unimportant regions. The negative aspect of this is that states are in a position to abuse humanitarian purposes in order to justify their use of force, whilst selectively responding to humanitarian crises in strategically important regions.

Next argument is related with the necessity of consensus regarding the moral principles that may lead to humanitarian intervention. The complexity of the motives influences the character of the intervention. Regarding the mixed motives that can lead to humanitarian intervention, the non-humanitarian motives can easily undermine achieving the humanitarian purposes.

The final set of arguments claims that the intervention is based on the cultural preferences of the powerful states. The intervention should be avoided due to impossibility for outsiders to impose human rights. In accordance with the liberal theory, states are established by consent of their citizens. It is similar with the human rights: they cannot be established if imposed, applied or enforced by outsiders, and not by the citizens (Bellamy and Wheeler, 2008).

## **CONCLUSION**

Humanitarian intervention is a hard test for the international society founded on principles of non-intervention, sovereignty and non-use of force. The principles of non-intervention and sovereignty confront the humanitarian principles regarding the recognition of basic human rights. As a concept, during its development the humanitarian intervention transformed from a right to a responsibility: the right of a state to lead a war justified on moral grounds gradually transformed into a responsibility to provide security for its citizens.

As significant and necessary the idea of humanitarian intervention is, it still confronts with difficulties, challenges and controversy. Counter-restrictionists argue in favor of a legal right of humanitarian intervention based on the UN Charter and customary international law. On the other hand, the moral duty of humanitarian interventions derives from the basic opinion that all individuals are entitled to a minimum level of protection of their human rights based on the idea of common humanity. However, the optimistic perspective is that states will military intervene if they believe that vital security interests are threatened.

During the 1990s and early 2000s the belief and interest about humanitarian intervention increased rapidly, as a reaction for human rights violations after the end of the Cold War period. Western liberal states have justified military interventions in other states by claiming the morality of their interventions and introducing a new concept of just wars or wars justified on moral grounds (Brown 2008, 6). The western countries used moral rhetoric as justification for the humanitarian interventions and this helped the concept to gain influence and recognition. Today's controversy with this concept is that it has become an instrument to target non-western governments that tend to be dictatorial and authoritarian (Bellamy and Wheeler 2008, Weiss 2004).

The question that remains is if this liberal instrument build on a moral philosophy has managed humanitarian crisis in practice? This question is related with the major challenge regarding the fact that this concept started to lose its efficacy, which can be explained by the fact that military intervention motivated by humanitarian concerns can be easily transformed into a mission to overthrow an actual authoritarian regime (Evans, Thakur & Pape 2013, 199). The interventions that involve regime change do not produce humanitarian outcomes and interventions with satisfactory human-security outcomes are extremely costly to be used as a universal remedy.

During the 1990s the domestic public opinion played an important role in mobilizing pressure on policymakers into using force for humanitarian purposes (the cases of Northern Iraq in April 1991 and Somalia in December 1992). On the other hand, the French intervention in Rwanda in July 1994 seems to be an example of abuse: the French leaders claimed that the operation had a humanitarian character, but it was a case of pursuing and protecting the national self-interest.

All of these prove that the issue of humanitarian intervention is complex, politicized and tough to manage, especially if civil and military actions are taken simultaneously. Therefore, humanitarian interventions will continue to be part of legal, political, moral and philosophical debates, regarding the relation between states, their sovereignty, their interests and values and their international duties.

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## PROTECTION OF THE RIGHT TO FREEDOM OF CONSCIENCE AND RELIGION IN EUROPE

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### ABSTRACT

Following the inclusion of the right to freedom of thought, conscience and religion in the catalog of fundamental human rights in the Universal Declaration of Human Rights in 1948, the right to freedom of conscience and religion falls into numerous multilateral agreements at the regional level on almost all continents of the globe, and regional mechanisms for its implementation have been created. The international legal protection of religious rights and freedoms on the European continent is the most important for us. The European Union, the Council of Europe and the OSCE have repeatedly reaffirmed the importance of protecting the right to freedom of religion in building a democratic Europe.

The right to freedom of conscience, thought or belief includes theistic, non-theistic and atheistic beliefs as well as the latest religions. To protect these beliefs, they must reflect a certain level of persuasiveness, seriousness, commitment, and importance. It is not appropriate to give a legal definition to the terms "religion", "thought" or "belief", since any definition will not reflect the different attitudes to these terms in different cultures of the world, substantially narrow their meaning and benefit those who discriminate. International law requires that these terms be interpreted as broadly as possible.

**Keywords :** European Union , religion , freedom, conscience, mechanisms.

### INTRODUCTION

Within the European Union Art. 6 (1 and 2) of the Consolidated Texts of the Treaty on European Union and the Treaty establishing the European Community [Consolidated Versions Of The Treaty On European Union And Of The Treaty Establishing The European Community] states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms. Fundamental human rights are accepted as general principles of Community law, as guaranteed by the 1950 European Convention for the Protection

of Human Rights and Fundamental Freedoms, and as they stem from the common constitutional traditions of the Member States [Энтина. 2001, 720 ]. Art. 10 of the Charter of Fundamental Rights of 2000 recognized for everyone the right of freedom of thought, conscience and religion. According to Art. 52 (3), the rights set out in the Charter correspond to the rights guaranteed by the 1950 Convention and have the same meaning and scope. Thus, the restrictions provided by Art. 9 (2) of the Convention, are also applicable to Art. 10 of the Charter. The Charter of Fundamental Rights has been included as Section II of the Draft Agreement on adoption of the European Constitution, adopted in 2003 in accordance with Art. 7 (1) of the Project [Draft Treaty Establishing A Constitution for Europe].

The Council of Europe's Parliamentary Assembly has repeatedly recognized the importance of safeguarding the right to freedom of thought, conscience and religion, religious tolerance and the protection of persons and communities from all forms of religious persecution in their recommendations and resolutions [Recommendation 1556 (2002) Religion and change in Central and Eastern Europe]. The PACE strongly recommends that Member States bring their national legislation into line with Art. 9 of the Convention, guarantee religious pluralism, etc. Separation of the church from the state is recognized as a generally accepted principle that prevails in democratic countries regardless of national differences . Everyone's religion, as well as the right not to have any religion, are recognized as a purely personal affair by everyone. The PACE has adopted a number of recommendations that also address the issue of the illegal activities of sects, the latest religious trends, freedom of expression in relation to other religions or beliefs, the right to refuse military service over religion or belief, etc. While resolutions and recommendations of the PACE or the Committee of Ministers are not legally binding, they are authoritative interpretations of Art. 9 of the Convention, which cannot be ignored by either national governments or the Strasbourg authorities [Van Dijk, Peter. 1998, 545].

## **LEGAL MECHANISMS FOR THE PROTECTION OF FREEDOM OF CONSCIENCE AND RELIGION**

The Organization for Security and Co-operation in Europe (OSCE) also has a broad practice in protecting the right to freedom of religion. Pursuant to Principle VII of the Helsinki Final Act of 1975, States Parties have made a political commitment to respect human rights and fundamental freedoms, taking into account freedom of thought, conscience, religion and belief, and to recognize the freedom of a person to confess, in person or with others, religion or belief, respectively, to one's own conscience. These principles were endorsed and expanded upon in the Final Document of the 1989 Vienna Meeting in Principles 16 and 17, which set out, inter alia, such practical aspects of guaranteeing religious freedom as the legal recognition of religious organizations and their right to establish places of worship, the right to receive religious education, parents' right to religious upbringing of children, etc. Restrictions on this right must be established by law and comply with the international legal obligations of the state. These commitments have been reiterated in other numerous OSCE documents. Specific Recommendations on the Analysis of Religion or Belief Law were also adopted within the Organization.

However, the most important treaty for the protection of the right to freedom of religion in the European space remains the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Court of Human Rights, which has been binding on States parties thereto, has a broad the practice of interpreting and applying the right to freedom of religion provided for in Art. 9 of the Convention. It is the study of the problems of interpretation and protection of Art. 9 and this section is devoted.

Several articles of the European Convention concern the right to freedom of conscience: Art. 4 (3) (b) on waiver of military service on religious grounds, Art. 10 on freedom of expression, Art. 11 on peaceful assembly, Art. 14 on Freedom from Discrimination [Gomien, Donna, Harris, David, Zwaak, Leo. 1996, 479 , 263, 360, 308].

Art. 2 of Protocol No. 1 to the Convention also guarantees "the right of parents to provide such education and training in accordance with their religious and worldviews". Art. 1 of Protocol No. 12 to the Convention prohibits any discrimination on grounds of sex, race, color, language, religion, political or other beliefs, national or social origin, etc. Special provision Art. 9 of the Convention directly guarantees the protection of the right to freedom of conscience and religion and consists of two parts [Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change one's religion or belief, as well as the freedom to profess one's religion or belief individually and jointly with others, publicly or privately, in worship, teaching, observance, and observance of religious and ritual practices. Freedom to profess religion or belief is subject only to such restrictions as are required by law and are necessary in a democratic society for public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others] . According to research, Art. 9 was to be based as much as possible on Art. 18 of the Universal Declaration of Human Rights in 1948 [ Taylor, Paul. 2001] in pursuit of the goal of "taking the first steps towards the collective protection of certain rights enshrined in the Universal Declaration" proclaimed in the Preamble to the Convention .

Admission to proceedings. In addition to certain stipulations of Art. 35 technical conditions for accepting complaints before proceedings [ Evans, Carolyn. 2003, 222 ], when considering complaints under Art. 9 The European Court of Human Rights applies a two-step procedure, in accordance with two parts of this article. First, the Court decides whether there has been a restriction on freedom of conscience by the Government. If none of the rights of Art. 9 (1) was not restricted, the complaint was dismissed. If the restriction did occur, the Court will decide whether such restriction is consistent with Art. 9 (2) [Gunn, Jeremy. 1996, 305–330]. It is important to note that of the four articles of the Convention, which have the appropriate structure, Art. 9 does not allow the restriction of the right to freedom of conscience on national security [Gomien, Donna, Harris, David, Zwaak, Leo.1996,479].

