

STUDIA IURIDICA MONTENEGRINA

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ČLANCI



Grupa 12 i institucionalna reforma Evropske unije

Dvanaest eksperata, predloženih od vlada Francuske i Nemačke, nazvali su sebe „grupom 12“. Verovatno su imali u vidu poznate grupe „4“ i „7“ profesora-eksperata iz nemačke državopravne istorije, koji su svojim predlozima, u kritičnim razdobljima država u kojima su živeli, pomogli da se nađu spasonosna rešenja. Razumevanje odluke šest nemačkih i šest francuskih eksperata da se nazovu grupom 12, pretpostavlja određeno znanje o berlinskoj grupi „4“ i čuvenoj grupi „7“ profesora sa Univerziteta u Tibingenu. Nikada svet u svojoj istoriji nije bio bliži potpunom uništenju. Istorija svedoči o usponu i padu velikih sila. Ali, nijedna od tih sila u povlačenju nije bila dovoljno snažna da u zaštiti svoje hegemonije u svetu taj isti svet povuče u propast zajedno sa sobom. Stoga, danas je od izuzetne važnosti da se profesori univerziteta bore za istinu, slobodu i pravdu. Obaveza profesora univerziteta jeste da objektivno ispita činjenice, istraži uzroke i posledice određenih događaja, izvuku iz toga zaključke poštujući kao svoje najviše načelo — istinu i samo istinu.

Ključne reči: Evropska unija, grupa 12, reforma, Miršajmer, Štek

I

Grupa od četiri umna čoveka, sledbenika Kantovog učenja „sapere aude“ (usudi se da se služiš svojim umom) nastala je u Pruskoj u vreme Napoleonovih ratova. Posle dva teška poraza Pruske u ratu sa Napoleonovom Francuskom, postavilo se pitanje opstanka pruske države. Očigledno su bile potrebne brze i duboke reforme pruskog društva i države. Ta reforma morala je poteći sa vrha, od monarha Vilhelma Fridriha III. Nažalost, monarh je bio neodlučan čovek, ali nije njegova supruga kraljica Lujza. Ona je uspela da uveri supruga da su nužne duboke reforme u državi, a da predloge za reforme treba da sačine dva čoveka čija su shvatanja suprotna stavovima monarha i visokog plemstva kojim je bio okružen. U gotovo bezizlaznoj situaciji, kralj Fridrih Vilhelm III prihvatio je predlog svoje supruge Lujze i ovlastio von Štajna i Hardenberga da pripreme i izvrše potrebne reforme. Njih dvojica su zatražili priključenje Šajnhorsta (za reformu vojske) i Humbolta (za reformu obrazovanja). Vilhelm fon Humbolt je uspostavio sistem

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obrazovanja, čiji osnovni principi i danas važe u Saveznoj Republici Nemačkoj, a Šarnhorst je ustanovio vojnu akademiju na čijem je čelu bio Klauzevic. Izvršene promene u organizaciji pruske države, vlasništvu na zemlji, obrazovanju i u vojnoj organizaciji, omogućili su Pruskoj ne samo opstanak, već i izrastanje u veliku evropsku silu. Poseban doprinos tom izrastanju dali su fon Stajn i Klauzevic koji nisu prihvatili ultimatum Napoleonov da velika francuska vojska, sastavljena od 300.000 vojnika uđe na teritoriju Pruske 1811/1812. na putu ka Rusiji u nameri da je uništi. Od kralja Fridriha Vilhelma, Napoleon je zatražio smeštaj vojske na teritoriji Pruske i njeno izdržavanje, dok vojska ne krene u pohod na Rusiju. Zahtevao je i dobio dodatnih 12.000 pruskih vojnika. Kraljica Lujza umrla je mlada, kralj se nije usudio da se suprotstavi Napoleonu, ali jesu von Stajn i Klauzevic. Oni su napustili Prusku i na poziv ruskog cara Aleksandra I postali savetnici u njegovoj vojsci. Posle poraza Napoleona u Rusiji, Napoleon je zatražio od pruskog kralja da se suprotstavi ulasku ruske vojske u Prusku i tako spase preostalu francusku vojsku iz pohoda na Rusiju. Pruski general von Jork, komandant pruskih snaga na granici, poslušao je fon Stajna i Klauzevica, propustio rusku vojsku i na kraju uverio kralja da se priključi koaliciji protiv Napoleona.¹

Izuzetan značaj za razvoj pruskog društva i obrazovanja imao je Vilhelm fon Humbolt. Poštujući Kantove principe o razumu i umu, Humbolt je smatrao da prva dva nivoa obrazovanja treba da omoguće da budući studenti mogu samostalno da misle i koriste svoj razum i um. U skladu sa takvim stavom, Humbolt je, zajedno sa tvorcom čuvene istorijsko-pravne škole Fridrihom fon Savinijem, osnovao Univerzitet u Berlinu 1810. godine. Univerzitet je nosio ime kralja Fridriha Vilhelma i bio je smešten u dvorcu kraljevog mlađeg brata u ulici Unter von Linden, gde se i sada nalazi. Jedino mu je s pravom promenjeno ime u Humboltov univerzitet.

Verujući da se do saznanja i istine može dopreti samo ako postoji sloboda nauke i naučnog istraživanja, te slobode je Humbolt ugradio u temelje Univerziteta u Berlinu. Naravno, posle završetka Bečkog kongresa i ograničavanja sloboda izvojevanih u Francuskoj revoluciji, isti proces je zahvatio i Prusku i druge države Nemačkog saveza (Deutsche Bund). Humbolt, koji je napisao vrednu knjigu o granicama političke vlasti, nije smeo da je objavi za života. Objavljena je tek posle njegove smrti.

Ovaj reakcionarni proces, koji se brzinom vatre proširio po državama članicama Nemačkog saveza, zahvatio je i kraljevinu Hanover. U kraljevini Hanover osnovan je Univerzitet u Tibingenu 1737. godine. Profesor tog univerziteta, čuveni istoričar u tom vremenu, Dalman, zajedno sa drugim umnim ljudima u Hanoveru, pokrenuo je proces donošenja Osnovnog zakona Hanovera (ustava). Posle složenih pregovora, u kojima su učestvovali predstavnici svih staleža i prećutnog

¹ Christopher Clark, *Iron Kingdom*, Penguin Books, 2007, str. 320 i sl.

pristanka ostarelog monarha, ukinut je stari staleški zakon iz 1819. godine i usvojen novi Osnovni državni zakon 1833. godine. Na osnovu odredaba tog zakona izabrana je i skupština kraljevine Hanover. Međutim, kad je na presto stupio 1837. godine unuk umrlog kralja Karl August, odmah je raspustio skupštinu i zatražio mišljenje o punovažnosti Osnovnog državnog zakona iz 1833. godine. Mišljenje je napisao jedan od dvojice profesora državnog prava na Univerzitetu u Tibingenu, Lajst. Profesor Lajst je utvrdio nepunovažnost Osnovnog državnog zakona zbog nedostatka saglasnosti monarha. Kralj Karl August stavio je odmah van snage zakon iz 1833. i proglasio važnost Osnovnog zakona iz 1819. Raspisani su odmah izbori za stalešku skupštinu prema Osnovnom zakonu iz 1819. Te 1837. godine slavila se 100-godišnjica Univerziteta u Tibingenu. Sedam najpoznatijih profesora tog univerziteta napisalo je čuveni Protest iz Tibingena i uputilo ga upravi Univerziteta. U protestu je navedeno da je Osnovni državni zakon iz 1833. i dalje na snazi, da je postojeća skupština kraljevine Hanover punovažna i da ne treba Univerzitet u Tibingenu da učestvuje u raspisanim izborima.

Čim je saznao za Protest grupe 7 iz Tibingena, kralj Karl August je zatražio njihovu krivičnu odgovornost. Ministar fon Šele je odmah otpustio svih sedam profesora, a kralju napisao da „za talir više uvek se može naći profesor, prostitutka i plesačica”. Profesor državnog prava na Univerzitetu u Tibingenu Lajst poslužio mu je kao uzor za takav zaključak. Drugi profesor državnog prava na Univerzitetu u Tibingenu, Albreht, imao je suprotno mišljenje i priključio se grupi sedam.² Na Univerzitetu u Tibingenu bilo je tada ukupno 41 profesor, a samo sedam od njih bili su spremni da se bore za pravdu i slobodu i poučavaju istinu.

Istorija svedoči da su u prelomnim vremenima nosioci najviše državne vlasti pribegavali racionalnim rešenjima. Izradu najviših pravnih akata poveravali su afirmisanim profesorima univerzita. Profesori su izradili nacрте Građanskog zakonika Nemačke, Vajmarskog ustava a sudije najviših sudova Francuske, Francuski građanski zakonik na osnovu objavljenih radova najpoznatijih francuskih profesora. Verovatno su imali u vidu ove činjenice, ministri u francuskoj i nemačkoj vladi, kad su, s obzirom na krizu u kojoj se našla Evropska unija, odlučili da povere izradu predloga za reviziju konstitutivnih ugovora Evropske unije grupi eksperata-profesora. Šest eksperata je odredila nemačka vlada, a šest francuska vlada. Deset eksperata ima zvanja naučnih savetnika (u Delorovom institutu za evropsko pravo i Evropskom institutu u Brižu), jedan je profesor Univerziteta u Bilefeldu, a jedan Univerziteta u Lionu. Postavlja se pitanje da li su nemačka i francuska vlada birale eksperte prema njihovom odnosu prema istini, slobodi i pravdi ili prema drugim merilima. Drugim rečima,

² Frotsher/Pieroth, *Verfassungsgeschichte*, 13. Auflage, C. H. Beck, Munich, 2014, str. 141 i sl.

da li izabrani eksperti imaju osobine profesora iz grupe Tbingen 7 ili profesora Lajsta, saradnika kralja Karla Augusta?

Grupa od 12 eksperata sačinila je svoj predlog s nazivom „Jedre-
nje na otvorenom moru, reformisanje i proširenje EU za 21. vek”³ i predstavila ga 18. septembra 2023. Na osnovu tog predloga Evropski parlament je pokrenuo postupak za reviziju Ugovora Evropske unije. U dosadašnjoj praksi izmena Ugovora EU, to su činili Savet ministara i Komisija a ne Parlament. U Parlamentu EU mišljenja su bila podeljena o ekspertskom predlogu i rezoluciji o pokretanju postupka revizije uoči predstojećih izbora za evropski parlament. Razlika u glasovima za i protiv bila je mala, oko 30 glasova.

Kakve izmene je predložila grupa eksperata?

Grupa 12 je izradila i obrazložila svoje predloge za institucionalnu reformu Evropske unije na 50 strana, uz dodatak četiri aneksa. Celokupna sadržina izveštaja podeljena je na uvod (1–16), tri dela i zaključak. Svaki deo počinje prikazom stanja, a završava se preporukama za izmene primarnog ili sekundarnog prava EU.

Prvi deo nosi naslov „Zaštiti osnovne principe: vladavina prava” (16–20), drugi deo nazvan je „Osvrt na institucionalne izazove” (20–35), treći deo nosi naziv: „Kako upravljati napretkom: produbljivanje i širenje EU” (35–47) i, na kraju, zaključak (47–50). Ocena rada grupe pretpostavlja pažljiv prikaz svakog dela izveštaja francusko-nemačke radne grupe. Treba naglasiti da su francuska i nemačka vlada izjavile da su predlozi sadržani u izveštaju radne grupe isključivo gledišta eksperata, a ne francuske ili nemačke vlade.

II

U prvoj tački Uvoda (Unija i hitnost promene), grupa 12 konstatuje da su se fundamentalna pitanja vratila na agendu Unije. EU preispituje svoju geografiju, institucije, nadležnosti i finansiranje. Za dvanaestoricu eksperata, osnovni uzrok za neibežnost ovog preispitivanja je ruski brutalni rat sa Ukrajinom, koji je podigao tenzije u Evropi i ugrozio sigurnost na kojoj je izgrađena EU. Pored tog osnovnog uzroka, postoje i drugi uzroci koji zahtevaju preispitivanje institucionalnog evropskog okvira: transnacionalni izazovi, kao što su klimatske promene, bezbednosne pretnje, kriza zdravlja i hrane. Sa ruskim ratom protiv Ukrajine, tvrdi grupa 12, potpuno se izmenila geostrateška uloga Evrope. EU se militarizuje i pruža ogromnu vojnu, finansijsku, humanitarnu pomoć Ukrajini. Debata o sposobnosti Unije da dela, o njenoj suverenosti i odnosu sa susedima na Istoku i Jugu dobija na zamahu. Postoji geopolitička potreba za proširenjem Unije, ali Unija nije za to spremna. Unija je dizajnirana za 27 članica.

³ *Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century*, Report of the Franco-German Working Group on EU Institutional Reform, Paris-Berlin, 2023.

Zbog prava koja imaju države članice, institucije Unije i mehanizam odlučivanja u njima teško funkcioniše. Šta bi se tek dogodilo proširenjem Unije na 37 država članica. Pri tome, neke od postojećih država članica otvaraju pitanje vladavine prava, prednosti prava EU nad nacionalnim pravom i drugih vrednosti utvrđenih u Ugovori ma EU. Stoga, Unija mora raditi na sebi i tražiti najbolja rešenja. Iako postoji geopolitička neophodnost da se u Uniju prime Ukrajina i Moldavija, ne postoji saglasnost o tome među članicama EU, niti su institucije Unije i mehanizam donošenja odluka podobni za to.

Grupa 12 postavlja pitanje šta činiti ako se o određenim krucijalnim pitanjima ne može postići saglasnost između država članica? I daje odgovor koji podseća na rasprave vođene između tzv. botaničara i hramovnika, odnosno o Evropi sa više brzina, u vreme donošenja Mاستrihtskog i Amsterdamskog ugovora. Grupa 12 predlaže dizajniranje puta za različite nivoe integracija odnosno izvesnih oblika slabijih asocijacija novih država članica.

U drugoj tački Uvoda grupa 12 ukazuje na pristup i principe institucionalne reforme koje će kasnije razraditi u drugom delu sadržane izveštaja. Osnovna teza grupe 12 je — dok proširenje ne postane najviši prioritet, treba raditi na reformama koje povećavaju delotvornost Unije, njen kapacitet da deluje, njenu demokratsku legitimnost i naročito osnažiti vladavine prava.

Najzad, u poslednjoj tački Uvoda, ukazujući na različita shvatanja pravne prirode Evropske unije, grupa 12 ističe da vidi EU kao hibridni politički sistem u kome se opšti evropski interes ostvaruje na tri načina: preko Evropske komisije, preko predstavnika građana u Evropskom parlamentu i preko predstavnika vlada država članica u Savetu i Evropskom savetu. Predlozi grupe 12 za izmenu Ugovora EU ne dovode u pitanje uspostavljenu ravnotežu između ovih institucija. Stoga, tri osnovna cilja reforme su: podići sposobnost Unije da deluje, ojačati vladavinu prava i demokratski legitimitet Unije i osposobiti institucije Unije za proširenje. Predlozima iznetim u tri dela sadržine izveštaja grupe 12, osvetljen je put kako to treba učiniti.

Prvi deo, posvećen zaštiti osnovnih principa, a naročito vladavini prava, podeljen je na dva segmenta. U prvom segmentu se podvlači važnost vladavine prava za ustanovljenje i funkcionisanje Unije i na probleme u ostvarivanju načela vladavine prava u EU. Konstatuje se da poštovanje vladavine prava i šta ovo načelo stvarno obuhvata, nije univerzalno usaglašeno između država članica.⁴ Evropski instrumenti nisu bili dovoljni da spreče povrede načela vladavine prava. Član 7 Ugovora o Evropskoj uniji, koji dozvoljava suspenziju prava koja izviru iz Ugovora (UEU i UFEU), u slučaju ozbiljnog i upornog kršenja vrednosti Unije, u sadašnjem obliku nije dovoljan da obezbedi puno poštovanje načela vladavine prava. Očigledno, suspenzija glasačkih prava u Savetu i sprečavanje preuzimanja predsedavanja

⁴ Report of the franco-german working group on EU institutional reform, Paris-Berlin- 18 September 2023, str 18.

Savetom nisu dovoljno snažni da privole državu prekršioca da poštuje vladavinu prava i druge vrednosti Unije utvrđene u članu 2 Ugovora o Evropskoj uniji. Taj cilj ne može ostvariti ni Sud pravde Evropske unije odlukama u individualnim slučajevima. Treba razmisliti čak i o isključenju iz Unije države članice koja ozbiljno i trajno vređa vrednosti iz člana 2 UEU.

U drugom segment prvog dela izveštaja grupe 12 sadržane su preporuke kako obezbediti ostvarivanje vladavine prava izmenama u primarnom i sekundarnom pravu Unije. Prva mogućnost je širenje instrumenata budžetske uslovljenosti, a draga mogućnost odnosi se na izmene u proceduri primene člana 7 UEU. Naime, radi zaštite budžeta EU u pravu EU je Uredbom o budžetskoj uslovljenosti utvrđena mogućnost primene sankcija kad postoji direktna veza između povrede vladavine prava i budžeta. Grupa predlaže da Uredba postane instrument za sankcionisanje povreda vladavine prava i, još više, sistematske povrede i drugih evropskih vrednosti sadržanih u članu 2 UEU (kao demokratija, slobodni i pošteni izbori, sloboda medija, zloupotreba osnovnih prava sadržanih u Povelji EU o onovnim pravima). U tu svrhu ne može se kao pravni osnov koristiti član 352 UFEU jer za primenu tog člana kao pravnog osnova, potrebna je jednoglasnost u Savetu.

Druga mogućnost je preformulisanje člana 7 UEU. Grupa 12 predlaže da se član 7, drugi stav, preformuliše i jednoglasnost minus 1 zameni većinom od četiri petine u Evropskom savetu. Istovremeno, predlažu dopunu stava 1 i 2 člana 7 sa ograničenjem vremena za zauzimanje pozicije o povredi vrednosti Unije iz člana 2 UEU.

Najzad, Grupa 12 smatra da EU ne može funkcionisati bez uzajamnosti, međusobnog poverenja i bez poštovanja, od strane svih njenih članica, vladavine prava. Ovaj pristup pretpostavlja da na izvesnom nivou trajne i teške povrede načela vladavine prava, država članica ne može više ostati članica Unije. Naravno, ističe grupa 12, možda će za državu članicu u povredi EU vrednosti biti prihvatljiviji neki drugi manje integrativan oblik udruživanja o kome se može pregovarati.

U drugom delu izveštaja grupe 12, posvećenom institucionalnim izazovima, razmatraju se izmene u pet ključnih oblasti: priprema institucija EU za proširenje, odlučivanje u Savetu, demokratija na nivou EU, ovlašćenja i nadležnosti i sredstva Unije.

Konstatujući da EU još funkcioniše sa institucijama dizajniranim pedesetih godina prošlog veka, one pate od sporosti, previše igrača i preterane složenosti. Proširenje Unije učiniće ove nedostatke još težim. Grupa 12 predlaže reforme na sastav i način odlučivanja u institucijama EU. Broj članova Evropskog parlamenta ne treba povećavati preko 751. Raspodelu mesta u parlamentu u slučaju prijema novih članica treba obavljati prema matematičkoj formuli koju su izradili profesori sa Kembridža („Cambridge formula,“). Ta formula omogućava da se održi ustanovljena ravnoteža u Parlamentu između država prema veličini njihovog stanovništva, bez potrebe uvećavanja broja poslanika preko 751. Dosadašnji trio koji predsedava

Savetom treba povećati na pet i svaka država bi semestralno, u petogodišnjem mandatu Saveta, bila predsedavajuća.

U pogledu Evropske komisije, najbolje rešenje bi bilo poštovanje člana 17(5) Lisabonskog ugovora. Ovaj član kojim je predviđeno smanjenje broja članova Komisije (napuštanje načela da svaka država ima svog člana u Komisiji) na 2/3 država članica i uvođenja sistema rotacije nikad nije primenjen. Na referendumu u Republici Irskoj nije bio prihvaćen Lisabonski ugovor, između ostalog i zbog ovog člana. Irskoj je garantovano da će biti zadržano načelo da svaka država ima člana u Komisiji i Lisabonski ugovor je potvrđen na ponovljenom referendumu u Irskoj. Pošto takva mogućnost postoji i u predstojećoj reformi institucija EU, Grupa predlaže, kao drugu opciju, uvođenje hijerarhije unutar kolegijuma. Postojao bi „vodeći komesar” i komesar. Samo vodeći komesari bi imali pravo glasa u odlučivanju u Komisiji. Predviđena je i mogućnost zamene između vodećeg i običnog komesara posle polovine mandata (na 2,5 godine).

Veoma važno pitanje, kome je grupa 12 posvetila posebnu pažnju, jeste pitanje donošenja odluka u Savetu. Grupa predlaže generalizaciju odlučivanja kvalifikovanom većinom. Naravno, postoje oblasti u kojima nije moguće u sadašnjim okolnostima napustiti načelo jednoglasnosti. U procesu prijema novih članova treba da važi većinsko načelo, s tim što na kraju procesa prijema svaka država članica zadržava pravo veta. Isto tako, u oblasti zajedničke spoljne i bezbednosne politike i fiskalne politike ostaje načelo jednoglasnosti, s težnjom da se lagano stvara prostor za primenu većinskog načela uz odgovarajuću zaštitu vitalnih državnih interesa. Za jačanje demokratije na nivou EU, predlaže se harmonizacija izbornog prava EU i novine u izboru predsednika Komisije, kao i širenje oblika participativne demokratije. Grupa 12 je uočila rast korupcije u ključnim institucijama Unije (protiv predsednice Komisije Ursule fon der Lajen vodi se krivični postupak, a isti je slučaj sa više poslanika Evropskog parlamenta) i predložila je stvaranje nove Službe za transparentnost i poštenje sa neophodnim instrumentima za sprečavanje korupcije.

Grupa 12 je predložila određene promene u oblasti ovlašćenja i nadležnosti Unije. Postojeća ovlašćenja i nadležnosti Unije mogu se i proširiti i suziti, zavisno od postignute saglasnosti država članica. Predlaže se i povećanje budžeta EU i stvaranje novih Unijinih finansijskih izvora.

U završnom, trećem delu izveštaja, grupa 12 je razmotrila pitanje upravljanja procesom produbljivanja i proširenja Evropske unije. Predložili su usvajanje ponuđenih amandmana u skladu sa procedurom ustanovljenom u članu 48. UEU (sazivanje Konvencije a zatim međuvladine konferencije). Države članice, gospodari Ugovora, ne bi izgubile kontrolu nad sadržinom amandmana, jer bi one odlučile o pomenama na međuvladinoj konferenciji održanoj posle konvencije (skupštine). Ako se ne postigne saglasnost o sazivanju konvencije, alternativa je uprošćeni revizioni postupak. Sem toga, ističe grupa 12, moguća je revizija i kroz ugovore o pristupanju Uniji.

Ako se ne ostvari potrebna saglasnost država ni u redovnom ni u uprošćenom revizionom postupku, moguća je revizija kroz dopunski ugovor (koalicija onih koji hoće). Ova opcija bi bila moguća u slučaju neuspeha konvencije ili ratifikacije u državama članicama prihvaćenih promena za reviziju Ugovora. Primer dopunskog reformskog ugovora je Evropski stabilizacioni mehanizam (ESM), kome su pristupile države koje su to htele. Zahvaljući ovoj mogućnosti diferenciranja može se, prema mišljenju grupe 12, ostvariti jedinstvo u različitosti. Ne žele sve evropske države ili nisu u mogućnosti da se priključe EU. Možda i neke sadašnje države članice žele blaži oblik integracije. Stoga, grupa 12 vidi buduću integraciju u četiri različita kruga, sa različitim balansom prava i dužnosti. Ta četiri kruga su: (a) unutrašnji krug (najpotpunija integracija — članovi Euozone, Šengena, Stalne strukturalne saradnje, koalicija onih koji to hoće), (b) sadašnja EU i budući članovi koji prihvataju da budu povezani istim političkim ciljevima, vrednostima iz člana 2 UEU i sadašnje nadležnosti EU, (c) pridruženi članovi (mogući su različiti oblici kao sa Evropskim ekonomskim prostorom ili Švajcarskom) i (d) Evropska politička saradnja. Ne obuhvata nijednu formu integracije sa EU. To je labavi oblik saradnje sa EU koji vremenom može prerasti u viši oblik integracije.

Neke od predloženih mera za reformu Ugovora treba ostvariti pre evropskih izbora (oktobar 2023 — jun 2024) a druge u sledećem institucionalnom ciklusu (2024–29)

III

Prošlo je 187 godina od protesta grupe 7 iz Tibingena. Jedna šestina tadašnjih profesora Univerziteta u Tibingenu bila je spremna da dovede u pitanje svoju egzistenciju i da se bori za istinu, pravdu i slobodu. Sličan odnos postoji i danas na poznatim svetskim univerzitetima. Grupu 12 ne čine najpoznatiji profesori sa nemačkih i francuskih univerziteta. Njih je izabrala francuska i nemačka vlada i utvrdila jasan mandat njihovog rada. Francuski državni sekretar za evropske poslove formulisao ga je sledećim rečima: „Misija radne grupe je da u sledećim mesecima izradi konkretne preporuke kako ojačati kapacitet EU da dela, da zaštiti njene osnovne vrednosti, da ojača njenu gipkost, naročito u svetlu ruske agresije na Ukrajinu i približi Uniju bliže građanima”. Polazeći od stavova francuske i nemačke vlade, grupa 12 je upravo to učinila. Ipak, izvestilac francuske grupe eksperata O. Kosta, na predstavljanju izveštaja grupe 18. septembra 2023. godine, oprezno je napomenuo da je osnovni razlog zašto se pristupilo reformama Ugovora EU neposredno pred izbore za Evropski parlament, geopolitička potreba da Ukrajina bude primljena u Evropsku uniju, iako ne ispunjava uslove za prijem utvrđene u Kopenhagenu, a povrđene u Lisabonskom ugovoru. Dodao je, uz to, da bi prijem Ukrajine u EU imao veoma negativne posledice ne samo za budžet EU, već i za njenu verodostojnost, jer bi se političkim

kriterijumima dala prednost nad pravnim i ugrozilo načelo vladavine prava. I grupa 12, i u to vreme francuska i nemačka vlada, bile su svesne sadržine člana 42(7) UEU prema kome „ukoliko je neka država članica predmet oružane agresije na svojoj teritoriji, ostale države članice su u obavezi da joj pruže pomoć i podršku svim sredstvima koja su u njihovoj mogućnosti, u skladu sa članom 51 Povelje UN”. Iz ovog ugla posmatrano postaje jasno zašto je Grupa 12 zauzela stav da institucije Unije nisu u ovom trenutku spremne za prijem novih članova, uključujući i Ukrajinu.

Postoji razlika između profesora koji su lojalni i podržavaju vladu i kad je u pravu i kad nije. Pojedini od njih se trude da nađu argumente za odbranu vladine politike (ili da je pasivno prihvataju), dok drugi profesori teže da navedu vladu da sledi politiku za koju se oni zalažu. Zbignjev Bžežinski je objasnio kakva treba da bude politika SAD prema Rusiji u objavljenom članku⁵ i knjizi⁶ iz 1997. godine. Polazeći od EU kao mostobrana za prodor SAD na Istok, založio se za rasparčavanje Rusije na tri dela i za punu kontrolu SAD nad Krimom i Sibiru. Robert Kejgan je 2007. godine izneo sledeću tvrdnju: „Budućnost međunarodnog poretka biće uobličena od onih koji imaju moć da to učine. Lideri postameričkog sveta neće se sresti u Briselu već u Pekingu, Moskvi i Vašingtonu. Međunarodni poredak ne počiva na idejama i institucijama. Njega uobličava konfiguracija moći.”⁷

Za razliku od Bžežinskog i Kejgana, Čarls Krauthamer piše 1991. o unipolarnom momentu SAD, a 2002. da je „unipolarni moment postao unipolarna era”.⁸

Nikada svet u svojoj istoriji nije bio bliži potpunom uništenju. Istorija svedoči o usponu i padu velikih sila. Ali, nijedna od tih sila u povlačenju nije bila dovoljno snažna da u zaštiti svoje hegemonije u svetu taj isti svet povuče u propast zajedno sa sobom. Stoga, danas je od izuzetne važnosti da se profesori univerziteta bore za istinu, slobodu i pravdu. Naročito zbog toga što su američka administracija i vlade država članica u februaru 2022. tvrdile, a mediji jedino to prenosili, da će Rusija biti poražena za najviše dva meseca. U maju 2024. te iste vlade i mejnstrim mediji tvrde da će u slučaju pobede Rusije u Ukrajini Rusija porobiti Evropu i da je zato neizbežan rat SAD i NATO protiv Rusije. Najveći deo profesora sledi svoje vlade i mejnstrim medije. Ali, postoje i drugačija mišljenja i istinski profesori. Posebnu pažnju privlače tekstovi američkog profesora Džona Miršajmera i nemačkog Volfganga Štreka (Wolfgang Streeck).

⁵ Zbigniew Brzezinski, *Geostrategy for Eurasia*, *Foreign Affairs*, t. 76, no. 5, New York, 1997.

⁶ Zbigniew Brzezinski, *The Grand Chessboard and American Primacy and the Geostategic Imperatives*, New York, Basic Books, 1997.

⁷ Robert Kagan, *End of Dreams, Return of History*, Hoover Institution, 2007, str. 6.

⁸ Charles Krauthammer, *The National Interest*, Winter, 2002, str. 5–12.

Džon Miršajmer je jedan od najpoznatijih američkih profesora međunarodnih odnosa i međunarodne politike. Zajedno sa profesorom Sebastijanom Rozatom objavio je avgusta 2023. godine knjigu „How States Think”⁹ i odmah zatim raspravu na temu „Rađanje novog poretka — kuda ide svet? (11. 09. 2023). Osim toga, objavljeno je na društvenim mrežama više njegovih video intervjua o budućnosti Ukrajine. U knjizi, jedan važan deo posvetio je odluci administracije SAD o proširenju NATO pakta na Istok. Ukazao je Miršajmer da su postojala dva gledišta. Prema prvom, širenje NATO pakta na Istok je „politička greška od istorijskog značaja. Rusija to širenje ne može a da ne shvati kao ugrožavanje njene bezbednosti i opstanka, što može izazvati žestoku reakciju”. Ovaj stav je zastupao i čuveni tvorac politike obuzdavanja SSSR Džordž Kenan i mnogi penzionisani nosioci najviših vojnih funkcija, bivši i sadašnji senatori i diplomate. Drugo gledište, koje je prihvatila Klintonova administracija, priznavalo je postojanje rizika od proširenja NATO na istok, ali se verovalo da je moguće uveriti Jeljcina da od širenja NATO Rusiji ne pretili nikakva opasnost. Ovo drugo gledište je odnelo prevagu, otpočelo je širenje NATO na istok prijemom bivših članica rasformiranog Varšavskog pakta u sastav NATO. Istovremeno, pripreman je i mostobran, kako je Bžežinski definisao EU, radi lakšeg prodora na istok i privlačenja suseda Rusije u zapadni blok. Posebna pažnja bila je usmerena na Belorusiju i Ukrajinu, jer bi odvajanjem te dve bivše republike SSSR od Rusije i njihovim priključenjem EU i NATO, položaj Rusije postao neodrživ. Klintonovoj administraciji se jako žurilo (posebno kad je Jeljcinova administracija odbila američku ponudu da proda Sibir i spreči državni bankrot). Uvereni u svoju izuzetnost i silu, vojnu nadmoć kojoj se niko nije mogao ni smeo da suprotstavi, SAD su 1999. agresijom na Saveznu Republiku Jugoslaviju i Kinu (bombardujući ambasadu Kine čija se teritorija po međunarodnom pravu smatra kineskom teritorijom). I Kina i Rusija shvatile su poruku. Počela je priprema za opstanak. U Rusiji i Kini izvršena je smena političkog rukovodstva, na svetskoj sceni su se pojavili Vladimir Putin i Si Đi Ping.

Raspravu „Rađanje novog poretka — kuda ide svet?” Miršajmer je započeo sledećim rečenicama: „U suštini, nedavno se dogodio veliki preobražaj međunarodne politike, što je loša vest za Zapad. Šta je pošlo naopako? Šta objašnjava ovu promenu i kuda je svet krenuo?” Pošto je izvršio analizu odnosa SAD i Kine, Miršajmer navodi da „konvencionalna mudrost na Zapadu povodom rata u Ukrajini nameće zaključak da se Rusija u Evropi ponaša kao Kina u Aziji. Priča se da Putin ima imperijalne ambicije koje počinju stvaranjem velike Rusije duž linija starog Sovjetskog Saveza, nastavljaju se osvajanjem bivših tampon država Varšavskog pakta, čime se ugrožava bezbednost čitave Evrope”. Ova priča, ističe Miršajmer, ma koliko puta

⁹ John J. Mearsheimer, Sebastian Rosato, *How States Think, The Rationality of Foreign Policy*, Yale, University Press, 2023.

bila ponavljana, običan je mit. Posebno je važno sledeće Mišmajerovo zapažanje: „Iako nema dileme oko toga da je Rusija napala Ukrajinu, podjednako je jasno da su taj sukob isprovocirale SAD i njihovi evropski saveznici onda kada su odlučili da Ukrajinu pretvore u bastion Zapada na ruskim granicama. Želeli su da uvuku Ukrajinu u NATO i EU i pretvore je u prozapadnu liberalnu demokratiju. Ruski lideri su neprekidno naglašavali da je takva politika egzistencijalna pretnja za Moskvu i da neće biti tolerisana. Sukob u Ukrajini, naglašava Miršajmer, nije počeo 2022. nego 2014, šest godina nakon što je NATO 2008. godine obznanio da će Ukrajina postati član NATO. Rusija je, i posle državnog udara na Majdanu, pokušavala da spor reši diplomatskim putem. Uputila je, navodi Miršajmer, pismo predsedniku Bajdenu i NATO paktu (17. 12. 2021) zahtevajući pisanu garanciju da Ukrajina neće postati NATO članica, nego da će umesto toga biti neutralna država. Državni sekretar Antoni Blinken (očigledno duboko potcenjujući Rusiju i precenjujući SAD) odgovorio je 26. januara 2022. sledećim rečima: „Nema promene, neće biti promena”. Mesec dana kasnije, piše Miršajmer, Rusija je napala Ukrajinu. Sa stanovišta teorije realizma, tvrdi Miršajmer, reakcija Moskve na ekspanziju NATO u Ukrajini predstavlja očigledan primer balansiranja protiv opasne pretnje.

