Criminal Legal Studies

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DESCRIPTION

The book series *Legal Studies on Central Europe* seeks to publish comparative legal scholarship on a wide variety of topics. The primary goal of the series is to present and address legal issues which arise in connection with the Central European region, taking into account the legal traditions, culture and approach of the countries therein. The series consists and will consist of titles on not only private and public law but also legal and integration history. Furthermore, it aims to encompass titles which deal with and analyse international law and EU law aspects related to the countries in the Central European region. The books published in the series are written for both academics and legal practitioners who are interested in contemporary legal problems connected to Central European countries.

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Criminal Legal Studies

European Challenges and
Central European Responses in the
Criminal Science of the 21st Century

Edited by
Erika VÁRADI-CSEMA

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Preface

In human history, states have become each other's allies or enemies along economic, political, religious, and ideological fault lines. Europe is no exception to this. The peoples who settled in the central areas of the continent had to endure particularly difficult trials.

Although serious conflicts are the legacies of the past, their memories are integral part of these peoples relationship; despite this we believe that more events connect these nations than separate them.

This approach is particularly exciting when we focus on a specific area of law that ensures the protection of the basic pillars of social existence. To an area of law that possesses the coercive power of the state. Were there, are there any influences or social problems that trigger similar responses? To what extent are national characteristics and different cultural roots decisive, or can we still find points of connection despite these differences?

The purpose of the volume is to find the answers to these questions so that we can get to know the national regulations of the 8 countries of the region, such as Poland, the Czech Republic, Slovakia, Romania, Serbia, Croatia, Slovenia and, of course, Hungary. The criminal policy of the given countries determines the direction of the criminal law, criminal procedure law, and correctional law provisions, which are strongly determined by historical experiences as well as the challenges of the present. Therefore, the *first study* of the book presents the development of criminal policy from an interdisciplinary perspective.

Although the mutual past and present – belonging to the group of socialist countries, ordeals due to political transition, joining the Council of Europe and then the European Union – connect us, the concrete answers to the challenges related to public safety may differ. Therefore, the *second* large *unit* of the book presents the criminal policy responses and national regulations of the countries, keeping in mind the purpose of the volume.

Even in the 21st century, however, there are special social problems and special questions to which criminal policy pays more attention. Thus, the *third theoretical unit* is

not a juxtaposed series of national regulations, but a collection of current criminal law topics that are presented from a regional perspective.

We sincerely believe that the exploration of the mutual elements of the past and present will also help us in finding our joint future answers to these problems. In the information society of the 21st century, not only are the problems globalized, crossing national borders, but the criminal policy responses also require joint action.

We thank the Authors, Professional Reviewers and all contributing Colleagues for their valuable effort and commitment to the topic, and the dear Readers for their interest. We hope that our book can add to finding the aforementioned answers.

October, 2022

The editor

PART I

| Chapter 1 |

‘Behind The Fence’—An Interdisciplinary Perspective

Erika VÁRADI-CSEMA

ABSTRACT

The policy of a country’s legal area carries all the historical, legal history, political, socio-psychological, social, etc. the direct and indirect imprint of processes that it had to face in the past decades. This is also true for criminal policy. Moreover, there are few areas of law where the relationship between individual factors is so complex and multidirectional. The specific forms of state responses to crime and actions against behavior that offends or endangers society can change quickly, responding sensitively to society’s (perceived or real) expectations. After all, the basic phenomenon, the causes of crime, are also complex, and it is only possible to determine in retrospect which of the factors influencing illegal behavior played a specific role in its creation – at the same time, whether was the chosen criminal policy directions good. In the case of Central and East-European countries, however, there are common events that connect their past and present, and at the same time help us understand their responses to crime. Belonging to the former Soviet bloc can be considered as such – even if its ideological, political and economic influence was different in certain regimes. Similarly shared, mostly cataclysmic socio-psychological experience for the societies of these countries is system change and all its negative accompanying phenomena, from the economic crisis to the crisis of values and the loss of trust in state bodies. And although the accession to Council of Europe, and to the European Union (or its intention) provides a new common framework for the current existence of criminal policy, the strong demand for public safety remained a marked feature of this region.

KEYWORDS

post-socialist countries, criminal policy, political and economic changes, social challenges, crisis of value

The main principles and criminal policy approaches defining the framework of a country’s criminal justice system were influenced by many factors. Direct factors, such as the prevailing criminal policy or the specific level of crime, and indirect factors such as the economic, social, social characteristics, political, ideological organization, and demographic conditions of the given country play an equally important role in this context. Although these direct and indirect elements exert their influence within national borders, the importance of the international environment, which indirectly influences the institutions and operational frameworks of the justice system, cannot be ignored either. The study focuses on eight Central and East-Central European countries, from Poland until Slovenia and on their common historical roots, political

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changes, economic experiences and social challenges (like the crisis of confidence, the worsening public security etc.) – and which[1] resulted in a common framework for their criminal policy responses.