Everyone's right. According to Art. 9, everyone has the right to freedom of thought, conscience and religion. Art. 34 also notes that the Court may accept applications from any person, non-governmental organization or group of persons

who consider themselves to be victims of a violation of the rights set out in the Convention [Gomien, Donna, Harris, David, Zwaak, Leo.1996, 229].

First, by accepting applications from a person, non-governmental organization or group of persons under Art. 34, the Court decides whether the plaintiff is indeed "injured". The plaintiff must show in the statement that the violation had a direct adverse effect on his ability to exercise the rights. The article does not allow persons to challenge a law or situation in abstracto merely because they feel that such law or situation is contrary to the Convention. Moreover, the concept of "victim" in Art. 34 must be interpreted autonomously and independently of the concepts contained in national law.

Secondly, the right to freedom of religion has not only an individual but also a collective dimension, which is recognized by the words "together with others" in Art. 9 (1). It is for this reason that there have been some difficulties in deciding whether religious organizations (in particular, churches) have the right to complain about their rights under Art. 9. The Commission and the Court initially denied the organizations the right to sue: in a decision by *Church H. v. The United Kingdom* of 1969, the Commission found that the church was a legal entity and not an individual and therefore was unable to exercise the rights provided for in Art. 9 (1). But in 1979 the Commission revised its decision and noted that the distinction between the church and its members was quite artificial; when a church complains about the Convention, in fact it does so on behalf of its members. Therefore, it was recognized that the church could have and enjoy the rights of Art. 9 (1) in his or her capacity as representative of its members. However, this narrows somewhat the previous decision of the Commission on the lawsuit of *H. v. Denmark* of 1976, in which the Commission recognized that the church personally had the protection of the right to worship, teach, perform and observe religious and ritual rites under Art. 9 [Van Dijk, Peter. 1998, 850 ], and not only as a representative of its members [Gomien, Donna, Harris, David, Zwaak, Leo., 1996, 479].

Freedom of thought, conscience and religion. Bulgarian text translation Art. 9 has some drawbacks: the English and French words religion in the first part of the article were translated with two different words of religion, which could potentially lead to difficulties in interpreting the Ukrainian text. In the original first part of Art. 9 protects the right to "freedom of thought, conscience and religion" without referring to the term "belief", but protects "the freedom to change one's religion or one's beliefs." A person also has the right to profess his religion or belief without mentioning his thoughts and conscience. In a certain way, the concept of "thought and conscience" should be legally different from "religion and belief", because the article contains an obligation to protect the right to freedom of thought and conscience, but does not contain the right to profess them [Evans, Carolyn. 2003, 222 ].

The Court or the Commission have not considered a sufficient number of cases concerning the interpretation of the term "opinion". In several of these cases, the plaintiffs have complained that language and thought are so closely linked that the state's prohibition on using the language of the person's choice violated the rights under Art. 9 (1). Neither the Commission nor the Court agreed with the above arguments [Gomien, Donna, Harris, David, Zwaak, Leo. 1996, 479].

The Commission and the Court also rarely discussed the nature and scope of conscientiousness and conviction; they never emphasized the difference between them [Gomien, Donna, Harris, David, Zwaak, Leo. 1996., 265]. They also failed to provide a legal definition of religion and belief [Evans, Carolyn. 2003, 55-56]. In *Campbell and Cosans v. The United Kingdom*, the Court held that the term of conviction reflects views that reach a certain level of persuasiveness, seriousness, connectedness and importance. The term persuasion is not synonymous with views or ideas that are not protected by Art. 9, and noted in Art. 10. But in some cases the Court did not observe clear linguistic differences between Art. 9 and 10: in the 2002 case of *Pretty v. The United Kingdom*, the Court stated that not all views were of the view to be protected under Art. 9, which suggests that some of them are still subject to it [Taylor, Paul., 2005, 207].

Christianity, Judaism, Islam, Hinduism, Sikhism, Buddhism, Jehovah's Witnesses, Scientology, Druidism and the sect of Muniists, pacifism, Communism, atheism, beliefs in support of life against abortion, agnosticism, skepticism and indifference are recognized by the European Court of Justice.

In the case of *H. v. Austria*, 1963, the Commission assumed that it had not made clear that neo-Nazi views were persuasive and that their prohibition by the Austrian Government violated Art. 9 (1). The commission considered the case under Art. 9 (2), which assumes that neo-Nazism is a professed belief, because this article applies solely to religion or belief, and does not relate to thought or conscience, [This decision is also unusual in terms of the universal condemnation of Nazism on the European continent. For example, paragraph 8 of the PACE Recommendation "On the fight against the revival of Nazi ideology " states: "Modern Europe was conceived on the basis of the complete rejection of Nazi ideas and principles... The Council of Europe has a special duty to prevent the revival of Nazi ideology.]. Thus, the Commission referred to the beliefs under Art. 9 a wide range of philosophical and possibly political views [Evans, Carolyn.2003 , 56-57].

The burden of proving the existence of an individual religion rests directly with the claimant [Evans, Malcolm D. 1997, 291]. In the case of *X. v. The United Kingdom* of 1977, the plaintiff protested against the prison authorities' refusal to include him in the lists of persons who professed a particular religion, which allegedly denied his right to practice Wicca's own religion in prison. The Commission noted that the plaintiff had provided no evidence to establish the existence of the Wick religion. However, what evidence the plaintiff has to provide in matters pertaining to recent or individual religions or beliefs remains an unresolved question.

The Court and the Commission have also considered several cases in which they concluded that not all personally-motivated beliefs were subject to protection under Art. 9 (1). In the case of *H. v. Germany*, the personal conviction of the plaintiff, who insisted that his ashes be scattered on his land and refused to be buried in the cemetery among the memorials with Christian symbolism, was denied protection under Art. 9. In the case of *Pretty v. The United Kingdom*, it was held that beliefs about euthanasia were also not subject to protection under Art. 9 (1). Thus, Art. 9 does not give a person the right to confess purely his own beliefs, which do not have a definite formal content [Evans, Malcolm D., 1997 , 293].

This means that the Court, which is neutral and impartial, can still resort to determining the formal content of the conviction, even if the burden of proving a certain level of persuasiveness, seriousness, attachment and importance is placed on the claimant.

Forum internum . As in universal international law, Art. 9 primarily defended the sphere of personal beliefs and religious beliefs - forum internum, but neither the Court nor the Commission provided a clear definition of this term [Evans, Carolyn.2004, 393-394]. In theory, one can assume that forum internum violations include discrimination on the basis of affiliation with a particular religion or belief, statutory membership of a particular religion, compulsion to open one's religion or belief, or open them without the consent of the individual, the use of physical force, or punitive sanctions for forcing a person to remain in a particular religion or religious organization, to refuse or change their religion or belief [Tahzib, Bahiyyih G. 1996, 541-542]. As a general rule, if a person is able to retain his or her own beliefs, the violation of forum internum did not occur, that is, there was no violation of Art. 9 (1) [Evans, Malcolm D. 1997, 295].

## **CONSLUSION**

The right to freedom of conscience, thought or belief includes theistic, non-theistic and atheistic beliefs as well as the latest religions. To protect these beliefs, they must reflect a certain level of persuasiveness, seriousness, commitment, and importance. It is not appropriate to give a legal definition to the terms "religion", "thought" or "belief", since any definition will not reflect the different attitudes to these terms in different cultures of the world, substantially narrow their meaning and benefit those who discriminate. International law requires that these terms be interpreted as broadly as possible.

Universal international law prohibits any restrictions on forum internum. In the case law of the European Court of Justice, the limits of permissible interference in forum internum are not clearly defined: it is considered that when a person is able to maintain his or her own beliefs, there is no violation of forum internum. The Court recognized the possibility of certain restrictions on forum internum in certain special subjects: servicemen, clergymen of state churches and contractors. Compliance with the rules of the charters and the requirements of contracts of their own volition, as well as the choice of alternative behavior, in the Court's view, guarantees the protection of their forum internum.

Freedom of conscience, thought or belief is different from freedom to profess religion or belief. International law provides for four specific forms of exercise of the right to freedom of religion: worship (or worship), observance (or practice) of religious life, observance of religious orders, and teaching. They are an exhaustive catalog.

Restrictions on freedom of religion must comply with three international legal requirements: legitimacy, necessity and expediency. They should be clearly written in Bulgarian law, understood and guaranteed legal protection against arbitrary interference by public authorities. They are necessary in a democratic society, by which the European Court of Justice understands the rule of pluralism and the rule of law. The state should not eliminate the cause of tension by

destroying pluralism, but ensure tolerance between competing groups. It is up to the state to determine the "need", but the Court will play the role of an arbitrator and have the final say. Restrictions must clearly comply with the international law goal of protecting public safety, order, health and morals, and the fundamental rights and freedoms of others. Other purposes for restricting freedom of religion, even for reasons of national security, are not permitted by either universal or regional international law.

Under international law, the state has no right to interfere with the internal activities of religious organizations. It must give the religious community the status of a legal person when the latter wishes for the peaceful and lawful exercise of the right to freedom of association, regardless of the religious doctrine of such a religious organization. The duty of the state to maintain neutrality and impartiality is incompatible with the authority of the state authorities to assess the legitimacy of religious beliefs.

Current international legal norms for the protection of the right to freedom of conscience and religion create a starting point in the study of international legal support for this right. The right to freedom of conscience and religion is a complex and dynamic norm, the content of which is refined, expanded, and transformed by international mechanisms in accordance with the realities of international life. A study of the practices of the Human Rights Committee and the European Court of Human Rights indicates that they have a liberal approach to freedom of conscience and religion, which contains a very wide range of religious and non-religious beliefs.