Za razliku od profesora Miršajmera, profesor Štrek nije predavao ni međunarodne odnose ni međunarodnu politiku, niti se posebno bavio geopolitikom. Priznanje je stekao svojim radovima iz oblasti sociologije i industrijskih odnosa. Bio je profesor sociologije na univerzitetu Johan Wolfgang Gete u Frankfurtu i dugogodišnji profesor Industrijskih odnosa na Univerzitetu u Viskonsinu (SAD). U momentu pisanja dva teksta, koja su ovde predmet analize, bio je kao emeritus profesor direktor Maks Plank Instituta za istraživanje društva u Kelnu.

Prvi tekst *Pipe Dreams* napisao je kao osvrt na intervju Volfganga Šojbla u listu *Welt am Sonntag* od 25. jula 2022. Objavio ga je tamo gde je prihvaćen za štampanje, u *New Left Review* 12. septembra 2022.¹⁰ Štreka su zapanjili predlozi Šojblea (o izgradnji nove evropske zajednice država sa trijumviratom Nemačka, Francuska i Poljska na čelu). Iako je vrlo zanimljiva analiza Šojbleovih predloga, nema potrebe na njoj se zadržavati. Važniji su stavovi prof. Štreka o odnosu EU i SAD i proksi ratu SAD i saveznika protiv Rusije na teritoriji Ukrajine. Štrek piše „obim u kome je upravljanje Evropom prešlo na US — i stepen do koga je Evropa izgubila kontrolu nad sobom, pokazuje politika prijema novih država članica u EU. Tu se rešavao konflikt ko upravlja Evropom, u kom cilju”. U devedesetim godinama prošlog veka, US su počele stvarati novi svetski poredak i Evropska zajednica bila je primorana da primi bivše članice Varšavskog pakta (Poljsku, Mađarsku i Češku), da ih ekonomski podrže i reorganizuju

¹⁰ Wolfgang Streeck, *Pipe Dreams*, *New Left Review*, London, 12.9.2022, dostupno na: <https://newleftreview.org/sidecar/posts/pipe-dreams> (pristupljeno 1. 6. 2024).

i čvrsto vežu za Zapad. Sledile su baltičke države, Rumunija i Bugarska. Francuska i Nemačka uspele su samo da spreče prijem Turske, a članstvo Turske u EU je za US bilo izuzetno važno, jer je cilj bio zaokruživanje Rusije i kontrola nad određenim neposlušnim državama na Bliskom istoku („Evropa” bi imala zajedničku granicu sa Sirijom, Iranom i Irakom). Ulazak Ukrajine u EU, za politiku Vašingtona, ima izuzetan značaj, a za EU pogibeljan. Profesor Štek piše da bi budžet EU bio razbijen, a u poređenju sa ukrajinskim oligarhijskim političkim sistemom, Mađarska i Poljska, arhi neprijatelji većine u EP, izgledali bi kao prefinjena skandinavska demokratija.

Profesor Štek upozorava da je prostor za legitimnu javnu debatu o miru i ratu na Zapadu dramatično sužen. Citira javno publikovano saopštenje vladi Nemačke šefa Federalne službe za zaštitu Ustava (orvelijanski naziv za federalnu obaveštajnu službu koji je trebalo da prikrije poreklo ove službe iz organizacije Gelen, na čijem vrhu se po odluci US nalazio general Rajnhard Gelen, šef Hitlerove obaveštajne službe za Istok), da će Služba budno paziti na svakog koji bi mogao tvrditi da je ruski napad na Ukrajinu povezan sa ranijim američkim vojnim zaokruživanjem Rusije. I pored tog upozorenja Službe, profesor Štek tvrdi da je postojala do tada neviđena u istoriji vojna priprema za rat (u poslednjih trideset godina), uključujući naoružavanje Ukrajine od 2014. godine, kao i jednostrano otkazivanje ugovora za kontrolu naoružanja i nepoštovanje Minskih sporazuma.

U drugom tekstu, objavljenom u Frankfurter Rundschau od 3. februara 2024,¹¹ profesor Štek se osvrće na ćutanje ili iskrivljeno predstavljanje govora lidera nove stranke levice Sare Vagenkneht, koja je pozvala nemačku vladu da prestane da isporučuje oružje ukrajinskoj vladi i okonča embargo na naftu i gas koji je uveden protiv Rusije. Predlozi Sare Vagekneht mogli su i morali biti povod za dugo očekivanu debate o nemačkim nacionalnim interesima, o miru i ratu. Štek naglašava da je veoma važna obnova poverenja između Nemačke i Rusije. On podseća na akciju Borisa Džonsona da Ukrajina odustane od sporazuma u Istanbulu marta 2022, jer će „sankcije Zapada dokrajčiti Rusiju”. Rusija ima mnogo razloga da ne veruje Zapadu, što je reakcija „na neskrivene fantazije Zapada o uništenju Rusije na početku rata — od Bajdenove promene režima u Moskvi preko zahteva Analene Berбок da se Putin uhapsi i prebaci u Hag, do očekivanja Fon der Lajenove da će zapadne sankcije postepeno narušiti industrijsku bazu Rusije, a da i ne govorimo o nastojanju da se uništi ruska centralna banka isključenjem zemlje iz međunarodnog finansijskog sistema”.

Prethodni izbori za Evropski parlament nisu imali gotovo nikakav poseban značaj. Postoji mogućnost da izbori koji će biti održani od

¹¹ Wolfgang Streeck, Nibelungentreue un ihre Gefahren, *Frankfurter Rundschau*, Frankfurt am Main, 3. 2. 2024, dostupno na: <https://www.fr.de/kultur/gesellschaft/wolfgang-streeck-zu-ukraine-krieg-nibelungentreue-und-ihre-gefahren-92811171.html> (pristupljeno 1. 6. 2024).

6. do 9. juna ove godine budu prekretnica, da na njima većinu dobi-ju stranke koje se zalažu za mir a ne rat. Naravno, strankama koje u svom programu imaju težnju za uspostavljanjem pravednog mira u Evropi mnogo je teže. Ograničene su u pristupima medijima, protiv njih etablirane proradne vlade organizuju proteste, podstičući tako brojne negativne pojave koje bukne u Evropi (policijski prekid skupa u Briselu organizovan od manjinskih stranaka u EP, prebijanje i pokušaji atentata na lidere stranaka koje se zalažu za mir i ne prihvataju da je Rusija jedini krivac a SAD branilac slobode i demokratije).

Obaveza profesora univerziteta jeste da objektivno ispita činjenice, istraži uzroke i posledice određenih događaja, izvuku iz toga zaključke poštujući kao svoje najviše načelo — istinu i samo istinu. To načelo istine poštovali su profesori Miršajmer i Štrek.

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Budimir Košutić, PhD

GROUP 12 AND INSTITUTIONAL REFORM OF THE EUROPEAN UNION

Twelve experts, proposed by the governments of France and Germany, called themselves Group 12. They probably had in mind the well-known groups 4 and 7 of professors-experts from German state-legal history who with their proposals, in critical periods of the countries in which they lived, helped to saving solutions are found. To understand the decision of six German and six French experts to call themselves Group 12, it presupposes some knowledge of the Berlin Group 4 and the famous Group 7 of professors from the University of Tübingen. Never in its history has the world

been closer to total destruction. History bears witness to the rise and fall of great powers. But, none of those retreating forces were strong enough to protect their hegemony in the world and drag that same world with them. Therefore, today, it is extremely important that university professors fight for truth, freedom and justice. The obligation of University professors is to objectively examine the facts, investigate the causes and consequences of certain events, and draw conclusions from them, respecting the truth and only the truth as their highest principle.

Key words: European Union, Group 12, Reform, Mearsheimer, Streeck

Alternativne krivične sankcije u Krivičnom zakoniku Crne Gore**

Alternativne krivične sankcije predstavljaju odstupanje od tradicionalnog sistema kažnjavanja gde kazna zatvora zauzima centralno mesto, a njihova prednost bi bila svakako u znatno humanijem i manje represivnom tretmanu osuđenih lica. Sam pojam alternativne krivične sankcije za potrebe ovog rada treba shvatiti u užem smislu: taj pojam se odnosi samo na one supstitute kazni zatvora koji su u obliku krivičnih sankcija predviđeni krivičnim zakonodavstvom. Stoga su predmet ovog rada alternativne krivične sankcije prema Krivičnom zakoniku Crne Gore — kazna zatvora koja se izvršava u prostorijama za stanovanje, rad u javnom interesu i uslovna osuda sa zaštitnim nadzorom, ali ne samo njihova normativna rešenja, već i način njihovog izvršenja. Cilj rada jeste da se pruži jedna sveobuhvatna analiza položaja vanzavodskih sankcija u sistemu krivičnih sankcija Crne Gore, sa preporukama za njihovo unapređenje u skladu sa međunarodnim standardima u ovoj oblasti. Osvrćući se na važnost alternativnih sankcija i razvoj probacionih službi za njihovu primenu, u radu se naglašava njihova ključna uloga za postojanje efikasnog sistema krivičnih sankcija svake zemlje, prvenstveno imajući u vidu ciljeve specijalne prevencije, odnosno veću mogućnost individualizacije sankcije i njeno bolje prilagođavanje učiniocu krivičnog dela i okolnostima pod kojima je delo izvršeno, u poređenju sa tradicionalnom kaznom zatvora.

Ključne reči: krivične sankcije, alternative kazni zatvora, vanzavodske sankcije, probacija, Krivični zakonik Crne Gore

Uvod

Kazna zatvora, kao centralni element u okviru strukture krivičnih sankcija, neizostavno zauzima primat u konceptualizaciji savremenog krivičnog prava. Formiranje moderne države, uz paralelnu institucionalnu sposobnost za efektivno izricanje i implementaciju kazni lišenja slobode, cementiralo je ovu vrstu kazne kao dominantnu.¹ Međutim, akademski diskurs poslednjih decenija

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** Ovaj rad je rezultat angažovanja autora u skladu sa Planom i programom rada Instituta za kriminološka i sociološka istraživanja za 2024. godinu, na osnovu ugovora br. 451-03-66/2024-03/200039 sa Ministarstvom nauke, tehnološkog razvoja i inovacija Republike Srbije.

¹ U teoriji se odavno postavlja pitanje da li je uopšte moguće kažnjavanje bez kazne zatvora, te da li bi krivično pravo moglo da ostvari svoju svrhu bez ove

sve više akcentuje inherentne nedostatke primarno kratkotrajnih zatvorskih sankcija, posebno osvetljajući njihovu neefikasnost u pogledu resocijalizacije osuđenika, visok procenat recidivizma, te negativne psihosocijalne efekte izolacije i interakcije sa drugim osuđenimima. Naglašavaju se pozitivne strane primene vanzavodskih sankcija i mera, poput smanjenja zatvorske populacije, smanjenja troškova izvršenja, veće mogućnosti individualizacije sankcije, kao i humaniji i manje represivan odnos prema učiniocu, uz mogućnost šireg učešća društvene zajednice prilikom njihove realizacije.² Ovi uvidi su postali podloga za težnju ka reformi zakonodavstva, usmerenu ka identifikaciji i implementaciji adekvatnih alternativnih krivičnih sankcija, s ciljem prevazilaženja pomenu- tih nedostataka tradicionalne kazne zatvora.

Ovaj rad se upravo temelji na eksploraciji takvih alternativa u krivičnom pravu Crne Gore, sa fokusom na one zakonski predviđene krivične sankcije čija primena ima za cilj da ublaži negativne posledice inherentne kazni zatvora, promovišući rehabilitaciju i socijalnu reintegraciju osuđenika, uz smanjenje represivnosti koja je karakteristična za konvencionalne kazne.

Međutim, u pogledu samog pojma alternativne krivične sankcije, prisutne su od samog početka znatne nejasnoće kako u teorijskim raspravama, tako i kod samih zakonodavaca u komparativnom pravu. Često, ovaj pojam obuhvata različite uprošćene forme postupanja u fazi pred suđenje, raznovrsne oblike vanzavodskog sankcionisanja, kao i širok spektar modaliteta izvršenja kazne zatvora, uključujući različite forme uslovnog otpusta i mogućnosti boravka osuđenih na slobodi tokom izdržavanja kazne.³ Međutim, za potrebe ovog rada, pojam alternativne krivične sankcije biće shvaćen u najužem smislu reči, odnosno striktno će biti ograničen na one supstitute kazni zatvora koji su formalno definisani kao krivične sankcije unutar krivičnog zakonodavstva, konkretno Krivičnog zakonika Crne Gore⁴ i koje sud izriče nakon okončanog krivičnog postupka, a zahtevaju kontrolu i nadzor nad osuđenikom.⁵

kazne. Vid. M. Gisel-Bugnon, *Punir sans prison, Prisons, droit penal: le tournant?*, (ed. Gottraux M.), Editions I. E. S, 1987, str. 25.

² O. Tešović, *Priručnik za primenu alternativnih sankcija*, Beograd, 2020, str. 83–85.

³ Vid. N. Bishop, *Non-Custodial Alternatives in Europe*, Helsinki, 1988, str. 42; Đ. Ignjatović, *Kriminologija*, jedanaesto izmenjeno izdanje, Beograd, 2011, str. 182–183; N. Mrvić-Petrović, Đ. Đorđević, *Moć i nemoć kazne*, Beograd, 1998, str. 96–97.

⁴ Krivični zakonik Crne Gore, *Službeni list RCG*, br. 70/2003, 13/2004, 47/2006 i *Službeni list CG*, br. 40/2008, 25/2010, 32/2011, 64/2011 — drugi zakon, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 — drugi zakon, 44/2017, 49/2018, 3/2020, 26/2021 — ispravka, 144/2021 i 145/2021 i 110/2023.

⁵ Njih Bishop naziva *pravim alternativama kazni zatvora*, dok mere koje se primenjuju pre suđenja u cilju odlaganja ili obustave krivičnog postupka naziva *alternativama optuženju* koje izriče tužilac, a propisane mere i načine kojima

Stoga će u narednim redovima biti pružena detaljna analiza i evaluacija takvih alternativnih krivičnih sankcija u crnogorskom krivičnom pravu, ne samo kroz prizmu normativnih odredbi Krivičnog zakonika Crne Gore, već i sa posebnim fokusom na njihovu efikasnost i izazove u izvršenju, kao i potencijal za unapređenje u skladu sa međunarodnim standardima. Ova analiza nastoji ne samo da osvetli postojeće stanje i primenu alternativnih krivičnih sankcija u Crnoj Gori, već i da predloži smernice za njihovo dalje razvijanje i integraciju u što efikasniji sistem krivičnih sankcija.

1. *Alternativne krivične sankcije u sistemu krivičnih sankcija Crne Gore*

Kada govorimo o alternativnim krivičnim sankcijama u pomenutom smislu, dve su ključne odlike koje ih karakterišu: prvo, da ta krivična sankcija predviđena pozitivnim krivičnim zakonodavstvom predstavlja po svojoj prirodi zamenu kazni zatvora, i drugo, da je za sprovođenje njenog izvršenja predviđen nadzor od strane nadležnog organa.

Dakle, ono što je sama srž ovih sankcija jeste da je njihova svrha *zamena kratkotrajnih kazni zatvora*, a kako bi se fleksibilnijom sankcijom, bolje prilagođenoj učiniocu krivičnog dela, postigli delotvorniji efekti na planu njegove resocijalizacije. Sama reč alternativan ukazuje da je u pitanju nešto drugo, odnosno drugačije od uobičajenog, a što kada se prenese na teren krivičnog prava i krivičnih sankcija označava drugu sankciju od one koja je osnovna, što u svakom slučaju u modernom krivičnom pravu jeste kazna zatvora.⁶

Drugi element koji odvaja alternativne sankcije od ostalih krivičnih sankcija jeste *postojanje nadzora nad njihovim izvršenjem*. Postojanje nadzora i stručne pomoći od strane zakonom ustanovljenih probacionih službi jedna je od tekovima modernog, stručnog i efikasnog pristupa u razvoju vanzavodskih sankcija i mera u savremenom pravnom pravnom sistemima i jedan je od garanta delotvornog izvršenja alternativnih sankcija i mera. Ključna karakteristika alternativnih krivičnih sankcija ogleda se upravo u obaveznom nadzoru od strane nadležnih organa tokom njihovog izvršenja, sa ciljem procene poštovanja od strane osuđenika nametnutih ograničenja i obaveza. Ova osobina ih čini usmerenim na resocijalizaciju osuđenika, bez izolacije od društva, što je temeljna razlika u odnosu na tradicionalnu kaznu zatvora. Efikasan nadzor nad primenom alternativnih sankcija ključan je za njihovo razlikovanje od drugih sankcija koje

se menja način izvršenja izrečene kazne zatvora naziva *alternativama institucionalizaciji*. N. Bishop, *op. cit.*, str. 42.

⁶ Vid. M. Škuljić, „Alternativne krivične sankcije — pojam, mogućnosti i perspektive”, *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, Intermex — Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor-Beograd, 2009, str. 32.

ne podrazumevaju ovakav vid nadzora, ističući ih kao moderne i efikasne metode za aktivnu društvenu reintegraciju učinioca, umesto da služe samo kao preliminarno upozorenje za nezakonite radnje.⁷

Stoga, uzimajući u obzir navedena dva osnovna obeležja vanzavodskih sankcija, te kada se analiziraju odredbe Krivičnog zakonika Crne Gore (u daljem tekstu KZ), kao i relevantnih zakona iz oblasti izvršenja krivičnih sankcija,⁸ dolazi se do zaključka da se u Crnoj Gori prema punoletnim učiniocima krivičnih dela⁹ mogu izreći sledeće alternativne krivične sankcije: kazna zatvora koja se izvršava u prostorijama za stanovanje (tzv. kućni zatvor), kazna rada u javnom interesu i uslovna osuda sa zaštitnim nadzorom. S druge strane, pod ove parametre bismo možda mogli podvesti i uslovni otpust, mada je njegova pravna priroda u teoriji sporna¹⁰ i to posebno u slučaju kada su uz njega izrečene određene obaveze predviđene zakonom. Međutim, kako je opredeljenje u radu da se analiziraju isključivo alternativne krivične sankcije shvaćene u najužem smislu reči, dakle krivične sankcije koje se izriču nakon okončanog sudskog postupka, koje zamenjuju kaznu zatvora i čije izvršenje prati probaciona služba, analiza je ciljano usmerena na prethodno navedene tri sankcije.¹¹

Dakle, tzv. kućni zatvor, rad u javnom interesu i uslovna osuda sa zaštitnim nadzorom nesumnjivo sadrže dva pomenuta distinktivna elementa neophodna za određenje alternativne sankcije u užem smislu reči, odnosno sve su to zakonom predviđene sankcije koje su

⁷ U tom smislu, klasična uslovna osuda i sudska opomena predstavljaju te inicijalne mere upozorenja i prve oblike zamene za kaznu lišenja slobode. Međutim, u kontekstu savremenog krivičnog prava, one se ne mogu kvalifikovati kao alternativne krivične sankcije u navedenom užem smislu reči, jer im manjka ključni element u vidu konstantnog nadzora i pružanja mera podrške i pomoći tokom izvršenja.

⁸ Pre svega Zakona o izvršenju uslovne osude i rada u javnom interesu *Službeni list RCG*, br. 32/2014 i 17/2019, kao i Zakona o izvršenju kazne zatvora, novčane kazne i mjera bezbjednosti, *Službeni list RCG*, broj 36/2015.

⁹ Maloletničko krivično pravo nije predmet ove analize, mada treba reći da je sam koncept alternativnog sankcionisanja i zamene kazne lišenja slobode manje retrubitivnim sankcijama prvobitno nastao u maloletničkom pravu, odakle je docnije preuzet u krivičnom pravu namenjenom za punoletne izvršioce krivičnih dela.

¹⁰ Sama pravna priroda uslovnog otpusta u teoriji je bila predmet rasprave, pa se on smatra, sa jedne strane, posebnom kriminalnopolitičkom merom kojom se podstiče dobro vladanje osuđenih, a sa druge strane se smatra krivičnopravnim institutom kojim se suspenduje već određena kazna zatvora. Takođe, pojedini autori ga smatraju samo fazom u izvršenju kazne zatvora, odnosno da je reč o penološkom institutu. Vid. Z. Stojanović, *Komentar Krivičnog zakonika*, šesto izmenjeno i dopunjeno izdanje, Beograd, 2017, str. 229–230.

¹¹ S druge strane, treba napomenuti da se institut uslovnog otpusta inače u crnogorskoj praksi retko primenjuje, a posebno kada je u pitanju modalitet sa određenom obavezom — u periodu od 2013. do 2022. godine Direkciji za uslovne osude kao organu nadležnom za nadzor dostavljena je svega jedna odluka sa navedenim uslovnim otpustom. Vid. Strategija za izvršenje krivičnih sankcija Vlade Crne Gore za period 2023–2026, str. 51. <https://www.gov.me/clanak/strategija-za-izvršenje-krivicnih-sankcija-2023–2026> (9. 3. 2024).

supstituti kazne zatvora i za njihovo izvršenje u Crnoj Gori je nadležan poseban organ — Direkcija za uslovnu slobodu, koja je organizacioni deo Direktorata za izvršenje krivičnih sankcija Ministarstva pravde Crne Gore.

1.1. Kazna zatvora koja se izvršava u prostorijama za stanovanje

Odredbom člana 36a stav 1 KZ propisano je da sud, ukoliko izrekne kaznu zatvora do šest meseci učiniocu krivičnog dela, može istovremeno odrediti da se kazna izvrši tako što će osuđeni izdržavati u prostorijama svog stanovanja, ukoliko se, uzimajući u obzir ličnost učinioca, njegov raniji život, njegovo držanje posle učinjenog dela, stepen krivice i druge okolnosti pod kojima je delo učinio, može očekivati da će se i na taj način ostvariti svrha kažnjavanja. Stav 2 istog člana propisuje da osuđeni, kojem je izvršenje kazne zatvora određeno na način predviđen u stavu 1, ne sme napuštati prostorije svog stanovanja, osim u slučajevima propisanim zakonom kojim se uređuje izvršenje krivičnih sankcija. Ukoliko osuđeni samovoljno napusti prostorije više od šest sati jednom, ili dva puta do šest sati, ili ometa, oštećuje ili uklanja uređaj za praćenje ili na drugi način onemogućiti ili odbija izvršenje kazne zatvora na način iz stava 1 ovog člana ili postane nedostupan, sud će odrediti da ostatak kazne zatvora izdrži u Zavodu za izvršenje krivičnih sankcija. U stavu 3 navedeno je da osuđenom za krivično delo protiv braka i porodice, koji živi sa oštećenim u istom domaćinstvu ili porodičnoj zajednici, ne može biti određeno izvršenje kazne zatvora na opisani način.

Dakle, od izmena iz 2013. godine, u krivičnom zakonodavstvu Crne Gore predviđena je mogućnost izricanja kazne zatvora tako da se izvršava u prostorijama u kojima osuđeni stanuje. Međutim, ono što se prvo zapaža prilikom analize navedenih zakonskih odredbi jeste činjenica da ova kazna nije propisana kao samostalna kazna lišenja slobode (iako je predviđena u posebnom članu), već kao modalitet izvršenja kazne zatvora, tj. alternativni način izvršenja kazne lišenja slobode.

Kada se posmatraju uslovi koji su potrebni da bi uopšte došlo do primene ove alternativne krivične sankcije, jedini uslov koji se zahteva jeste da sud učiniocu krivičnog dela *izrekne kaznu zatvora do šest meseci*. Imajući u vidu ovakvu formulaciju, gde je uslov vezan za izrečenu (a ne zaprečenu) kaznu, primena ove sankcije dolazi u obzir kod velikog broja lakših krivičnih dela, ali je moguće da se primeni i kod nekih težih krivičnih dela, gde je kao poseban minimum propisana kazna zatvora od dve godine (ukoliko su ispunjeni uslovi za ublažavanje kazne predviđeni čl. 45 KZ, moguće je primenom odredbe čl. 46 st. 1 tač. 4) KZ učinioca osuditi na kaznu zatvora u trajanju od šest meseci). Stoga, nameće se zaključak da praktično kod velike većine krivičnih dela predviđenih crnogorskim krivičnim zakonodavstvom postoji mogućnost osude na kaznu zatvora u kućnim uslovima, ukoliko sud proceni da su ispunjeni i uslovi za ublažavanje (na

primer, kod veoma teških krivičnih dela, poput krivičnog dela silovanja iz čl. 204 st. 1–4 KZ ili, recimo, kod najtežeg oblika krivičnog dela utaje poreza i doprinosa predviđenog odredbama čl. 264 st. 4 Krivičnog zakonika, gde iznos poreske obaveze čije se plaćanje izbegava prelazi sto hiljada eura).

U svetlu prethodnih konstatacija, postavlja se pitanje da li je adekvatno takvo zakonsko rešenje koje ograničava primenu kazne kućnog zatvora samo u pogledu visine izrečene kazne, posebno imajući u vidu potencijalnu opasnost da se čak i kod veoma ozbiljnih krivičnih dela sudu ostavlja mogućnost primene sankcije koja je, po samoj svojoj prirodi, alternativna reakcija na lakše oblike kriminaliteta. U teoriji se navodi da ovako široko i neodređeno postavljena mogućnost izricanja kućnog zatvora ostavlja previše prostora sudu i može dovesti do veoma neujednačene politike izricanja ove sankcije.¹² Rešenje bi trebalo naći u ograničavanju primene ove sankcije, ne samo u pogledu visine izrečene kazne zatvora, već, na primer, i u pogledu visine zaprećene kazne zatvora, što bi znatno više suzilo oblast njene primene u praksi.

Što se tiče pomenutih drugih zakonskih uslova za odabir ove alternativne sankcije, u zakonskim odredbama nisu propisane neke posebne okolnosti ili kriterijumi koji bi bili neka bliža smernica sudu za izbor ove kazne.¹³ Umesto toga, u čl. 36 a st. 1 KZ pomenute su samo okolnosti koje su navedene i kod opštih pravila o odmeravanju kazne predviđenih odredbom čl. 42 st. 1 KZ, a koja je inače sud u obavezi da primeni.

Postoji samo jedno posebno pravilo predviđeno kod krivičnih dela protiv braka i porodice, da se u toj situaciji učiniocu koji živi sa oštećenim u istom porodičnom domaćinstvu ili u porodičnoj zajednici, ne može odrediti izvršenje kazne zatvora u kućnim uslovima (čl. 36a st. 3 KZ). Navedena odredba je i logična imajući u vidu nespojivost ovog modaliteta kazne lišenja slobode sa ovom vrstom krivičnih dela, pa se postavlja pitanje da li je bilo uopšte potrebno da se u posebnom stavu naglašava navedeno, imajući u vidu da se kućnim zatvorom u opisanim uslovima evidentno ne bi ostvarila svrha kažnjavanja.¹⁴

¹² Đ. Đorđević, „Kazna kućnog zatvora kao alternativna krivična sankcija”, *Suprotstavljanje savremenim oblicima kriminaliteta — analiza stanja, evropski standardi i mere za unapređenje*, Tom 1, zbornik radova, Kriminalističko policijska akademija, Beograd, 2015. str. 104.

¹³ Ovakvo zakonsko rešenje nije preporučljivo takođe zato što se u teoriji u vezi kazne kućnog zatvora često postavlja pitanje njene pravednosti, te se ističe da ova alternativna sankcija neuporedivo lakše pogađa bogatije, one koji žive u boljim stambenim i drugim uslovima, nego siromašne, one koji žive u jako lošim životnim uslovima, kao i one koji žive sami i sl. Vid. Đ. Đorđević, *Kućno zatvaranje — nov modalitet izvršenja kazne zatvora, Kaznena reakcija u Srbiji*, II deo, tematska monografija, Beograd, 2012, str. 126–127. Dakle, ukoliko nisu predviđene posebne okolnosti koje se tiču upravo specifičnosti ove vrste sankcije, vrlo lako bi se ona mogla pretvoriti u privilegiju za imućne.

¹⁴ I kod nekog drugog krivičnog dela, a ne samo protiv braka i porodice, sud bi trebalo da inače uzme u obzir okolnost da oštećeni živi u istom porodičnom

Međutim, kada se uzmu u obzir rezultati nedavnog istraživanja sprovedenog u Srbiji u pogledu problema u primeni kazne kućnog zatvora, gde je utvrđeno da sudovi ovu kaznu, suprotno članu 45 st. 5 Krivičnog zakonika Republike Srbije (koji je identičan odredbi člana 36a st. 3 KZ Crne Gore), izriču i učiniocima krivičnog dela nasilje u porodici i da to predstavlja, nažalost, rasprostranjenu praksu,¹⁵ očigledno da ni izričita zakonska zabrana nekada nema efekta.

Treba reći da su, nasuprot navedenoj zakonskoj soluciji da nisu ni približno navedene neke specijalne okolnosti prilikom odabira ove sankcije, u uporednom pravu brojni primeri suprotne prakse. Tako je, na primer, u krivičnom pravu Severne Makedonije kućni zatvor propisan kao posebna krivična sankcija koja se može izreći ako je izvršilac krivičnog dela za koje je propisana novčana kazna ili kazna zatvora do jedne godine, star i nemoćan, teško bolestan ili ukoliko se radi o trudnoj ženi, a učinilac pristaje da mu se izrekne ova sankcija.¹⁶ U anglosaksonskim pravima, a naročito u pravu Sjedinjenih Američkih Država gde je ova vrsta sankcije i nastala, okolnosti pod kojima se određuje kućni zatvor su redovno vezane za lična svojstva učinioca krivičnog dela, pa se smatra naročito pogodnom prema učiniocima koji prvi put vrše krivična dela, zatim prema starima, hronično bolesnim, invalidima, trudnicama, kao i majkama sa malom decom. Takođe se obraća pažnja i na težinu izvršenog krivičnog dela, pa se ova alternativna sankcija primenjuje prema učiniocima lakših krivičnih dela koja se ne odlikuju elementima nasilja i za prekršaje, a posebno za vožnju automobila pod uticajem alkohola.¹⁷

Potrebno je naglasiti da je jedan od ključnih nedostataka ovakvog načina uređenja kazne kućnog zatvora nedostatak bilo kakvog rehabilitacionog programa u okviru nje. Naime, zakonodavac je propustio da u okviru ove sankcije predvidi mogućnost primene neke od zakonom predviđenih obaveza učiniocu (na primer, mera koje su predviđene u zaštitnom nadzoru kod uslovne osude), te je time ovu sankciju lišio mogućnosti primene bilo kakvog tretmana ili programa pomoći prema učiniocu. Praktično, radi se o „golom” nadzoru osuđenog lica, te se došlo u jednu paradoksalnu situaciju da je u okviru tradicionalne kazne zatvora u okviru zavoda za njeno izvršenje predviđen određeni program postupanja i tretman, dok u okviru kazne kućnog zatvora takva solucija ne postoji. Time se značajno

domaćinstvu sa učiniocem kao jedan od kriterijuma za odlučivanje da li će odrediti izvršavanje kazne zatvora u kućnim uslovima. Z. Stojanović, *op. cit.*, 2017, str. 228.

¹⁵ M. Bojović-Kolaković, A. Batrićević, M. Matić-Bošković, *Analiza uticaja primene alternativnih sankcija i mera u Republici Srbiji u periodu od 2015. do 2020.* Institut za kriminološka i sociološka istraživanja, Beograd, 2022, str. 37.

¹⁶ čl. 59a Krivičnog zakonika Republike Severne Makedonije, <https://legislative.org/sites/default/files/2023-09/criminal%20code%20of%20Macedonia.pdf>, (10. 3. 2024).

¹⁷ N. Mrvić-Petrović, *Alternativne krivične sankcije i postupci*, Beograd, 2010, str. 85.

dovodi u pitanje i priroda ove sankcije, jer je u osnovi svake vanzavodske sankcije u okviru modernih probacionih sistema postojanje mera pomoći i zaštite u cilju potpune rehabilitacije učinioaca.¹⁸ Rešenje bi svakako trebalo tražiti u razvijanju i primenjivanju prilagođenih programa tretmana namenjenih osuđenim licima koji kaznu zatvora izvršavaju u prostorijama u kojima stanuju.¹⁹

Na kraju treba istaći da ovaj način izvršenja kazne zatvora u prostorijama gde živi osuđeni može biti opozvan ukoliko osuđeni samovoljno napusti prostorije više od šest sati jednom, ili dva puta do šest sati. Najnovijim izmenama KZ iz 2023. godine uvedeno je da će sud odrediti da će se ostatak kazne zatvora izdržavati u zavodu za izvršenje krivičnih sankcija i kada osuđeni ometa, oštećuje ili uklanja uređaj za praćenje ili na drugi način onemogućiti ili odbija izvršenje kazne kućnog zatvora ili postane nedostupan. Na ovaj način se izašlo u susret različitim zloupotrebama koje su se dešavale u praksi prilikom izvršenja kazne zatvora u prostorijama u kojima osuđeni stanuje i teškoćama sa kojima su se suočavali službenici Direkcije za uslovne osude prilikom sprovođenja elektronskog nadzora kod ove sankcije.

1.2. Rad u javnom interesu

Rad u javnom interesu regulisan je u crnogorskom pravu kao kazna u članu 41 KZ. Određivanje rada u javnom interesu kao kazne je opravdano, imajući u vidu njegovu i represivnu, i preventivnu komponentu,²⁰ i nije usamljeno u uporednom zakonodavstvu, jer je takav slučaj i u krivičnim zakonodavstvima Srbije, Holandije, Češke, Mađarske i Španije.²¹ Prema članu 34 st. 1 KZ, rad u javnom interesu u Crnoj Gori može biti izrečen samo kao glavna kazna.²²

Stavom 4 člana 41 data je i definicija rada u javnom interesu, te je to *svaki onaj društveno-koristan rad kojim se ne vreda ljudsko dostojanstvo i koji se ne vrši u cilju sticanja dobiti*. Dakle, potrebno je da budu ispunjena tri uslova da bi se radilo o ovoj alternativnoj krivičnoj sankciji, a to su da je u pitanju:

¹⁸ I u Srbiji je kazna kućnog zatvora predviđena bez bilo kakvog tretmana u okviru nje, pa se postavilo pitanje svrhe ovako koncipirane kazne, budući da se, u odsustvu organizovanog i prilagođenog tretmana, svodi samo na puko lišenje slobode, istina sa umanjenim deprivacijama u odnosu na kaznu koja se izvršava u zavodskim uslovima. Vid. M. Bojović-Kolaković, A. Batrićević, M. Matić-Bošković, *op. cit.* str. 39.

¹⁹ *Ibid.*

²⁰ Rad u javnom interesu predstavlja zapravo nametnuto ograničenje slobode okrivljenog zarad obavljanja besplatnog rada u korist društvene zajednice i korekcije njegovog ponašanja u budućnosti.

²¹ E. Ćorović, Rad u javnom interesu u Krivičnom zakoniku Crne Gore: stanje u zakonodavstvu i praksi, *Studia Iuridica Montenegrina*, 2/2020, str. 42.

²² Opravdano se u teoriji ukazuje da kazna rada u javnom interesu kao sporedna kazna ne bi imala toliko rehabilitacijski uticaj na osuđeno lice koliko bi bila usmerena na simbolične vidove popravljavanja štete društvu, a što ne bi trebalo da bude mera dopunskog kažnjavanja. N. Mrvić-Petrović, *op. cit.*, str. 228.

- 1) društveno koristan rad,
- 2) rad kojim se ne vređa ljudsko dostojanstvo i
- 3) rad koji se ne vrši radi sticanja dobiti.²³

Prvi uslov znači da to mora biti rad koji se vrši u korist društvene zajednice u kojoj učinilac živi, a to je najčešće neki opštekorisni i humanitarni rad. Zapravo, u članu 18 stav 1 Zakona o izvršenju uslovne osude i rada u javnom interesu jasno je propisano koji su to radovi društveno korisni, s obzirom na to da je navedeno da se ova kazna izvršava „kod pravnog lica koje se bavi djelatnošću od javnog interesa (humanitarna, socijalna, komunalna, zdravstvena, poljoprivredna, ekološka ili druga slična djelatnost), ili neprofitabilne organizacije čija djelatnost je vezana za humanitarne, ekološke i druge slične aktivnosti”.

Drugim uslovom se ističe da izvršeni rad ne sme ugrožavati ljudsko dostojanstvo, shvaćeno kroz prizmu osnovnog ljudskog prava zagarantovanog univerzalnim međunarodnim dokumentima i članom 28 Ustava Crne Gore.²⁴ Zaštita ljudskih prava i sloboda cilja na očuvanje inherentnog dostojanstva osobe, kako je naglašeno u preambuli Univerzalne deklaracije o ljudskim pravima.²⁵ Rad u korist zajednice koji obavlja osuđena osoba, stoga, ne sme narušiti temeljne etičke i pravne principe koji čuvaju dostojanstvo pojedinca, bilo kao samostalne individue ili kao člana društva.

I treći uslov se tiče činjenice da taj rad koji osuđeni vrši ne može biti s ciljem sticanja dobiti, jer bi se u suprotnom, kada bi se plaćao taj rad, izgubio smisao ove sankcije, a koja zapravo predstavlja određeno „vraćanje duga” društvu od strane učinioca krivičnog dela volonterskim radnim angažovanjem u društveno-korisne svrhe.²⁶

U pogledu primene kazne rada u javnom interesu, Krivičnim zakonikom su praktično uvedena dva uslova. Prvi uslov tiče se zaprećene kazne, pa se tako rad u javnom interesu može izreći *za krivična dela za koja je propisan zatvor do pet godina ili novčana kazna*. Drugi uslov koji mora biti ispunjen kako bi se primenila kazna rada u javnom interesu jeste da postoji *pristanak učinioca*.

Naime, prinudni rad je zabranjen velikim brojem međunarodnih dokumenata, ali takođe i članom 63 Ustava Republike Crne Gore. Stoga je neophodan pristanak okrivljenog na takvu vrstu rada. Na

²³ Na isti način je definisana ova kazna i u Krivičnom zakoniku Republike Srbije. Vid. J. Lazarević, Rad u javnom interesu, *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, Zlatibor-Beograd, 2009, str. 214.

²⁴ Ustav Crne Gore, *Službeni list CG*, br. 1/2007 i 38/2013.

²⁵ Univerzalna deklaracija o ljudskim pravima (Generalna skupština UN, 1948).

²⁶ Da ovaj uslov nije postavljen, država bi praktično plaćala učiniocu za izvršeno krivično delo i time bi se narušio glavni cilj krivičnog prava — suzbijanje kriminaliteta. J. Jovičić, Rad u javnom interesu i oduzimanje vozačke dozvole, *Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU — Prilozi projektu 2007* (ed. Tabaroši S.), Beograd, 2008, str. 280.

ovaj način se „fleksibilizuje tradicionalni sistem krivičnih sankcija”,²⁷ ali javio se problem u praksi u pogledu pitanja u kojoj fazi glavnog pretresa i na koji način okrivljeni treba da se izjasni o radu u javnom interesu. U tom pogledu u sudskoj praksi nije zauzet jedinstven stav, te bi po logici stvari okrivljeni mogao u toku celog glavnog pretresa dati svoj pristanak, a najkasnije u završnoj reči, s tim što bi sud trebalo, pre nego što zaključi glavni pretres, da upozna okrivljenog o mogućnosti izricanja te sankcije i objasni mu njenu sadržinu i način izvršenja. Dakle, procena je suda u kom momentu će poučiti okrivljenog o toj mogućnosti, mada je najprirodnije nakon okončanog dokaznog postupka, pre ili posle završne reči, a svakako pre zaključenja glavnog pretresa.²⁸

Odredbom člana 41 stav 5 KZ posebno je naglašeno da će prilikom izricanja ove kazne sud voditi računa o vrsti učinjenog krivičnog djela, kao i o ličnosti učinioaca. Dakle, polazeći od opšte svrhe kažnjavanja opisane u članu 32 KZ, prilikom odlučivanja da li da izrekne ovu kaznu, sud posebno polazi od vrste učinjenog dela, prevashodno analizirajući u tom sklopu njegovu težinu, budući da je ova sankcija i nastala kao alternativa kratkotrajnim kaznama zatvora i kao reakcija na lakše oblike krivičnih dela. Zatim je potrebno uzeti u obzir i ličnost učinioaca, a posebno da li kazna rada u javnom interesu može biti njemu prilagođena imajući u vidu njegove lične i porodične prilike (da li živi u gradskoj ili ruralnoj sredini, ima li zaposlenje, da li ima porodicu i osobe o kojima je dužan da se stara i slično). Naravno, na kraju je prilikom ocene da li izreći ovu sankciju ili ne važan ne samo puki pristanak okrivljenog na rad, već njegova uopšte izražena spremnost da obavlja rad u javnom interesu koja se može oceniti u sklopu celokupne njegove odbrane na glavnom pretresu.²⁹

U pogledu trajanja ove kazne, propisano je da rad u javnom interesu ne može biti kraći od šezdeset časova, niti duži od trista šezdeset časova, te da mora da bude obavljen za vreme koje ne može biti kraće od trideset dana, niti duže od šest meseci (čl. 41 st. 2 KZ), a ne može biti duži od šezdeset časova u toku jednog meseca, osim ako učinilac krivičnog dela zahteva ili je saglasan da može trajati duže od šezdeset časova u toku jednog meseca (čl. 41 st. 3 KZ). Predviđen je i način pretvaranja kazne rada u javnom interesu u kaznu zatvora ukoliko osuđeni ne obavi deo ili sve časove izrečene kazne rada u javnom interesu, pa će tako sud tada ovu kaznu zameniti kaznom zatvora tako što će za svakih započetih osam časova rada u javnom interesu odrediti jedan dan zatvora (čl. 41 st. 6 KZ).

Na kraju je regulisan i obrnut slučaj od prethodno navedenog, odnosno fakultativno umanjenje od strane suda navedene kazne. Naime, u članu 41 stav 7 KZ je propisano da ukoliko učinilac ispunjava sve svoje obaveze vezane za rad u javnom interesu, sud mu može

²⁷ E. Ćorović, *op. cit.*, str. 45.

²⁸ Vid. J. Lazarević, *op. cit.*, str. 215.

²⁹ J. Јовичић, *op. cit.*, стр. 281.

dužinu izrečenog rada u javnom interesu umanjiti za jednu trećinu. Dakle, radi se o mogućnosti suda da u slučaju savesnog ispunjavanja kazne rada u javnom interesu, proceni da je umanjnje za jednu trećinu celishodno, što donekle podseća na institut uslovnog otpusta kod kazne zatvora. Međutim, u ovom slučaju je Zakonikom o krivičnom postupku Crne Gore (u daljem tekstu ZKP)³⁰ u potpunosti propušteno da se reguliše postupak za umanjnje kazne rada u javnom interesu, za razliku od postupka uslovnog otpusta, te se mora ju stoga primeniti opšte procesnopravne odredbe za postupanje pred većem iz čl. 24 st. 7 ZKP, van glavnog pretresa. Takođe, kod umanjnje za jednu trećinu rada u javnom interesu u materijalnim odredbama nije predviđena mogućnost opozivanja, pa je i to jedna od razlika sa institutom uslovnog otpusta.

1.3. Uslovna osuda sa zaštitnim nadzorom

Svi relevantni međunarodni dokumenti iz oblasti vanzavodskog sankcionisanja, kao što su tzv. Tokijska pravila Ujedinjenih nacija³¹ i Evropska pravila Saveta Evrope,³² promovišu primenu vansudskih sankcija i mera, koje su iscrpno opisane u njima i među kojima probacija zauzima važno mesto, kao i uslovna osuda sa zaštitnim nadzorom, a sve sa ciljem usmeravanja zakonodavne aktivnosti i prakse u državama članicama.³³ Recimo, u Preporuci broj P(2000)22 koja predstavlja dopunu Evropskih pravila Saveta Evrope³⁴ preporučuje se, između ostalog, zakonodavcima da razmotre mogućnost propisivanja određenih alternativnih sankcija ili mera umesto kazne zatvora kod određenih krivičnih dela, a i takođe da nastoje da isključe mogućnost izricanja alternativnih sankcija za teška krivična dela i u odnosu na prethodno osuđivana lica.

Takođe, značajan deo Preporuke broj P(2000)22 koja predstavlja dopunu Evropskih pravila Saveta Evrope³⁵ odnosi se na uspostavlja-

³⁰ Zakonik o krivičnom postupku, *Službeni list CG* br. 057/09, 049/10, 047/14, 002/15, 035/15, 058/15, 028/18.

³¹ Minimalna standardna pravila Ujedinjenih nacija o alternativnim merama — United Nations Standard Minimum Rules for Non-custodial Measures — The Tokyo Rules.

³² Preporuka Saveta Evrope broj R(92)16 o evropskim pravilima o sankcijama i merama koje se sprovode u zajednici, tzv. Evropska pravila — Recommendation No. R (92)16 of the Committee of Ministers to Member States on the European rules on community sanctions and measures. Usvojena od strane Komiteta ministara 1992. godine.

³³ O. Tešović, „Conditional sentence with protective supervision — concept, application, and relationship with other alternative sanctions and measures”, *Revija za kriminologiju i krivično pravo*, Beograd, 3/2022, str. 79.

³⁴ Preporuka broj R(2000)22 o unapređenju primene Evropskih pravila o sankcijama i merama koje se sprovode u zajednici — Recommendation No. R (2000) 22 of the Committee of Ministers to member States on improving the implementation of the European rules on community sanctions and measures. Usvojena od strane Komiteta ministara 2000. godine.

³⁵ *Pravila 19–23*.

nje efikasnih programa pomoći i tretmana koji mogu uticati na promenu ponašanja učinioca krivičnog dela (što predstavlja zapravo značajan deo zaštitnog nadzora kod uslovne osude), pa se naglašava da programi i tretmani za društvenu reintegraciju osuđenih treba da se karakterišu primenom različitih metoda i tokom izvršenja izrečene sankcije i nakon toga, kao deo postpenalnog programa. Posebno prilikom određivanja njihovog sadržaja, naglašava se da pažnja treba da bude usmerena na sledeće okolnosti: osnovna znanja koja uključuju, na primer, pismenost i ovladavanje osnovnim aritmetičkim operacijama, sposobnost konstruktivnog rešavanja ličnih i porodičnih problema, zatim obrazovanje ili mogućnost zaposlenja, uticaj koji na učinioca ima moguća zavisnost od alkohola, droga ili lekova, kao i prilagođavanje lokalnoj zajednici.³⁶

Imajući u vidu navedene preporuke iz međunarodnih akata iz ove oblasti, svakako da bi stoga uslovna osuda sa zaštitnim nadzorom trebalo da bude osnovna sankcija u sistemu vanzavodskih sankcija i mera.³⁷ Ona je zapravo spoj klasične uslovne osude iz kontinentalnog evropskog prava sa elementima probacije iz anglosaksonskog modela, imajući u vidu da sadrži kombinaciju upozorenja i provere ponašanja osuđenika na slobodi sa merama nadzora i određivanja ispunjenja zakonom određenih obaveza.

Uslovna osuda sa zaštitnim nadzorom u crnogorskom krivičnom pravu je regulisana kao jedna od predviđenih mera upozorenja i propisana je kao modalitet uslovne osude u čl. 59–64 KZ. Njome se, dakle, omogućava da se prema uslovno osuđenom preduzimaju aktivne radnje kroz koje se pruža pomoć i zaštita, za razliku od klasične uslovne osude kod koje je odnos prema osuđenom pasivan.³⁸

Inače, svi uslovi predviđeni u KZ, kako za izricanje, tako i sa opozivanje klasične uslovne osude primenjuju se i u slučaju uslovne osude sa zaštitnim nadzorom. Njen dodatni kvalitet jeste stavljanje pod zaštitni nadzor koji se, po čl. 60 st. 1 KZ, može izreći učiniocu krivičnog dela u slučaju kada mu se izrekne uslovna osuda, ako se, po oceni suda, s obzirom na njegovu ličnost, raniji život, držanje posle izvršenog krivičnog dela, a naročito njegov odnos prema žrtvi krivičnog dela i okolnosti izvršenja dela, može očekivati da će se zaštitnim

³⁶ O. Tešović, *op. cit.*, 2022, str. 79.

³⁷ U teoriji nisu retki ni stavovi da uslovna osuda sa zaštitnim nadzorom zapravo treba da bude u praksi pravilo, a da tek pri postojanju naročitih okolnosti u obzir dolazi klasičan vid uslovne osude. I. Đokić, *Uslovna osuda sa zaštitnim nadzorom — ispunjena očekivanja ili ne, Vaninstitucionalne mere, pojednostavljene forme postupanja i drugi krivičnopravni instrumenti reakcije na kriminalitet i pozitivno kazneno zakonodavstvo (ispunjena očekivanja ili ne?)*, Intermex — Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor, 2022, str. 216.

³⁸ Zaštitni nadzor, kao uostalom i probacija u celini, predstavlja posebnu vrstu stručnog delovanja — tretmana u zajednici uslovno osuđenih, usmerenog prema njihovoj uspešnoj socijalnoj integraciji u društvo. Z. Ilić, *Zaštitni nadzor uslovno osuđenih lica — alternativa koja obećava, Prevencija i tretman poremećaja ponašanja*, 2010, str. 218.

nadzorom potpunije ostvariti svrha uslovne osude. Navedeno znači da je procena suda u svakom konkretnom slučaju da li će se zaštitnim nadzorom i određenom obavezom u okviru njega pozitivno uticati na učinioca da zbog istih razloga koji su doveli do izvršenja krivičnog dela ponovo ga ne vrši.³⁹

Prema članu 59 st. 2 KZ zaštitni nadzor obuhvata zakonom predviđene mere pomoći, staranja, nadzora i zaštite, a koje su to mere regulisano je u čl. 61 KZ kroz deset obaveza koje se mogu odrediti uslovno osuđenom licu. To su sledeće obaveze:

- 1) javljanje organu nadležnom za izvršenje zaštitnog nadzora u rokovima koje taj organ odredi;
- 2) osposobljavanje učinioca za određeno zanimanje;
- 3) prihvatanje zaposlenja koje odgovara sposobnostima i sklonostima učinioca;
- 4) ispunjavanje obaveza izdržavanja porodice, čuvanja i vaspitanja dece i drugih porodičnih obaveza;
- 5) uzdržavanje od posećivanja određenih mesta, lokala ili priredbi, ako to može biti prilika ili podsticaj za ponovno vršenje krivičnih dela;
- 6) blagovremeno obaveštavanje o promeni mesta boravka, adrese ili radnog mesta;
- 7) uzdržavanje od upotrebe droge ili alkoholnih pića;
- 8) lečenje u odgovarajućoj zdravstvenoj ustanovi;
- 9) posećivanje određenih profesionalnih i drugih savetovališta ili ustanova i postupanje po njihovim uputstvima;
- 10) otklanjanje ili ublažavanje štete pričinjene krivičnim delom, a naročito izmirenje sa žrtvom učinjenog krivičnog dela.

Prilikom opredeljivanja koju će od navedenih obaveza da izrekne učiniocu i koliko će biti njihovo trajanje, čl. 62 KZ propisuje da će se naročito uzeti u obzir godine života učinioca, njegovo zdravstveno stanje, sklonosti i navike, pobude iz kojih je izvršio krivično delo, držanje posle izvršenog krivičnog dela, raniji život, lične i porodične prilike, uslove za ispunjenje naloženih obaveza, kao i druge okolnosti koje se odnose na ličnost učinioca, a od značaja su za izbor mera zaštitnog nadzora i njihovo trajanje.

Osim okolnosti koje zakon navodi, sud bi prilikom izbora određenih obaveza morao da ima u vidu i spremnost učinioca da ispunjava određenu obavezu. Naime, iako se ne zahteva pristanak osuđenog prilikom stavljanja pod zaštitni nadzor, ipak je njegova spremnost da ispunjava postavljene obaveze zbog same prirode tih obaveza i svrhe zaštitnog nadzora veoma važna okolnost koju sud treba da ima u vidu. U onim slučajevima gde se sa sigurnošću može zaključiti da je ta spremnost bez opravdanih razloga odsutna, ozbiljno se dovodi u pitanje opravdanost izricanja ove alternativne sankcije.⁴⁰

³⁹ O. Tešović, *op. cit.*, 2022, str. 81.

⁴⁰ Z. Stojanović, „Uslovna osuda sa zaštitnim nadzorom sa aspekta predstojeće primene”, *Pravni život*, br. 10, 1979, str. 25.

Iz čl. 63 KZ proizilazi da se vreme trajanja mera zaštitnog nadzora određuje u okviru roka proveravanja utvrđenog u uslovnoj osudi, pa stoga je moguće da zaštitni nadzor prestane i pre isteka roka proveravanja ukoliko je od suda određen kraći rok. Pored navedenog načina prestanka zaštitnog nadzora, predviđen je još jedan način, a to je ako u toku trajanja zaštitnog nadzora sud utvrdi da je ispunjena svrha ove mere, može zaštitni nadzor ukinuti i pre isteka određenog vremena. Inače, zaštitni nadzor prestaje opozivanjem uslovne osude, a u toku trajanja zaštitnog nadzora sud može, s obzirom na ostvarene rezultate, pojedine obaveze ukinuti ili zameniti drugim.

Na kraju su predviđene i posledice neispunjavanja obaveze zaštitnog nadzora, pa je u čl. 64 KZ propisano da ako osuđeni kome je izrečen zaštitni nadzor ne ispunjava obaveze koje mu je sud odredio, sud ga može opomenuti, ili može ranije obaveze zameniti drugim, ili produžiti trajanje zaštitnog nadzora u okviru vremena proveravanja, ili opozvati uslovnu osudu. Za koju će se od navedene četiri posledice sud odlučiti, zavisi od okolnosti svakog konkretnog slučaja, ali je evidentno da će na tu odluku svakako uticati i konkretni razlozi i okolnosti zbog kojih te obaveze u okviru zaštitnog nadzora nisu ispunjene.

Što se tiče samih obaveza koje čine sadržinu zaštitnog nadzora, a njih deset je navedeno u čl. 61 KZ, prvo što bi se moglo primetiti jeste da zapravo sud prilikom opredeljenja z mora u svakom slučaju da odredi bar njih dve, jer se bez određivanja prve obaveze koja se sastoji u javljanju organu nadležnom za izvršenje zaštitnog nadzora ne bi ni mogao realizovati zaštitni nadzor u pogledu ostalih obaveza. Za ostale obaveze može se generalno konstatovati da su sve preventivne prirode, odnosno da imaju za cilj uticaj na učinioca da ne ponovi kriminalno ponašanje.⁴¹

Ono što bi trebalo istaći takođe u pogledu sadržine obaveza jeste da su pojedine obaveze isuviše uopšteno određene, neke čak i suviše neprecizno, pa je prilikom njihovog određivanja potrebno da sud učini dodatni napor i bliže odredi njihov konkretni sadržaj. Takav je primer slučaj pete obaveze — „uzdržavanje od posećivanja određenih mesta, lokala ili priredbi”, i sedme obaveze — „uzdržavanje od upotrebe droge ili alkoholnih pića”, jer bi predmetne obaveze trebale da budu formulisane u obliku zabrana uz određivanje mogućnosti periodičnog proveravanja poštovanja tih zabrana kako bi se olakšalo njihovo kontrolisanje od strane probacionih službenika.⁴²

Na kraju treba istaći da, imajući u vidu prirodu i mogućnosti ove alternativne sankcije,⁴³ evidentno je da bi uslovna osuda sa zaštitnim

⁴¹ Lj. Lazarević, *Komentar Krivičnog zakonika*, drugo izmenjeno i dopunjeno izdanje, Beograd, 2011, str. 316.

⁴² Više o mogućnostima unapređenja sadržine predmetnih obaveza iz zaštitnog nadzora vid. O. Tešović, *op. cit.*, 2022, str. 84–92.

⁴³ U istraživanju koje je sprovedeno u Srbiji, poverenici (probacioni službenici) koji su u praksi sprovodili nadzor nad ovom merom, izrazili su mišljenje da uslovna osuda sa zaštitnim nadzorom na adekvatan način utiče na pozitivne promene u

nadzorom trebalo, u idealnim uslovima, da zajedno sa kaznom rada u javnom interesu čini stožer sistema vanzavodskih sankcija i mera, ali kako su, nažalost, podaci o njenom izricanju i izvršenju poražavajući⁴⁴ (što će biti predstavljeno u narednom poglavlju), postavlja se pitanje da li je praksa uopšte percipira kao takvu? Očigledno da je potrebno ne samo određenih normativnih usavršavanja (recimo, uvođenje društveno-korisnog rada kao jedne od obaveza kod zaštitnog nadzora koje je rešenje zastupljeno u uporednim zakonodavstvima,⁴⁵ a pruža znatno veće mogućnosti na planu efikasnosti i rehabilitacije od treće obaveze — „prihvatanje zaposlenja koje odgovara sposobnostima i sklonostima učinioca”), već i sveobuhvatnih akcija na planu promocije ove vrste sankcija, kako u pravosudnim krugovima, tako i u javnosti.

2. Izvršenje alternativnih sankcija u Crnoj Gori

Sam postupak nadzora nad izvršenjem alternativnih sankcija u Crnoj Gori sprovodi Direkcija (Jedinica) za uslovnu slobodu u okviru Direktorata za izvršenje krivičnih sankcija koja čini deo Ministarstva pravde Republike Crne Gore. Zakonom o izvršenju kazni zatvora, novčane kazne i mjera bezbednosti regulisan je postupak spovodjenja nadzora nad izvršenjem kazne zatvora u prostorijama u kojima osuđeni stanuje (čl. 128–133), dok je Zakonom o izvršenju uslovne osude i rada u javnom interesu regulisano izvršenje uslovne osude sa zaštitnim nadzorom i rada u javnom interesu.⁴⁶

Prema podacima same Direkcije za period 2013. do 2022. godine,⁴⁷ zabeležen je porast primene određenih alternativnih sankcija i to kazne zatvora koja se izvršava u prostorijama za stanovanje i kazne rada u javnom interesu. Međutim, kada je u pitanju uslovna osuda sa zaštitnim nadzorom, njena primena u praksi je više nego simbolična, odnosno jedva da je prepoznata od sudske prakse, što se sve može videti iz podataka prikazanih u Tabeli 1. (agenda: KZ — kazna zatvora koja se izvršava u prostorijama za stanovanje; RJI — rad u javnom interesu; UO — uslovna osuda sa zaštitnim nadzorom).

ponašanju osuđenih lica, te da je korektivni efekat ove sankcije veći nego kod ostalih vanzavodskih sankcija i mera. M. Bojović-Kolaković, A. Batrićević, M. Matić-Bošković, *op. cit.* str. 45.

⁴⁴ Isto u Srbiji. *Ibid.*, str. 44.

⁴⁵ Vid. član 132–54 Krivičnog zakonika Francuske (Code Pénale), kao i odeljak 56b. stav 2 Krivičnog zakonika Nemačke (Strafgesetzbuch).

⁴⁶ Takođe, izuzev već spomenutih zakona, podzakonskim aktima je dodatno uređen sistem izvršenja odluka o navedenim alternativnim sankcijama i to Pravilnikom o bližem načinu izvršavanja uslovne osude, uslovne osude sa zaštitnim nadzorom, kazne rada u javnom interesu i uslovnog otpusta i Pravilnikom o bližem načinu izvršenja kazne zatvora u prostorijama u kojima živi osuđenik, *Službeni list Crne Gore* br. 40/19.

⁴⁷ Vid. Strategija za izvršenje krivičnih sankcija Vlade Crne Gore za period 2023–2026, str. 51. (<https://www.gov.me/clanak/strategija-za-izvršenje-krivičnih-sankcija-2023–2026>, 9. 3. 2024).

Tabela 1. Usporedni prikaz broja primljenih predmeta
u rad Direkcije za uslovnu slobodu

	2022 ⁴⁸	2021	2020	2019	2018	2017	2016	2015	2014	2013
KZ	185	318	405	259	139	92	48	4	0	0
RJI	103	260	266	307	296	289	178	160	166	27
UO	5	3	1	0	0	0	0	0	0	0

Važno je ukazati na evidentirani trend porasta broja kazne zatvora koja se izvršava u prostorijama za stanovanje koje je, recimo, u 2016. godini bilo svega 48, dok je u 2020. godini predato na izvršenje čak 405. Uz to, došlo je i do znatnog porasta izricanja rada u javnom interesu u posmatranom periodu, kojeg je u početku primene u 2013. godini bilo svega 27, dok je taj broj u 2021. godini porastao na 260, sa apsolutnim rekordom u 2019. godini kada je na izvršenje prispeto 307 presuda gde je navedena alternativna sankcija izrečena. Iz navedenog proizilazi nesumnjiv zaključak da su navedene alternativne sankcije vremenom prihvaćene od sudova kao adekvatna reakcija na određene vrste kriminaliteta, dok se za uslovnu osudu sa zaštitnim nadzorom, nažalost, to ne može reći, s obzirom na to da je prvi put jedna takva presuda zabeležena tek u 2020. godini, a u naredne dve godine se ostalo na simboličnom jednocifrenom broju.

S druge strane, kada govorimo o kazni zatvora koja se izvršava u prostorijama za stanovanje, u najvećem broju slučajeva je ova kazna u periodu od 2013. do 2022. godine izrečena za krivična dela: nepostupanje po zdravstvenim propisima za suzbijanje opasne zarazne bolesti iz čl. 287 KZ (207 presuda, 13,8%), neovlašćena proizvodnja, držanje i stavljanje u promet opojnih droga iz čl. 300 KZ (163 presuda, 10,8%) i nedozvoljeno držanje oružja i eksplozivnih materija iz čl. 403 KZ (153 presude, 10,2%). Struktura krivičnih dela u predmetima gde je izrečena kazna tzv. kućnog zatvora je zaista raznolika, odnosno izricana je za čak 83 različita krivična dela.⁴⁹

U isto vreme kazna rada u javnom interesu je izricana za 98 različitih krivičnih dela i prekršaja,⁵⁰ od čega najviše za krivična dela: krađa iz čl. 239 KZ (187 presuda, 9,3%), nedozvoljeno držanje oružja i eksplozivnih materija iz čl. 403 KZ (184 presude, 9,2%), nedavanje izdržavanja iz čl. 221 KZ (183 presude, 9,1%) i ugrožavanje bezbednosti javnog saobraćaja iz čl. 339 KZ (175 presuda, 8,7%).⁵¹

Analizirajući navedene podatke vezano za primenu predmetne dve vanzavodske sankcije i krivična dela povodom čijeg izvršenja su

⁴⁸ Podaci za 2022. godinu su na dan 30. 6. 2022. godine.

⁴⁹ Vid. Strategija za izvršenje krivičnih sankcija Vlade Crne Gore za period 2023–2026, str. 54–55.

⁵⁰ Prema članu 22. Zakona o prekršajima Crne Gore (*Službeni list CG*, br. 1/11, 6/11 — ispr., 39/11, 32/14, 43/17 — odluka US, 51/2017), rad u javnom interesu je predviđen i kao prekršajna kazna.

⁵¹ Vid. Strategija za izvršenje krivičnih sankcija Vlade Crne Gore za period 2023–2026, str. 52–53.

izricane, primetan je širok dijapazon krivičnih dela, posebno kod kazne zatvora koja se izvršava u prostorijama gde osuđeni stanuje. Imajući u vidu činjenicu da ne postoje neki dodatni zakonski kriterijumi za izricanje ove sankcije, osim da je izrečena kazna zatvora do šest meseci, pitanje je da li se ona zaista u praksi samo izriče za krivična dela koja su lakše prirode, što je suštinski imanentno vanzavodskim sankcijama (npr. za krivično delo neovlašćena proizvodnja, držanje i stavljanje u promet opojnih droga iz čl. 300 KZ gde je za osnovni oblik predviđena kazna zatvora dve do deset godina, a gde je utvrđen veliki procenat izricanja ove sankcije, svakako ne možemo reći da je u pitanju neko bagatelno delo). Iz ovoga nesumnjivo proizilazi zaključak da su neophodni dodatni zakonski kriterijumi za primenu ove sankcije koji postoje u uporednom pravu gde se ova alternativa najčešće koristi za ranjive kategorije stanovništva (trudnice, žene sa malom decom, stare osobe i sl.). Uz ove normativne promene, kao i prilagođavanja koja omogućavaju primenu podrške i terapijskih programa unutar koncepta kućnog zatvora, probacioni službenici bi tada dobili priliku da pruže neophodnu podršku učiniocima krivičnih dela blaže prirode i nenasilnog karaktera u prevazilaženju izazova i ostvarivanju uspešne socijalne reintegracije.

Ono što ohrabruje u načinu izvršenja jeste činjenica da se Direkcija za uslovnu slobodu poslednjih godina i kadrovski proširuje sa intencijom da se njeno osnaživanje nastavi,⁵² a takođe postala je i deo Konfederacije evropske probacije (Confederation of European Probation — CEP),⁵³ jedne od evropskih, ako ne i svetskih, najvažnijih organizacija u oblasti probacije, što svakako ukazuje da postoji namera državnih zvaničnika da se unapredi sistem vanzavodskih sankcija i mera. Decentralizacijom Direkcije i njenim osamostaljivanjem u autonomnu instituciju nadležnu isključivo za probacione poslove i izvršenje vanzavodskih sankcija i mera, svakako, crnogorski sistem alternativnih sankcija dobiće na kvalitetu i na taj način će se uskladiti sa međunarodnim standardima u ovoj oblasti.

Zaključak

Reforme krivičnog zakonodavstva balkanskih država, koje teže usklađivanju sa standardima Saveta Evrope i pravom Evropske

⁵² Pravilnikom o unutrašnjoj organizaciji i sistematizaciji Ministarstva pravde donetim u junu 2022. godine, za vršenje poslova iz nadležnosti Direkcije za uslovnu slobodu sistematizovano je jedanaest radnih mesta, od kojih tri sa mestom rada u Bijelom Polju i osam u Podgorici, a jedan od osnovnih ciljeva Strategije za izvršenje krivičnih sankcija Vlade Crne Gore za period 2023–2026. jeste upravo primaran rad na kadrovskom osnaživanju Direkcije. *Ibid.*, str. 51, 59.

⁵³ Inače, za Evropsku uniju i Savet Evrope, CEP je telo koje je jedino ovlašćeno da govori u ime problema probacije na evropskom nivou, te za njihove potrebe obezbeđuje stručne i komparativne podatke iz ove oblasti. Zbog toga ovu organizaciju i zovu „glas probacije iz Brisela”. Vid. <http://www.cep-probation.org> (9. 3. 2024).

unije, ključne su za EU integraciju ovih država i svakako obuhvataju uvođenje alternativnih sankcija kao inicijalnu etapu prilagođavanja međunarodnim standardima. Međutim, prepreke poput nedostatka infrastrukture, ograničene državne podrške i skepticizma stručne zajednice i šire javnosti prema alternativnim sankcijama, iziskuju sveobuhvatan pristup i angažovanje kako bi se omogućilo da reforme pruže željene rezultate, sa ciljem stvaranja pravednijeg i humanijeg sistema krivičnog pravosuđa.⁵⁴

Izloženi sistem alternativnih krivičnih sankcija u Crnoj Gori predstavlja značajan korak ka stvaranju delotvornijeg sistema krivičnih sankcija. Unapređenje sistema vanzavodskih sankcija i mera u skladu sa preporukama zasnovanim na međunarodnim standardima, pre svega sa Evropskim pravilima Saveta Evrope, ali i Preporukom broj R(2010)1 koja se odnosi na probaciona pravila Saveta Evrope, tzv. Evropskim probacionim pravilima,⁵⁵ kao i sa tzv. Tokijskim pravilima Ujedinjenih nacija i Pravilima Ujedinjenih nacija o postupanju prema zatvorenicama i primeni alternativnih mera prema njima (tzv. Pravila iz Bankoka),⁵⁶ iziskuje sistematičnu reformu koja uključuje razvoj probacionih službi, obezbeđenje organizacionih i finansijskih preduslova, kao i edukaciju i senzibilizaciju stručne i šire javnosti o značaju i prednostima primene alternativnih sankcija.