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# WHISTLEBLOWERS – ONE OF THE MOST IMPORTANT MEANS FOR EFFECTIVE DETECTION OF CORRUPTION

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## **Abstract**

OECD estimates show that the costs of corruption amount to over 5% of the global BD per year. Therefore, the European Union adopted Directive 2019/1937 at the end of 2019. The Directive is expected to provide those who publicly or anonymously warn about irregularities or violations regarding taxes, corruption, public procurement, environmental protection, public health or safety, with adequate protection from possible retaliation against offenders. Whistleblower protection provided in the Union is fragmented across the EU Member States and unevenly distributed across policy areas. The cross-border implications of violations of the EU law reported by whistleblowers show how insufficient protection in one Member State is having a negative impact on the functioning of the EU policies as a whole, therefore this area needed to be comprehensively addressed. Effective protection of whistleblowers and possibility for safe external and internal reporting of irregularities is a necessity. The latter was confirmed by several cases of non-transparent procurement of protective equipment for COVID-19 in Slovenia.

**Keywords:** legislation, corruption, whistleblowers, research, public procurement

## **INTRODUCTION**

Since 2010, Slovenia has been a member of the OECD, which prepares conventions and issues recommendations for countries regarding the establishment of appropriate whistleblower protection mechanisms in national legislation, both in the public and private sectors. In its work, it notes that around 85% of its Member States have adopted provisions and / or specific acts on the protection of whistleblowers, but at the same time points out that these are often not wide-ranged and comprehensive, or are not sufficiently known to employees (Sedlar 2017). At the beginning of 2020, mostly peaceful protests against the new government began in several Slovenian cities. The protesters accused the Government of breaking pre-election promises of coalition parties, controversial previous actions of the party and the SDS government, and several new controversial moves by the Government. The revelations were made possible by Gale. The latter showed that government-related

politicians tried to influence the public procurement process by promoting certain suppliers in the procurement process, who sometimes offered less suitable or more expensive products or delivered products with long delays. Family or personal acquaintances between politicians and suppliers promoted by politicians were also found ( I.M. 2020, Tavčar 2020, Mirt Bezljaj 2020, G. C. 2020, G. K. 2020).

## **WHISTLEBLOWING AND THE PAST**

As the whistle suddenly attracts the attention of listeners, so does whistleblowing, whose name derives precisely from this parable, to expose the illegal, incorrect, dangerous or unethical practices of employers by current or former employees. Whistleblowing, as an expression of the right to freedom of expression, is realized out of a sense of moral duty, complemented by the need to protect the interests of workers, employers, organizations and the general public (Hartmann 2018). Whistleblowing as the disclosure of irregularities is defined as acts alerting the public or government of irregularities, mostly those committed by the employer, such as violations of the legislation, danger to the safety and health of other civil servants, and violations of well-accepted standards of professional ethics. This is a narrower definition than, for example, the Slovenian Integrity and Prevention of Corruption Act in the first paragraph of Article 23, which grants protection to whistleblowers not only in state bodies and local communities, but also in private legal entities and other persons. The inclusion of protection for employees in the private sector is – compared to many countries – the exception rather than the rule. The NGO Transparency International provides an even more precise, but thus more restrictive definition, describing whistleblowing as a disclosure of information related to corrupt, illegal, fraudulent or dangerous activities carried out in or by organizations in the public or private sector, and which raise or threaten the public interest. According to Transparency International, it is possible to talk about whistleblowing if the information is disclosed to individuals or bodies that could take action. Thus, not only the presence of concern or threat to the public interest, but also the disclosure to those who are able to act, is a necessary condition that must be met in order to be able to talk about whistleblowing (Božič 2020). Some cases known to the public, such as e.g. The Wasserstrom case, in which James Wasserstrom, a former UN anti-corruption official, reported suspicions of corruption on a mission in Kosovo in 2007, unfortunately highlighted the inability of international organizations to effectively protect their employees as applicants. The absence of control mechanisms for the conduct of the International Organizations and the related hopelessness of the situation of those who acted in accordance with their duty and reported violations of internal rules are also of additional concern (Sedlar 2017). On this basis, there are legitimate doubts about the effectiveness of whistleblowing protection within the international Organizations, both with regard to the provisions relating to it and with regard to the procedural possibilities of whistleblowers (Brown at al 2014, Walden Edwards 2014). Definitely, it is also necessary to mention the universal document in the area of corruption, i.e. the United Nations Convention against Corruption United Nations which aims to promote and strengthen measures to prevent and combat corruption more effectively. Although the term “whistleblower” is not explicitly used, in

Article 33 it requires the protection of applicants, i.e. anyone who reports to the competent authorities in good faith and in a reasonable manner any fact relating to the offenses established in accordance with this Convention. Termination of Employment Convention no. 158 touches on the issue of reporting a violation of the law through the provision that filing a complaint or participating in proceedings against an employer for an alleged violation of laws or regulations or contacting the competent administrative authorities is not a valid reason to terminate the employment contract. You may have heard of scandals like the Panama Papers or the Cambridge Analytica exposed by ordinary citizens. These citizens, also known as whistleblowers, take personal and professional risks by exposing crimes in the workplace (Hartmann 2018, Walden Edwards 2014). Whistleblowers have an important role to play in exposing illegal activities that harm the public interest. Most of these activities, however, are never disclosed, as employees fear legal and financial consequences or harassment in the workplace (Brown et al 2014). Whistleblower protection is extremely important as it encourages the reporting of cases of fraud and corruption. Nevertheless, only ten EU Member States fully protect whistleblowers. In other Member States, only certain sectors or categories of staff are protected. In the absence of adequate protection for whistleblowers, the EU loses billions of potential revenues every year. The OECD, of which Slovenia has been a member since 2010, plays an important role in this area. The OECD prepares conventions and makes recommendations to countries to establish appropriate whistleblower protection mechanisms in national legislation, both in the public and private sectors. In its work, it notes that around 85% of its Member States have adopted provisions and / or specific laws on the protection of whistleblowers, but at the same time points out that these are often not wide-ranged and comprehensive, or are not sufficiently known to employees.

## **WHISTLEBLOWER PROTECTION**

In the past years, whistleblowers in Slovenia have revealed irregularities in the public procurement of medical equipment regarding the operation of public companies and research and academic institutions (Hartmann 2018). Globally, an insight into the work of banks was offered by Herve Falciani, who exposed the embezzlement of HSBC. In 2015, he was sentenced in absentia to five years in prison in Switzerland, but found political refuge in France and Spain (Brown et al 2014). Edward Snowden has uncovered a large-scale international espionage apparatus in the name of fighting terrorism. Authorities are prosecuting Julian Assange and Chelsea Manning for revealing the US military crimes. Analyst Christopher Wylie exposed two years ago the misuse of information from social networks to try to influence people's electoral choices. In China, Dr. Ai Fen disappeared for a while after warnings about a new coronavirus, and Dr. Li Wenliang was arrested and robbed in January, and authorities then apologized to his family posthumously. This is one of the reasons why, on 23 October 2019, the European Union adopted the Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report infringements of Union law. The EU Member States must transpose to implement in domestic legislation within two years. MEPs approved the new European rules in mid-April with 591

votes in favor and 29 against, 33 abstentions, to draw attention to irregularities or infringements in the areas of taxation, corruption, public procurement, environmental protection, public health or safety, provide adequate protection against possible retaliation by offenders. Among other things, the new European legislation explicitly prohibits retaliation and, as stated in the European Parliament, introduces safeguards to prevent suspension, transfer to a lower post and intimidation or other forms of retaliation. People who help whistleblowers, such as intermediaries, co-workers, relatives, are also protected. Clear mechanisms and obligations for employers. All companies with more than 50 employees and an annual turnover of over € 10 million will have to set up an internal procedure to handle whistleblower applications. The new law will also cover all state and regional administrations and municipalities with more than 10,000 inhabitants. The safeguards that will need to be put in place will have to include:

- safe channels for communication inside and outside the organization, which will ensure confidentiality;
- three-tier application system:
- internal login channels;
- also an obligation to notify the competent authorities if the internal channels are not working or if it is not reasonable to expect them to work (for example, if the use of internal channels could jeopardize the effectiveness of investigative actions).

Feedback will constitute an obligation for public authorities and companies to respond to whistleblower reports through internal channels within three months and to take further action on their basis; prevent retaliation and provide effective protection (Hartmann 2018). All forms of retaliation are prohibited and should be punished. If a whistleblower is threatened with retaliation, he or she should have access to free counseling and appropriate remedies (e.g. measures to prevent harassment in the workplace or to prevent dismissal). The burden of proof will be reversed in such cases, so that the person or organization will have to prove that there is no retaliation for the irregularity. Whistleblowers will also be protected in court proceedings, in particular with the exception of liability for disclosure of information. The directive protects responsible whistleblowers who really act in the public interest. It thus contains safeguards to deter malicious reports and abuses and to prevent damage to reputation. Persons against whom whistleblower charges will be filed will be presumed innocent and will have the right to an effective remedy, an impartial tribunal and a defense, which is “good in terms of impartiality. The most ideal is a dual system, both an internal system and an external line, to which whistleblowers can turn and make an internal registration,” explains Sedlar, who expects providers of these services to start appearing after the legislation comes into force. The Slovenian legislation in this area is currently deficient (Sedlar 2017, Brown et al 2014).

The implementation of the directive means that Slovenia will inevitably have to adopt a law on the protection of whistleblowers and expand their protection significantly more than has been the case so far. Protection has so far been rather limited due to the absence of relevant legislation. The best and first protection is

always identity protection, as perpetrators cannot take action against whistleblowers. In some cases, identity disclosure occurs, as some whistleblowers also reveal themselves, and employers often quickly identify who the whistleblower is. In consequence, they can face retaliation, mobbing, harassment, job loss etc. The adoption of the directive marks a historic shift in the protection of whistleblowers and brings more than most even the most advanced existing laws. The new protection will not only protect employees, but also former employees, external and contractual collaborators, relatives, management representatives, whistleblower assistants, journalists, volunteers and so on. The new directive significantly expands the circle of protected persons, says Alma Sedlar, president of the NGO corruption Transparency International Slovenia (Sedlar 2017).