Stoga, kao ključne preporuke ističu se: uspostavljanje jasnijih smernica za izricanje alternativnih sankcija, uvođenje šireg spektra obrazovnih, terapijskih i reintegracionih programa, osnaživanje kapaciteta probacionih službi, te povećanje saradnje pravosudnih organa, probacionih službi i društvene zajednice. Takođe, važan aspekt je i podizanje svesti o značaju alternativnih sankcija za efikasno smanjenje recidivizma, unapređenje javne bezbednosti i promocija socijalne inkluzije osuđenih osoba ne samo u javnosti, već i nosiocima pravosudnih funkcija.⁵⁷

Realizacija navedenih preporuka zahteva sveobuhvatan i koordinisan pristup, uključujući angažovanje svih relevantnih aktera u pravosudnom i socijalnom sistemu, te kontinuirano praćenje i evaluaciju učinaka primenjenih mera u praksi.⁵⁸ Ukoliko bi primenila

⁵⁴ N. Mrvić-Petrović, „Alternativne krivične sankcije u državama balkanskog regiona”, *Pravo zemalja u regionu*, Institut za uporedno pravo, Beograd, 2010, str. 56–57.

⁵⁵ Recommendation CM/Rec (2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules. Usvojena od strane Komiteta ministara 2010. godine.

⁵⁶ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders — The Bangkok Rules.

⁵⁷ Vid. Priručnik UN Kancelarije za drogu i kriminal o programima rastorativne pravde — UNODC Handbook on Restorative Justice Programmes, United Nation, Vienna, 2020, str. 97–98. www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf (10. 3. 2024).

⁵⁸ U pogledu uvođenja sistema monitoringa i evaluacije za praćenje efekata primene vanzavodskih sankcija vid. Priručnik UN Kancelarije za drogu i kriminal za

ovakav pristup, Crna Gora bi mogla značajno unaprediti efikasnost svog sistema krivičnih sankcija, promovišući pravednije, humanije i društveno odgovornije pravosuđe, koje je usmereno na reintegraciju osuđenih osoba, uz istovremeno očuvanje bezbednosti u društvu.

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ALTERNATIVE CRIMINAL SANCTIONS
IN THE CRIMINAL CODE OF MONTENEGRO

Alternative criminal sanctions represent a deviation from the traditional system of punishment where imprisonment occupies a central place, and their advantage would undoubtedly be in a significantly more humane and less repressive treatment of convicted persons. For the purposes of this paper, the concept of alternative criminal sanctions should be understood in a narrower sense; namely, this term refers only to those substitutes for imprisonment that are in the form of criminal sanctions prescribed by criminal legislation. Therefore, the subject of this paper is alternative criminal sanctions according to the Criminal Code of Montenegro — imprisonment executed in residential premises, community service, and suspended sentence with protective supervision, but not only their normative solutions but also the manner of their execution. The aim of the paper is to provide a comprehensive analysis of the position of non-custodial sanctions in the system of criminal sanctions of Montenegro, with recommendations for their improvement in accordance with international standards in this field. Reflecting on the importance of alternative sanctions and the development of

probation services for their application, the paper emphasises their key role in the existence of an effective system of criminal sanctions in each country, primarily taking into account the goals of special prevention, i. e., a greater possibility of individualising the sanction and its better adaptation to the perpetrator of the criminal act and the circumstances under which the act was committed, compared to the traditional prison sentence.

Key words: criminal sanctions, alternative to prison sentence, non-custodial sanctions, probation, Criminal Code of Montenegro

The Rise and Risk of Private Credit

Private credit creates significant economic benefits by providing long-term financing to firms too large or risky for banks and too small for public markets. However, credit migrating from regulated banks and relatively transparent public markets to the more opaque world of private credit creates potential risks. Firms borrowing private credit tend to be smaller and riskier than their public market counterparts, and the sector has never experienced a severe economic downturn at its current size and scope. Such an adverse scenario could see a delayed realisation of losses followed by a spike in defaults and large valuation markdowns. The chapter identifies vulnerabilities arising from relatively fragile borrowers, increased exposure of pensions and insurers to the asset class, a growing share of semiliquid investment vehicles, multiple layers of leverage, stale valuations, and unclear interconnections between participants. Assessing this asset class's overall financial stability risks is challenging because the data needed to analyse these risks fully are unavailable. Despite these limitations, such risks appear contained at present. However, given private credit's size and role in credit creation—now large enough to compete directly with public markets—it may become macro-critical and amplify negative shocks to the economy. The rapid growth of private credit, coupled with increasing competition from banks on large deals and pressure to deploy capital, may lead to a deterioration in pricing and non-pricing terms, including lower underwriting standards and weakened covenants, raising the risk of credit losses in the future. If the asset class remains opaque and continues to grow exponentially under limited prudential oversight, the vulnerabilities of the private credit industry could become systemic.

Key words: private credit, stale valuations, risk of credit, credit industry, financial stability

Introduction

This chapter evaluates how financial stability is affected by the recent evolution of private credit into a major asset class. Private credit has grown exponentially and is becoming an increasingly important and interconnected part of the financial system. The sector predominantly involves alternative asset managers who raise capital from institutional investors using closed-end funds and lend directly to predominantly middle-market firms. This chapter focuses

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on performing corporate credit rather than distressed assets, infrastructure, and real estate. Private credit has provided significant economic benefits during its approximately 30-year existence. It developed as a lending solution for middle-market companies deemed too risky or large for commercial banks and too small for public markets. Loans are typically negotiated directly between borrowers and one or more alternative asset managers. Although usually more expensive than bank loans, private credit offers borrowers a value proposition through strong relationships and customised lending terms designed to provide flexibility in times of stress.¹

In contrast with most broadly syndicated loans, private credit offers terms that include enhanced covenants, providing lenders with downside protection.² Private credit managers also claim to have much greater resources to deal with problem loans than either banks or public markets, thereby enabling fewer sudden defaults, smoother restructurings, and lower costs of financial distress. Lenders typically rely on long-term pools of locked-up capital for financing because private credit deals are idiosyncratic and difficult for outside parties to value or trade. Private credit has grown rapidly since the global financial crisis, taking market share from bank lending and public markets.

Private credit benefitted from the long period of low interest rates that saw a huge expansion of attention to alternative investment strategies. In this context, private credit has appeared attractive, with some of the highest historical returns across debt markets and appears to be relatively low volatility. At the same time, post-crisis regulatory reforms raised capital requirements for banks and made regulation more risk-sensitive, incentivising banks to hold safer assets. Some end investors (notably insurance companies) were also incentivised to move into private credit because the capital charges are lower and less risk-sensitive than those applicable to commercial banks.³ There is a concern that tighter bank regulation will continue to encourage credit migration from banks to private credit lenders.⁴ As banks appear to have become less willing to lend to middle-market firms with riskier profiles in the United States and Europe, private credit has emerged as a key lender. Private credit assets grew to

¹ Customized lending terms can include, for example, the option to capitalize interest payments (that is, pay in kind) in times of poor liquidity.

² Covenants can vary depending on the transaction and can include, for example, limits for leverage and interest coverage ratios, restrictions on capital expenditures and dividend distributions, restrictions on additional debt, and limitations on asset sales.

³ Cortes, Fabio, Mohamed Diaby, and Peter Windsor, *Private Equity and Life Insurers*, IMF Global Financial Stability Note 2023/001, International Monetary Fund, Washington, DC, 2023.

⁴ Cai, Fang, and Sharjil Haque, *Private Credit: Characteristics and Risks*, FEDS Notes, Board of Governors of the Federal Reserve System, Washington, DC, 2024.

approximately \$2.1 trillion globally in combined assets and undeployed capital commitments in 2023, with a focus on North America and Europe.⁵

For context, such assets are comparable to about three-quarters of the global high-yield market, a more mature but similarly risky market. Although still focused on middle-market lending, private credit has expanded its remit significantly over the last 20 years, particularly over the last 5. As a result, private credit firms in the United States and Europe can now provide loans to much larger corporate borrowers that would previously fund themselves through broadly syndicated loans or even corporate bonds. Such borrowers may now prefer the customised arrangement of private credit that avoids the disclosures and costs associated with public markets. Private credit remains focused on North America, but other regions, including Europe and Asia, are experiencing similar growth dynamics. As of June 2023, assets under the management (deployed and committed) of private credit managers in the United States reached \$1.6 trillion, growing at an average annual rate of 20 per cent over the last five years.

Private credit now accounts for 7 per cent of the credit to non-financial corporations in North America, comparable with the shares of broadly syndicated loans and high-yield corporate bonds. In Europe, private credit also increased rapidly at an average rate of 17 per cent per year over the same period, although it has a smaller footprint of 1.6 per cent of corporate credit. There is evidence of cross-regional investments, with North American managers financing a significant portion of the private credit funds focused on Europe and Asia. Asian private credit accounts for about 0.2 per cent of the credit to nonfinancial corporations, although it has grown by 20 per cent annually over the last five years. Private credit in Asia finances mostly smaller deals, targeting high-yield and distressed segments with limited financing options in emerging market economies. Given the low liquidity, higher credit risk, and lack of transparency of private credit, the space is dominated by institutional investors. The most common private credit investment vehicle, accounting for approximately 81 per cent of the total market, is a closed-end fund with a capital call structure and limited life cycle, similar to funds used for private equity. An additional 5 per cent of the market consists of specialised collateralised loan obligations (CLOs) that invest in middle-market private credit.⁶ Typical investors in these two vehicles are pension funds, insurance companies, sovereign wealth funds, and family offices. A rapidly growing segment in the United States is known as

⁵ This estimate of the growth in private credit assets includes the assets of private credit funds (\$1.7 trillion globally, as of 2023), business development companies, and private collateralised loan obligations. Therefore, it underestimates the overall size of private credit globally. This is because some end investors also lend directly to middle-market firms.

⁶ Sources: Preqin, S&P Capital IQ, and PitchBook LCD.

business development companies (BDCs), which account for 14 per cent of the market. BDCs (covered in greater detail later in the chapter) are often public and open to retail investors. In Europe, some funds have adopted more frequent redemption periods (for instance, monthly or even more often) to appeal to a wider investment base. The growth in private credit has followed the rise in private equity, which is closely linked. Managers whose umbrella firm is also active in private equity hold more than three-quarters of private credit assets. For about 70 per cent of private credit deals, the borrowing company is sponsored by a private equity firm.

1. How Private Credit Could Threaten Financial Stability

This chapter assesses private credit vulnerabilities and risks to financial stability and focuses on macro-financial imbalances that might amplify negative shocks to the real economy.⁷ Specifically, this chapter analyses the risks from borrowers, liquidity mismatches, leverage, asset valuations, and interconnectedness. The migration of credit provisions from regulated banks and relatively transparent public markets to more opaque private credit firms raises several potential vulnerabilities. Whereas bank loans are subject to strong prudential regulation and supervisory oversight, bond markets and broadly syndicated loans to comprehensive disclosure requirements that foster market discipline and price discovery, private markets are comparatively lightly regulated and more opaque. Furthermore, private credit loans are unrated, rarely traded, typically „marked to model” by third-party pricing services, and without standardised contract terms. Rising risks and their potential implications may, therefore, be difficult to detect in advance. Severe data gaps prevent a comprehensive assessment of how private credit affects financial stability. The interconnections and potential contagion risks many large financial institutions face from exposures to the asset class are poorly understood and highly opaque. Because the private credit sector has rapidly grown, it has never experienced a severe downturn at its current size and scope, and many features designed to mitigate risks have not yet been tested. At present, the financial stability risks posed by private credit appear contained. Private credit loans are funded largely with long-term capital, mitigating maturity transformation risks. The use of leverage appears modest, as do liquidity and interconnectedness risks. The rapid growth of the asset class requires careful monitoring. As private credit assets under management grow rapidly and competition with investment banks on larger deals intensifies,

⁷ Adrian, Tobias, Dong He, Nellie Liang, and Fabio Natalucci, *A Monitoring Framework for Global Financial Stability*, IMF Staff Discussion Note 2019/006, International Monetary Fund, Washington, DC, 2019.

supply-and-demand dynamics may shift, thereby lowering underwriting standards, raising the chance of credit losses in the asset class, and rendering risk management models obsolete.

The private credit sector may also eventually experience falling risk premiums and weakening covenants as assets under management rise rapidly and the pressure to deploy capital increases. Immediate risks may seem contained, but the sector has meaningful vulnerabilities, is opaque to stakeholders, and is growing rapidly under limited prudential oversight. If these trends continue, private credit vulnerabilities may become systemic:

— Borrowers' vulnerabilities could generate large, unexpected losses in a downturn. Private credit is typically a floating rate and caters to relatively small borrowers with high leverage. Such borrowers could face rising financing costs and perform poorly in a downturn, particularly in a stagflation scenario, which could generate a surge in defaults and a corresponding spike in financing costs.

— These credit losses could create significant capital losses for some end investors. Some insurance and pension companies have significantly expanded their investments in private credit and other illiquid investments. Without better insight into underlying credit performance, these firms and their regulators could be caught unaware by a dramatic rerating of credit risks across the asset class.

— Although currently low, liquidity risks could rise with the growth of retail funds. The great majority of private credit funds pose little maturity transformation risk, yet the growth of semiliquid funds could increase first-mover advantages and run risks.

— Multiple layers of leverage create interconnectedness concerns. Leverage deployed by private credit funds is typically limited, but the private credit value chain is a complex network that includes leveraged players ranging from borrowers to funds to end investors. Funds that use only modest amounts of leverage may still face significant capital calls in a downside scenario, with potential transmission to their leverage providers. Such a scenario could also force the entire network to simultaneously reduce exposures, triggering spillovers to other markets and the broad economy.

— Uncertainty about valuations could lead to a loss of confidence in the asset class. The private credit sector has neither price discovery nor supervisory oversight to facilitate asset performance monitoring, and the opacity of borrowing firms makes prompt assessment of potential losses challenging for outsiders. Fund managers may be incentivised to delay the realisation of losses as they raise new funds and collect performance fees based on their existing track records. In a downside scenario, the lack of transparency of the asset class could lead to a deferred realisation of losses followed by a spike in defaults. Resulting changes in the modelling assumptions that drive valuations could also cause dramatic markdowns.

— Risks to financial stability may also stem from interconnections with other financial sector segments. Prime candidates for risk are

entities with particularly high exposure to private credit markets, such as insurers influenced by private equity firms and certain groups of pension funds. The assets of private-equity-influenced insurers have grown significantly in recent years, with these entities owning significantly more exposure to less liquid investments than other insurers. Data constraints make it challenging for supervisors to evaluate exposures across financial sector segments and assess potential spillovers.

— Increasing retail participation in private credit markets raises conduct concerns. Given the specialised nature of the asset class, the risks involved may be misrepresented. Retail investors may not fully understand the investment risks or the restrictions on redemptions from an illiquid asset class.

2. *Characteristics of Private Credit Borrowers*

Private credit borrowers tend to be riskier than their traded counterparts, such as high-yield bonds and leveraged-loan issuers. Borrowers in private credit are also relatively vulnerable to interest rates, as loans have floating rates. However, the support of private equity sponsors and the relatively close and flexible relationship between lender and borrower partially mitigate liquidity and solvency risks. Collateralisation and the greater use of covenants provide additional protection for investors.

A key reason driving firms to private credit markets is the challenges of accessing traditional funding sources. Evidence suggests that weaker firms with low or negative earnings and high leverage are less likely to secure bank loans and are more inclined to borrow from nonbank sources.⁸ Private debt fund managers also believe that they finance companies and leverage levels that banks would not fund.⁹ In addition, borrowers in the private credit market may be excluded from the syndicated loan market because of their size or lack of high-quality collateral for bank lenders. Private credit can also offer benefits in flexibility, speed of execution, and confidentiality. Aspects of each transaction, such as the repayment schedule and collateral requirements, can be tailored to the parties involved. Compared with traditional bank loans and public debt offerings, private credit transactions are often executed more quickly and provide confidentiality. These characteristics have recently attracted larger borrowers who have traditionally accessed other funding sources. This alternative and flexible funding source for riskier borrowers involves a higher cost; as a result, interest rates on private credit loans tend to exceed yields for market-based alternatives.

⁸ Chernenko, Sergey, Isil Erel, and Robert Prilmeier, Why Do Firms Borrow Directly from Nonbanks?, *Review of Financial Studies* 35 (11): 4902–947, 2022.

⁹ Block, Joern, Young Soo Jang, Steven N. Kaplan, and Anna Schulze, *A Survey of Private Debt Funds*, NBER Working Paper 30868, National Bureau of Economic Research, Cambridge, MA, 2023.

3. *Characteristics and Vulnerabilities of Private Credit Borrowers*

Tracking the financial characteristics of private credit borrowers is challenging because of their private nature, resulting in limited availability of their financial statements. To address this challenge, a sample of private credit borrowers was constructed by cross-referencing data from Preqin with corporate fundamentals sourced from S&P Capital IQ. Private credit borrowers are typically highly leveraged middle-market companies. These firms are significantly smaller than broadly syndicated loans or high-yield bond-issuing firms. Private credit borrowers have higher debt-to-earnings ratios but better asset coverage than their syndicated loan counterparts. For all these asset classes, high debt levels are often driven by private equity sponsors that enhance returns for their investors by increasing debt on the balance sheets of the firms they acquire.¹⁰ Private credit borrowers operate across various economic sectors and are overrepresented in the information technology and healthcare sectors.¹¹ Private credit borrowers are vulnerable to interest rate shocks. Private credit borrowers almost exclusively use floating-rate loans. By contrast, only about 29 percent of high-yield corporate bond issuers' total debt is a variable rate.¹² Panel 1 of Figure 2.4 highlights the swifter transmission of interest rates to the cost of debt for firms with a higher share of variable-rate debt. Rising interest rates could ultimately lead to a deterioration in credit quality. The rise in benchmark rates has increased the interest burden for private credit borrowers, prompting some firms to resort to payment-in-kind interest. This flexibility may help borrowers withstand temporary stress but can lead to compounding losses if a firm's underperformance cannot be reversed. The share of payment-in-kind interest in BDC interest income has doubled since 2019. In addition, the proportion of firms with unsustainable interest coverage ratios has increased to over one-third among firms with size and leverage characteristics similar to those of private credit borrowers.

¹⁰ Haque, Sharjil M, *Does Private Equity Over-Lever Portfolio Companies?* Finance and Economics Discussion Series 2023–009, Board of Governors of the Federal Reserve System, Washington, DC, 2023.

¹¹ For comparison, the weights of the technology and health care sectors in the S&P 500 Index are 30 percent and 12 percent, respectively, whereas these shares are 24 percent and 11 percent for the Bloomberg World Large and Mid Cap Index.

¹² For a sample of 518 North American and 157 European high-yield corporate bond issuers, the average share of variable rate debt is 29.4 percent, at the end of 2022. Sources: S&P Capital IQ; and IMF staff calculations.

3.1. Mitigating Factors of Credit Risk

Despite the risky profile of private credit borrowers, their credit losses have not historically exceeded losses in high-yield bonds and are comparable to leveraged loans. Headline default rates for private credit indices tend to be relatively high, but these include covenant defaults, which often lead to renegotiated terms rather than a true payment default. Sponsorship by private equity firms also mitigates private credit risks. Private equity sponsors want to preserve the long-term value of their investments and may inject additional capital into their portfolio firms if they believe that stress will be transient. Evidence from the leveraged loan market illustrates that firms sponsored by private equity have lower default rates during periods of stress than other firms. This strategy may lessen defaults in a short-lived downturn. Most private credit loans are secured to help boost recovery rates in case of liquidation, which mitigates credit losses. Collateralisation can be lower in some sectors, such as the software industry, where unitranche and mezzanine loans are more common.

3.2. Private Credit Cyclicalities

There is mixed evidence regarding the cyclicalities of private credit lending. Private credit managers argue that private credit remains accessible during economic downturns, whereas traditional funding sources often contract. Evidence suggests that private credit's relationship with private equity sponsors facilitated lending during the COVID-19 pandemic.¹³ In March 2020, private credit lending did not „dry up,” while high-yield bond and leveraged-loan issuance contracted strongly. Private credit lending subsequently proved more stable than similarly floating-rate leveraged loans. A structural analysis shows that private credit market activity is less responsive to a sudden credit shock than the high-yield bond and leveraged-loan markets. However, there is also evidence of procyclical behaviour. The Bank for International Settlements found that capital deployment in private equity and private credit positively correlates with stock market returns.¹⁴ In addition, data from the BDC markets indicate that new private credit loans contract when banks tighten their lending standards. New lending by private credit funds seems to be less procyclical than BDC lending.

¹³ Young Soo, Are Direct Lenders More Like Banks or Arm's-Length Investors? SSRN, January 24, 2024.

¹⁴ Aramonte, Sirio, and Fernando Avalos, The Rise of Private Markets. *BIS Quarterly Review*, December, 2021.

Conclusion

Current reporting requirements are insufficient and prevent a comprehensive assessment of the leverage used in private credit. At present, the potential transmission of funding shortfalls from leverage providers cannot be fully evaluated. Fund-level reporting requirements to securities, insurance, or pension fund supervisors may not capture the complex and multilayered sources of leverage, including the subscription lines and leverages special-purpose vehicles or feeder funds deployed. Reporting is also fragmented across borders and sectors. These data gaps and the lack of a comprehensive overview prevent supervisors from monitoring leverage at the macro level. When banks or other supervised institutions provide private credit firms with leverage, regulators should enhance risk management practices regarding potential funding needs. This will likely require the private credit funds borrowing from supervised institutions to engage in some thematic reviews of liquidity management practices. Such exercises should incorporate stress scenarios featuring tightening of funding availability, markdowns of levered portfolios, and sudden and significant drawdowns of credit facilities by private credit funds' corporate borrowers.

Regulators should fill data gaps by enhancing comprehensive reporting of leverage across the value chain, with close cooperation domestically and internationally. Insurance and pension supervisors should address excessive risk-taking by adjusting prudential requirements under the principle of „same activity, same risk, same regulation.” In the event that such monitoring finds excessive leverage that may have systemic implications, securities regulators should consider suitable regulatory tools such as leverage caps.

Regulatory requirements for private credit funds currently focus on policy documentation, governance, and investor disclosures but do not specify how assets should be valued. The overall regulatory framework for private funds tends to have a light touch, including on valuation, because the institutional investors are sophisticated, the primary expectation being that investors have the capacity and incentive to seek relevant information from asset managers and adjust their valuations. Unlike other aspects of a private credit fund, however, the main investors (insurance companies and pension funds) may not have an incentive to challenge fund managers' valuations because they desire to maintain the stability of their investments. The managers' significant discretion also results in wide variations in valuation for the same asset across funds and entities. An IOSCO survey also found that the approach to valuation varies significantly by country. IOSCO's agreement with the International Valuation Standards Council to identify potential approaches to enhance the quality of valuations is welcome in this context. Supervisors should closely monitor the valuation approaches and procedures of private credit funds, insurers, and pension funds and, in case of heightened valuation risks,

strengthen regulation on valuation independence, governance, and frequency. To address these concerns, some regulators have already strengthened regulation concerning independent audits (for example, the US SEC) and intensified supervision (for example, US SEC, UK Financial Conduct Authority, European Securities and Markets Authority) relating to the valuation of private funds.

Supervisors should continue to thoroughly assess valuation governance and control through intrusive supervision, including on-site inspection, of the valuation practices of private credit funds. Timely and strict actions, including enforcement, should follow improper or fraudulent valuation. Proper and timely loss recognition will become even more important for private credit funds with semiliquid structures and funds after the expiration of lock-up periods. If such supervisory efforts indicate heightened valuation risks, regulators should consider mandating independent external valuations and audits while strengthening the managers' internal governance mechanisms on valuation procedures. Regulators may also consider increasing the frequency of external valuations and audits if necessary.

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USPON I RIZICI PRIVATNOG KREDITA

Privatni kredit stvara značajne ekonomske koristi pružanjem dugoročnog finansiranja kompanijama koje su prevelike ili rizične za banke i premalene za javna tržišta. Međutim, migracija kredita iz reguliranih banaka i relativno transparentnih javnih tržišta u neprozirni svijet privatnih kredita stvara potencijalne rizike. Kompanije koje posuđuju privatne kredite obično su manje i rizičnije od svojih kolega na javnom tržištu, a sektor nikada nije doživio ozbiljan ekonomski pad u svojoj trenutnoj veličini i opsegu. Takav nepovoljan scenarij mogao bi dovesti do odgođene realizacije gubitaka praćene naglim porastom neispunjavanja obaveza i velikim smanjenjem vrijednosti. U poglavlju se identificiraju ranjivosti koje proizlaze iz relativno krhkih zajmoprimaca, povećane izloženosti mirovina i osiguravatelja klasi imovine, sve većeg udjela polulikvidnih investicijskih sredstava, višestrukih slojeva financijske poluge, zastarjelih procjena vrijednosti i nejasnih međupovezanosti između sudionika. Procjena ukupnih rizika finansijske stabilnosti ove klase imovine je izazovna jer su podaci potrebni za potpunu analizu tih rizika nedostupni. Unatoč ovim ograničenjima, čini se da su ti rizici trenutačno obuzdani. Međutim, s obzirom na veličinu i ulogu privatnih kredita u stvaranju kredita — koji su sada dovoljno veliki da se izravno natječu s javnim tržištima — oni mogu postati makrokritični i pojačati negativne šokove za ekonomiju. Brzi rast privatnih kredita, zajedno sa sve većom konkurencijom banaka u velikim poslovima i pritiskom za raspoređivanjem kapitala, može dovesti do pogoršanja cjenovnih i necjenovnih uvjeta, uključujući niže standarde preuzimanja i slabije obveze, povećavajući rizik od kreditnih gubitaka u budućnosti. Ako klasa imovine ostane neprozirna i nastavi eksponencijalno rasti pod ograničenim bonitetnim nadzorom, ranjivosti privatne kreditne industrije mogle bi postati sustavne.

Gljučne riječi: privatni kredit, zastarjele procjene, kreditni rizik, kreditna industrija, financijska stabilnost



IZLAGANJA NA
KONFERENCIJI
„Promovisanje javne svijesti
o borbi protiv transnacionalnog
kriminaliteta, ulozi policije i pravosudne
saradnje i poštovanju osnovnih prava”

20. jun 2023. godine,
Fakultet pravnih nauka,
Univerzitet Donja Gorica



The Evolution of European Criminal Competence in the Fight Against Transnational Crime

Summary: 1. Preliminary Considerations on Globalisation, Transnational Crimes and European Area of Freedom, Security and Justice. — 2. The Achievement of European Criminal Competence Through the Court of Justice's Case-Law. — 3. The Path to the Introduction of a Formal Legal Basis — 4. The Treaty of Lisbon and the Indirect Criminal Competence. — 5. Some Conclusive Remarks.

1. Preliminary Considerations on Globalisation, Transnational Crimes and European Area of Freedom, Security and Justice

Transnational crime is now recognised as a global issue that must be addressed through collaboration among States and their judicial and law enforcement authorities.¹ In this direction, States have developed a series of regulatory responses within international organisations, both at the global and regional levels.² However, the

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¹ See, among others, C. Steer, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, in E. Van Sliedregt, S. Vasiliev (eds.), *Pluralism and Harmonization in International Criminal Law*, Oxford, 2013; J. Haken, *Transnational Crime in the Developing World*, Washington D. C., 2011; T. Obokata, *Transnational Organised Crime in International Law*, Oxford-Portland, 2010; D. Siegel, H. Bunt, D. Zaitch (eds.), *Global Organised Crime: Trends and Developments*. Berlin, 2003; W. Schomburg, *Are We on the Road to a European Law-Enforcement Area? International cooperation in Criminal Matters: What Place for Justice?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8, No. 1, 2000, pp. 51–60; P. Wilkitzki, *International and Regional Developments in the Field of Inter-State Cooperation in Penal Matters*, in M. C. Bassiouni (ed.), *International Criminal Law*, Vol. II, Procedural and enforcement mechanisms, New York-The Hague, 1999.

² With respect to the United Nations' global framework, notable examples are: *UN Convention on Psychotropic Substances* (1971); *UN Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973); *UN Convention against Transnational Organised Crime* (2000), as well as its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000), its *Protocol against the Smuggling of Migrants by Land, Sea and Air* (2000), and its *Protocol against the Illicit Manufacturing of and Trafficking*

European Union (EU) has even created the European area of freedom, security, and justice, endowing itself with police and judicial cooperation tools, as well as a specific criminal law competence in the field. In light of this, a discussion with professors and lawyers of criminal law and criminal procedure, held as part of the activities of the Jean Monnet Chair EUVALWEB, revealed that, because these two disciplines are primarily within the competence of the Member States, a number of issues arise in terms of effectiveness in the fight against transnational crimes at the international and European levels. This is because, while globalisation has altered how crime can and should be dealt with,³ traditional criminology has difficulty identifying legal definitions of common crimes. There is a lack of a broader concept of crime, which is hampered by application and procedural difficulties at the national level.⁴

There is also a terminological problem that concerns the same definition of transnational crime. The term was coined by the United Nations to describe certain criminal phenomena that cross international borders, violate the laws of several states, or have an impact on

in Firearms, Their Parts and Components and Ammunition (2001); *UN Convention Against Corruption* (2003). Regarding the regional framework, the efforts of the Council of Europe in the field led to: *Criminal Law Convention on Corruption* (ETS No. 173, 1999) and its *Additional Protocol to the Criminal Law Convention on Corruption* (ETS No. 191, 2003); *Civil Law Convention on Corruption* (ETS No. 174, 1999); *Convention on Action against Trafficking in Human Beings* (CETS No. 197, 2005); *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (CETS No. 198, 2005); *Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health* (CETS No. 211, 2011); *Convention against Trafficking in Human Organs* (CETS No. 216, 2015); *Convention on Offences Relating to Cultural Property* (CETS No. 221, 2017).

³ Globalisation establishes a very complex relationship with crime: negative and positive, as well as preventative. Negative relationship because it is globalisation itself that produces negative collateral consequences by encouraging the introduction and rapid growth in the number of crimes. Positive relationship because, simplistically, globalisation is also the „cure” because it has fostered to fight crime through cooperation and coordination of efforts between states. Preventative relationship, because globalization has emphasised the importance of prevention in the fight against transnational crime and adoption of preventive measures. In this sense, see E. C. Viano, *Globalization, Transnational Crime and State Power: The Need for a New Criminology*, in *Rivista di Criminologia, Vittimologia e Sicurezza*, Vol. 3–4, No. 3–1, 2009–2010, pp. 63–85. According to J. Wilson, *Transnational Crimes*, in A. Lautensach, S. Lautensach (eds.), *Human Security in World Affairs: Problems and Opportunities*, 2023, pp. 335–349, transnational crimes may be committed by individuals working alone but more often they involve organised groups or networks of individuals working in more than one country. Criminal organisations are taking advantage of the opportunities created by globalization — easier, faster and cheaper communication technologies, deregulated financial markets, and more open borders that allow increased flows of people and money.

⁴ See again the considerations of E. C. Viano, *op. cit.*, p. 79.

another country.⁵ It was a criminological term, with no claim to providing a juridical concept.⁶ Furthermore, it has been considered primarily a functional rather than normative descriptor with definitional problems: a generic concept covering a multiplicity of different kinds of criminal activity, including organised, corporate, professional, and political crime. The use of the adjective „transnational” is also discussed, because in fact not all transnational crime crosses State boundaries. What is relevant is the ripple effect these crimes can have on other States, thus generating the legitimate concern of international society to combat them on a common basis.⁷ Therefore, transnational crime has been deemed to describe conduct that has actual or potential cross-border effects of national and international concern. Such crimes must be differentiated from international crimes,⁸ which are recognised by and can therefore be prosecuted under international law and domestic crimes that fall under one national jurisdiction. This is true to the extent that, prior to the adoption of the Convention on Transnational Organised Crime, the UN had, without obtaining satisfactory and unequivocal answers, asked member states to list cases of transnational organised crime in their jurisdictions. Even in the drafting of the Convention, then, the perspective had prevailed to focus on the characteristics of the actors rather than those of the acts.⁹

With the adoption of the 2000 United Nations Convention against Transnational Organised Crime (UNTOC), as stated in the Foreword, „*the international community demonstrated the political will to answer a global challenge with a global response*”.¹⁰ The

⁵ In the 2002 Report of the UNODC, *Results of a pilot survey of forty selected organised criminal groups in sixteen countries*, www.unodc.org/pdf/crime/publications/Pilot_survey.pdf, it is possible to read that: „*The concept of transnational crime — essentially criminal activity that crossed national borders — was introduced in the 1990s. In 1995, the United Nations identified eighteen categories of transnational offences, whose inception, perpetration and/or direct or indirect effects involve more than one country*”. The offences listed included money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit arms trafficking, aircraft hijacking, sea piracy, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illicit drug, trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public or party officials.

⁶ G. O. W. Mueller, *Transnational crime: Definitions and Concepts*, in P. Williams, D. Vlassis (eds.), *Combating Transnational Crime. Concepts, Activities and Responses*, 2001, p. 13.

⁷ In this sense, see N. Boister, *Transnational Criminal Law?*, in *European Journal of International Law*, Vol. 14, No. 5, 2003, pp. 953–976.

⁸ See for all, M. C. Bassiouni (ed.), *International Criminal Law*, Vol. 1: Sources, Subjects and Contents, Ed. 3, 2008.

⁹ For a reconstruction of the drafting process, see D. Vlassis, *Drafting the United Nations Convention against Transnational Organised Crime*, in P. Williams, D. Vlassis (eds.), *Combating Transnational Organised Crime: Concepts, Activities and Responses*, London, 2001.

¹⁰ Insightful comments on the convention can be found, *ex multis*, in V. Musacchio, A. Di Tullio D’Elisiis, *Commentario breve alla Convenzione di Palermo*

Convention served as a novel instrument to tackle the worldwide issue of crime: the first attempt to compile all the ideas and strategies required to combat organised crime globally into a single, legally binding text. Transnational crime is becoming more widely acknowledged as a serious threat to human security in addition to posing a threat to state security. Both the concept of transnational offences and the reference to serious crimes are contained in this convention. The crimes to which the UN Convention is applicable are listed in its art. 3, para. 1. There is no closed list. Apart from the four distinct offences (affiliation with an organised criminal group, money laundering, corruption, and obstruction of justice) that State Parties must include in their national legislation, any other offences that meet the definition of „serious crimes” are encompassed under this regulation. Serious crimes are defined by art. 2, lett. b as those that carry a minimum sentence of four years in prison. Nonetheless, serious crimes covered by the UN Convention will only be considered if two requirements are met: they must be transnational in nature and involve the actions of an organised criminal group. Art. 3, para. 2 lists a number of situations in which the crime in question must be considered transnational; while this is the most evident instance of „transnationality”, it is not required for the crime to have been committed in more than one State. If the offence was primarily planned, directed, or controlled in another State, then all situations in which it is fully committed in one State are also covered. Even though all of the events leading up to a crime, including its commission, may have taken place in the same State, the crime may still be classified as transnational if it meets one of two criteria: either the organised crime group involved operates internationally, or the crime has a significant impact on another State.

In accordance with art. 36 of the UNTOC Convention, the European Community (EC) at the time was the first international

sulla criminalità organizzata, Padua, 2021; C. Rose, *The Creation of a Review Mechanism for the UN Convention Against Transnational Organised Crime and Its Protocols*, in *American Journal of International Law*, Vol. 114, No. 1, 2020, pp. 51–67; G. Polimeni, *The Notion of Organised Crime in the United Nations Convention against Transnational Organised Crime*, in S. Carnevale, S. Forlatti, O. Giolo (eds.), *Redefining Organised Crime. A Challenge for the European Union?*, Oxford-Portland, 2017, pp. 59–63; F. Balsamo, M. A. Accili, *Verso un nuovo ruolo della Convenzione di Palermo nel contrasto alla criminalità transnazionale. Dopo l'approvazione del Meccanismo di Riesame ad opera della Conferenza delle Parti*, in *Diritto penale contemporaneo*, No. 12, 2018, pp. 113–128; N. Boister, *The Cooperation Provisions of the UN Convention Against Transnational Organised Crime: A „Toolbox” Rarely Used?*, in *International Crime Law Review*, Vol. 16, No. 1, 2016, pp. 39–70; S. Redo, *The United Nations Criminal Justice System in the Suppression of Transnational Crime*, in N. Boister R. J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, 2015; D. McClean, *Transnational Organised Crime: A Commentary on the UN Convention and its Protocols*, Oxford, 2007.

organisation to sign it.¹¹ Combating organised crime was, in fact, one of the EU's top priorities in its endeavour to establish an area of freedom, security, and justice. This idea, which was introduced in the Amsterdam Treaty, is an attempt to address the growing belief that organised crime is proliferating throughout the EU with never-before-seen virulence. Nearly everywhere in the world, the rapid advancement of communication technologies and the globalisation of economies have resulted in a rise in activities linked to highly organised criminal groups. However, in the European Union, this phenomenon was posing a particularly serious problem due to the Single Market and the Schengen system, which had established a nearly borderless region. Despite the general understanding of the urgent need to address these new challenges of crime, only the Treaty of Lisbon's implementation signalled a turning point. After a protracted and laborious process, this Treaty on the reform of the European Union provided significant, albeit incomplete, answers for the formalisation of the Union's criminal competence in the areas of particularly serious crime with a cross-border dimension, raising a number of concerns that will be addressed in the conclusions of the current work.

2. The Achievement of European Criminal Competence Through the Court of Justice's Case-Law

It would be incorrect to view the EU's criminal competence as a Lisbon Treaty-era accomplishment. Quite the contrary; it started to take shape at the close of the 20th century when the Court of Justice acknowledged that community obligations to incriminate date back to broad principles of Union law, both written and unwritten.¹² In

¹¹ See the Working Paper, *The European Union and the United Nations Convention against Transnational Organised Crime*, Civil Liberties Series, of September 2001, LIBE 116.

¹² See Court of Justice of the European Communities, Judgment of 21 September 1989, Case C-68/88, *Commission v. Greece (Greek Maize)*. In particular, Court of Justice of the European Union, Judgment of 8 July 1999, Case C-186/98 *Nunes and de Matos*, paras. 12–14 and Court of Justice of the European Communities, Judgment of 2 February 1977, Case 50/76, *Amsterdam Bulb*, paras. 32–33, where the Court first stated that that Member States have an obligation to cooperate loyally in criminal matters according to principles of efficient and equal cooperation. Subsequently, the Court of Justice of the European Union, Judgment of 13 September 2005, Case C-176/03, *Commission v. Council*, paras. 47–48, it admitted that criminal law and criminal procedure are not within the scope of Community competence. But, however, this does not prevent the then EC legislature from taking measures in relation to the criminal law of the Member States, if the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities are essential measures to combat serious crimes (with respect to the case at issue serious „environmental” crimes), when it is required that the rules which it lays down on protection are fully effective. Hence, „*The Court conferred express criminal competence upon the Community with this judgment. Striking points within this*

fact, it is possible to distinguish different stages of this competence in the EU integration process. During the first phase of negative integration, the Court of Justice frequently ordered national judges to disregard substantive criminal law rules that were deemed incompatible with Union law. This is done to prevent the single market's fundamental freedoms or other European policies' goals from being hampered, which has resulted in the legislatures of Member States repealing the offending rules, for example on gaming and betting.¹³ Even on migration, the Court has occasionally evaluated whether the scope or type of an afflictive measure imposed by State law was consistent with the principles of equality and proportionality.¹⁴

The second stage of integration was positive since states must take all necessary measures, some of which may even be criminal in nature, to guarantee the efficacy of EU law. From a reverse „positive” standpoint, the Court of Justice confirmed that Member States must take all necessary steps to ensure the effective implementation of European rules, such as imposing penalties that are „effective, appropriate to the gravity of the offence and dissuasive”, as a peculiar declination of the principle of loyal cooperation. This competence was reaffirmed in 2005 when case law once again recognised the legitimacy of criminal harmonisation directives in specific cases pertaining to matters falling under the purview of the Union's first pillar, even before the Lisbon Treaty came into effect. Specifically, Directive 2008/99/EC¹⁵

judgment are the effectiveness of Community law and the achievement of Community aim's” from the standpoint of B. Yakut, Post-Lisbon Criminal Law Competency of the European Union, in Marmara Journal of European Studies, Vol. 17, Nos. 1–2, 2009, p. 15. Cfr. N. Neagu, Entrapment Between Two Pillars: The European Court of justice Rulings in Criminal Law, in European Law Journal, Vol. 15, No. 4, 2009, pp. 536–551. See for discussions, M. J. Borgers, T. Kooijmans, The Scope of the Community's Competence in the Field of Criminal Law, in European Journal of Crime, Criminal Law and Criminal Justice, Vol. 16, No. 4, 2008, pp. 379–397; S. Peers, EU Justice and Home Affairs Law, Oxford, 2007, pp. 389–427; F. Angelini, Ordine pubblico e integrazione costituzionale europea. I principi fondamentali nelle relazioni interordinamentali, Padova, 2007; V. Mitsilegas, Constitutional Principles of the European Community and European Criminal Law, in European Journal of Law Reform, Vol. 8, Nos. 2–3, 2006, pp. 301–324.

¹³ Court of Justice of the European Union, Judgment of 6 March 2007, Joined Cases C-338/04, C-359/04 and C-360/04, *Placanica and Others*, in which it was found that the imposition of a prior police authorisation, whose absence would entail the materialisation of the offence of abusive exercise of gaming or betting activities, was considered incompatible with the rules of the single market as it was liable to unduly restrict the freedom of establishment.

¹⁴ Court of Justice of the European Union, Judgment of 19 January 1999, Case C-348/96, *Calfa*; Court of Justice of the European Union, Judgment of 30 April 1998, Case C-24/97, *Commission v. Germany*; Court of Justice of the European Communities, Judgment of 3 July 1980, Case 157/79, *Pieck*.

¹⁵ Directive 2008/99/EC of the European Parliament and of the Council, on the protection of the environment through criminal law, of 19 November 2008, in OJ L 328, of 6 December 2008. See, R. M. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden, 2015.

requires Member States to include criminal sanctions in their national legislation for serious violations of Community law's environmental protection provisions, or Directive 2009/52/EC¹⁶ of the European Parliament and of the Council, which sets minimum standards for sanctions and measures against employers of third-country nationals staying illegally.

Although the Union did not yet have criminal competence, in these phases the possibility that the European Community could bind States to the introduction of criminal sanctions or norms that implicate them gave rise to a debate. The same Court stated that, while the *ius puniendi* falls under the exclusive jurisdiction of national authorities, it was also possible that obligations originating from the European Community could activate this sovereign power.¹⁷ In addition, the famous landmark Court ruling in the *Greek Maize Case* from the late 1980s formulated Member States' obligations to protect the Community's financial interests, including using criminal law. The principle of effective and equivalent protection for the protection of the Union budget was established by this ruling, and the Directive on the fight against fraud to the Union's financial interests by means of criminal law (also known as the „PIF Directive")¹⁸ still uses language from that judgement, such as that on „effective, proportionate and dissuasive” sanctions. Therefore, as frequently occurs in the development of EU law, the European Court of Justice's jurisprudence may have provided the true catalyst for changes to EU competences even earlier.

3. *The Path to the Introduction of a Formal Legal Basis*

However, establishing a legal basis explicitly dedicated to the Union's criminal competence required a lengthy and laborious process.¹⁹

¹⁶ Directive 2009/52/EC of the European Parliament and of the Council, *providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, of 18 June 2009, in OJ L 168, of 30 June 2009. See K. Ambos, P. Rackow (eds.), *The Cambridge Companion to European Criminal Law*, Cambridge, 2023.

¹⁷ Court of Justice of the European Union, Judgment of 28 January 1999, Case C-77/97, *Unilever*; Court of Justice, *Amsterdam Bulb*, cit.; Court of Justice, *Commission v. Greece (Greek Maize)*, cit.

¹⁸ Directive (EU) 2017/1371 of the European Parliament and of the Council, *on the fight against fraud to the Union's financial interests by means of criminal law*, of 5 July 2017, in OJ L 198, of 28 July 2017.

¹⁹ As discussed by many scholars, among them J. Oberg, *Union Regulatory Criminal Law Competence after Lisbon*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, No. 3, 2011, pp. 289–318; E. Baker, *Governing through Crime: The Case of the European Union*, in *European Journal of Criminology*, Vol. 7, No. 3, 2010, pp. 187–213; F. Calderoni, *Organised Crime Legislation in the European Union. Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organised Crime*, Heidelberg, 2010, p. 27 ff.; A. Weyembergh, V.

The Treaty establishing the European Economic Community of 1957, did not include any rules in the area of judicial cooperation. The development of the Union's competences in the field of criminal law dates to the 1990 Convention implementing the 1985 Schengen Agreement²⁰ which was outside the community system. Then, because the terms „*political cooperation*” and „*European Union*” were employed for the first time, the Single European Act represented the first embryo of political unity between the twelve Member States at the time. A „*Political Declaration of the Governments of the Member States*” concerning the free movement of persons²¹ contained an early (though very vague) indication of potential police and criminal cooperation. They also cooperated in the fight against terrorism, crime, drugs, and the trafficking of antiques and works of art. To avoid any misunderstanding about the „non-existent” cession of sovereignty, it was specifically stated in the subsequent Declaration „*on Articles 13 to 19 of the Single European Act*” that „*Nothing in these provisions shall affect the right of Member States to take such measures as they deem necessary to control immigration from third countries and to combat terrorism, crime, drug trafficking, and trafficking in works of art and antiquities*”. Furthermore, these mechanisms were devoid of any implementing instruments.

Then, legal cooperation in criminal matters obtained a new institutional place within the formal framework of the EU with the implementation of the Treaty of Maastricht, which established the European Union, in the so-called „third pillar”. The EU Member States formally recognised judicial cooperation in criminal matters as a matter of common interest (art. K, para. 1, sub-para. 7). This did not, however, change the fundamental aspect of the intergovernmental nature of decision-making concerning cooperation in criminal matters. Both the requirement of unanimity and the Member States' sole authority to take the lead in creating third-pillar legal instruments

Santamaria (eds.), *The Evaluation of European Criminal Law*, Brussels, 2009; V. Mitsilegas, *The Competence Question: The European Community and Criminal Law*, in E. Guild, F. Geyer (eds.), *Security Versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot, 2008, p. 153 ff.; S. White, *Harmonization of Criminal Law under the First Pillar*, in *European Law Review*, Vol. 31, No. 1, 2006, pp. 81–92; V. Mitsilegas, *Defining Organised Crime in the European Union: The Limits of European Criminal Law in an Area of „Freedom, Security and Justice”*, in *European Law Review*, Vol. 26, 2001, pp. 565–581; J. W. Bridge, *The European Communities and the Criminal Law*, in *Criminal Law Review*, 1976, pp. 88–97.

²⁰ The abolition of internal border controls required greater cooperation between national police, customs and judicial authorities concerned with the Union's external borders, on issues such as terrorism, organised crime, immigration and asylum, as set out in the „Schengen *acquis*”.

²¹ The Declaration reads as follows: „*In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of third-country nationals*”.

in this area were preserved. Although Title VI of the Treaty on European Union contained provisions on cooperation in the fields of justice and home affairs (JHA), the Treaty did not specifically address the competence of harmonising criminal law. However, this did not stop the Union from enacting a number of international legal conventions (most notably, on the protection of the Union's financial interests), whose obvious goal was to specify the elements of specific criminal offences and the appropriate penalties for them.²²

Subsequently, JHA components were included in the Community legal framework proper (i. e., the first pillar) by the 1997 Treaty of Amsterdam. This gave the European Commission the authority to suggest laws and policies regarding borders, immigration, asylum, visas, and civil court cooperation. The EC Treaty's Title IV, concerning „*Visas, asylum, immigration, and other policies related to free movement of persons*”, was then invoked to address those issues. Conversely, cooperation between the police and courts in criminal cases was still governed by intergovernmental decision-making and fell under the third pillar. Nonetheless, the Amsterdam Treaty established a new goal for the EU: „*an Area of Freedom, Security, and Justice*” through the adoption of a new legal tool known as a „*Framework Decision*” that reflected the paradigm shift to bring Member States' laws and regulations closer together. While leaving the choice of form and methodology to the national authorities, framework decisions would bind Member States with regard to the intended outcome. They had no immediate effect, but were acts of Union law, even though criminal law remained restricted to intergovernmental cooperation under what was then the third pillar of the Union (rather than the Community method).²³ Nevertheless, the Amsterdam Treaty clearly recognised the Union's authority to harmonise criminal law for the first time by adding new provisions specifically addressing the matter (art. K. 6, para. 2, lett. b).²⁴

²² See for example, Council Act, *drawing up the Convention on the protection of the European Communities' financial interests*, of 26 July 1995, in OJ C 316, of 27 November 1995, broadly known as the „PIF Convention”. The Convention is assisted by two protocols: the Council Act, *drawing up a Protocol to the Convention on the protection of the European Communities' financial interests*, of 27 September 1996, in OJ C 313, of 23 October 1996; Council Act, *drawing up, on the basis of Article K. 3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests*, of 29 November 1996, in OJ C 151, of 20 May 1997.

²³ In the following years, the Council adopted a large number of framework decisions in the area of criminal law and cooperation, see *infra* note 36.

²⁴ See, among others, M. Zbinden, *Les institutions et les procédures de prise de décision de l'Union européenne après Amsterdam*, Bern, 2002; S. Peers, *Justice and Home Affairs: Decision-Making after Amsterdam*, in *European Law Review*, No. 2, 2000, pp. 183–191; P. Magrini, *L'evoluzione delle politiche europee nel settore della giustizia e degli affari interni: da Schengen a Tampere via Amsterdam*, in *Diritto pubblico comparato ed europeo*, No. 4, 2000, pp. 1817–1828; D. O'Keefe,

Later, „*closer cooperation between judicial and other competent authorities of the Member States*” was emphasised in the Treaty of Nice. The changes include „*enhanced cooperation*” in areas referred to in Title VI of the Treaty on European Union (art. 40–40b TEU), extension of the co-decision procedure to areas such as illegal immigration and short-term visa policy as well as immigration and asylum, and cooperation through Eurojust (art. 31 TEU).²⁵ The changes aimed to enable the European Union to develop into an area of freedom, security, and justice more quickly. In addition, the Nice European Council officially „proclaimed” the Charter of Fundamental Rights in December 2000. The right to liberty and security (art. 6), the right to asylum (art. 18), protection from removal, expulsion, or extradition (art. 19), non-discrimination (art. 21), and Title VI on justice are just a few of the topics that are covered by the 54-article Charter and are pertinent to justice and home affairs. As is well known, the Treaty of Lisbon, which came into effect on December 1, 2009, gave the Charter the same legal standing as the Treaties (see art. 6 TEU). As one of the elements of a space of freedom, security, and justice, the Lisbon Treaty also established the European Criminal competence, which is finally covered in Chapter 4 regarding the „*Judicial Cooperation in Criminal Matters*”.

4. *The Treaty of Lisbon and the Indirect Criminal Competence*

As a result, the Lisbon Treaty is a watershed moment because it abolishes the division of the pillars and unites the entire area of freedom, security, and justice in Title V of the Treaty on the Functioning of the European Union (TFEU). Furthermore, it enshrines the core of EU criminal competence in art. 83, para. 1 TFEU, on the basis of which the European Parliament and Council may establish „*minimum rules*” concerning criminal offences and penalties in the field of serious cross-border crime, with the directive replacing the instrument of the framework decision. While this European criminal competence remains indirect, it now obligates Member States to implement the provisions in which it is expressed, with the threat of

P. Twomey (eds.), *Legal Issues after the Treaty of Amsterdam*, London, 1999; J. Monar, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, in *European Law Review*, Vol. 23, No. 4, 1998, pp. 320–335; G. Soulier, *Le Traité d'Amsterdam et la coopération policière et judiciaire en matière pénale*, in *Revue de science criminelle et de droit pénal comparé*, No. 2, 1998, pp. 237–254.

²⁵ The European Judicial Co-operation Unit, or Eurojust, was established in accordance with Council Decision 2002/187/JHA, *setting up Eurojust with a view to reinforcing the fight against serious crime*, of 28 February 2002, in OJ L 63, of 6 March 2002, which followed the Nice amendments to Title VI of the EU Treaty.

an action for failure to fulfil obligations and a Court of Justice sentence. The majority of substantive criminal law framework decisions have now been repealed by directives based on art. 83, para. 1 TFEU.²⁶

The recognition of the absolute necessity of combating transnational crime in the European sphere, first and foremost through substantive law texts capable of ensuring sufficiently homogeneous areas of criminal unlawfulness and punitive treatment in the various Member States, has resulted in the conferral of an autonomous character on the Union's criminal competence under consideration here. A competence that legitimises itself by combating the most insidious manifestations of the crime at hand. The aforementioned EU criminal competence has acquired a marked functionalist autonomy, in that it no longer primarily serves the needs of coordination between the authorities responsible for combating crime (whereas, on the contrary, such needs were the basis of third-pillar criminal competence under arts. 29 and 31 TEU until 2009).²⁷ Of course, this autonomous development of European criminal competence does not deny the long-known virtuous synergies between criminal harmonisation and judicial cooperation; rather, it expresses the desire to give

²⁶ Under art. 83, para. 1 TFEU, by repealing previously existent framework decisions, the following legislative acts have been adopted at the EU level: Directive 2019/713 of the European Parliament and the Council, *on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA*, of 17 April 2019, in OJ L 123, of 10 May 2019; Directive (EU) 2017/2103 of the European Parliament and of the Council, *amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of „drug” and repealing Council Decision 2005/387/JHA*, of 15 November 2017, in OJ L 305, of 21 November 2017; Directive (EU) 2017/541 of the European Parliament and of the Council, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, of 15 March 2017, in OJ L 88, of 31 March 2017; Directive 2014/62/EU of the European Parliament and of the Council, *on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA*, of 15 May 2014, in OJ L 151, of 21 May 2014; Directive 2013/40/EU of the European Parliament and of the Council, *on attacks against information systems and replacing Council Framework Decision 2005/222/JHA*, of 12 August 2013, in OJ L 218, of 14 August 2013; Directive 2011/92/EU of the European Parliament and of the Council, *on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*, of 13 December 2011, in OJ L 335, of 17 December 2011; Directive 2011/36/EU of the European Parliament and of the Council, *on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, of 5 April 2011, OJ L 101, of 15 April 2011.

²⁷ In this sense, see A. Bernardi, *La competenza penale accessoria dell'Unione Europea: problemi e prospettive*, in *Diritto Penale Contemporaneo*, No. 1, 2012, p. 44. See also R. Sicurella, *Il diritto penale europeo dopo Lisbona. Dall' „osimoro polisenso” al diritto penale di un sistema di ordinamenti integrati. Ancora a metà del guado*, in *Archivio Penale*, 2021, No. 1, <https://archiviopenale.it/File/DownloadArticolo?codice=6ccd8889-ad15-40e4-8f29-6f3f1d0db-c60&idarticolo=27098>.

the new European rules aimed at combating the most serious forms of cross-border crime additional purposes, sometimes with symbolic implications. In fact, it is primarily through these rules that a common sense of justice is established, an ideal of retributive fairness aimed at affirming the substantial equality of Union citizens in their dual capacities as perpetrators and passive subjects. Furthermore, it is through the criminal laws under consideration that a „feeling of belonging to Europe as a political, legal, and cultural whole” is affirmed, expressive of homogeneous values and aimed at firmly striking at those behaviours that, by their inherent seriousness, overshadow its image as an „entity of law”.²⁸

While Art. 29 of the Treaty of Maastricht established a core set of offences (which were not always clearly defined), Art. 83 TFEU addresses minimum standards for serious cross-border crime known as „Euro-crimes”, which include terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of payment instruments, computer crime, and organised crime. „*Serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis*”, it stated. Furthermore, in para. 2 of art. 83 TFEU, the so-called „accessory indirect criminal law competence” was introduced, which states that where the approximation of criminal laws and regulations of the Member States proves essential to ensuring the effective implementation of a Union policy in an area that has been subject to harmonisation measures, minimum rules concerning the definition of criminal offences and sanctions in the area concerned may be laid down by means of directives.²⁹ This rule is more complicated because the competencies are not identified for specific sectors but must be exercised in areas that have already been subject to harmonisation measures, a condition that does not appear to adequately fulfil the Union’s delimiting function of criminal law intervention. The requirement of „essential” becomes important at this point: the latter, by subordinating the judgement of necessity of criminal intervention to the „*effective implementation of a Union policy*”, as variously interpreted, opens the way for some to „*possible extensive attitudes to the detriment of subsidiarity and extreme ratio of criminal intervention*”.³⁰

Furthermore, under art. 83, para. 1, sub-para. 3 TFEU, based on criminal trends, the Council may issue a decision identifying additional areas of serious crimes, acting unanimously after receiving approval from the European Parliament, as it has done recently in

²⁸ *Ibidem.*

²⁹ This ancillary or annex competence developed by the case law in the area of environmental crime and ship-source pollution has been now expressly codified in art. 83, para. 2 TFEU.

³⁰ In this sense, see A. Bernardi, *op. cit.*

the case of violations of EU sanctions. The European Union has imposed sanctions on third-country, entities, and legal and natural persons, such as arms embargoes, import and export bans, the freezing of funds and economic resources, and travel bans. While the adoption of EU sanctions is centralised at the EU level, Member States are responsible for their implementation and enforcement. Significant differences between national systems, particularly in terms of offences and penalties for violations of EU sanctions, are thought to undermine their efficacy and the credibility of the EU. As a result, the Council decided to classify violations of Union restrictive measures as a type of crime that meets the requirements of art. 83, para. 1 TFEU.³¹ Following the Council's decision to include violations of EU sanctions among the areas of „*particularly serious crime with a cross-border dimension*”, the European Commission issued a proposal for a directive in December 2022, aiming to approximate the definition of criminal offences and sanctions for violating Union restrictive measures.³² To summarise, „European criminal policy” now necessitates not only the expansion of domestic incriminatory offences or the introduction of new ones, but also, as anticipated in the 2011 Commission Communication,³³ the effective implementation of EU policies through criminal law.

5. *Some Conclusive Remarks*

The evolution of the Union's criminal competence in the fight against transnational crime allows for some critical reflections in the conclusions. While the advancement of European integration has created new opportunities for illegal activities of various kinds, there has also been a push in the opposite direction in terms of accelerating the integration process in the specific area of crime fighting. As a result, the role of criminal law within European institutions has changed dramatically over the years, becoming a topic of widespread interest. The EU's ambition to create an integrated common judicial area is predicated on the cooperation of law-enforcement authorities and a high degree of convergence in criminal law and procedure. The Lisbon Treaty has broadened the legal basis because the criminal justice cooperation is an important component of

³¹ Council Decision (EU) 2022/2332, *on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in art. 83, para. 1 TFEU*, of 28 November 2022, in OJ L 308, of 29 November 2022.

³² Proposal for a directive of the European Parliament and of the Council, *on the definition of criminal offences and penalties for the violation of Union restrictive measures*, of 2 December 2022, COM/2022/684 final, 2022/0398(COD).

³³ Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, COM/2011/0573 Final.

European integration and serves to promote respect for fundamental rights, based on the principle of mutual recognition of judgements and judicial decisions, including, if necessary, harmonisation of the Member States' laws and regulations in this area.

The mutual recognition of judicial decisions model was advanced by the political impulses provided by the European Council in Cardiff in 1998 and Tampere the following year on the basis of another key principle of European construction, namely mutual trust.³⁴ According to EU Court of Justice practice, there is a necessary implication that Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even if the outcome would be different if its own national law were applied.³⁵ This because judicial cooperation in criminal matters, but also in the entire area of freedom, security, and justice, is based on a relationship between Member States, between national judicial authorities and enforcement authorities, based on the commonality of fundamental values that constitute mutual trust and refer not only to the values of art. 2 TEU, but also, pursuant to art. 67, para. 1 TFEU, to respect for fundamental rights, as well as the different legal systems and traditions of the Member States. As a result, common minimum standards are required for one EU country's judicial decisions to be recognised by the others. The EU worked to protect the fundamental rights of suspects and

³⁴ The concept of mutual trust was expanded upon in the 2001 *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters*, in OJ C 12, of 15 January 2001, which stated: „*The implementation of the principle of mutual recognition of decisions in criminal matters presupposes mutual trust of the Member States in each other's criminal justice systems. This trust is based in particular on the common ground of their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law*”. There is an obvious differentiation that results from the 2005 *Hague Programme: strengthening freedom, security and justice in the European Union*, in OJ C 53, of 3 March 2005, where one part is defined as „*confidence-building and mutual trust*”, even more so in the 2010 *Stockholm Programme — An open and secure Europe serving and protecting citizens*, in OJ C 115, of 4 May 2010, where there is a broad articulation distinguishing the two concepts.

³⁵ Court of Justice of the European Union, Judgment of 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügger*; also, with respect to the application of the European Arrest Warrant, see Court of Justice of the European Union, Judgment of 29 January 2013, Case C-396/11, *Radu* and Court of Justice of the European Union, Judgment of 28 June 2012, Case C-192/12 PPU, *Melvin West*. According to S. Montaldo, *I limiti della cooperazione in materia penale nell'unione europea*, Naples, 2015, p. 368, the required trust is divided into two levels: trust in the counterpart authority's work and the information that may be transmitted; and trust in the foreign criminal justice system as a whole, including the adequacy of the procedural institutions that characterise it, the suitability of the penalties, and the ability to protect fundamental rights to a satisfactory degree.

accused persons.³⁶ When designing and implementing criminal law, the EU must strike the right balance between measures that protect the rights of suspects and accused, on the one hand, and measures that facilitate the investigation and prosecution of crime, on the other.

The Court of Justice continues to provide guidance on when this mutual trust breaks down, as in the case of the extension of the optional ground of non-execution of the European Arrest Warrant.³⁷ However, as stated, „[a] *more holistic vision of what EU criminal justice should encompass is also one which clearly defines what it should not. It must naturally be strongly guided by the principle of subsidiarity. Nevertheless, some concept of the EU as a community and its citizens as equal stakeholders in certain interests would contribute to a more positive and comprehensive means of defining the legitimate subject-matter, and bounds, of any EU criminal justice area. Such a definition is the necessary first step to forging any such area*”.³⁸ Conversely, the high level of fragmentation in the European legal framework risks affecting legal certainty and eventually leading to contradictory

³⁶ Directive (EU) 2016/1919 of the European Parliament and of the Council, *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings*, of 26 October 2016, in OJ L 297, of 4 November 2016; Directive (EU) 2016/800 of the European Parliament and of the Council, *on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, of 11 May 2016, in OJ L 132, of 21 May 2016; Directive (EU) 2016/680 of the European Parliament and of the Council, *on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*, of 27 April 2016, in OJ L 119, of 4 May 2016; Directive (EU) 2016/343 of the European Parliament and of the Council, *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, of 9 March 2016, in OJ L 65, of 11 March 2016; Directive 2013/48/EU of the European Parliament and of the Council, *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, of 22 October 2013, in OJ L 294, 6. November 2013.; Directive 2012/13/EU of the European Parliament and of the Council, *on the right to information in criminal proceedings*, of 22 May 2012, in OJ L 142, of 1 June 2012; Directive 2010/64/EU of the European Parliament and of the Council, *on the right to interpretation and translation in criminal proceedings*, of 20 October 2010, in OJ L 280, of 26 October 2010.

³⁷ See the case of a real risk of inhuman or degrading treatment for detention conditions in the Court of Justice (Grand Chamber), 5 April 2016, *Aranyosi and Căldăraru* (C-659/15 PPU), Joined Cases C-404/15 and C-659/15 PPU and in the Court of Justice (Grand Chamber), 15 October 2019, *Dorobantu*, C-128/18.

³⁸ M. L. Wade, *Developing a Criminal Justice Area in the European Union*, 2014, p. 53, the study was conducted on behalf of the Directorate General for internal policies policy, Department C: citizens' rights and constitutional affairs, [www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493043/IPOL-LIBE_ET\(2014\)493043_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493043/IPOL-LIBE_ET(2014)493043_EN.pdf).

outcomes, playing right into the hands of the very organised criminal groups it was designed to combat.³⁹ Finally, cooperation between the EU and the acceding countries in the fields of justice and home affairs is critical to the enlargement process. Its goal is to assist countries in meeting the political criteria set by the Copenhagen European Council (institutional stability, rule of law, and respect for human rights),⁴⁰ which is made more difficult when some Member States face multiple implementation challenges. Furthermore, given Ukraine's status as a candidate country for accession, the war in Ukraine raises new concerns about the enlargement of the European Union and its area of freedom, security, and justice.

³⁹ According to L. Picotti, *Sui tre volti del diritto penale comunitario: passato e future*, in C. Grandi (ed.), *I volti attuali del diritto penale europeo. Atti della giornata di studi per Alessandro Bernardi*, Pisa, 2021, p. 124: „starting from the identification and graduation of ‘European’ or ‘Europeanised’ legal goods deserving of common criminal protection, from the requirements of ‘European’ offensiveness that make it necessary to exercise the Union’s criminal jurisdiction in compliance with the principle of criminal, as well as European, subsidiarity, as well as of the principle of proportionality of penalties and of the other possible ‘punitive’ sanctions (including against entities), with respect to the different offences to the different legal goods, according to an overall coherent framework, which overcomes the sectoral fragmentation that still characterises much of the Union’s criminal policy”. See also V. Mongillo, *Strengths and Weaknesses of the Proposal for a EU Directive on Combating Corruption*, in *Sistema Penale*, No. 7, 2023, p. 19.

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on the EU Strategy to tackle Organised Crime 2021–2025*, of 14 April 2021, COM(2021) 170 final, para. 1.3: „It is essential to step up international cooperation including through the activities of the relevant justice and home affairs agencies, in particular in relation to the neighbourhood and enlargement countries” and „to equip partners with the tools allowing them to root out complex criminal structures potentially affecting the EU”.

Criminalistics and Criminal Justice Aspects of Proving and Solving Criminal Offences

Summary: 1. Transnational Organised Crime (TOC). — 2. Is Organised Crime the Same as Mafia? — 3. What is Organised Crime? — 4. Classic Areas of TOC. — 5. Relevant Offence Fields and Legal Foundations. — 6. Ethnic Organised Crime Groups and Their Offence Fields. — 7. Conclusions.

1. *Transnational Organised Crime (TOC)*

Organised forms of crime are to be found in nearly all countries around the world, and from the criminals' point of view, they are extremely lucrative industries with an estimated turnover of about one trillion US dollars annually. According to the economic reports from 2012, the southern Italian syndicates alone generated sales of approximately 140 billion euros and that despite the negative effects of economic and financial crises¹. The organised crime (OC) groups and individual criminals operating in the EU are highly diverse. They range from large 'traditional' OC groups to smaller groups and loose networks supported by individual criminals, who are hired and collaborate on an *ad hoc* basis. Approximately more than 5,000 OC groups operating on an international level are currently under investigation in the EU². This figure does not necessarily reflect an overall increase in TOC activities in the EU compared to 2013, when Europol reported on the activities of 3,600 internationally operating OC groups in the EU. This increase is primarily a reflection of a much-improved intelligence picture. The increase also points to the emergence of smaller criminal networks, especially in criminal markets that are highly dependent on the Internet as part of their *modi operandi* or business model. Overall, the number of TOC groups operating internationally highlights the substantial scope and potential impact of serious and organised crime on the EU.