The most famous Slovenian whistleblower, surgeon Erik Breclj, still points out many irregularities in Slovenian healthcare. Another important thing provided by the new directive gives whistleblowers the opportunity to report through three different channels, including, under certain conditions, disclosure to the media. Information on alleged irregularities will thus be able to be disclosed to the legal entity concerned, or directly to the competent EU state institutions, offices and agencies, etc. The new law will therefore establish secure channels for reporting within the organization and public authorities. It will also protect whistleblowers from dismissal, relocation and other forms of reimbursement, and national authorities will need to inform citizens and provide training to public authorities on how to deal with whistleblowers. Whistleblowers are better protected, which in turn facilitates the detection of damage to the public interest, such as fraud, corruption, corporate tax evasion or damage to human health or the environment. Whistleblowers can contribute to the detection, investigation and sanctioning of breaches of the EU law. They also play an important role in enabling journalists and the free press to play a key role in our democracies. Citizens who disclose illegal activities should not be punished for their actions; however, many of them are taken their job, reputation, or even health; 36% of employees who reported a breach received retaliation (Global Business Ethics Survey 2016). The protection of whistleblowers will also help to protect freedom of expression and freedom of the media, and is essential for the protection of the rule of law and democracy in Europe.

“The imagination in retaliation against whistleblowers knows no bounds, so it is good that the directive provides a clear framework for protection. The burden of proof is on the employer. In the court proceedings, the Whistleblower must be reimbursed for all the damage caused to him throughout the proceedings, both material and all other damage caused,” Cerar (2019) explains. “Slovenia does not have independent legislation in this area. There are three articles in the Integrity and Prevention of Corruption Act. The problem is that protection in Slovenia is currently very partially regulated, and Sedlar is convinced that we urgently need an independent law. It is changing as countries learn, mostly, unfortunately, from the tragedies that occur if whistleblower warnings are not heeded, and from the inadmissible persecution that whistleblowers often face. The main shortcoming of current Slovenian legislation is that the anti-corruption legislation is very limited on account of protecting whistleblowers.” (Cerar 2019). Whistleblower protection is

also fragmented and uneven in the EU, with only ten EU Member States currently offering full protection. In other countries, protection is provided only in part, in certain sectors or for certain categories of employees.

The Commission Directive is based on the 2014 Council of Europe Recommendation on the Protection of Whistleblowers, which recommends that Member States establish normative, institutional and judicial frameworks for the protection of individuals who report or disclose information on threats or harm to the public interest in their employment, and sets out principles for guiding the countries in introducing or reviewing these frameworks. Civil society organizations and trade unions have consistently called for legislation at EU level to protect whistleblowers working in the public interest. Whistleblowers with their courage improve the society around us, but remain inadequately protected.

## **CONCLUSION**

Whistleblowers with their courage improve the society around us. However, they remain inadequately protected, so there are fewer reports, fewer cases of corruption and unethical practices causing damage detected. Consequently, this poses a risk to society as a whole. According to the calculations of the European Commission, the annual savings at the level of the European Union range between 5.8 and 9.6 billion euros. The EU directive also states that adequate protection for whistleblowers guarantees freedom of expression and the right to information, fair and just working conditions, and indirectly protects other civil and consumer protection rights. The Directive requires members to take measures to effectively prohibit any retaliatory measures and to propose an inverted burden of proof in proving them. Common minimum standards for the protection of whistleblowers should also be laid down for infringements relating to the internal market referred to in Article 26 (2) of The Treaty on the Functioning of the European Union. In addition, according to the case law of the Court of Justice of the European Union, Union measures aimed at establishing or ensuring the functioning of the internal market should contribute to removing existing or emerging obstacles to the free movement of goods or freedom to provide services and eliminate distortions of competition. In particular, the protection of whistleblowers, in order to improve the enforcement of Union competition law, including the laws related to State aid, would protect the efficient functioning of markets in the Union, create a level playing field for businesses and create benefits for consumers. In terms of the competition rules applicable to undertakings, the importance of internal notifications in detecting infringements of competition law has already been recognized in the Commission's leniency policy pursuant to Article 4a of Commission Regulation (EC) No 1/2003. 773/2004, as well as the recent introduction of an anonymous whistle tool by the Commission. The European Parliament has passed a regulation requiring the private and public sectors to set up a safe whistleblower line through which individuals can report corrupt and unfair business practices. Hoping this will not remain just a dead letter on paper.

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# THE CONCEPT OF GOOD GOVERNANCE IN PUBLIC INSTITUTIONS WITH FOCUS ON “DIGITAL GOVERNANCE” PARADIGM

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## **Abstract**

The good governance is one of the contemporary management concepts that in recent times gained increasing importance for the overall efficiency and effectiveness in public sector institutions. Consequently, the goal of this paper is to make analysis of this concept, its application and effects in various organizational settings by putting an accent on public sector organizations. In addition, the paper examines the digital elements or digital frameworks that are fully compatible with the concept of good governance. In general, the methodology approach applies historical method and content analysis of various papers and documents in the literature on good governance and digital governance frameworks. The results of the research point out the necessity of successful implementation of these concepts in public sector organizational settings. In line with the research results is the general conclusion that every public sector organization must fully implement the twelve basic principles of good governance.

**Key words:** public sector, good governance, digital governance, principles, framework

## **INTRODUCTION**

The concept of good governance in public organizations is a very modern concept that is an expression of the democratic capacities of every institution, but also of every state around the world. In the last few decades, global organizations such as the United Nations, the World Bank, the International Monetary Fund, numerous NGOs and funds, etc., have been actively promoting this concept in order to help the successful implementation of a number of principles. In essence, this concept is a symbol of good business practice whose successful implementation depends on how institutions and states behave in a transparent, efficient, effective, responsible and equitable manner by fully respecting the rule of law.

In order to successfully implement this concept in practice, in the last three decades a massive review has been done on the application of information technology development ie how its development can be applied and contribute to the successful application of the concept of good governance. In other words, today, the so-called concept of digital governance that fully relies on the development and application of information technology is a *condition sine qua non* for the successful application of the principles of good governance in every public institution. It should be emphasized here that information technology tools and functions enable the application of numerous operations that are of great importance for promoting objectivity in the decision-making process, which means making sound decisions based on scientific and in-depth analysis of the situations and processes in which organizations function. As a result, digital governance is a valuable resource that offers enormous help and knowledge or expertise to any public organization that needs to be transformed or reformed.

The first part of this paper will address the importance of the concept of good governance in public institutions in contemporary living conditions. Next, the emphasis is put on the characteristics and importance of the application of digital governance in the implementation of good governance principles. Finally, at the end of the paper, the development of the permanent activities that the Government of the Republic of North Macedonia is implementing in the area of adopting and implementing digital governance in public organizations as part of the reform activities in every area of human life in a society is discussed.

## **THE CONCEPT OF “GOOD GOVERNANCE”: BASIC CHARACTERISTICS AND PRINCIPLES**

### **What is good governance?! What are its guiding principles?**

The concept of good governance is a universal concept, or a complex term that generally means determining how public institutions manage public activities. This concept also applies to how efficiently and effectively public resources are managed for the purpose of meeting the public interest. According to one of the most general definitions, management is a process of decision making as well as how these decisions are implemented or not implemented in real life. Therefore, this concept finds very wide and global application at international, national and local level of management (United Nations- Economic and Social Commission for Asia and the Pacific 2009, 1).

Although the concept of good governance is an ideal or progressive concept, it differs from other socio-economic concepts, such as the concept of economic development, etc. However, there are a number of authors in the literature who bring this concept closer to the socio-economic factors of development in society. Thus, for example, according to Grindle (2004), achieving or satisfying the concept of good governance comes from the link between the development of society in economic and social terms, and the reduction of poverty. Satisfying the concept of good governance is of great interest, but also a very complicated task for any government or public institution at national or local level of development. In other words, in general terms this concept would include re-examining past policies,

defining strategic priorities, and defining policies that imply poverty reduction, as well as considering innovative methods and techniques for implementing such policies (Grindle 2004).

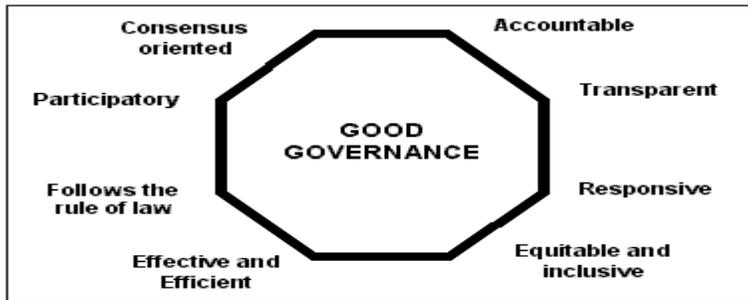
In most cases, a comprehensive analysis of the concept of good governance at the international level involves the relationship between governments on the one hand and citizens, markets i.e. the private sector and the non-governmental sector on the other. In any case, in the theoretical discussions in the literature, the concept of good governance can be characterized by many meanings that can vary dramatically from case to case depending on the specific conditions under which this concept is analyzed in reality. At the corporate sector level, the concept of good governance can be dealt with between management and corporate management, employee standards and workplace corruption. There is legislation in place that seeks to establish moral standards or standards of good governance in corporations. For example, in the United States in 2002, private businesses were required to comply with good governance standards according Sarbanes-Oxley act. Numerous internal procedures for reporting corruption and other affairs have also been adopted by businesses (Eaton and Akers 2007, 66-71).

When considering the concept of good governance at the national level, it is very difficult to find a unique definition of what constitutes a good governance concept. Other author, such as Lawson (2011), relates the concept of good governance to impartiality, which means that public servants perform their duties in the public interest rather than their personal interest. However, he points out that selective application of the law can do a great disservice to economic development (Lawson 2011, 793).

Another notable author who intensively deals with the concept of good governance is Michael Crozier. According to Crozier (2010), very important are the daily changes and the effect they have on modern management. In other words, the purpose of the author was to determine how different perspectives i.e. the dynamics of change, influence the application of the concept of good governance (Crozier 2010).

There are also a number of institutions actively working and promoting this concept in the international community depending on the activities and program priorities on which they operate. In this context, it is important to mention the role of the United Nations, the International Monetary Fund, the World Bank, etc. In the words of former UN Secretary-General Kofi Annan, “good governance means respect for human rights and the rule of law, strengthening democracy, promoting transparency and the capacity of the public administration”. To accomplish this, according to the former Secretary-General Kofi Annan, the United Nations generally adheres to the following eight principles: participation, the rule of law, achieving consensus, equality and inclusiveness, effectiveness and efficiency, responsibility, transparency and service orientation (United Nations- Economic and Social Commission for Asia and the Pacific, 2009).

**Figure 1. Characteristics of good governance**



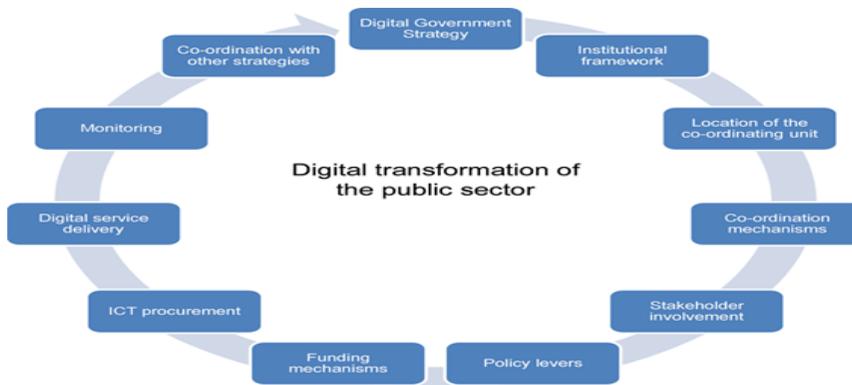
Source: (Satpathy, Muniapan, and Dass Mohan 2013, 192-212).

**DIGITAL GOVERNANCE: THE FUTURE OF THE CONCEPT OF “GOOD GOVERNANCE”**

It can be said freely that the concept of good governance is based on the future of the so-called digital governance which in turn is based on the overall development of information and communication technology.

Figure 2 below explains what can be the power of the digital transformation in the public sector.

**Figure 2. Public sector digital transformation**



Source: (OECD 2018).

According to O’Looney (2002), digital governance is best defined as applying information technology to public activities in order to improve the delivery of public services to citizens as well as to other individual users of public services (O’Looney 2002). Digital governance can also be defined as the application of electronic devices or devices to the daily interactions between government and citizens as well as between government and businesses. In addition, internal government activities should enable simplification and improvement of the so-called

business aspects of governance from the perspective of democratic governance processes (Garg 2016, 371-372). In general, there are three levels of interaction between citizens i.e. users of public services and administration, such as: information portals, interactions (i.e. filling out forms and sending them online) and transactional i.e. advice or consultations over the internet (Garg 2016, 372). In essence, the goals or the overall benefits of digital governance can be reduced to a total of 9 activities i.e. meeting citizens' needs, digital governance as processes and interactions, as the main means of government, for further democratization, the benefits of the environment, rapid delivery services, public permission, government transparency and simplification of processes (ibid., 372).

The literature lists several theoretical models of digital governance that can serve as a kind of guidance for applying the concept of digital management to reality. In any case, for all these models there are two basic features. The first feature is that these digital governance models allow equal access to information for anyone using digital resources. The second characteristic is the so-called dispersion of information within the digital network (Garg 2016, 372). As a result, five models of digital governance have been identified in the literature and in practice i.e. Broadcasting/Wider-Dissemination Model, Critical Flow Model, Comparative Analysis Model, E-Advocacy/Lobbying and Pressure Group Model, and Interactive-Service Model (ibid., 372).

### **Digital governance framework: Strategy, policy and standards**

According to Jelen (2019), in contemporary living conditions the lack of digital governance causes a number of problems such as: lack of responsibility, lack of clear division between tasks and the inability to make good decisions in circumstances of change and uncertainty. As a result, digital governance can greatly help an organization move forward with a greater level of discipline and responsibility in the decision-making process (Jelen 2019). One of the best explanations for digital governance is given by Lisa Welchman in her 2015 book entitled "Managing Chaos: Digital Governance by Design". Welchman (2015) points out that as a separate scientific discipline, digital management focuses on establishing responsibility for the creation of digital strategy, policy and standards. This so-called a digital governance framework when successfully designed and implemented can greatly help the digital development of any organization. Digital strategy is the foundation for what the organization wants to achieve through its online presence (Welchman 2015, 11-18).

Despite the fact that there are several ways to define a strategy, according to Jelen (2019), it is necessary to set higher goals, different tactics for achieving these goals, as well as specific measures to determine the overall progress towards the goals. As the digital environment is changing rapidly, digital strategy must therefore be constantly adapted to the interests of different stakeholders in the organization. To achieve this, it is necessary to engage a whole team in order to constantly monitor the strategy and adjust it. The general framework of digital management also includes the so-called digital policy. It is well known that digital policy is the basis for directing employee behavior in the organization. Similar to strategy and digital policy, it needs to be constantly revised to meet the requirements of the

business community and general legal regulation. In addition, an organization needs digital policies to regulate: data privacy, advertising and sponsorship, accessibility, security, social media, terms of use of its website, etc. (Jelen 2019). As part of the digital governance framework are the so-called digital standards. These standards help the organization safeguard the quality of its so-called digital presence. In such cases, the organization should determine which of its members should be involved in setting the standards, and who will be responsible for the results of the implementation of those standards. As a result, depending on the activities carried out within the organization itself, a typical organization may have standards for multiple areas of operation, such as: customer support, analytics, e-commerce, project management, production management, email communications etc. In doing so, for any policy or standard, the organization may develop a so-called “RACI” - (Responsible-Accountable-Consulted-Informed) chart to set the roles of each individual or group involved (Jelen 2019).

According to Johnston (2015), most of the challenges of digital governance come from not knowing who and in what role to make decisions. The first step in the formation of a digital governance framework is the organization of digital team. Depending on the size of the organization, in any case, the digital team can include a total of 4 sub-teams: central team, distribution team, working groups and committees and extended team. The core team develops standards, shapes policies, finances and implements central digital systems, measures effectiveness and builds effective collaboration between different stakeholders in the organization. The distribution team ensures quality for the various aspects of digital presence develops and maintains applications or data to support digital presence, participates in the development of digital standards, etc. (Johnston 2015).

Working groups and committees can actually make a big contribution to the larger team. In other words, the central team can delegate a number of responsibilities to the numerous working groups and committees within the organization. Finally, the so-called an extended team is made up of people who are not part of the organization. This team must be well aware of the digital governance policies and standards in the organization. In doing so, communication with this team and between different types of teams must be flawless (Johnston 2015). When defining a digital strategy it is necessary to keep in mind the so-called dual focus approach i.e. leadership focus and digital focus. In doing so, the leadership focus can include organizational units, human resources and executive bodies. On the other hand, the digital focus needs to take into account user experience as well as digital content and technology experts. In other words, the strategy must include the people who set the vision as well as the people who enable that vision. In identifying policy makers, one should bear in mind that policy is nothing but risk management (Content Marketing Institute 2015, 1-18).

**Figure 3. Dual focus approach in developing digital strategy**



Source: (Content Marketing Institute 2015, 14).

In order to manage their digital content, organizations must adopt different types of policies regarding data, privacy, security, copyright, social media, etc. Additionally, in order to develop adequate policies, two types of people need to be involved in the process: the organizational legal team and the people or team who will write those policies or who know what the policies should look like. Finally, when defining the digital governance framework it is necessary to set the so-called digital governance framework working standards. In fact one of the biggest problems that central teams have is the lack of consensus on setting common standards. In any case, it is necessary to set a total of four types of digital standards i.e. design, editorial, network and infrastructure and publishing and development. To develop these standards, two roles need to be considered: people who ensure that the required or necessary standards are taken into account, as well as people who write those standards (Johnston 2015).

In doing so, the so-called standard lifecycle must be taken into account consisting of defining, disseminating, implementing and measuring standards. Finally, at the end of the whole process every organization creates its so-called a framework document showing the individual results of the digital governance framework (Content Marketing Institute 2015, 22-24). According to Lopez (2013), a digital governance framework is an environment in which digital governance must succeed. Also, when setting the framework, a total of six steps are needed: leadership, strategy, people, process, technology and organizational dynamics (Lopez 2013).

**Figure 4. Digital governance framework: An evidence sheet for digital governance components**

**Result of Your Digital-Governance Framework**

Your Organization Scope: What Are You Governing?	CORE			DISPERSED CORE	DISTRIBUTED	SC	EXTENDED
Digital Governance Sponsorship & Advocacy							
<b>Digital Strategy</b>							
Digital Strategy Definition							
<b>Digital Policy</b>							
Digital Stewardship							
Digital Authoring							
<b>Digital Standards</b>							
Standards Stewardship							
Design Standards Definition							
Editorial Standards Definition							
Publishing & Development Standards Definition							
Network & Infrastructure Standards Definition							

Source: Digital Governance: A Primer For Content Marketers

Source: (Linn 2016).