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¹ R. Wirtschaft, *Organisierte Kriminalität boomt — Mafia is the largest bank in Italy*, 2012, <http://www.n-tv.de/wirtschaft/Mafia-ist-groesste-Bank-Italiens-article5179561.html>.

² Europol, *EU Serious and Organised Crime Threat Assessment — Crime in the age of technology*, 2017, p. 14.

The progressing globalisation of economic and financial systems, rapid developments in communications and cyberspace³, as well as the dynamic political and economic integration processes in Europe, accompanied by a multitude of crises and the greatest wave of irregular migration since the Second World War, will inevitably affect the interior and exterior security situation. No other profession has such a good international network of organised structures in the area of cross-border criminality. In addition to the global systems of economy and finance, another field has developed, namely organised forms of crime. These organisms sometimes have more economic power than a state that has to abide by such structures reluctantly, which is at least a natural defensive attitude of the normal population. The countries of origin of organised forms of crime are usually characterised by a weak political system and very often coupled with an inadequately developed and functioning legal system in which the rule of law is only partially implemented or not at all.

As a result, legal, social and society norms are pushed back and replaced by violence and the right of the strongest, coupled with an unrestrained pursuit of profit and power. Crime structures adapt almost without any problems to the economic and social framework conditions of the respective country. The combined absence of rule of law and non-enforcement of monopoly of power by a state, together with the ability of criminal groups to completely isolate themselves from society, provide the perfect breeding ground for infiltration into a society and thus guarantee the success of their criminal actions⁴. These developments initially have a local origin and can develop rapidly in the country and then in a cross-border context. For this reason, it can be unequivocally ascertained that organised forms of crime appear not only in the national context but are also operating predominantly across borders⁵. On the one hand, the steady increase in cross-border passenger and freight traffic allows only selective controls. On

³ R. Lackes, M. Siepermann, *Cyberspace*, in *Gabler Wirtschaftlexikon*, 2014, online on Internet: „Cyberspace (also called virtual space) is a non-real world that can only be used by a computer. In the real sense Cyberspace refers to a computer-generated three-dimensional world, also called Virtual Reality”, <http://wirtschaftslexikon.gabler.de/Archiv/75127/cyberspace-v9.html>.

⁴ G. Emperor, *Kriminologie*. „In order to record the organised crime, the Federal Criminal Police Office has developed a comprehensive system of indicators, which clearly highlights the description elements of the planning, preparation and implementation of the criminal acts as well as the exploitation of the prey. The following indicators point to the forms of organised crime: [...] a long-term consolidation of a plurality of persons as a profit-oriented solidarity of interests, with a high degree of exchangeability of their members and systematic foreclosure to the outside [...]”, 1996, p. 410. H. D. Schwind, *Kriminologie: Eine praxisorientierte Einführung mit Beispielen*, „the total foreclosure to the outside (silence against law enforcement authorities)”, 2010, p. 624.

⁵ M. Soiné, *Strukturen der Organisierten Kriminalität in Europa — aus der Sicht des Bundesnachrichtendienstes*, in G. Gehl (ed.), *Europa im Griff der organisierten Kriminalität?*, 2006, p. 9.

the other hand, the elimination of stationary border controls within the *Schengen* area promotes these developments and minimises the risk of discovery. Corresponding numbers of cases within the continually increasing cross-border passenger and goods transport system are documented in the *Eurostat* passenger transport statistics⁶.

Much faster than most states with their law enforcement and investigative authorities, these criminal structures are able to take advantage of the speed at which the international market operates and all kinds of technical advances in state-of-the-art communication technologies. These criminal groups often form complex business-oriented alliances and linkages, strengthened by agreements that serve to influence the decision-making processes in politics, society and the economy in a transnational manner. Other significant characteristics of these criminal structures are their fundamental rejection of state monopolies, intimidation and scaremongering of dissenters, as well as a hierarchical system coupled with the conditioned behaviour of the members, based on their own code of conduct with the possibility of sanctioning in cases of non-compliance. In its entirety, three recurring causes are observed: poverty, regulation⁷ and greed⁸.

„*We want to be tough on crime, but equally tough on its causes*“⁹, according to Blair¹⁰, it would certainly be possible to find ways of relieving and developing positive changes in order to combat poverty and normative constraints. However, the endeavour to change the characteristic trait of greed is a whole different concept and one that is far more difficult to achieve.

The detection and investigation, structural analysis and consequent combating of transnational OC groups present huge challenges for national law enforcement agencies and intelligence services, which ideally should cooperate closely. This phenomenon must be combated by all available means according to the rule of law, in order to continue to guarantee the free democratic constitution in Germany and the democracies of the other EU member states¹¹.

⁶ Eurostat, Passenger transport statistics provide information on a range of passenger transport modes, such as road, rail, air and maritime transport, 2016, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Passenger_transport_statistics&oldid=317881.

⁷ In this case, regulation should be understood as an instrument for overseeing and at the same time suppressing the society by means of normative constraints.

⁸ D. Southwell, *Die Geschichte des Organisierten Verbrechens*, 2007, p. 9.

⁹ *Ibid.*

¹⁰ T. Blair, *Leader's speech*, in *British Political Speech*, 1995, <http://www.britishpoliticalspeech.org/speech-archive.htm?speech=201>.

¹¹ E. Thurich, *Pocket politik. Demokratie in Deutschland*, 2011. P. Thielböcker, *Free and Democratic Order — the designation for the highest fundamental values of democracy in Germany*, 2011, „the Constitution uses twice the concept of a free and democratic order [Art. 18, Art. 21 (2) GG]. This refers to the democratic order in Germany in which democratic principles [Art. 20 GG] and supreme basic values, which are inviolable. Above all, the dignity of the individual person [Art. 1 GG]. In German democracy freedom

2. Is organised crime the same as Mafia?

Organised forms of crime are often equated with the expression *Mafia*; but this is inappropriate. The colloquially manifested concept of *Mafia* cannot be equated with organised crime and is not correct in this respect, since organised crime is, from a holistic viewpoint, a heterogeneous and not a monolithic structure¹². Rather, the respective organised crime groups have resulted independently in different countries with their respective forms of governance, in different epochs, cultures and structures with different names and traditions¹³. However, no other coalition of an organised crime group is more famous than that of the Italian *Mafia*, although this term does not exist in a real sense¹⁴. Technically speaking, *Mafia* stands for the emergence of criminal groups in Sicily, which continue to commit serious crimes in organised forms and procedures. However, in order to understand the origins of the *Mafia*, one must know and understand the cultural, sociological and political developments of Sicily¹⁵. A possible historical explanation can be derived from the long-standing foreign domination by the dynasty of the Bourbons, according to which nationalist groups in the south of Italy wrote the saying: „*M. a. F. l. a. — Morte alla Francia, Italia anela!*” (The death of France is longing for Italy)¹⁶, or comparatively „*M. a. F. l. a. — Morte Ai Francesi, Invasori*,

and equality prevail over the law. A dictatorship is excluded. In regular general elections, the people themselves determine who should rule it. It has the choice between competing parties. Those who receive the majority of electors will then be governed — but only for a certain period of time. For democracy is only rule on time. A party that is once at the helm must also be able to be descended”, <http://www.bpb.dxe/nachschlagen/lexika/pocket-politik/16414/freiheitliche-demokratische-grundordnung>.

¹² M. Soine, *op. cit.*, p. 13.

¹³ D. Southwell, *op. cit.*, p. 8.

¹⁴ *Ibid.*

¹⁵ *Ibid.* Retrospective Summary.

„Over long periods of time, self-proclaimed and non-state-legitimate structures exerted power relations on society, almost as in the exertion of the state’s power monopoly. In the 19th century large landowners took over this role and equipped their workers with weapons to protect their interests, in order to violently counteract the misery and the competing rebellion. These armed men then very quickly learned to take advantage of the power given to them in order to extort their sacrifices and make financial profit from them. The decisive step towards the *Mafia* was carried out until the second half of the 19th century, since the Italian central government, which was then responsible, was unable in enforcing an effective state control over Sicily. The landowners and their armed subordinates gained so consequently more and more influence and control in the region, society and structures such as church, government and newspaper publishers. This is how the organisation of the *Mafia* came about as part of this development process, just as it is known to a large extent today. Nevertheless, a clear definition of the term *Mafia* cannot be derived so easily since there are quite different description approaches”.

¹⁶ O. Bossert, *Cosa Nostra — Die Geschichte der Mafia*, in *KrimLEX*, 2006, http://www.krimlex.de/artikel.php?BUCHSTABE=M&KL_ID=118.

Assassini!” (Death to the French, Invaders, Murderers!)¹⁷. Further references are also found in the Sicilian dialectic. Here, *Mafia* is equated with boldness or boastfulness, but the word presumably derives from the Arabic word ‘*mahyah*’, which has roughly the same meaning¹⁸.

Mafia-like structures are viewed from the outside as strictly isolated and familial constructs and are bound both territorially and thematically. Southwell describes the myth ‘*Mafia*’ as a consolidated part of Italian culture, such that the general viewer gets the impression that this is part of the national cultural heritage¹⁹. Organised forms of crime emerged independently of one another in terms of time and territory, and they developed individually in different cultures and political systems. In all of these developments similar or even identical patterns can be observed, such as a clear hierarchy, a strong seclusion to the outside, a code for their members, a strong potential for violence, operating within an indeterminate time period, no cooperation with state authorities, as well as greed and profit striving coupled with the re-investment of criminally generated profits. There were, for example, organised forms of criminality in the former Soviet Union, which, were little known at all, due to the partitioning of the Communist system. These criminals, called ‘thieves in the law’, organised themselves in syndicates and were active almost in all criminal areas, which promised financial profit²⁰. After the fall of the Iron Curtain and the dissolution of the former Soviet Union, the almost limitless possibilities of expansion were immediately recognised, and there was nothing to hinder an extension to the West and the extension of the thematic areas. The ‘thieves in the law’ have always enjoyed great respect in the Russian-speaking population, and they are forbidden to cooperate with government authorities, found a family or even carry out a regular job.

As a second example, the *Yakuza* is said to be a group of criminals and criminal family clans in Japan²¹. They are among the oldest and most established criminal organisations in the world²². The influence of this TOC group extends to all areas of Japanese politics, in

¹⁷ S. Runciman, *Universal Encyclopaedia* — Revolt of the citizens of Palermo against the rule of Karl I of Naples-Sicily (from the house of Anjou), which on Easter Monday broke out into Vespers in 1282 and spread throughout Sicily, 1976, http://universal_lexikon.deacademic.com/301913/Sizilianische_Vesper.

¹⁸ Schüler-Wahrig, *Foreign words dictionary*, 2008, p. 228.

¹⁹ D. Southwell, *op. cit.*, p. 12.

²⁰ *Ibid.*, „Thieves in law — Russian: воры в законе — worry w sakone”, p. 146.

²¹ *Ibid.* „*Ya-Ku-Za*” is originally a dialectical term for the number combination 8–9–3, a series of numbers from a Japanese card game, which is the epitome of worthlessness. Thus, it is to be understood that the *Yakuza* proudly consider themselves the ‘worthless’ of the society and take out people who have been expelled from Japanese society. Characteristics for the *Yakuza* are extensive tattoos, as well as often missing fingertips, which *Yakuza* members have to separate themselves in case of misconduct. The more fingers are missing, the more wrongs are internally condemned, p. 90.

²² *Ibid.*, p. 92.

commerce, industry, banks, media, all social classes, not least based on the binding compliance and practice of old rituals.

Further examples of powerful and influential TOC groups are:

— *La Cosa Nostra* USA, *Medellin* cartel in North, Central and South America

— Chinese *Mafia* — *Triads* in Asia

— Albanian *Mafia*, Russian *Mafia*, and others in Europe

The political developments and the dramatic changes that have taken place during the last 20 years have led to the emergence of new, internationally-operating structures, such as the successor states of the former Soviet Union, South East Europe and North Africa, as shown by Libya's example²³.

3. *What is Organised Crime?*

Actions described in today's juridical understanding as, organised forms of criminal machinations, can be traced back to human history by means of their patterns. People have always agreed to pursue their goals through the use of force or other unlawful procedures. The description of organised crime was decisively influenced by different developments of the individual societies, as well as a differentiated legal, economic and sociological view from the respective political systems²⁴. As a result, today a variety of organised crime definitions have been developed, sometimes brief and concise, but conversely sometimes very detailed and extensive. An immediate and comprehensive response to a possible questionnaire, asking ultimately, what organised crime is, appears initially to be relatively simple, but becomes more difficult and complex on closer inspection. The term organised crime is very comprehensive and complex and difficult to grasp in a uniform definition. This is, *inter alia*, in the sense that the Member States have not been able to reach an agreement on an EU-wide or globally unified definition of this concept and is used accordingly. The reasons for the different developments are that organised crime structures have developed over long periods of time in different political and legal systems with special regional and cultural influences²⁵. This, at the same time, is an explanation for why the individual countries have different characteristics in the descriptions of organised crime compared to the definitions of international organisations. A first attempt by experts to put organised forms of criminality into words dates back to 1968 in Germany. In the journal „Criminalistics“, a specialised magazine for criminal science and practice, a German

²³ M. Soiné, *op. cit.*, examples are the Sicilian *Mafia*, the Neapolitan *Camorra*, the *Ndrangheta*, the American *Cosa Nostra*, the Chinese triads such as *Kung Lock*, *Wo Hop To*, *Sun Yee On*, 14K, p. 9.

²⁴ T. Jäger, Thomas (2013): *Transnationale Organisierte Kriminalität*, 2013, <http://www.bpb.de/apuz/168912/transnationale-organisierte-kriminalitaet?p=all>

²⁵ *Ibid.*

detective superintendent asked the question: „*Nip things in the bud — but how?*”²⁶ On the basis of his statements related to the example of combating French criminals who were active at this time in Germany, it was noted that there would be no organised criminality in its literal meaning in Germany.

In 1973, a study was published commissioned by the Council of Europe to analyse the relevant aspects of organised crime and the possibility of professional crimes in Europe at that time²⁷. This work focused mainly on the specific situation in Germany and the Netherlands. A main conclusion was that there were great differences between the conventional levels of understanding with regard to organised crime (compared to the Sicilian-Italian *Mafia* and the American *Cosa Nostra*) both in qualitative and quantitative terms. It was described for the first time as the notion of a general European ‘criminal industry’ with simultaneous negation of organised crime²⁸. This new term was used to describe a criminality form that was largely commercial and widely used, and it also pointed out that this ‘criminal industry’ had reached new dimensions and the actors involved had developed new work practices. In the following years, these discussions were pushed forward mainly by officials from the Federal Criminal Police Office and the association of German Criminal Officers. One of the first results of this discussion process, a special documentation on the ‘development of modern strategies to combat organised crime’ was published in 1975²⁹. From this period onwards, it became clear that these organised forms of crime constituted an urgent threat to the internal security of the Federal Republic of Germany if appropriate countermeasures were not immediately taken. In the following years, both the intensity of the discussions held and the number of new discussants increased. In 1988, a first attempt at an empirical investigation carried out by the detectives *Rebscher* and *Vahlenkamp*, produced an up-to-date picture of the current situation with recognisable trends of development in the area of organised crime in Germany³⁰. On the basis of their investigations and skilful interviews, the two experts came to the conclusion that the phenomenon of ‘organised crime’ in the USA could scarcely be compared with organised crime in Germany. Two basic structural forms were presented as a major result of this work:

²⁶ A. Luczak, *Organisierte Kriminalität im internationalen Kontext: Konzeption und Verfahren in England, den Niederlanden und Deutschland*, 2004, p. 188.

²⁷ H. J. Kerner, *Professionelles und organisiertes Verbrechen. Versuch einer Bestandsaufnahme und Bericht über neuere Entwicklungstendenzen in der Bundesrepublik Deutschland und in den Niederlanden*, 1973.

²⁸ A. Luczak, *op. cit.*, p. 188.

²⁹ H. P. Jansen, *Zentrale Ermittlungsdienststellen als organisatorische Voraussetzung für die wirksame Bekämpfung krimineller Gruppen*, in *Bund Deutscher Kriminalbeamter* (eds.), *Entwicklung neuzeitlicher Strategien zur Bekämpfung des organisierten Verbrechens*, 1975, pp. 71–83.

³⁰ A. Luczak, *op. cit.*, p. 190.

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

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

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

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

1. Organised crime, such as the official German definition, is essentially the planned commission of criminal offences.
2. According to a different view, criminal acts are not primarily organised, just the people committing them.
3. According to a third view, the central moment of organised crime is the exertion of power, either by criminals alone or in an alliance of criminals and social elites³¹.

According to the first point and the general and specific features of the German definition of the conceptuality of organised crime, the criminal area of gang crime also shows similar, or even the same, facts and characteristic features³². These include, *inter alia*, the description of a group of offenders, the proceedings of division of labour and planning. However, regarding organised crime the element of co-operation has no time boundaries, whereas in the case of gang

³¹ K. Von Lampe, (2013): Was ist organisierte Kriminalität?, in Aus Politik und Zeitgeschichte, 63. Jahrgang, v. 38–39/2013, p. 3.

³² Article 129 of the Criminal Code (*StGB*) — Formation of criminal associations. Section 7 — Offences against public order, <http://dejure.org/gesetze/StGB/129.html>.

crime, it is aligned to a specific period of time and thus limited. It is irrelevant if the period for the commission of criminal offences is not clearly defined.

The term 'gang' presupposes the amalgamation of at least three persons, who have joined with the intention of committing in the future and for an uncertain duration an unspecified number of serious crimes of the type of offence referred to in the criminal code. A particular 'strong individual commitment to the gang' or 'taking actions in an overarching interest' is not necessary³³.

Regarding Lampe's second point, criminals are organised in a group to commit crimes. Thus, the term organised crime is intended to explain the form that criminal organisations take, in that they are groups with defined and recognisable structures. The Federal Bureau of Investigation (FBI) defines organised crime as „[...] *any group having some manner of a formalised structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole*”³⁴.

In his third point, *Lampe* describes power as the central element of organised crime. The exertion of power is ensured here on the one hand by threat of force or by the effective exercise of violence by individual criminals, or also by mutual interaction between individuals of social elites. In the first case *Lampe* speaks of illegal governance, respectively extra-legal governance³⁵. It is about special manifestations in social classes, which cannot be regulated by state authorities in their competence to apply the monopoly of power, because the appropriate capacities for combating these criminal structures are not sufficient. This is highlighted by the fight against the drug cartels in Mexico, the production of opium and heroin in Afghanistan, or irregular migration from North Africa, mainly organised in the northern part of Libya. Another option would be that a state has little interest in regulating the legal grievances, whether for traditional reasons such as parts of society deliberately isolating themselves and rejecting the rule of law, or for reasons of considerations in terms of investments and returns (cost matrix)³⁶.

In other constellations, TOC structures are finding an ideal breeding ground or shelter because the respective national legislation is not in alignment with the EU's neighbouring countries. For example, TOC groups use Switzerland as an international hub for cigarette

³³ Bundesgerichtshof, BGH GSSSt 1/00, Beschluss v. 22. 03. 2001, HRRS-Datenbank, Rn. X. Federal Supreme Court, BGH GSSSt 1/00, Decision of 22nd March 2001, HRRS-Data Base, Rn. X.

³⁴ *Federal Bureau of Investigation, Definition „organised crime”, 2016.*

³⁵ K. Von Lampe, *op. cit.*

³⁶ R. Isak, Redi, *Der Kanun in Albanien — Gewohnheitsrecht im modernen Staat?* Diploma thesis submitted at the University of Vienna, 2011, p. 37–39, <https://core.ac.uk/download/pdf/11594738.pdf>.

smuggling to the detriment of EU member states. As a *modus operandi*, cigarettes under customs control are illegally removed from the transit procedure and subsequently smuggled into the EU member states declared as empty packaging. In 2013, the EC noted in its reports that the illegal tobacco trade is classified as a global threat and the EU is losing more than 10 billion euros annually due to non-paid taxes and duties³⁷. As a consequence, the illegal cigarette trade is associated exclusively with organised crime groups. Despite the generation of billions of Euros of criminal profits, Switzerland plays down the role of international cigarette smuggling³⁸. For example, the EU and Switzerland have been discussing for years the enforcement of relevant EU member states' judicial assistance agreements and the conduct of requested extraditions of criminals living in Switzerland, which are attributed to TOC in the field of international cigarette smuggling.

4. Classic areas of TOC

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

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

- a) using commercial or business-like structures,
- b) by use of force or other means of intimidation, or

³⁷ COM(2013) 324 final, Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products — A comprehensive EU Strategy, 2013, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0324>.

³⁸ R. Meinrado, Inquiry to the Swiss National Council regarding international cigarette smuggling in connection with OC. Rationale, „It is true, on the other hand, that the smuggling of cigarettes in Switzerland does not meet any conditions for legal aid in criminal matters. This is, however, always granted if the foreign procedure concerns a treaty, which would be qualified as a tax fraud in fiscal matters in Switzerland (art. 3 (3), second sentence, of the Federal Law on International Acts in Criminal Matters, IRSG, SR 351.1). Art. 24 (1) of the Regulation on international legal assistance in criminal matters (IRSV, SR 351.11) defines the tax fraud as the tax fraud as defined in art. 14 (2) of the Federal Law on Administrative Criminal Law (VStrR, SR 313.0). The fraudulent withdrawal of duties using falsified or false documents fulfils the facts of the tax fraud, for which legal assistance may be granted. In the case of large cigarette smuggling attributable to organised crime, the Customs Administration has always been able to provide legal assistance”, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20003441>.

c) influencing policy, the media, public administration, the judiciary or the economy³⁹.

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

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

(1) Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits' members or supporters for it or supports it, shall be liable to imprisonment not exceeding five years or a fine. [...] ⁴⁰.

TOC uses almost every criminal field offered to them that promises high profit margins, which are listed as criminal offences in the German Code of Criminal Procedure (herein later referred to as *StPO*) in section 100a⁴¹.

5. Relevant Offence Fields and Legal Foundations

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

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

- Asylum Procedures Act — smuggling of human beings;
- Commodities control act — environmental crime;
- Criminal code — *inter alia*, crimes against property, violent crimes;
- Foreign trade legislation — smuggling related to economic sanctions;
- General fiscal law — avoidance of taxation and customs offences;
- International Criminal Code;

³⁹ Justiz Online, Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Zusammenarbeit bei der Verfolgung der Organisierten Kriminalität, 2016, <http://www.jvv.nrw.de/anzeige-Text.jsp?daten=510&daten2=Vor>.

⁴⁰ German Criminal Code art. 129– Forming Criminal Organisations. Section 7 — Offences against public policy, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1204.

⁴¹ German Code of Criminal Procedure (*StPO*), as amended by the notice of 7 April 1987 (Law Gazette I, 1074, 1319), which was last amended by art. 2 (3) of the Law of 21 January 2015 (Federal Law Gazette I, p. 10) has been amended. The translation includes the amendment(s) to the Act by art. 3 of the Act of 23rd April 2014 (Federal Law Gazette Part I p. 410), https://www.gesetze-im-internet.de/englisch_stpo.

- Medicines law — crime of counterfeiting;
- Military weapons control act — illicit trafficking of military weapons;
- Narcotics law — illicit trafficking of drugs and drug smuggling;
- Residence Act — trafficking in human beings and people smuggling;
- Weapons law — illicit trafficking of small arms and light weapons (SALW), arms smuggling.

6. *Ethnic Organised Crime Groups and Their Offence Fields*

The Federal Criminal Police Office assesses the capacities of TOC groups based on the number and weighting factors of relevant indicators from the list of ‘general indicators for the detection of organised crime relevant issues’⁴². The Federal Criminal Police Office conducts evaluations of the actual phases after preparation and planning of the respective crimes. Both the duration of the investigation and the use of the resources used play a decisive role in determining the indicators. The Federal Criminal Police Office clearly points out that a low potential of a TOC group does not necessarily indicate a small degree of organisation and professionalism.

The crimes to be prosecuted under German jurisdiction in section 100a *StPO* are often committed by certain ethnic groups by tradition and not infrequently because of a division of the classical areas with other TOC groups. According to the Federal Criminal Police Office, the nationality of the persons responsible for the assignment, who have the leadership function in the TOC groups, is decisive⁴³. These leaders need not necessarily represent the ethnic majority within a group. According to the 2014 Federal Criminal Police Office national situation report, the following ethnic organised crime groups are mainly concerned with the following areas of crime and are given here as exemplary and not exhaustive⁴⁴:

- German-dominated organised crime groups

Illicit trafficking of narcotics and drug smuggling, criminality in connection with economy, avoidance of taxation and customs offences, property criminality, money laundering, violent criminality, environmental criminality, counterfeit criminality, pimping, people smuggling, corruption, arms trafficking and smuggling, cybercrime

⁴² Bundeskriminalamt-BKA German Federal Criminal Office, *Organised crime. National Situation Report 2014*, 2015, p. 11–17. <https://www.bka.de/Shared-Docs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/OrganisierteKriminalitaet/organisierteKriminalitaetBundeslagebild2014.html>.

⁴³ *Ibid.*

⁴⁴ BKA, *Organisierte Kriminalität. National overview of the situation in 2014*, 2015, pp. 13–17. The frequency of the number of cases recorded in the *PKS* is determined by the frequency of the respective offence fields.

— Turkish-dominated organised crime groups

Illicit trafficking of narcotics and drug smuggling, violent criminality, criminality in connection with economy, pimping, THB and people smuggling, avoidance of taxation and customs offences, property criminality, cybercrime, counterfeit criminality

— Polish-dominated organised crime groups

Property criminality, avoidance of taxation and customs offences, illicit trafficking of narcotics and drug smuggling, counterfeiting

— Italian dominated organised crime groups

Illicit trafficking of narcotics and drug smuggling, money laundering, avoidance of taxation and customs offences, counterfeit criminality, arms trafficking and smuggling, criminality of property, criminality in connection with economy

— Serbian dominated organised crime groups

Property criminality, criminality in connection with economy, illicit trafficking of narcotics and drug smuggling, THB and people smuggling, violent criminality

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

7. Conclusions

TOC comprises a huge potential of threats to national law enforcement services and other security agencies involved in border security and management, both of EU member states and non-EU countries with regard to their defined needs in terms of national security and public order. According to the glossary of the Federal Agency for Civic Education, TOC has been used since the 1980s as an internationally accepted term for complex and rational forms of crime that operate across national boundaries⁴⁵. This excludes all relevant offences, which are related to terrorism and the phenomenon of foreign terrorist fighters. The most important areas of TOC are all serious offences with regard to section 100a *StPO*, or their corresponding relevant offences.

⁴⁵ BPB, *Glossary — Organised (transnational) Crime*, <http://www.bpb.de/politik/grundfragen/deutsche-verhaeltnisse-eine-sozialkunde/138404/glossar?p=129>.

In December 2006, during the 14th OSCE Ministerial Council meeting in Brussels, extensive measures were taken in the fight against TOC⁴⁶. At the beginning of 2006, however, it was recognised that the defined activities were unlikely to be achieved when appointed officials from OSCE participating States started to discuss the complexity of TOC⁴⁷. Despite intense expert discussions carried out during the course of meetings, initially the assigned ‘experts’ faced enormous difficulties in finding a level of common understanding for the description of organised crime. The reason was simple: the ‘experts’ followed the respective national definitions, sometimes paired with a basic understanding of the definitions of Interpol and Europol. Since there was no common international definition available, this led to the misunderstandings of the participating organised crime experts and fundamental misunderstandings.

The comparison of descriptions for organised crime illustrates that a simple and absolutely certain implementation of the definitions for organised crime is complicated and difficult to manage. Both the content and the scope of the definitions of the respective EU member states and international organisations are very different. While the UN expresses itself with a one-sentence definition, other EU member state institutions or international organisations need almost a full page. On the one hand, in the analysis of the respective definitions, it turned out that the multiple use of the conjunction ‘*or*’ promotes the inclusion of many different forms of criminal offences, instead of facilitating a clear and simple understanding of what organised crime is. On the other hand, the linking of the individual qualification characteristics with the conjunction ‘*and*’ is also not uncomplicated, since it invariably raises the question of how many of these criminal offences must at least be listed in order to affirm organised crime as defined. Von Lampe is questioning the degree to which criminal offences can be organised rather than how organised the actual criminal offenders are in order to cover a specific portfolio of scene-type crimes⁴⁸. A description of organised crime should then usually refer to a criminal organisation, that is to say a group with formal structures, as in the definition of the FBI. A distinction between forms of organised crime and non-organised crime is therefore likely to be drawn between complex associations of criminals on the one hand and individually acting perpetrators on the other.

A further aspect of the description of TOC is to include the increasing co-operation of organised crime groups at an international level, which can take place either in accordance with long-term agreements or through specific project-related agreements. This can result either in an occasional collaboration as well as in a longer cooperation

⁴⁶ OSCE Decision No. 5/06 Organised Crime. MC. DEC/5/06 OSCE (2006).

⁴⁷ From 2005 to 2009, the author was the Senior Border Adviser in the OSCE Secretariat and was present in all relevant meetings as the leading OSCE expert.

⁴⁸ K. Von Lampe, *op. cit.*, p. 3.

between organised crime groups based on labour division agreements, involving different nationalities, ethnic groupings and different languages. Behrens and Brombacher⁴⁹ assess TOC as one of the biggest threats to security in the 21st century and map out two dominant types for a better understanding of organised crime that relate to structural or procedural aspects of organised crime as a quest for profit. In this way, they strengthen the thesis of *Von Lampes* that organised crime as a structure refers to the organised commissioning of criminal offences and not to the organisational forms of the members of the respective organised crime groupings.

Without any doubt, the implementation of the European Arrest Warrant (EAW) can be assessed as a major achievement in the fight against TOC⁵⁰. As a result of the framework decision from 2002, this option increases the effectiveness of international police cooperation in the implementation of criminal proceedings and has been established as an EU-wide instrument for the enforcement of national arrest warrants in EU member states. The EAW implies faster and simpler surrender procedures and an end to political involvement and EU countries can no longer refuse to surrender, to another EU member state, their own citizens who have committed a serious crime or are suspected of having committed such a crime in another EU member state, on the grounds that they are nationals. A high level of mutual trust and cooperation between EU member states made simplifying and improving the surrendering procedure possible.

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

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

⁴⁹ T. Behrens, D. Brombacher, Transnationale Organisierte Kriminalität, in T. Jäger (ed.), *Handbuch Sicherheitsgefahren*, 2015 pp. 135–145.

⁵⁰ The European Arrest Warrant (EAW) is applied throughout the EU since 1st January 2004. It replaced lengthy extradition procedures within the EU's territorial jurisdiction. It improves and simplifies judicial procedures designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence or spell in detention, http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm.

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

Organised Crime

Summary: 1. Issues of the Definition of Organised Crime and the Criminal Justice Reaction.

*1. Issues of Definition of Organised Crime
and Criminal Justice Reaction*

Certain serious forms of crime, such as organised crime, present a challenge to many modern democratic societies to such an extent that in relation to them and their prevention and suppression, the entire criminal justice systems of many countries, and society as a whole, have been put to the test. First of all, it is about establishing a balance between the protection of society from crime on the one hand, and the protection and provision of basic, universally accepted human rights and freedoms on the other¹.

Organised crime is a phenomenon that, apart from the field of law, has various implications in numerous other fields, has an extremely negative effect on the entire society and practically leaves no one indifferent². In this sense, for a successful fight against such a serious form of crime, the cooperation and timely action of competent institutions, both nationally and internationally, must be synchronised and constantly improved.

When analyzing serious forms of crime, it is always important to start from a rational and scientific approach that requires a deeper knowledge of them, a realistic assessment of their severity and the dangers they pose both for individuals and for society as a whole, but also the possibilities and limits of criminal law in combating them, especially taking care that it does not become a threat to certain rights and freedoms of citizens. In this sense, it is indisputable that the danger and harmfulness of organised crime are extremely high, but it is very important to realistically assess the possibilities and scope of the criminal law response in relation to such a serious

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¹ I. Bodrožić, Review of the book „Criminal Law Suppression of Organised Crime, Terrorism and Corruption” by Z. Stojanović and D. Kolarić, in *Safety*, v. 1/2015, 2015, p. 231.

² M. Škulić, *Organised Crime — Term, Manifestations, Criminal Offense and Criminal Procedure*, Belgrade, 2015, p. 19.

form of crime, that is, they should not be underestimated, but neither should they be overestimated³.

The successful definition and determination of the main characteristics of organised crime is multifold important for its successful prevention, both from the aspect of adopting quality strategies and from the aspect of the operational activities of competent authorities, especially when it comes to a quality normative framework that is relevant to this issue⁴.

With certain specific legal solutions that would not call into question the basic principles of criminal law, nor threaten basic human rights and freedoms, criminal law is certainly capable of suppressing these forms of crime to the extent that criminal law can otherwise contribute to suppressing crime in general. In this sense, it is extremely important to emphasise that for a successful fight against organised crime, it is necessary to continuously provide favorable conditions for the wider application of the existing criminal law and to arrive at an adequate model of its use in order to suppress organised crime as successfully as possible⁵.

Also, it is important to point out that the term organised crime was recognised in professional literature as one of the „*most controversial terms*”⁶. Such an attitude was most often influenced by its different criminological and legal definitions, sometimes by wrong interpretations, and the fact that the term „organised crime” itself was not initially created as a product of scientific consideration, but received its content previously in media representations, certainly had a special significance in this context⁷. In this sense, and as it is often pointed out in the literature, it was precisely the lack of clear and generally accepted criteria that would successfully define the term itself that led to sharp academic disagreements, which later had their repercussions on the normative level as well⁸.

In addition to the fact that organised crime can manifest itself in different ways in every society, it is well known that it represents a dynamic category with a constant tendency to change and complicate its manifestations, which further complicates its adequate definition⁹. In the context of the above, it is also important to point

³ Z. Stojanović, D. Kolarić, *Criminal Law Suppression of Organised Crime, Terrorism and Corruption*, Belgrade, 2020, p. 13.

⁴ A. Stevanović, *Organised Crime — Key Elements of the Term: Legal and Criminological Determinants*; Annual of the Faculty of Security, Belgrade, 2018, p. 283.

⁵ Z. Stojanović, D. Kolarić, *op. cit.*, p. 14.

⁶ Đ. Ignjatović, *Organised crime in the 21st century — controversies and dilemmas*, in J. Ćirić (ed.), *Suzbijanje organizovanog kriminaliteta kao preduslov vladavine prava*, 2016, p. 40 stated according to: A. Stevanović, *op. cit.*, p. 284.

⁷ *Ibid.*

⁸ P. Gounev, T. Bezlov, *Examining the links between organised crime and corruption*, 2010, p. 23. stated according to: A. Stevanović, *op. cit.*, p. 284.

⁹ S. Mijalković, M. Bajagić, *Contemporary armed conflicts — definition, eitiology and phenomenology*, in *Kultura Polisia*, v. 9, 2, 2012, p. 23. stated according to: A. Stevanović, *op. cit.*, p. 284.

out that the term organised crime itself is a criminological and not a criminal law term that represents a special combination of several punishable behaviors that, under certain conditions, grow into a specific type of crime with a high degree of danger to society, which is why its direct statistical monitoring is impossible¹⁰. It is a phenomenon that has numerous characteristics that criminologists arrive at on the basis of a certain generalization of certain characteristics that occur in some criminal organizations around the world, where the shaping of these characteristics depends on the authors themselves or researchers¹¹.

As is well known in the theory and science of criminal law, it is very difficult to come up with a unique criminal law definition of organised crime, especially for the reason that its concept can be understood and even defined too broadly and vaguely. As stated in theory and science, the problem of the impreciseness of the concept of organised crime could be alleviated to some extent by accepting the division into organised crime in a narrower and broader sense¹².

As can be concluded, the importance of properly defining this phenomenon is only an initial step in the field of its better familiarization, especially its phenomenological characteristics, but at the same time the most significant step in terms of its successful recognition and suppression¹³. Also, it is necessary to continuously analyze all the possibilities of the existing legal mechanisms that must be used in order to suppress this phenomenon, to improve and modernise them. Certainly, it is quite clear that criminal law and punishment are necessary and irreplaceable in the fight against organised crime, while also keeping in mind the important principle that criminal law represents the last resort in the line of defense of society against crime, and accordingly it is important to point out that for the successful fight against organised crime and its suppression, preventive action through the application of a series of measures and standards from other areas and branches of law, as well as the establishment of adequate solutions that are outside the scope of criminal law, is of exceptional importance.

In the end, it is important to point out that for the successful suppression of organised crime, it is necessary to constantly monitor its phenomenological dimensions, which especially apply to its actors

¹⁰ Đ. Ignjatović, M. Škulić, *Organised Crime*, Belgrade, 2012, p. 17.

¹¹ Z. Stojanović, D. Kolarić, *op. cit.*, p. 109. In this sense, the US doyen of criminology, Howard Abadinsky, gave the most comprehensive definition of organised crime.

¹² See more in Z. Stojanović, *Organised crime and issues of protection and realization of human rights*, in *Human rights and contemporary trends in criminal policy*, 1989, pp. 122–125, where this division is encountered for the first time in our literature; stated according to: Z. Stojanović, D. Kolarić, *Criminal law suppression of organised crime, terrorism and corruption*, 2020, p. 14.

¹³ M. Škulić, *Organised crime, concept and aspects of criminal procedure*, 2003, p. 23.

and new emerging forms in society, given that, unlike any other type of crime, it has a pronounced ability to adapt to various newly emerging social — political and technological circumstances¹⁴. In this sense, for a successful fight against such a serious form of crime, such as organised crime, the cooperation and timely action of competent institutions, both on the national and international level, must be synchronised and constantly improved.

¹⁴ A. Stevanović, *op. cit.*, p. 283.

Montenegro and the EUROJUST

Summary: 1. EUROJUST as a Bypass for National and International Gaps in Mutual Legal Assistance: Montenegrin View.

1. EUROJUST as a Bypass for National and International Gaps in Mutual Legal Assistance: A Montenegrin View.

Global events, in the form of various conflicts, unfortunately often lead to an increase in crime. The formation of organised criminal groups is motivated by the creation of power circles, which in turn are created by money. Large sums of money are obtained through the most serious criminal offenses. Close cooperation between law enforcement agencies provides an adequate and strong response to these criminal structures in the form of confiscation of all income and property acquired through crime, which reduces their power. When the power disappears, the purpose of the existence of criminal organizations vanishes.

We strive for joint success in the fight against crime. State prosecutors of different countries must have legal bases on which they base their international cooperation in this fight against crime. However, perpetrators of criminal offenses do not need formal conditions for cooperation; they organise and collaborate worldwide.

The unpredictable and planetary operation of criminal organizations has shown us that state prosecutors must strengthen their mechanisms of direct cooperation. Since Montenegro is not a member of the European Union, the traditional system of international legal assistance in criminal matters is applied. International legal assistance is provided on the basis of multilateral (Conventions of the Council of Europe and the United Nations) and bilateral agreements, and if there is no international treaty, domestic legislation is applied. Bilateral agreements, especially with countries in the region, provide the possibility of effective cooperation, as a large number of international legal assistance cases formed in Montenegro involve individuals residing in the countries of the region.

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The Law on International Legal Assistance in Criminal Matters of Montenegro regulates the conditions and procedure for providing international legal assistance in criminal matters, and this law actually elaborates the norms contained in ratified conventions.

To provide international legal assistance, it is necessary to send a request, whereby the domestic judicial authority addresses the competent judicial authority of a foreign state, in order to collect certain information, data, and evidence necessary for effective proceedings in national criminal cases. The central communication organ for international legal assistance cases is the Ministry of Justice of Montenegro. However, among other things, with the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters from 1959, it is also possible to send and receive requests directly, i. e., competent judicial authorities can communicate directly.

In the case of direct cooperation, certain challenges may arise in terms of „identifying” the competent authority to whom the request should be sent, the form of the request, the content of the request in terms of its effective execution by the competent authority of the requested state, etc.

The possibility of overcoming these challenges in practice is enabled through cooperation with Eurojust — the European Agency for Judicial Cooperation in Criminal Justice. Through this agency, Montenegrin prosecutors have the opportunity to cooperate with prosecutors from EU member states, as well as with colleagues from third countries that have concluded cooperation agreements with Eurojust. The network of contact points for cooperation with Eurojust is spread across all continents.

The State Prosecutor’s Office of Montenegro achieves significant and successful cooperation with Eurojust. The cooperation was established based on the Law on Ratification of the Cooperation Agreement between Montenegro and Eurojust. Since December 2017, Montenegro has had its office at Eurojust. Since this date, the state liaison prosecutor for Eurojust has been performing work tasks, precisely in this office.

The multiple important aspects of cooperation through Eurojust are recognised in various forms. Through Eurojust, support is provided to Montenegrin prosecutors in dealing with cases with a foreign element. From receiving advice on how to initiate the process of international legal assistance, to the possibility of direct communication with colleagues from the states to which it is intended to send a request, and discussion of certain segments of this international request process through participation in coordination meetings and participation in joint investigative teams with colleagues from the EU member states’ prosecutors’ offices, these are just some of the advantages and benefits that cooperation through Eurojust provides.

Aware of the fact that the success of the fight against international crime depends on the intensive cooperation of prosecutors at the regional, European, and global level, we must strengthen mutual trust, which is the basis of successful prosecutorial cooperation, which shows that crime, no matter how complex its forms, cannot be more organised and stronger than united prosecutors.

International Judicial Cooperation in Criminal Matters in Montenegro

Summary: 1. Navigating the Present and Predicting the Future in the International Judicial Cooperation System in Montenegro.

1. Navigating the Present and Predicting the Future in the International Judicial Cooperation System in Montenegro.

The area of international judicial cooperation in criminal matters, i. e., criminal justice cooperation with an element of foreignness in Montenegro, can be viewed from the perspective of current application and through the prism of European integration. The present state refers to the traditional procedure of mutual legal assistance (MLA), while through the process of European integration, our country is in the lobby of the procedure, which in the European Union is called judicial cooperation in criminal matters.

The two terms mentioned jointly form the field of international judicial cooperation in criminal matters in a broader sense. Although they are closely related, there is a clear difference between them. The first is based on the conventions and standards of the Council of Europe (CoE) and the United Nations (UN), which are already applied in Montenegro and are recognised in national legislation through the Law on Mutual Legal Assistance in Criminal Matters and the Law on Confiscation of Property Derived from Criminal Activity, i. e., through chapter VIII of the latter which refers to international cooperation. Both of these laws refer to the corresponding application of the Criminal Procedure Code. It is also very important to mention Article 9 of the Constitution of Montenegro, which stipulates that confirmed and published international agreements and generally accepted rules of international law are an integral part of the internal legal order, and what is even more important — they have primacy over domestic legislation and are directly applied when regulating relations different from the internal legislation. With this, the Constitution, as the highest legal act in the country, extends the normative framework for MLA to numerous bilateral and multilateral agreements that are applied in Montenegro. Moreover, it places

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them above national laws. Montenegro has acceded to all the key conventions of the CoE and the UN, but it also achieves cooperation in this area on a bilateral basis, mainly with neighbouring countries.

On the other hand, the area of judicial cooperation in criminal matters represents the perspective of Montenegro in the context of application, but also indicates the current state in terms of the transposition of EU instruments into the national legal system and preparation for their implementation. Namely, through the process of European integration, Montenegro is gradually transferring the legal *acquis* of the EU into its legislation. Significant steps in this regard have already been taken with the adoption of the Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union, as well as through the training program implemented in 2019 and 2020. This law introduced into the domestic legal system instruments such as the European arrest warrant, the European investigation order, the Decision on financial penalties, the European protection order, etc. It is important to note that these mechanisms are based on the principle of mutual recognition of the decisions of EU member states and as such differ from those currently applied in our country, as well as that the mentioned law will be applied from the day of Montenegro's accession to the European Union.

When it comes to the institutional framework, it consists of Courts and Prosecution Offices, then the Ministry of Justice, INTERPOL and the Ministry of Foreign Affairs. Courts and Prosecution Offices achieve international cooperation through receiving and sending requests (rogatory letters) for MLA, and at the same time they are preparing for a new, more demanding role within the process of judicial cooperation in the EU. The Ministry of Justice, in addition to the competence for drafting laws in this area and the process of European integration, also has the role of a central authority, i. e. mediator between domestic and foreign judicial authorities in the procedure of the MLA. By using INTERPOL as a channel of communication that was introduced for the sake of a more efficient procedure of the MLA and recognised as such in the law, there is a synthesis of judicial and police cooperation, i. e. using channels of international police cooperation in order to achieve judicial cooperation with an element of foreignness. The Ministry of Foreign Affairs also enters the institutional framework, through the work of the sector dealing with international legal affairs. This is of particular importance in cases where there is no bilateral or multilateral basis for cooperation, but it takes place on the basis of reciprocity. This state of affairs requires diplomatic communication, which is carried out precisely through the aforementioned sector of the Ministry of Foreign Affairs. In addition, some countries such as Germany and France insist on diplomatic communication in extradition cases.

This closes the circle of institutions that formally participate in the MLA process, but opens a special chapter of international judicial cooperation, namely networks and bodies for informal communication

and cooperation. There are numerous organizations that facilitate and speed up the sometimes slow and cumbersome MLA. One of them is the European Union Agency for Criminal Justice Cooperation — EUROJUST. Before Montenegro signed the agreement with this EU agency, cooperation on a bilateral basis took place through contact points, and since 2017 and the entry into force of the aforementioned agreement, Montenegro, in addition to contact points, also has a liaison prosecutor for EUROJUST and a national correspondent for terrorism issues. This mechanism represents a very important and effective means of judicial cooperation, especially in important and urgent cases. The importance of such cooperation is emphasised by the European Commission in almost all of its reports on Montenegro within the sub-area of Judicial Cooperation in Civil and Criminal Matters of Negotiating Chapter 24 — Justice, Freedom and Security.

Speaking further about networks, it is worth mentioning the European Judicial Network in Criminal Matters (EJN). It is a network that functions under the auspices of EUROJUST and is predominantly composed of representatives of EU member states, in which Montenegro has observer status. It is also a very important instrument of judicial cooperation, and it is particularly suitable for dealing with urgent cases, as shown by numerous examples from practice. Through the participation of their two contact points in the plenary and regular meetings of this network, Montenegrin practitioners are simultaneously familiar with the specifics of the application of instruments of judicial cooperation in EU countries.

A somewhat younger, but no less important body is the GlobE network, which recently operates with the support of the United Nations Office on Drugs and Crime (UNODC). GlobE has been in existence for a little more than two years, and the plan is to form a sub-component of this network with the aim of providing support to the Western Balkans region in the fight against organised crime and corruption. The formation of this regional component of the GlobE network would have exceptional value and serve as an example for other regions around the world.

In conclusion, it is clear that mutual legal assistance and judicial cooperation in criminal matters in Montenegro are interconnected aspects of a unique process. Proper development is essential for both. Despite Montenegro's future EU membership, the procedure of mutual legal assistance, aligned with CoE and UN conventions and standards, will persist, requiring dedicated attention. Simultaneously, in line with our country's pronounced foreign policy priority, it is imperative to meticulously equip and shape personnel for the implementation of EU instruments based on the principle of mutual recognition.



Free Movement of Crime

Summary: 1. A Brief Critique of Judicial Cooperation in the Western Balkans.

1. A Brief Critique of Judicial Cooperation in the Western Balkans

Free movement of people, goods, services, and capital. These four fundamental freedoms, on which the European Union's single market is based, are not unlimited. They are regulated by norms, which make the single market a space of justice, freedom, and security.

Unlike the prescriptive concept of the EU's four freedoms, the title „Free Movement of Crime” is descriptive. It serves as a figure of speech for contrast, used to illustrate the situation in the Western Balkans compared to that in the European Union.

The difference is understandable: neither have the Western Balkan countries reached a level of economic-social integration, nor have they achieved the level of political-legal integration of EU member states. However, this does not mean that there is no freedom of movement of crime in the European Union, nor that there is no freedom of movement of people, goods, services, and capital in the Western Balkans. The point is that Western Balkan countries are not showing readiness to establish a regional space of justice, freedom, and security, which would be an advancement of some kind of regional market. This demonstrates their lack of readiness for what they aspire to on a larger scale. And they aspire, at least declaratively, to membership in the European Union.

The best illustration of this unreadiness is judicial cooperation. In the European Union, it operates on the principle of mutual recognition of decisions. In the Western Balkans, it is still regulated by international instruments, bilateral agreements, and national laws. Finally, in the EU this area is called judicial cooperation, while in the Western Balkans it is still international legal assistance. Analyses have shown that Western Balkan countries do not use even the existing mechanisms to their full potential. On the contrary, some examples

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of clear violations of obligations from bilateral agreements have been recorded, unimaginable in the European Union. Instead of an area of justice, freedom, and security, the Western Balkans appear to be an area of politics, irresponsibility, and insecurity.

The „evidence explosion” from the SKY app has revealed the extent of transnational crime in our region. It is a devastating fact that there is a Balkan cartel, but there are no joint investigative teams between the Western Balkan countries. If we add to this the question of the legal validity of evidence from the Sky app raised in the professional community, then the law, instead of being a mean of achieving justice, becomes an obstacle to it.

On the other hand, instead of regional cooperation, Western Balkan countries are developing „bilateral cooperation” with the European Union, concluding agreements with the EUROJUST unit and sending liaison prosecutors to The Hague, designating contact points for the European Judicial Network in criminal matters, and recently concluding working arrangements with the European Public Prosecutor Office. The European Union, for its part, finances and implements multi-million projects to strengthen the rule of law, often overlapping and thematically repeating. This money is frequently spent on expertise-for-the-sake-of-expertise, resulting in project-for-the-sake-of-project realization.

Once, the countries of the Western Balkans had a level of judicial cooperation like the European Union has today. This was in the former Yugoslavia. Today, they do not use the capital of origin from the common Yugoslav legal system (except for Albania, which was not part of it), nor the capital of a common language and the absence of linguistic barriers (excluding Kosovo and partly North Macedonia). This reveals a paradox: these countries strive for judicial cooperation with those further away (EU), without developing to the fullest extent international legal assistance with those closer (WB). One of the reasons is that there is a variable between EU member states that does not exist in the Western Balkans, a guiding principle of judicial cooperation: it is called *trust*.

There is also a certain passivity among the Western Balkan countries and an expectation that every answer will come from Brussels. The exception is (and this claim is not subjective) Montenegro. It is the only country whose Ministry of Justice is a regular host of the Regional Forum on Judicial Cooperation in Criminal Matters, which brings together representatives of the ministries of justice, courts, and prosecutors of the Western Balkan countries. This forum has, among other things, been dedicated to the revision of bilateral agreements, and every topic on the forum’s agenda is illuminated by EU standards. Montenegro has met the challenges in this area by adopting the Law on Judicial Cooperation in Criminal Matters with EU member states as early as 2018. This law represents a small codification of EU instruments, including the European arrest warrant, the European investigation order, the European protection order, and other

instruments. It is envisaged that the Law will start to be applied on the day of Montenegro's membership in the EU.

This proactive approach by Montenegro is in line with the basic principle of the European Union: the principle of subsidiarity. According to it, higher instances should not take away the initiative from lower instances, which they can achieve with their own means and potential.

The higher instance in this sense is the European Union, and the lower instances are the Western Balkan countries. To become part of the EU, the EU needs to become part of them.



Respect for Human Rights and the Concept of Transnational Organised Crime (Challenges in the Rule-of-Law Field)

Summary: 1. Introduction. 2. Legal and Theoretical Views. — 3. Relevant Constitutional Provisions and Other Acts in National and International Law. — 4. Conventional Law. — 5 — Concluding Remarks.

1. Introduction

Social phenomena research models are more difficult to be predicted than those ones in the natural sciences and that is why these are often questioned in the modern world. The above also stands for the study of human rights, the catalogue of which is continually expanding, especially internationalization hereof, which dates back to the end of World War II. Since then, human rights are no longer a „matter of the state”, but quite the contrary: new rights are introduced on an international level, while existing ones are standardised along with the establishment of new forms of protection hereof. After all, the history of humanity, when taking into account a long period of time, may be presented as a quadrilateral, including the following: prescription, realization, violation and protection of human rights. All of this also applies to the respect for human rights in the fight against transnational organised crime, since, even in such circumstances, human rights must be respected, that is, which means that these must not be violated in the name of efficiency in the actions taken by judicial and police authorities.

The field of my legal interests, that is, the issue of human rights and transnational organised crime, shall be presented from three aspects, chosen from the three disciplines I teach (Introduction to Law, Constitutional Law and Human Rights). Therefore, this paper shall analyze the following three levels: legal and theoretical, constitutional and legal, and the level of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which is increasingly being applied in our judicial practice.

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2. Legal and Theoretical Views

In order to effectively exercise state power, various policies (legal, economic, educational, etc.) are implemented; in addition, various mechanisms and instruments are established for the purpose of improving effectiveness of the aforementioned policies. In the context of legal policy, the policy of crime combating is taking an increasingly important place, as is the policy of combating transnational organised crime. The above stems from the fact that the compression of time and space in which we live produces new forms of criminality. The danger of violation of human rights justified by the efficiency of the actions taken by state bodies is especially emphasised in the age of unexpected technological development and that is why the following often quoted legal question can be asked here: Who will protect us from the guardians („*quis custodiet ipsos custodet*”). All this sharpens the relationship between the following two values: the first one — suppression of crime and the second one — respect for human rights, despite the need to achieve a balance between these two for the good of citizens. The same stands for transnational organised crime which shows that erasing borders and facilitating the flow of people and ideas has to be considered in two aspects. Therefore, legal experts define the aforementioned relations more closely as follows: 1) positively (from the aspect of cooperation between states) and 2) negatively (from the aspect of easier circulation of criminal activities)¹.

The term transnational organised crime is a recent one, which is confirmed by the fact that in these regions we can only find it as a lexicon term in encyclopaedia dated less than a decade ago.² However, the aforementioned circumstances did not result in a precise definition of this type of crime. Thus, Lampe and Knickmayer argue that the above presents a considerable challenge for anyone dealing with this topic and refer to it as „confusing term” approached from many sources, the meaning of which is subject to constant changes and which, despite numerous attempts, has so far resisted any acceptable attempt to be defined in a binding sense³.

¹ Teresa Russo, Professor of Law at the University of Salerno, presentation at the conference „Raising public awareness of the fight against transnational crime, the role of police and judicial cooperation and respect for human rights”, organizers: Faculty of Law at the University of Donja Gorica and Department of Legal Sciences, University of Salerno, Podgorica, 20 June 2023.

² The term „transnational organised crime” is not found in the Legal encyclopaedia, edition of Savremena administracija, Belgrade, 1984, nor in the Legal Lexicon, edition of the Lexicographic Institute Miroslav Krleža, Zagreb, 2007, and is contained in the General Legal Dictionary, edition of Narodne Novine, Zagreb, 2015, p. 1400.

³ K. von Lampe, S. Knickmeier, *Organisierte Kriminalität, Die aktuelle Forschung in Deutschland*, Berlin, 2018, p. 8. See also Z. Stojanović, *Politics of Crime Suppression*, Third Edition, Belgrade, 2023, p. 107.

The modalities of manifestation of transnational organised crime require the establishment of new legal instruments and the improvement of the existing ones, the appearance of which as well as the „underlying convention” may be associated with the period at the end of the last and beginning of this century. Thus, the basic source of international law in this regard is the United Nations Convention against Transnational Organised Crime, which was adopted in the form of a resolution of the United Nations General Assembly (55/25 of 15 November 2000). It was opened for signing at the conference in Palermo held in the period from 12 to 15 December 2000 and became effective on 29 September 2003. Along with the Convention, the following three protocols were adopted: the Protocol on Prevention, Suppression and Punishment of Trafficking in Human Beings, Especially Women and Children, the Protocol against Smuggling of Migrants by Land, Sea and Air and the Protocol against Illicit Manufacturing and Trafficking in Firearms, Parts of Firearms and Ammunition⁴. However, in the text of this convention, in art. 2, which prescribes the use of the term, the meaning of the term „transnational organised crime” is not fully and explicitly defined, which confirms the extent to which it remains indeterminate. In connection with the above, it should be pointed out that many international documents (multilateral and bilateral agreements, other types of agreements and memoranda, etc.) are not binding ones, which further complicates the fight against transnational crime.

The aforementioned view is confirmation of law development in the modern age, while this example confirms that law development must be increasingly reflected in the development of new legal institutes and legal procedures, as well as in innovative forms of police cooperation. The above is also necessary within this form of criminality since there are differences depending on the type of criminal acts in which it is manifested and the way it is organised in certain parts of the world. Therefore, it can be concluded that we are witnessing the diversity, high level of planning, complexity and sophistication of this type of criminality in which a large number of actors participate striving to illegally obtain significant funds and other material benefits.

The specificity of this type of criminality lies in the fact that it strives to influence state functioning, try to be part of it, and manage social processes. In addition, it is characterised by constant adaptation („flexible criminal technology”) to the extent that it becomes resistant to various forms of social reaction⁵. Furthermore, it is characterised by infiltration into various areas of society (banks, companies, media, etc.) either individually or simultaneously in several areas.

⁴ The Convention became an integral part of the legal system of Montenegro, by ratification during the existence of the Federal Republic of Yugoslavia (Official Gazette of the FR Y, International Treaties, No. 6/2001).

⁵ Z. Stojanović, *op. cit.*, p. 107.

Therefore, for the fight against this form of criminality, we need new ways of legal and police thinking, as well as a continuous dialogue between legal science and practice in the context of law application (judicial, prosecutorial, and police). However, for the purpose of affirmation of awareness in relation to this problem and the solution hereof, non-legal knowledge is also needed (informatics, economics, media, etc.). Therefore, complicated illegal puzzles require not only legal responses, which especially refer to „new democracies” and divided societies in politically unstable regions, such as the one Montenegro belongs to. For example, there are almost 10–15% of foreigners who live in Montenegro for various reasons—running away from the horrors of war, looking for a job, or as tourists—and among them are those who see this circulation as an opportunity for illegal behaviour, including, of course, the citizens of Montenegro. That is where the following questions arise: do we have the instruments, legal and other, to analyse the aforementioned issues and react hereto effectively while protecting human rights simultaneously, or are we moving towards or halting on our way towards a rule-of-law society? Unfortunately, European reports do not continually indicate a negative response to both questions, primarily at the political level.

The aforementioned indicates that the academic community, especially in relation to legal science, should have a dialogue on this topic, improve teaching plans, strengthen cooperation, and research this type of crime from a multidisciplinary point of view. This type of view still does not have a proper place in legal textbooks or, generally speaking, in literature. And it should always be emphasised that this topic is primarily the subject of criminal law but also of a whole set of other legal disciplines from the fields of international and domestic law. This is precisely why different disciplines are connected by the importance of doing justice and showing respect for human rights, i. e. having aspiration to hold monopoly over state power in a legitimate and legal way, which presents an essential state feature⁶.

3. Relevant Constitutional Provisions and Other Acts in National and International Law

The constitutional and legal aspects of this topic have their basis in the preamble and normative part of the Constitution of Montenegro⁷. In the preamble, it is prescribed that the citizens of Montenegro are determined to live in a state where, among others, the basic and inseparable values are respect for human rights and the rule of law. At the same time, the fight against transnational organised

⁶ B. Košutić, M. Vukčević, *Introduction to Jurisprudence*, Second Edition, Podgorica, 2023, p. 46.

⁷ Official Gazette of Montenegro, p. 107.

crime is an important segment of the process of building the rule-of-law principles, which are based on respect for human rights.

In addition to the preamble, the normative part of the Constitution confirms the importance of human rights. arts. 1, 6 and 9 of the Constitution of Montenegro are important in the context of this topic and are contained in the first part of the Constitution (Basic Provisions), whereas the central part of defining human rights and freedoms is presented in its second part (Human Rights and Freedoms), starting from art. 17 and concluding with art. 81. The aforementioned indicates that the content, number and diversity of human rights, together with other factors, confirm the democratic character of the highest legal act of Montenegro.

Starting from the definition provided in the preamble, in art. 1 of the Constitution the rule of law is defined as a fundamental principle of the state organization of Montenegro, whereas the guarantee of human rights and freedoms is an integral part of the rule of law, together with other elements that constitute the state organization of Montenegro (separation of powers, independence of the judiciary, respect for constitutionality and legality, free elections, etc.). The foundation of human rights and freedoms is defined in art. 6 of the Constitution, which prescribes the principles of guarantee, inviolability and obligation to respect rights and freedoms, whereas the state of Montenegro is defined as their guarantor and protector.

Art. 9 of the Constitution stipulates that confirmed and published international treaties and generally accepted rules of international law present an integral part of the internal legal order, that these have primacy over national legislation and that these are directly applied „*when regulating relations differently from national legislation*”. This provision requires a brief overview. Namely, unlike other constitutions in which the primacy of international law is related to „the legal order”, our constitution maker, by using the (too narrow) term „national legislation” does not imply the primacy of international law over the Constitution, by-laws and other acts of state authorities. Such a concept is further narrowed by the explanation that it exists only in cases in which the aforementioned sources of international law regulate relations „*differently from national legislation*”. For these reasons, the term „legislation” should be interpreted more broadly, in a material sense, and not in a strictly formal or procedural sense. Such reading of the constitutional norm shall expand the space for enforcement of international legal regulations in the part referring to transnational organised crime, whereas the cited provision should be adapted to European constitutional standards when and if the revision of the constitution happens.

The following provisions from the second part of the Constitution are of particular relevance for the topic of this paper: the provisions related to limitation and temporary limitation of human rights and freedoms (arts. 24 and 25), a set of constitutional rights related to guarantees in proceedings before the courts (arts. 29–38 of the

Constitution), Articles that guarantee the right to privacy (art. 40 of the Constitution) and the right to the inviolability of the home (art. 41 of the Constitution), as well as the Article related to the protection of personal data (art. 43 of the Constitution).

This approach of our constitutional maker confirms the idea that „*constitutionalism is a limitation of power in the interest of freedom*” (K. Friedrich). Following the provisions of the European Convention and comparative constitutional solutions, our Constitution includes an obligation of cumulative fulfilment of the three conditions for the limitation of rights and freedoms (only by law, only if needed in a democratic society and only for the purpose for which these rights have been prescribed). The above is needed for the purpose of avoiding arbitrariness as well as inappropriate attempts to limit rights, since there is a thin line between limitation and violation of human rights.

In relation to the catalogue of human rights determined in the Constitution, here we are at the legal dividing line between the principles of criminal law science and academic hesitation on one side and police and a part of prosecutorial structures that prefer efficiency in acting (collection of evidence and adjudication). We are at the crossroads between the rights of those who are identified as the actors of transnational organised crime and the need of the state to deal with them more efficiently, having in mind the social danger of this type of crime, even at the cost of „*urgency may be the source of a norm*”. In that regard, there are also frequent political and media requests for the establishment of special courts and special investigative agencies that present a kind of „normative optimism,” i. e., the belief that it is enough to prescribe something in order to achieve it. Therefore, both sides (science and practice) must be aware that abuses are possible.

For the normative aspect of this topic, in addition to the constitutional one, it's also important to know the legal definition hereof: from the Criminal Code, the Criminal Procedure Law, the Law on Mutual Legal Assistance, the Law on Confiscation of Assets Acquired through Criminal Activity, the Law on Data Confidentiality, the Law on Personal Data Protection, the Law on Border Control, the Law on Human Rights and Freedoms, the Law on the Protector of Human Rights and Freedoms and other laws.

In addition to the constitution and laws, agreements, protocols, memoranda and joint statement signed by the Government of Montenegro and the Ministry of Interior with the governments and ministries of interior of other countries present an important segment of normative regulation of transnational organised crime. The aforementioned documents are named differently, although some of them include the names of criminal offences from the part of criminal legislation referring to transnational organised crime. However, what all these have in common is the trait of being „transnational” and „organised” (in the context of crime). However, it is interesting that

only one of these documents explicitly uses the phrase „transnational organised crime”⁸.

The existing normative framework relevant to this topic should be supported by the Strategy for Combating Transnational and Organised Crime, the adoption of which, together with the adoption of the corresponding Action Plan, is being postponed and still in its draft phase. Therefore, the process of adopting this strategy should be accelerated, especially since it has been defined as one of the important tasks in the process of accession to the European Union and a step towards the operationalization of the European Union Strategy for combating organised crime (2021–2025).

⁸ Agreement between the Government of the Republic of Montenegro and the Government of the Republic of North Macedonia on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics, psychotropic substances and precursors, illegal migration and other criminal offences, signed on 10 June 2003; Agreement on cooperation between the Government of the Republic of Montenegro and the Government of the Republic of Albania on cooperation in the fight against terrorism, organised crime, trafficking, as well as other illegal activities, signed on 31 October 2003; Agreement between the Ministry of Interior and the Ministry of Interior of the Government of the Republic of Montenegro on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics, psychotropic substances and precursors, trafficking in human beings, illegal migration and other criminal offences, as well as cooperation in other areas within their jurisdiction, signed on 03 December 2003; Agreement between the Government of the Republic of Slovenia and the Government of Montenegro on cooperation in the fight against organised crime, trafficking in human beings and illegal migration, trade in illicit drugs and precursors, terrorism and other forms of crime, signed on 13 October 2006; Agreement between the Government of Montenegro and the Council of Ministers of Bosnia and Herzegovina on cooperation in the fight against terrorism, organised crime, illicit trafficking in narcotics, psychosomatic substances and precursors, illegal immigration and other criminal offences, signed on 07 September 2007; Agreement between the Government of Montenegro and the Government of the Republic of Bulgaria on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics, psychotropic substances and precursors, illegal migration and other criminal offences, signed on 05 April 2005; Agreement between the Government of Montenegro and the Government of the Republic of Italy on the fight against crime, signed on 25 July 2007; Memorandum of Understanding between the Department for Public Security of the Ministry of the Interior of the Republic of Italy and the Southeast Europe Police Chiefs Association (SEPCA) regarding the strengthening of cooperation in the fight against organised crime, signed on 15 May 2011; Agreement between the Government of Montenegro and the Republic of Cyprus on cooperation in the fight against terrorism, organised crime, illicit trade in narcotics and psychotropic substances, illegal migration and other criminal offences, signed on 21 March 2015; Joint statement of intent between the Federal Ministry of Interior of the Federal Republic of Germany and the Ministry of Interior of Montenegro on prevention in the fight against transnational crime and capacity building, signed in 2015; Agreement between the Government of Montenegro and the Federal Council of Switzerland on police cooperation in the fight against crime, signed on 07 September 2016.

4. Conventional Law

The relationship between respect for human rights and suppression of transnational organised crime cannot be fully understood if the analysis hereof does not include consideration of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols. The following convention rights are of special importance for the aforementioned relationship: the right to liberty and security (art. 5), the right to a fair trial (art. 6), the right to privacy (art. 8) and the right to property (art. 1 of Protocol No. 1). However, the foregoing does not exhaust the list of relevant convention rights, starting with the fact that all of these are characterised by the features of substantive indivisibility and reciprocity.

Art. 5 of the Convention guarantees the right to liberty and security, i. e., the prohibition of deprivation of liberty except for the cases specified therein and in accordance with the procedure prescribed by law. This article also provides other guarantees for a person deprived of liberty (the right to be informed of the reasons for the arrest in his native language, the right of appeal to the decision on deprivation of liberty, etc.). In addition, when persons who were participating in illegal actions that bear the traits of transnational organised crime are deprived of liberty, strict compliance with the aforementioned rights must be ensured. Otherwise, pursuant to paragraph 5 of this article, a person who is deprived of liberty contrary to the provisions hereof is entitled to a complainable compensation.

With regard to art. 6 of the Convention, it should be taken into account that around 80% of the total number of cases from Montenegro that have been brought before the European Court of Human Rights are related to the right to a fair trial. These are of great importance in the context of respect for human rights in the fight against transnational organised crime, since it must be taken into account that when deciding on criminal charges against a person, everyone has the right to a fair and public hearing within a reasonable time before an independent and impartial court, according to the law. Especially „ordinary courts” and the Constitutional Court have taken this convention right into account in order to prevent violations of human rights and reduce the number of applications addressed to the Court in Strasbourg.