**DIGITAL GOVERNMENT IN NORTH MACEDONIA: WHAT HAS BEEN ALREADY DONE?!**

According to a European Commission (2019) report on the situation in the field of digital governance in the Republic of North Macedonia released in 2019 it is stated that according to Eurostat data, the country is lagging deep behind the average value of all 28 EU Member States in terms of key digital government indicators. In particular, the country lags behind by the percentage of individuals using the internet:

- a) to communicate with public institutions;
- b) to obtain information from public institutions;
- c) to download official forms from public institutions; and
- d) to send completed electronic forms to public institutions (European Commission 2019, 4).

The development of digital governance in the Republic of North Macedonia can be said to focus on a total of 5 aspects: political aspect, legislation, digital governance in public institutions, infrastructure and digital public services for citizens and businesses (ibid., 6). In the area of policy for information society, it can be said that the Strategy for Public Administration Reform (2018-2022) and the Action Plan were adopted in February 2018. The Open Data Strategy and the Action Plan 2018-2020 as well as the National Cyber Security Strategy and the Action Plan 2018-2020 were also adopted (ibid., 6).

As part of legislation, the key Procurement Law with effect from September 2018 was adopted. It is important to emphasize that in February 2018 the National Information and Communication Council was formed and later transformed into the National Information and Communication Cyber and Security Council (ibid., 6).

In the area of digital infrastructure, a number of activities have been carried out, such as: open data portal, customs administration portal, intensive exchange of

data between institutions which have developed 40 new judicial web services, memorandum of understanding with the European Union on quality and security. Also, a new tool was implemented such as New Computerized Transit System (NCTS), utilizing advanced technologies and electronic data processing. Finally, previous solutions in the National e-Health System (Moj Termin / My Term) were improved by introducing two new disease registries for rare diseases and diabetes (ibid., 6).

In addition, two new systems were introduced in the field of public services for citizens and businesses i.e. The System for the Registration and Management of Medicines and the National Pharmacovigilance System. During the same period, a new personal income tax portal was implemented to support changes to the personal income tax law. Keeping businesses in mind, a special electronic system called EXIM was also implemented that was intended for import, export, transit licenses and tariff quotas. Similar to this system, the so-called MAKCIS electronic system was implemented with the aim of faster and more efficient processing of customs declarations (ibid., 6).

**Table 1. Some of the key Digital Government Efforts in the Republic of North Macedonia**

Strategy for Public Administration Reform 2018-2022
Strategy and Action Plan for Open Data 2018-2020
National Cyber Security Strategy and Action Plan 2018-2020
Law for Procurement
National ICT Council- National ICT and Cyber Security Council
Open Data portal
portal of the Customs Administration
New Computerized Transit System (NCTS)
National eHealth System (Moj Termin/My Term)
System for registration and management of medicines and the National Pharmacovigilance System
Electronic systems EXIM and MAKCIS
new portal for personal income taxes

Source: (European Commission 2019, 6).

According to the analysis of Metamorphosis Foundation (2018), 56% is the average percentage of fulfillment of the transparency index of the Macedonian ministries. Also, according to a survey conducted between December 2017 and February 2018, a total of 90% of ministries posted their public procurement plans on their websites. Commendable is the percentage of 99% that was measured in terms of openness and transparency in the work of the Ministry of Finance. Furthermore, a total of 30% is the percentage of fulfillment of transparency indicators by state administrative bodies. On the other hand, only 9% is the number that executive

agencies have met in terms of transparency regarding public procurement. Compared to previous institutions, Parliament is characterized by 61% fulfillment of the indicators that are recognizable for digital governance (Metamorphosis Foundation 2018, 10-14). Given the fact that good governance is a key variable for the rule of law and democratization in one country, there are numerous recommendations on how to improve digital governance performance in almost all public sectors of the Republic of North Macedonia. In any case, the Western Balkan countries when implementing the digital governance must fully take into account the so-called Regional Transparency Index based on four principles, such as transparency, effectiveness, accessibility and integrity (Metamorphosis Foundation 2018, 24).

## CONCLUSION

The concept of good governance is a universal interdisciplinary concept that promotes the successful implementation of the key democratic values i.e. principles, such as: rule of law, responsiveness, ethical conduct, competence and capacity, accountability, participation, representation, fair conduct of elections, sustainability and long-term orientation, sound financial management, innovation and openness to change, openness and transparency, human rights, cultural diversity and social cohesion and efficiency and effectiveness (Tatarenko 2018). It can be said that these principles are the *condition sine qua non* for any further development of any democratic concepts in the society.

In addition, today, the concept of good government is fully supported by the concept of digital governance. In other words, the intensive use of recent developments of the information and communication technologies is of enormous help for any further development and successful implementation of the good government principles. Without the use of information technology we cannot speak about successful democracy in general or building democratic capacities of the public institutions. All digital governance models as well as digital government framework are integral part of almost all scientific discussions and policy practices in the field of promoting democracy nowadays. Put it simple “the largest the scope of implementation of the digital governance models and framework in public sector organizations, we can expect better implementation of sound principles of governance as well as better process of democratic decision-making”.

Finally, it must be pointed out that the Republic of North Macedonia in recent years undertook active policies for promoting and implementing digital government in almost all public institutions. However, because of a number of reasons (lacking finances or needed expertise etc.), some public institutions are more advanced compared to other institutions regarding digital government. Besides, the country has already made a substantial progress considering the adoption of the necessary legislation that defines the legal frame for the implementation of the digital solutions. But, compared to other countries especially EU countries, recent European Commission reports point out that the country is still well beyond the average values of the all EU countries considering digital government. These official data sources pose a great challenge for all subsequent governments in the country to put more efforts as a part of the overall requirements

that the country must fulfill on its path for a full membership in the European Union.

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## ALTERNATIVE MEASURES IN THE CRIMINAL CODE OF THE REPUBLIC OF NORTH MACEDONIA

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### **Abstract**

The system of sanctions provided for in our CC contains: penalties, alternative measures and security measures, while the educational measures imposed on juveniles no longer form part of the CC. The aim of punishment is:

- prevention of crimes and reeducation and
- educational impact towards others not to commit crimes.

According to the Criminal Code, criminal offenders can be sentenced to five types of penalties: imprisonment, fine, prohibition on performing a profession, activity or duty, prohibition on driving a motor vehicle, expulsion of a foreigner from the country and prohibition on attending sports. competitions. The amendment of our CC in 2004 introduced alternative measures in the legislation of the Republic of Macedonia. The purpose of alternative measures is not to impose punishment for lighter offenses, when this is not necessary and when the purpose of punishment can be attained. The offender may be sentenced to the following alternative measures: probation, probation, protective termination of criminal proceedings, community service, court reprimand, and house arrest.

**Key words:** penalties, alternative measures, security measures, probation, protective termination of criminal proceedings.

### **INTRODUCTION**

Conception of alternative measures is found in common law jurisdictions. As their father considered shoemaker John Augustus<sup>1</sup> who before Boston Municipal Court in 1841 by an act guaranteed convicted man who was an alcoholic in the future will not put alcohol in the mouth if freed from prison. He continued to provide bail for other defendants, establishing a "temporary home" and until 1858 bailing 1152 men and 794 women before the court. This practice soon turns into legislation, ie. in the criminal law institute called "probation" - known as the common law system of probation, and Augustus was called the father of probation. The Criminal Code of the Republic of North Macedonia envisages alternative

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<sup>1</sup> [John Augustus, Father of Probation, and the Anonymous Letter - Federal Probation Archived](#) October 26, 2014, at the [Wayback Machine](#)., *A Journal of Correctional Philosophy and Practice* - Vol. 70 Number 1]

measures which, by their application for lesser offenses, avoid the application of punishment, in cases when it is not necessary, and at the same time the purpose of the punishment is achieved. (Marijanovich, 1982, 386)

The purpose of the alternative measures is not to apply punishment for the less responsible perpetrator when it is not necessary for criminal law protection and when it can be expected that the purpose of the punishment can be achieved by warning with a threat of punishment (suspended sentence), only a warning (court reprimand) or with measures of assistance and supervision of the behavior of the offender. If we compare the punishment, which is a retributive-preventive sanction, alternative measures are preventive sanctions, in which the retributive element is suppressed and placed in the function of a threat of punishment that intensifies their preventive action. The literature on alternative sanctions and measures insists on the term "intermediate sanctions" or "community sanctions and measures" instead of "alternative sanctions" or "alternative sanctions", because the use of the word "alternatives" assumes that these sanctions are a substitute for "real" penalties. It starts from the assumption that the norm of the sentence is the prison sentence, on the basis of which all other sentences / sanctions should be measured / graded. This is not true, neither historically nor in current practice. Most crimes, neither before nor today, are punishable by imprisonment. (Lazetich- Buzarovska, 2003, 47)

Prison may be the norm or imperative of punishment according to the perception of the general public, but not for those who are familiar with the criminal justice system.

Several types of alternative measures can be imposed on perpetrators, as follows:

- 1) probation;
- 2) probation with a protective supervision;
- 3) conditional termination of the criminal procedure;
- 4) community service;
- 5) court reprimand and
- 6) house arrest.

### **Probation**

The purpose of the suspended sentence as an alternative measure is to postpone the imposition or execution of the sentence, which depends on the future behavior of the perpetrator, who if in a certain period of time does not commit a new crime, the sentence will not be imposed or executed.

With a conditional sentence of the perpetrator of a crime, the court determines the sentence and at the same time determines that it will not be executed if the convict for the time determined by the court, which can not be shorter than one or longer than five years (probation period), in which period, did not commit a new crime.

The court may also determine in the suspended sentence that the sentence will be executed even if the convicted person does not return the property benefit obtained by committing the crime within the determined period, does not compensate the damage caused by the crime or does not fulfill the other obligations provided in criminal law provisions.

The deadline for fulfilling those obligations is determined by the court within the determined time for verification.

A suspended sentence may be imposed when the perpetrator has been sentenced to imprisonment for up to two years or a fine. It can also be imposed when a prison sentence of up to two years or a fine has been imposed by applying the mitigation provisions. In deciding whether to impose a suspended sentence, taking into account the purpose of the suspended sentence, the court shall take into account the identity of the perpetrator, his past life, his conduct after the crime, the degree of criminal responsibility and other circumstances under which the offense was committed.