The cases related to respect for private and family life, correspondence and inviolability of home referred to in art. 8 of the Convention are important for the context of this paper. For example, the use of data from encrypted messaging applications (EncroChat, Sky, etc.) and its validity in court proceedings present a central topic in numerous European judicial systems. This issue raises a number of questions, such as the following ones: the legal basis for „hacking” mentioned applications; whether these can be evidence or only operational data; at which stage of the proceedings these can have the power of evidence; whether these are valid if being taken individually

or must be supported by other evidence, which includes the manner in which they were obtained, i. e., how the collection of evidence was reasoned; dilemmas about their reliability; the right to challenge the legality of evidence collection in the proceedings, etc. There is case law of the European Court of Human Rights related to the cases from the region (*Dragojević v. Croatia* (2015), *Bašić v. Croatia* (2016)) referring to the method of data obtaining, all of which open up new challenges and lead to the search for new answers. The situation is further complicated by the fact that the Convention does not contain rules on the legality and illegality of evidence; however, it only assesses whether the use of evidence is contrary to its provisions. All this should be related to one of the basic principles of interpretation of the Convention, according to which the Convention is a „living document” that is constantly being developed and adapted in accordance with ongoing changes in social circumstances.

Sensitivity is also visible in the application of art. 1 of Protocol 1 to the Convention, according to which every person is entitled to peaceful enjoyment of his or her possessions and that he or she shall not be deprived of his or her possessions except for situations in which it is centred around a public interest and in circumstances prescribed by law and general principles of international law. This provision becomes actualised in situations of temporary or permanent confiscation of property acquired by criminal activity, situations related to the distribution of such property to family members, separation of such property from previously acquired property, as well as all other procedural problems arising from the above. It seems that the media has the greatest interest herein, but, at the same time, it also has the greatest task in terms of disclosure, investigation and interest in those who adjudicate. In such cases, experiences from Italy are of great importance, as are experiences from international cooperation on this topic, such as, for example, the experience from a French-Montenegrin seminar that has been recently organised with the aim of improving knowledge in the field of confiscation of property acquired through criminal activity. Confiscation activities must not be the only focus of the media when it comes to the fight against this socially negative phenomenon. Otherwise, the practice of pompous announcements of property confiscation and then just silent abandonment of this issue shall be continued, whereas the discrepancy between public expectations and efficient satisfaction of justice shall be increased.

5. *Concluding Remarks*

Taking into consideration the content of this paper, appropriate conclusions have been reached. These conclusions further point to possible directions in terms of both the study of this topic and concrete activities aimed at the fight against organised crime, however, with respect for the human rights of actors in this form of crime.

e content of this paper, appropriate conclusions have been reached. These conclusions further point to possible directions in terms of both the study of this topic and concrete activities aimed at the fight against organised crime, however, with respect for the human rights of actors in this form of crime.

Having in mind the above, the following can be concluded:

— respect for human rights and activities aimed at suppressing transnational organised capital represent a complex relationship and a demanding legal and social task for all authorities involved in solving hereof. The same stands for the analysis of all aspects of this problem, which, within legal science, in addition to criminal law, include other legal disciplines, not only legal and theoretical ones, but also the ones from positive law;

— suppression of transnational organised crime and respect for human rights should be the subject of a special legal discipline and other forms of acquisition, deepening, and verification of legal knowledge—at faculties, in the Centre for Training in Judiciary and State Prosecution, in preparation programmes for taking professional and bar exams, as well as at various professional conferences;

— when considering the revision of the Constitution, Article 9 of the Constitution should be upgraded, along with ensuring the (unconditional) primacy of international law;

— when it comes to laws, the qualifications of criminal offences related to transnational organised crime should be reviewed, as should the penal policy related to them. First of all, this refers to the review of solutions provided in certain laws, especially the ones from the Criminal Code and the Code of Criminal Procedure. The list of changes in legislation should also include the solutions provided in the Law on Personal Data Protection, the Law on the Protector of Human Rights and Freedoms of Montenegro, as well as in other acts regulating human rights;

— As for the ongoing year, it is necessary to adopt the strategy of the Government of Montenegro for the fight against transnational and organised crime for the period 2023–2026;

— it is necessary to upgrade the curricula of the faculties of law, the faculties of security and the Police Academy in order to familiarise students with modern approaches to this topic and the influences that fall under the process of internationalization in the context of the definition and protection of human rights;

— certain segments of this topic should be analyzed within master's theses and doctoral dissertations, as well as within various columns in legal journalism. In such a way, comprehensive legal analyzes shall produce wider resonance by promoting awareness of the importance of the fight against transnational organised crime;

— new forms of international judicial and police cooperation should be developed, as should the instruments related to the fight against this form of crime.

Searching for a Just Balance

Summary: 1. Issues for Consideration at the International Level of Fighting Transnational Organised Crime and Protection of Human Rights.

1. Issues for Consideration at the International Level of Fighting Transnational Organised Crime and Protection of Human Rights

Respecting human rights in the fight against transnational organised crime is an extremely broad and demanding topic. It is as broad as the concept of human rights and as demanding as the fight against transnational organised crime itself.

In this context, human rights do not only refer to individuals who are perpetrators of transnational organised crime, but also to their human rights before, during, and after criminal proceedings. It concerns the human rights of all of us, from citizens to victims of transnational organised crime.

The fundamental concept should be based on balance. Symbolically speaking, on the scales of *Iustitia*, we measure not only the *pro et contra* arguments of defence and prosecution but also the proportionality of limiting the human rights of perpetrators of transnational organised crime in order to protect the rights of others.

This is a legitimate basis for limiting human rights according to the European Convention on Human Rights and Fundamental Freedoms. Art. 8 of the Convention guarantees everyone „*the right to respect for his private and family life, his home and his correspondence*”, with the assurance that „*public authorities will not interfere with the exercise of this right*”. However, this right is not absolute, as public authorities will legitimately interfere if it is „*in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*”.

The same applies to the right to enjoyment of property, guaranteed by art. 1 of Protocol 1 to the Convention, as the right of everyone „*to*

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peaceful enjoyment of his possessions”, from which no one can be deprived, with a relativization in the continuation of the article: „[...] *except in the public interest and under the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*”.

These two rights are key in the fight against transnational organised crime in two ways: through measures of secret surveillance and confiscation of property obtained through criminal activity. It should be noted that transnational crime is not only about one segment or several of them but is a concept that is changing. Today, transnational organised crime is not the same phenomenon as it was in the 1970s or 1980s. It has been changed by globalization, not as overcoming physical borders, but as its virtualization. The latest data shows that 80% of criminal acts in the world have some digital element. Therefore, we must not give narrow meanings to concepts.

Transnational organised crime seriously endangers our human rights. The latest measures of secret surveillance of the use of encrypted applications, among which the most used is SKY, have raised questions about respecting the right to respect for private and family life under art. 8 of the Convention. Without delving into the legal validity of evidence obtained in this way, it is to be believed that the European Court of Human Rights deeply contemplates the balance between the human rights of the accused and the human rights of everyone else.

In this regard, there is also the mechanism of confiscating property acquired through criminal activity, which is one of the most effective tools in the fight against transnational organised crime. In terms of art. 1 of Protocol 1 to the Convention, it is beyond doubt that the fight against transnational organised crime represents a „public” and „general” interest, as a legitimate basis for limiting the right to peaceful enjoyment of property.

In all of this, the need for strengthening international police and judicial cooperation emerges. We must not be partially focused on this. Such cooperation must be systemic. This implies the internationalization of criminal law and human rights in this context. The European Union and more and more Western Balkan countries should have a common approach to this.

In conclusion, none of the above can derogate from the right to a fair trial under art. 6 of the Convention; on the contrary, the balance we strive for can only contribute to the full realization of this principle.

PRIKAZI



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Donja Gorica, Podgorica, 2024.

Ljudskim pravima užas je ratovanja i nasilja dao oblik u kome se ona sada iskazuju. Crne dubine međuljudskih i međunarodnih odnosa čuvaju i dalje tajne od kojih bi svaka pojedinačno zaštitila barem još jedno neregulisano značajno pravo, i to — ljudsko pravo. Čini se da se pojavom svakog novog slova o ovoj temi međuljudski ambis ispunjava svjetlom, a u daljim će redovima biti riječi o jednom takvom poduhvatu.

Univerzitetski udžbenik *Uvod u ljudska prava (drugo osavremenjeno izdanje)* rezultat je saradnje dva istaknuta profesora prava: prof. dr Mladena M. Vukčevića i prof. dr Danila Čupića. Objavljen godine 2024. u okviru biblioteke *Pravna misao*, čiji je izdavač Fakultet pravnih nauka Univerziteta Donja Gorica, ovaj udžbenik (474 stranice) primjer je uspješnog i dosljednog slijeđenja ideje o nužnoj evoluciji prava, kao društvene odnosno kulturne pojave. Svaki obrazac ponašanja, počevši od onog kojeg nazivamo nepisanim običajem, pa sve do propisanog pravila — zakonske norme, podložni su sopstvenoj evoluciji koja se uvijek vezuje za promjene u društvenom odnosu prema njima. Najpozvaniji da proučavaju te promjene, kao i da ih na različite načine tumače, svakako su univerzitetski profesori. Pri naučnom posmatranju prava, uvijek mora biti prisutan ideal istinitosti i tačnosti. Da bi se taj ideal ostvario, pravo se ne smije izučavati, tumačiti, ni stvarati, odvojeno od drugih društvenih pojava. S tim u vezi je i stav autora, prof. dr Mladena Vukčevića, da ne postoji jedinstvena definicija ljudskih prava i da je određenje pojma ljudskih prava jedno od najsloženijih pitanja ne samo ustavnog prava, već i cjelokupne pravne nauke: autor navodi da je osnovni razlog njihove kompleksnosti taj što se ljudska prava ne mogu posmatrati samo kao pravna kategorija, te je, stoga, za njihovo tumačenje i definisanje neophodna analiza ekonomskih, kulturnih, socijalno-političkih i drugih uslova koji utiču na njihov nastanak, prirodu, evoluciju i ostvarivanje.

Udžbenik *Uvod u ljudska prava* primjer je strogog držanja njegovih autora za principe koji pravnu nauku čine većim i značajnijim fenomenom nego što to predstavlja njena najvidljivija manifestacija

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— normativizam. Kao što autori u uvodnim napomenama kazuju, činjenica da je od sredine prošlog vijeka do danas proces internacionalizacije ljudskih prava bitno uticao na izučavanje njihovih izvora, obilježja, međusobnih odnosa i ukupne prakse u ostvarivanju, iziskivala je pojačan naučni interes u tom smjeru. Upravo je to opredijelilo autore da izrade monografiju koja u većoj mjeri, u odnosu na prvo izdanje, obrađuje Evropsku konvenciju za zaštitu ljudskih prava i osnovnih sloboda koja se primarno ostvaruje u praksi Evropskog suda za ljudska prava. Takođe, treba napomenuti da su u modernom vremenu posebno teška određena pitanja koja odnedavno uživaju zaštitu kroz sistem zaštite ljudskih prava na međunarodnom nivou. Autori su to imali na umu, te možemo kazati da su svojim pregnućem dali doprinos razumijevanju modernog filozofsko-pravnog poimanja jednakosti, slobode, pravednosti.

Potreba za teorijskim, opštim znanjem o pravu, veoma je prisutna. Prema riječima profesora Radomira Lukića, pravnik isključivi praktičar, iako, po pravilu, stiče veliko iskustvo u praktičnoj primjeni prava, mora biti ličnost koja se ne zbunjuje čim dođe do složenijih pitanja, a zbunjuje se upravo jer mu nedostaje opšte znanje o pravu. Pravo se mora shvatati kao sistem, kao cjelina, i mora se razumjeti njegova suština. Neizmjernost prava je neizmjerna! Ukoliko nema stručnog, na teoriji zasnovanog, znanja, onda će pravo u praksi mnogo trpjeti. Vrlo je važno ukazati na činjenicu da pravni fakulteti našeg regiona ne prate u dovoljnoj mjeri pomenutu evoluciju prava i društvenih odnosa zbog kojih se pravo donosi. Zato su studenti veoma često prinuđeni da uče iz udžbenika koji sadržinski ne odgovaraju potrebama novog doba. Koautori udžbenika *Uvod u ljudska prava (drugo izdanje)* svojim ukupnim profesionalnim i ličnim angažmanom konstantno su ukazivali na važnost pomenute prakse. Upravo je ovo izdanje udžbenika primjer dosljednog praćenja ideje da na pravnim fakultetima budući pravници ne treba da svoje znanje o pravu zasnivaju samo na već uspostavljenim pravilima. Analiza osnovnih pravnih instituta u ovom udžbeniku ne zatvara, već otvara i podiže vidik sa kojeg će studentkinja ili student posmatrati pravo. Konstantna i trajna volja za preispitivanjem smisla pravnih ustanova i njihove podobnosti za primjenu u sadašnjosti mora biti aksiom, a toga su koautori ovog udžbenika bili i te kako svjesni.

Drugo izdanje udžbenika *Uvod u ljudska prava* ima pet cjelina. *Prva cjelina* tiče se: opštih pojmova koji se vezuju za ljudska prava, istorijskog razvoja ljudskih prava i njihove klasifikacije. Pojam ljudskih prava, kao subjektivnih prava, veoma je složen i to stoga što ona nisu nužan element svakog pravnog poretka, odnosno pravnog sistema. Jasminka Hasanbegović je ukazivala na to da ljudska prava mogu u pravnim porecima odnosno sistemima pozitivnopravno postojati ili ne postojati (kontingentnost ljudskih prava). Autor, prof. dr Mladen Vukčević, na veoma jasan i razumljiv način približava čitaocu prirodu ljudskih prava, uz osvrt na njihov istorijski razvoj i klasifikaciju. Ipak, ljudska prava su moderna, nastala su u moderno doba,

a zbog svog značaja postala su bitno obilježje modernosti prava, države i društva. Ona su pojedinačno sadržinski određena i, po pravilu, objedinjena u jednom — modernom konstitucionalnom — izvoru prava.¹ Zato, međusobna povezanost i isprepletanost naučne discipline ustavnog prava i ljudskih prava čine logičnim stav da će naučnu legitimaciju ljudskih prava najbolje dati upravo konstitucionalisti, kakvi su i autori ovog udžbenika.

U *drugoj cjelini*, koja nosi naziv „Ljudska prava u ustavnom sistemu Crne Gore”, obrađena su ljudska prava sa stanovišta pozitivnog prava Crne Gore, a autor čitaoca u nju uvodi citatom znamenitog Sule Radovog Radulovića: „Čovjek ne traži mnogo — koru hljeba da nije gladan, knjigu da nije slijep i slobodu da smije zboriti”. Treba imati na umu da ljudska prava nisu prirodna, već pravno pozitivizovana prirodna (tj. subjektivna) prava. Ona su postala pravno značajna tek kad su postala dio pozitivnog prava, tj. pozitivno pravo ljudskih prava.² Ljudska prava su, zapravo, prva normativno-konceptualna manifestacija višemilenijumskog traganja različitih društava za sistemom pravednog prava koji će biti pismom izražen. U ovom dijelu udžbenika čitalac se može detaljno upoznati o ljudskim pravima sadržanim u Ustavu Crne Gore, a pored toga je na veoma jasan način opisan postupak i nadležnost organa za zaštitu ljudskih prava u Crnoj Gori.

Treća cjelina ovog udžbenika obrađuje „međunarodno pravo ljudskih prava”. Počevši sa izvorima ljudskih prava u međunarodnom pravu, u okviru ovog dijela čitalac se i bez prethodno stečenog pravnčkog znanja može upoznati o opštim karakteristikama i pravnim dejstvom: međunarodnih ugovora, međunarodnih običaja, opštih pravnih načela priznatih od strane civilizovanih naroda, zatim o pomoćnim i dodatnim izvorima međunarodnog prava ljudskih prava. Pored toga, jasno je objašnjena hijerarhija izvora i načini implementacije međunarodnih ljudskih prava. Veoma zanimljive činjenice mogu se naći u dijelu koji govori o sistemima zaštite ljudskih prava u međunarodnom pravu. U širem smislu, oko 80 strana o sistemima zaštite ljudskih prava u međunarodnom pravu mogu značajno poslužiti za razumijevanje cjelokupnog međunarodno-pravnog sistema. Radbruh je govorio da etika ne može riješiti pitanje rata³, pa baš iz tog razloga, pogotovo u sadašnjem vremenu, sistem zaštite ljudskih prava je usamljeno ostrvo ka kojem će (nakon prestanka prijetnje ljudskim pravima *in concreto*) jedino moći ići ona strana čija su ljudska prava povrijeđena. Do tog ostrva stiže se u ranama, ali je svako konkretno odlučivanje o povrijeđenom ljudskom pravu bolje od *isključivo* filozofskog promišljanja o povredi i eventualnoj nepravdi. Nemir je ovlađao, strpljenja i pažnje sve je manje, sila prijeti da još jednom pokaže svoju konačnu nadmoć nad pravom, pa je baš zato hitno potrebno još

¹ Jasminka Hasanbegović, *Ka filozofiji prava kao filozofiji ljudskih prava*, Dosije studio, Beograd, 2021, str. 165.

² *Ibid*, 13.

³ Gustav Radbruh, *Filozofija prava*, Nolit, Beograd, 1980, str. 256.

više raditi na sistemima zaštite ljudskih prava. Međutim, ono što se često zanemaruje u tom procesu jeste činjenica da bi sve strane morale biti saglasne u pogledu uspostavljanja i održavanja tih sistema. Saglasnost volja dovodi do (punovažnog) dejstva. Nametanje volje radi postizanja dejstva (iz bilo kojih razloga) dovodi do kraha cjelokupnog principa konsenzualizma u stvaranju ovih sistema. Svaki čitalac, bilo da je pravnik, da je tek na putu sticanja diplome pravnika, ili da se uopšte ne nalazi na tom putu, može u ovom dijelu pronaći mnogo korisnih i potrebnih informacija, a posebno u dijelu koji se tiče sistema zaštite ljudskih prava pred Evropskim sudom za ljudska prava.

Četvrta cjelina nosi naslov: „Sadržaj ljudskih prava i sloboda u Evropskoj konvenciji o zaštiti ljudskih prava i osnovnih sloboda”. Nažalost, sukob moći na evropskom kontinentu mogao bi dovesti do uništenja temeljnih kulturnih vrijednosti koje karakterišu pozitivne strane u razvoju Evrope. Posljedice uspostavljanja različitog sistema vrijednosti unutar Evropske unije, osim onih koje su ekonomskog karaktera, dovešće do formiranja interesnih nedržavnih entiteta koji bi mogli u potpunosti urušiti domete do kojih se stiglo u višemile-nijumskom evropskom razvitku. Paradoksalno izgleda činjenica da se slobode moraju *nametati*. Ova cjelina, na krajnje suprotan i manje sumoran način, govori o sadržaju ljudskih prava u EKLJP i trebalo bi da čitaocu pruži uvid u to šta se nalazi na udaru ukoliko dođe do sloma *naslijeđenih* vrijednosti u Evropskoj uniji. Kako u uvodu udžbenika i piše: „Evropska konvencija nije značajna samo kao najefikasniji i uzoran model zaštite ljudskih prava. Ona je i instrument koji je pokazao da je davanje pravnog subjektiviteta pojedincima u međunarodnom pravu značajno i za primjenu načela vladavine prava u unutrašnjem pravu. Zato se kaže da konvencijsko materijalno pravo nije statička, nego živa materija, u stalnoj evoluciji i nadogradnji, sa težnjom dostizanja univerzalnog shvatanja i primjene ljudskih prava na evropskom kontinentu”. Studenti i drugi čitaoci će u okviru ove cjeline moći veoma lako da nauče, a što je i bitnije — shvate, zašto su evropske vrijednosti jedino što nas drži podalje od varvarstva i anarhije.

U *petoj cjelini* nalazi se značajan broj dokumenata koji se neposredno ili posredno tiču ljudskih prava, kao što su npr: Univerzalna deklaracija o pravima čovjeka (1948), Međunarodni pakt o građanskim i političkim pravima (1966), Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima (1966), Evropska konvencija o zaštiti ljudskih prava i osnovnih sloboda (1950), protokoli uz EKLJP i tako dalje. Činjenica da udžbenik sadrži i ovu cjelinu, koja čitaocu omogućava neposredan susret sa prethodno iznesenim teorijskim faktima, uvjerava nas da će svi čitaoci, a pogotovo studenti, moći na savremen i jasan način razumjeti važnost, karakteristike, ostvarenost i zaštitu ljudskih prava.

Novo izdanje udžbenika *Uvod u ljudska prava* u velikoj mjeri će olakšati studentima usvajanje znanja o međunarodnom i nacionalnom sistemu zaštite ljudskih prava, odnosno o ustanovama koje su

rezultat civilizacijski najznačajnijeg konsenzusa država. To olakšanje tiče se obezbjeđivanja onih uslova koji garantuju da student neće stečeno znanje izgubiti vrlo brzo nakon položenog ispita. Kao što se pravo donosi i mijenja zbog potreba zajednice, tako se i univerzitetski udžbenici pišu, prije svega, zbog potreba studenata prava. I pored toga, sigurni smo da će ovo izdanje biti neizostavan dio literature koju će svakodnevno koristiti pravnici praktičari u svojim zadacima.



IZ PRAVNE ISTORIJE



Isprave Velikog suda^{*}

I

VELIKI SUD NAREĐUJE KAPETANU GRAHOVSKOM DA IZMIRI SUDSKE TROŠKOVE OKO SUĐENJA I IZVRŠENJA KAZNI NAD SAVOM VUJAČIĆEM I DA IZVRŠI PRESUDE

G. Kap. Akimu Dakoviću

U Grahovo

Neobični zločinac Sava Jovanov Vujačić iz Grahova koji je izvršio ubistva nad sedmoro čeljadi muških i ženskih, za koje je nad njim izvršena smrtna kazna. Pri ispitima Sava je kaza:

1. Kad je ubio pok. Steva Andrina iz Cuca i da je našao na njemu tal. 59 koje u zlato koje u cvancike, jedan nož i jednu struku.
2. Kad je ubio Ubljanina da je našao na njemu cv. 26, 1 kapu i džamadan.
3. Kad je ubio pok. Stevana Bulaića bila je na njemu jedna kubura i jedna struka.
4. Kad je ubio ženu pok. Stevana na njoj je naša a. v. f. 32.
5. Kad je ubio pok. Milutina Ercegovca našao je na njemu groša 3, a na ostale koje je ubio nije naša ništa. Sava je kaza da je dužan:
 1. Đuru Morinjaninu t. 70. 2. Radu Jovanovu Cuci t. 9. 3. Petru Zejanovu 2 f. 4. Tripu Bjelopljcu 4 f. 5. Božu Bogdanovu Ledeničinu f. 3. 6. Špiru Vidoviću u Risan t. 28. 7. Raju Nikovu Ubljaninu t. 6. 8. Šćepanu Stanišinu Cuci cv. 4.

Okolo izvršenja kazne nad Savom Jovanovijem bilo je troškova. Oficer i barjaktar sa 4 vojnika potrošili f. 15 i 77. Komandir Nikola f. 2. Savu Bjelošu i Joku Lukinu koji su povelu Savu do na Grahovo za putninu obojici t. 12. koje kad nakudžate od imanja Savina da iste pošljete u ovi Sud, a ostale predajte kome je što navedeno. Familiji ovog zločinca ne ostavlja se ništa t. j. ni kuća ni ralo zemlje. Najpriđe treba izmirit sa imanja sve ravno do kuće i rala zemlje, a s kućom

^{*} Sljedeće isprave nalaze se u Arhivu Velikog suda, a navedene su prema: Nikola P. Rajković, *Isprave crnogorskih sudova (1879–1899)*, CID, Podgorica, 1998, str. 305–306 (I), 313–314 (II), 346 (III), 381–382 (IV).

i ralom zemlje da se domiri ono što je Sava ponio sa ubivenih. Za omir troškova pada na imanje sledećih krivaca da potpune. Glavari Grahovski isključeni su od naknade svija troškova uzrokom slabe marljivosti o pogibijama. Milutin Jovanov koji je znava da je Sava ubio Stevana Cucu on je zatajio njegov zločin i nije kaza Sudu, zato je presuđen na 5 godina robije o svom trošku na Grmožur koji iznosi a. v. 456, 75. Miloš Vujačić stric Savin koji je znava da je Sava ubio pok. Iliju Malteza pa ga zataja da ne kaže Sudu njegov zločin zato je presuđen na 4 godine robije o svom trošku na Grmožur koji iznosi a. v. f. 305 i 25. Đurđe Spasojev Vujačić koji je znava za ubistvo pok. Ilije Malteza kao i Miloš. No pošto je bio nepunoljetan presuđen je na dvije godine u zatvor na Grmožur o svom trošku koji iznosi a. v. 374. Borika Spasojeva majka Đurđina koja je znala sa kćerkom za ubistvo pok. Ilije Malteza pa nije kazala zločin Sudu presuđena je da ostoji 6 mjeseci u zatvor na Grahovo. Golub Jovanov Vujačić koji je bio očevidac kad je Sava ubio pok. Stevana Bulaića u njegovoj kući pa zatajio da ne kaže Sudu presuđen je kad ozdravi na 5 godina robije na Grmožur.

Navedeni krivci pošto se izmire dosuđene putnine i troškovi a tako i dugovi od zajednice njihovih kuća pa onda od osobitih njihovih delova da se izmire njihovi troškovi koji su im dosuđeni sa robijom. I to ako njihove familije nebi pristale da iz zajednice izmire dosuđene im troškove.

Cetinje 13. nov. 1887.

/Fasc. 78 br. 3051/

V. Sud.

Vojnici koji su po naredbi Suda šiljati na Cetinje, držali duge straže takvi imaju pravo na zakonite putnine.

II

GODIŠNJI PREGLED I IZVJEŠTAJ O RADU VELIKOG SUDA CRNE GORE ZA 1887 GODINU PRIKAZAN U BROJKAMA

Knjaž. C. Veliki sud
Broj 3424
Cetinje 29/12. 1887.

Raporat rada Velikog suda za 1887.

1. Prinjenih pisama, davija i pitanja bilo je svega 3542 više no lani 496 od kojih zavedeno u glavni registar 2623, a ostatak od 919 molbe su i pitanja.
2. Izdatih pisama i presuda u Državu 3427 više nego lani 367/
3. Bračni davija 58 manje nego lani 4/

4. Nezakonite dece 46 / manje nego lani 15/
5. Ubistva 16 / više nego lani 1/
6. Samoubistava 6 / više no lani 2/
7. Nehotični ubistava 5 / manje nego lani 3/
8. Pokušaja ubistava 1 / manje nego lani 1/.
9. Udaljenje vanbračne dece 4.
10. 7 ubistava koje je izvršio u predprošle godine Sava Jovanov.
11. Svađa, pokrađa i niže kriminalne parnice 18.
12. Primjeno pisama iz stranih Država 343 / više no lani 68/
13. Izdato pisama za strane Države 293 / manje nego lani 14/
14. Tamničara prošlo je u tamnicu 372 / više nego lani 68/ od kojih se nalazi danas u tamnicu 69, a od preprošlih godina 50, u sve 119/ više nego lani 36/ od kojih su na trošak Države 115, a o svom trošku 4. Razumije se traži se i tražiće se naplata za njihov trošak od njihova imaća.
15. Po protokolima kapetanskim koji su do danas pregledati t. j. 59 protokola uzeto je globe f. 4441.20. po istem izdato za putnine f. 3847 i 92 n.

Ostaje za kasu f. 593 i 28 n.

Veliki Sud

/Fasc. 78 br. 3424/

III

ODLOMAK BRZOJAVA KAPETANA IZ CRMNICE UPUĆENOG VELIKOM SUDU O BJEGSTVU ZATVORENIKA IZ ZATVORA GRMOŽURA SA ŠKADARSKOG JEZERA

...nalazilo oduzeli su mi sve oružje, novce protokole i t. d. Ovo je sve rađeno od 5 i po do 1 ure posle ponoći. Od društva te je bilo oružje Petrovo pri ovijema. Isti čas čim se lađa odmakla od Grmožura put pristana Selačkog ovi tri tada postanu slobodni popnu se uza zid i poviču Petro jesi li živ. Na prvo pitanje Petro im se nije odazvao, a drugom kad poviču odazvaše se i reče živ sam ništa ljudi a što mi je jer da ste ljudi biste me ubili. Oni na to odgovore oni koji su to radili utekli su nego izlazi. Ja izist ne mogu što nećete vrata lomiti. Oni otvore vrata i razvežu me. Ja pošto me odvezaše ruke podoh slomih katanac od tavnice i puštih tavnica koji su bili zatvoreni kad i ja. I posle su vikali ali badava. U toliko Puniša Bjelopavlič sveže dvije grede i na njima se preveze u Godilje i dadne glas, to je bilo još 1 ura do svanuća.

Imena sledeća koji su pobjegli:

1. Risto Žikić 2. Milivoje Lazarević 3. Spasoje Lazarević 4. Ilija Škuletin Pješivac 5. Filip Nikolin Građanin 6. Vuko Pijov iz Nikšića 7. Stevan Đukić Vasojević 8. Muharem Kofrc! 9. Luka Jokov Drob-njak 10. Tomo Savov Bratonožić 11. Rade Savov Kuč 12. Vukosav

Vuković 13. Tomo Tomov /! / 14. Mališa Rašov 15. Gavrile Pekov Markovljanin 16. Tripko Nedić iz Pive 17. Bogdan Marašev Moračanin 18. Čepan Aleksić Banjanin 19. Čubro Lakov Kuč 20. Miko-nja Božov Bjelopavlić 21. Tripko Lazović Drobnjak.

/bez datuma/

/Fasc. 96 br. 694 iz 1888. g./

Pokorni Kap. G. Đonović

IV

VELIKI SUD DOSTAVLJA RASPIS KAPETANIMA DA SE PRIDRŽAVAJU NAREDBE O IZVRŠENJU TJELESNE KAZNE NAD KRADLJIVCIMA I DA IM SE NE DOZVOLI PRAVO ŽALBE

G. Kapetane.

Kao što Vam je poznato Vrhovni Sud davno je ustanovio da se svaki koi bi se u lupeštinu uhvatio podvrgne tjelesnoj kazni. Iza toga ne samo da je Vrhovni Sud potvrdio gornju odredbu nego i još dodao da svaki vojnik koji bi se usudio da iz potaje udari drugoga podvrgne šibikanju sprovodom između četnog fronta.

Cijelj koja se ovim odredbama ima postići od velikog je stvarnog i moralnog značaja jer ona ne samo što želi da se u ličnoj slobodi i svakoj sopstvenosti osigura potpuna bezbjednost, nego još teži da se čast vojnička drži na onoj visini na kojoj je vazda u našoj zemlji stajala.

Iz primjera koji su Vel. Sudu poznati primjetilo se, da nekoji kapetani ne izvršavaju ponekad na prestupnicima prepisatu kaznu nego ih sprovode na apelaciju Velikom Sudu, te im na takvi način idu na ruku da mogu dobit pomilovanje. Ovako postupanje ili pravilnije reći popuštanje kapetana prouzrokovalo je da se označeni prestupi sve više i više u našoj zemlji potvoravaju.

Želeći da se ovom stane na put što prije, Veliki Sud našao je za nužno da Vam g. Kapetane naredi sledeće:

1. Pošto se jednom uvjerite i pošto Vam se potpuno dokaže da je jedno lice doista uhvaćeno u lupeštini to u određenim zato varošima izvršite odmah nad njim tjelesnu kaznu od 25 udaraca. Za svako neizvršavanje ove tačke Vi ćete g. Kapetane platiti po 25 tal. globe. Iz ovoga pravila izuzimaju se lica maloljetna, pre-stara i suludna.
2. Da svakog vojnika za kojeg se jasno i tačno dokaže da je iz potaje udario drugoga predate nadležnoj vojničkoj vlasti da nad njim izvrši tjelesnu kaznu. Razumije se vaša odgovornost prestaje od onog časa kad prestupnike uredno predate vojnim vlastima.

U slučaju ako ovu tačku ne budete vazda tačno izvršavali određeno je da svaki put za neizvršenje platite onoliko talijera koliko je prepisato da se prestupniku udari šibljika.

Pri suđenju za ovakve prestupe preporučuje Vam se da budete vrlo oprezni, da nebi pravi postradao, jer inače Vi bi se podvrgli strogoj kazni. Zato u svakom slučaju kad se nebi moglo tačno i potpuno dokazati da je okrivljeni izvršio jedan ili drugi od dva prestupa, nego bi stvar njegova bila pod najmanjom sumnjom te bi trebalo dalje istrage to samo u takvim prilikama okrivljenoga sproveste dotičnoj višoj vlasti.

Cetinje 15. dec. 1889.

/Fasc. 108 br. 3714/

Veliki Sud

Izvod iz uputstva autorima

Tekstovi se predaju na crnogorskom i drugim jezicima ovog govornog područja ili na engleskom jeziku, ukupnog obima 1 – 1,5 autorski tabak (do cca. 45000 znakova sa bjelinama).

Predati tekst na početku sadrži apstrakt s osnovnim nalazima, obima do 20 redova i do pet ključnih riječi. Na kraju teksta nalazi se Apstrakt (summary) približnog obima i do pet ključnih riječi na engleskom, odnosno njemačkom jeziku, te eventualno na drugom stranom jeziku koji je relevantan za disciplinu na koju se tekst odnosi.

Potrebno je navesti i spisak literature i izvora po azbučnom, odnosno abecednom redu.

Za objavljivanje se prihvataju isključivo originalni tekstovi.

Redakcija zadržava pravo da tekstove prilagođava opštim pravilima uređivanja časopisa i jezičkom standardu u pogledu pravopisa i gramatike.

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An abstract of the article containing general results of maximum 20 lines should be included at the beginning together with up to 5 keywords. At the end of an article a resume (summary) of an approximate length written in English, German, or any other language relevant for the area related to the article should be included.

A list of references and sources should be submitted in alphabetical order.

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