The court shall revoke the suspended sentence if the convicted person commits one or more criminal offenses for which he has been sentenced to two years in prison or for a longer period. If at the time of the examination the convicted person commits one or more criminal offenses for which a prison sentence of less than two years or a fine has been imposed, after assessing all the circumstances related to the committed criminal offenses and the perpetrator, and especially the relatedness of the committed criminal offenses acts, their significance and the motives for which they were committed, will decide whether to revoke the suspended sentence. The court is bound by the prohibition of imposing a suspended sentence, if the perpetrator of the criminal offenses determined in the suspended sentence and for the new criminal offenses should be sentenced to more than two years in prison.

If he does not revoke the suspended sentence, the court may impose a suspended sentence or punishment for the new crime committed. A convicted person who will be sentenced to imprisonment for a new crime, the time spent serving this sentence shall not be counted in the probation period determined by the conditional sentence for the previous crime

The court is obliged to revoke the suspended sentence if after its pronouncement it determines that the convict committed a crime before being sentenced to probation and if it assesses that there would be no grounds for pronouncing a suspended sentence if the crime had been known.

If the probation of the convict determines the fulfillment of an obligation (does not return the property benefit obtained by committing the crime, does not compensate the damage caused by the crime or does not fulfill the other obligations provided in the criminal law provisions), and if he does not fulfill that obligation within the time limit specified in the judgment, the court may, within the probation period, extend the time limit for fulfilling the obligation or it may revoke the suspended sentence and impose the sentence determined in the suspended sentence. If it finds that the convicted person, due to justified reasons, cannot fulfill the imposed obligation, the court will release him from fulfilling that obligation or will replace it with another appropriate obligation provided by law. If the court finds that the convict for justified reasons can not fulfill the obligation, the court may release him from her release, and may replace it with another appropriate obligation. However, the probation cannot be revoked forever, ie there are legal deadlines in which it can be revoked. Probation may be revoked during the probation period.

If the convict at that time commits a crime that entails revocation of the suspended sentence, and this is determined by the verdict only after the expiration of the probation period, the probation sentence can be revoked no later than one year from the day when the probation period expired. If the convicted person does not fulfill any obligation within the determined deadline, the court may, no later than one year from the day when the probation period has elapsed, decide to execute the determined sentence in the suspended sentence. (Tupancheski, 2015, 55)

### **Probation with protective supervision**

This alternative measure is imposed in cases when the Court finds that the imposition of a suspended sentence will not achieve the goal of punishing, resocializing and deterring the perpetrator from committing crimes, all because of the circumstances related to the perpetrator or the environment in which lives. The purpose of probation with protective supervision, in addition to the basic purpose of probation, is resocialization of the perpetrator by applying measures of supervision, care, assistance and protection, and its content consists in determining the obligations to be fulfilled by the probationer. at the time of the inspection determined by the court.

Pursuant to Article 56, when imposing this measure, the court may impose one or more of the following obligations on the convicted person:

- Training, specialization and retraining so that the convicted person can keep the job he / she holds or employment conditions can be created;
- Acceptance of employment that corresponds to the abilities and inclinations of the convict;
- Attending a program for working with convicts for crimes committed while committing domestic violence;
- Fulfilling family support responsibilities, raising children and other family responsibilities;
- Providing insights and advice regarding the distribution and spending of salary and other income earned,
- Not visiting certain types of bars or other places where alcoholic beverages are poured or games of chance are played;
- Prohibition of the use of alcoholic beverages, drugs and other psychotropic substances;
- Use of free time according to the assessment of a competent authority in accordance with law;
- Avoiding and not associating with persons who negatively affect the convict and
- Undergoing treatment or social rehabilitation in appropriate specialized institutions.

When imposing the obligation, the court takes into account the personality of the perpetrator, his health condition and mental characteristics, age, material and family conditions, the circumstances under which the crime was committed, the perpetrator's behavior after the crime, the motives for the crime and other circumstances in which the court should take care not to infringe on human dignity or cause unnecessary hardship.

The consent of the perpetrator of the crime to accept the obligation is not relevant for the imposition of a suspended sentence with protective supervision. This decision emphasizes the retributive character and reduces the effects of this sanction, because the only thing that obliges the perpetrator is to fulfill the imposed obligations, and if he does not fulfill the conditional sentence, he will be revoked. If the probationer fails to fulfill the obligation, the court may, at the time of the probation, extend the duration of the protective supervision or revoke the probation sentence. Also, during the conditional postponement of the execution of the determined sentence, upon the proposal of the social body or the convicted person, the court may replace the determined obligation with another one or revoke it. If more than six months pass after the decision with which the protective supervision is determined, and the supervision has not started, the court will decide again on the need for its execution.

As part of the criminal law reform is the adoption of the Law on Probation, which entered into force on 25.12.2015.

The Law on Probation regulates probation works and the procedure for execution of alternative measures, probation with protective supervision, community service and house arrest, obligations pronounced in criminal procedure, in accordance with the law, as well as execution of conditional release pronounced by a court decision. and which are performed in the community.

When performing probation imposed with a suspended sentence, the competent probation office shall summon the probationer for an interview during the probation period; determines the terms in which during the probation period the probationer is obliged to report to the locally competent probation office; exercises control over the execution of the conditional sentence with protective supervision and provides assistance to the conditionally sentenced person; inspects the documentation for the probationer, prepares reports on the execution of the probation with protective supervision and submits them to the court that made the decision in the first instance.

In case of revocation of the conditional sentence with protective supervision to the penitentiary-correctional institution where the person is sent to serve the prison sentence, submits a report on the activities undertaken during the execution of the conditional sentence and the behavior of the convicted person during the probation period. (Saltirovazh, 2017, 19)

Probation with protective supervision is a sanction that has the elements closest to probation, ie, as a form of treatment in the community, but controlled by imposed obligations. However, the courts in the Republic of Macedonia have not applied this sanction, and it is treated as if it is not provided for in the Law, ie as if it does not exist at all. If this sanction was imposed, there is an institutional problem regarding the supervision, ie which bodies and which staff of the body would conduct the supervision, so that given the incomplete legal regulation of the above sanction for its application, it is condemned in advance. of failure. The role of the new service, according to the Law on Probation, will be to implement the judgments of the court and to contribute to the fulfillment of the goals of such judgments which are a combination of: punishment, rehabilitation, deterrence and acceptance by the public. In this way, the perpetrator is allowed to stay in the community but with

imposed obligations and supervision by the probation officer. This is what puts in the foreground the rehabilitation and reintegration of perpetrators of crimes in the community, and thus strengthening security within the community.<sup>2</sup>

The Law on Probation was adopted as part of the implementation of the project "Support to Probation in the Macedonian Criminal Justice System". The adoption of the law aims to reduce the number of prisoners, and detention and imprisonment would be the ultimate measures that would be imposed on perpetrators of serious crimes.

With the adoption of the Law on Probation, in fact, there will be a wider application of alternative measures, and thus there will be a solution to another problem, and that is the overcrowding in prisons.(Kambovski, 2011, 739) In the Republic of North Macedonia there are a large number of convicts who can not serve their prison sentences due to lack of space in prisons. This contributes to a double pressure on the society that is afraid of committing a crime again, as well as on the perpetrator who is psychologically oppressed. Research shows that where there is a Probation Act and probation services exist, the percentage of the prison population decreases by 10 to 20%. Deprivation of liberty should be the last choice, ie the measure of house arrest, ie imprisonment, probation with protective supervision, as well as community service should be imposed more often.

### **Conditional termination of the criminal procedure**

Unlike probation and probation with protective supervision, which are a sentence that actually suspends the sentence, the conditional termination of the criminal procedure is a court alternative to the conduct of criminal proceedings.

"These are judicial alternatives that consist of mediation and turning the procedure in another direction, which are inspired by the idea of restorative justice and as experience in other legislation shows, have extremely beneficial effects in preventing crimes and satisfying the interests of the injured party."(Kambovski, 2011, 741)

The court for a criminal offense for which a fine or imprisonment of up to one year is prescribed after hearing and interrogation of the accused and with the consent of the injured party, to terminate the procedure, but provided that the perpetrator within the term not to commit a new crime. The procedure can be terminated within a maximum of one year. The term of termination is not counted in the statute of limitations of the criminal prosecution. If the perpetrator does not commit a new crime within the probation period or if a previously committed crime is not detected within that period, the procedure is stopped.

### **Community service**

Community service or community service has been introduced into our legislation since 2004. Its origins date back to 1972 when it was first introduced into English law.

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<sup>2</sup> Law on Probation "Official Gazette of the Republic of Macedonia", No. 226 of 25.12.2016

In the 17th century the labor penalty (Arbeitsstrafe) was imposed on a person who could not pay the fine. Its application is more and more common in a number of European countries, which contributes to obtaining great publicity followed by approval, but also great caution.

The work responsibilities imposed on the perpetrator are of a treatment nature and he can perform them in the community without being unnecessarily isolated in a penitentiary institution. This sanction is a useful alternative to short-term imprisonment and has a positive effect on both the perpetrator who does not feel rejected and the community that is obliged to provide assistance and support to the perpetrator. In principle, criminals in a society are unwanted members who should be isolated from other members of that society.(Vitlarova, 2017,4)

This measure is limited because it can only be imposed for a crime for which a fine or imprisonment of up to three years is envisaged. The court may impose the measure of community service only with the consent of the perpetrator and if the crime is committed, the measure is imposed for a period of 40 to 240 hours, during which the convict is obliged to perform them free of charge in a state body, public enterprise, public institution or organization, and not less than five hours per week, for a period of up to 12 months. When there are health or justified personal and family reasons, the court may extend the execution of the measure for a maximum of another six months. The community service can also be imposed as a substitute punishment in case the court imposes a fine of up to 90 daily fines or 1,800 euros in denar counter value or a prison sentence of up to three months. In such a case, it is necessary for the convict to request that the fines imposed or the prison sentences be replaced by community service. In addition, one day in prison, a daily fine or 20 euros in denar counter-value are replaced by three hours of community service, with the total sum of hours not exceeding 240 hours. When deciding to replace the punishment with the measure of community service, the court will take into account the gravity of the crime, the degree of criminal responsibility, the previous non-conviction of the perpetrator and the compensation or elimination of other harmful consequences of the crime.

Prior to the enactment of the Law on Probation, the performance of community service was regulated by the Law on Execution of Sanctions. This law regulates the probation works and the procedure for execution of all prescribed alternative measures with the Criminal Code of the Republic of Macedonia. The term probation affairs (Article 3 of the Law on Probation) means activities undertaken by probation officers during the supervision of the execution of the prescribed alternative measures.

The execution of the alternative measure of community service is performed in:

- State institutions;
- public enterprises and institutions;
- local self-government units;
- humanitarian organizations;
- other entities that perform an activity in which the goals for which the alternative measure of community service has been pronounced can be achieved.

## **Court reprimand**

The court reprimand, although systematized in our CC in the order of alternative measures, still does not have a retributive element, when compared to the conditional sentence. So, in the conditional sentence we have a threat with a fixed sentence that hangs on the perpetrator, while in the court reprimand we have a finding of guilt, a reprimand which emphasizes its preventive character. Its latent retributive element is seen from the hint of punishment in case of re-perpetration of a crime, while the factual element is a public condemnation of the perpetrator aimed at his humiliation. According to Article 59 of the CCM, a court reprimand can be imposed for criminal offenses for which imprisonment of up to one year or a fine is prescribed, and which are committed under such mitigating circumstances that make them particularly easy. This applies mostly to perpetrators who have for the first time come into conflict with the criminal code, who are in some way "accidental" delinquents. It is a measure with a predominantly educational pedagogical meaning and action. For certain criminal offenses and under conditions provided by law, a court reprimand may be imposed even when imprisonment of up to three years is prescribed.

## **House arrest**

By its legal nature, it theoretically represents a modality of imprisonment, in fact, the convicted person is serving the prison sentence in his home. Therefore, it is not an alternative to imprisonment, but an alternative to serving it in the criminal justice institution. Which means that the prison sentence is served at home, and thus a number of harmful consequences are avoided. criminal infection, prison deprivation, stigmatization of the convict after serving the sentence, separation from his previous social environment (immediate and extended family, friends, colleagues at work, etc.)

The alternative measure of house arrest is a modality of serving the prison sentence, ie the convict who is sentenced to prison under certain legal conditions is serving it in his home. House arrest, in fact, comes down to a ban on leaving the convict's home all day, for a certain amount of time, or just overnight. In addition to the basic ban on leaving the home, the house arrest, which includes electronic surveillance with the help of special electronic devices, also includes permanent monitoring of the convict's movement at the time determined by the court. The conditions provided in Article 59-a for obtaining the measure of house arrest refer to perpetrators of criminal offenses for which a fine or imprisonment of up to one year is provided, and refers to the category of perpetrators of criminal offenses that have the following characteristics: : old, frail, seriously ill and pregnant women. The court in the sentence imposes a prison sentence and at the same time decides that the sentence will be served in house arrest. When imposing the measure of house arrest, the consent of the perpetrator is required. If there are conditions with modern electronic or telecommunication means, the court can replace the sentence of imprisonment with house arrest, in order to control the execution of house arrest which consists in the ban on leaving the home by the convict. The supervision over the execution of the house arrest is performed by the court, and at the same time it can order the undertaking of certain supervision measures by the police in the place

where the convict's home is located, with the obligation to regularly report on their execution.

The conditions provided in Article 59-a for obtaining the measure of house arrest refer to perpetrators of criminal offenses for which a fine or imprisonment of up to one year is provided, and refers to the category of perpetrators of criminal offenses that have the following characteristics: : old, frail, seriously ill and pregnant women. The court in the sentence imposes a prison sentence and at the same time decides that the sentence will be served in house arrest. When imposing the measure of house arrest, the consent of the perpetrator is required.

We can conclude a little more about the alternative measures and their application from how we will look at the data for their application given in the table below.

Year	Alternative measures						Total	
	Prison	Fine	Probation with protective supervision	Conditional termination of the criminal procedure	Community service	Court reprimand		House arrest
2007	4712				1	214		4927
2008	4877					182		5059
2009	4698					180		4878
2010	4238	460				145		4843
2011	3753	385				145		4283
2012	4052	189			2	153		4394
2013	3319	114				130		3565
2014	5029	314				74		5417
2015	4358	43				63		4464
2016	4179	92				61		4332
2017	3350	138				46		3534

*Source: State Statistical Office*

According to the World Prison Population List more than 10.35 million people are registered in penitentiary institutions. What can be obtained as a possible way is to apply the application of imprisonment. On the other hand, lower rental

rates can be closed to hold public office and not to mention crime points for the most part, to be able to join the US, to allow multiple use of multiple places to allow of alternatives to alternatives to sanctions.(Kanevcev, 2017, 27)

However, the growing trend of crime in the world is certainly not to be neglected, which is by no means a justification for such a wide application of the prison sentence because it produces huge costs, and on the other hand its effectiveness is increasingly questioned. to reduce the crime rate in general, to correct, resocialize convicts, and hence to reduce the recidivism rate.

From the previously presented table we can conclude that the total number of criminal sanctions imposed in the analyzed period, on average 57.5% of fines were imposed, and 42.5% of alternative measures. of the total number of alternative measures imposed (42.5%), as many as 94.3%, on average, were given suspended sentences of imprisonment, then, 3.4% were suspended sentences of fines and 2.3% were issued court reprimands. The other alternative measures: probation with protective supervision, conditional termination of criminal proceedings, community service and house arrest were not imposed at all, with the exception of the alternative community service measure, which was imposed in two cases in 2012. In the period from 2007 to 2014, although crime is on the rise, we have a small percentage of pronounced alternative measures, which concludes that the alternative measures are still just the so-called "dead letter on paper". Effective prison sentences are mild, dominated by short prison sentences, such as those lasting up to 6 months and from 6 months to 1 year (65.14%), there is no reason why judges would not decide more often, and some of the alternative measures , of course if the formal and material conditions for their pronouncement are met.

The question arises why the judges in the Republic of North Macedonia do not impose at all, for example, the alternative measure conditional termination of the criminal procedure, for which there is no need to create additional conditions for its execution. Or, why, for example, the alternative measure of probation with protective supervision has not been pronounced at all, especially if we take into account that there is a competent body that will execute it, ie the centers for social work. With the adoption of the Law on Probation and its entry into force in 2016, things were expected to improve, but from the presented analysis of the policy of the courts we can conclude that the situation remains unchanged. Alternative measures are still less common compared to imprisonment, as the most commonly imposed sentence, while in the case of alternative measures, the conditional sentence takes precedence, followed by a court reprimand. Unfortunately, we can conclude that even 14 years after the introduction of alternative measures as a special type of sanctions that are an alternative to imprisonment, most of them still remain unimposed.

In any case, frequent application of alternative measures at the expense of effective imprisonment, will contribute to resolving some problems facing our penitentiary system, in particular the problem of overpopulation (overcrowding) of penitentiaries, then alternative measures way to annul the problem of criminal infection, which, in turn, is important for reducing the rates of recidivism in the Republic of North Macedonia. (Gruevska-Drakulevski, 2019, 157)

## **Conclusion**

Unlike punishment, which is a retributive-preventive sanction, alternative measures are preventive sanctions, in which the retributive element is suppressed and placed in the function of a threat of punishment that intensifies their preventive action. In the Republic of Macedonia, since the introduction of alternative measures in 2004 year we face a situation that these alternative measures, unfortunately, have remained just a "dead word" on paper. General normative determinations for the introduction of alternative measures in the Republic of Macedonia expressed in the CC since 2004, did not receive adequate normative and institutional applicative support (reaction), so except probation and parole, other prescribed alternative measures do not noted a relevant application. CC of RNM4, in Article 48 sets out the objectives of alternative measures, and the possibility of not imposing a prison sentence over a criminal one responsible perpetrators of lesser crimes, when it is not necessarily due criminal justice, when it can be expected that the purposes of punishment can be achieved by warning with a threat of punishment (probation), only a warning (court reprimand) or a measure of assistance and supervision of the behavior of the offender at liberty.

The empirically established fact that our prisons are dominated by convictsto short prison sentences, and again in the Idrizovo Penitentiary and other prisons in Macedonia represents more than 40% of convicted persons in prison, directly indicating the absence of effects of the application of the prison sentence, especially those short prison sentences. The claim that in the overall structure of crime, dominates crime that is defined as easy is unacceptable for the simple reason that it is not is based on criminological research and explanations of why people do it those crimes and what problems do they solve through crimes?

On the other hand, judges impose short sentences without prior criminological explanations of this crime. Without these explanations, the judge cannot make a choice a sanction that will influence the convicted person to change his position in the future to seek other "non-criminal" solutions to their problems. Judge without these studies can not assess the RISK for success or failure in achieving the main purpose for which the sentence is applied.(Arnaudovski, 2018, 6) When choosing a sentence duty is on the judge should assess whether the convicted person is "satisfied with the sentence" (no one can be satisfied with the sentence), but to assess whether the convicted person during the execution of the sentence will has its own positive attitude that will be expressed through acceptance, through the positive attitude towards the methods of treatment during the execution of the sentence and one's own immediate participation in them. He was sentenced to prison, which could not be released from prison deprivation which they carry with them and disable the re-education process, the alternatives measures in their essence and content with the methodology of their execution, with the fact that they are carried out at liberty and in the natural environment of the convicted person even when the "house arrest" measure is applied, they have numerous advantages over of imprisonment, especially in relation to short prison sentences.

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