1. Common roots

Regarding the Central and Central Eastern European region, there are many characteristics that can be a point of connection between the individual countries. An example of this is the common geopolitical past resulting from their geographical location. After the great social upheavals of the Middle Ages (for example Tatar and then Turkish subjugation), until the beginning of the 20th century, some of these countries were part of a larger empire (e. g., the Austro-Hungarian Monarchy, the German Empire or the Russian Empire,) while others existed partly as independent kingdoms (Serbia, Romania).

The political and geographical reorganization following World War II had an explosive effect on the region, creating new state structures that did not exist before; such as Czechoslovakia or Yugoslavia (earlier Serbian-Croatian-Slovenian Kingdom), which were founded in October and December 1918; while other countries, such as Poland, regained their statehood after 128 years.

The period following the Second World War can also be defined as a common political and historical framework. Although during the Global Conflagration the individual states appeared in different roles, on the side of the "winners" or "losers", at the end they tried to cope with the spiritual, economic and social wounds of the war as a member of same community – belonging to the Soviet sphere of influence. Although this link was not equally close for all Central and Central Eastern European countries, it significantly determined the political organization of these nations, and through this the state institutional system as well as the scenes of everyday life.

Belonging to the Soviet sphere of interest weighed on society as a heavy burden in an ideological sense, creating dictatorial periods, even political showdowns with human sacrifices, and the complete vulnerability of certain classes or groups. However, from an economic point[2] of view it provided apparent security – although it was not artificially sustainable in the long term.

COMECON, the Council of Mutual Economic Assistance[3] ("CMEA"), was already on January 5-8, 1949 established in Moscow with the aim of developing the national economy of the member countries with the help of economic cooperation and the international socialist division of labor, raising the standard of their productive forces[4].

1 See Selih and Zavrsnik, 2012.
2 See Böröczfy, 1975.
3 Múlt-Kor, 2004.
4 Ferenc, 2020.

The six founding countries – in addition to the Soviet Union, Bulgaria, Czechoslovakia, Poland, Hungary and Romania – continued to expand their network of contacts, and thus members appeared from all over the world (for example, Cuba (1973)) – some of them 'only' nations with observer status (for example, the People's Republic of China or Yugoslavia) were. Moreover, Finland (1973) or Mexico (1976) established a special contractual relationship with the organization. The member countries acquired their missing resources (Hungary, for example, raw materials) in this market, which, by concluding long-term contracts, also served as a safe receiving market for manufactured goods, freeing the member states from the hectically changing and uncertain atmosphere of free market.

Later, two financial institutions providing financial support were founded behind the organization: in 1964, the International Bank for Economic Cooperation (Mezsdbank), and in 1970, the International Investment Bank.

This economic framework made the most important tenets of the ideology of socialism feasible. By ensuring (indeed, requiring) full employment, standardizing the supply of the internal consumption market, and providing housing and other programs, the large economic, income, and wealth differences that affected the societies of the region in the previous eras were seemingly smoothed out. During the achievement of the goal, especially in the first period, some social groups were criminalized with an ideological background and political authorization (e.g., 'kulaks') or were deprived of their property, while other social strata (e.g., the working class) brought in the focus of support.

In other hands, the state tried to suppress initiatives coming from the side of society, to repress citizen self-organization (which existed in previous eras), and to put a wide range of decisions in the hands of the state. The communist / socialist party as a caring "parent" decided in different important question of society, concentrating the rights.

"Existing socialism", writes Katalin Gönczöl[5], "weakened all kinds of previously existing natural community cohesion, and did not motivate the formation of new ones."

However, the economic changes also brought about serious social changes; well-functioning systems, values, and norms that had been established for centuries were transformed, the effects of which can be felt direct and indirect even today.

Hundreds of thousands of women were went to work for ideological reasons – but otherwise, it was necessary to order to satisfy existing economic needs. This process not only meant new and cheap labor, enabling, for example, the establishment of state social care (which was ideologically expected), and to reinforcing the image of a caring state, but also resulted in a significant transformation of the previous family model.

However, the social change in the perception of male and female roles did not go as fast as entering into the workforce, as a result of which the old and new values

5 Gönczöl, 1991, p. 75.

continued to live in parallel: women tried to meet the previous role expectations of housewives and also of the new employees, while men – although their (main) position as family breadwinners changed, they continued to insist on their previous authority, their role as the head of the family.

The negative effects of the internal crisis, which led to the family becoming weaker and more vulnerable, were further strengthened by numerous external – partly ideological – 'attacks'. Although the family remained the basic arena of social reproduction, it was no longer claimed for its previous functions, such as in connection with the upbringing of the next generations.

From an ideological point of view, community work (for example, voluntary work on construction sites, agriculture), public or political work (for example, in workplace party organizations) was considered more useful and valuable. The institutional education of children was preferred, thus making it possible to develop a type of person suitable for the political needs of the socialist state. Thus, families were less and less able to fulfill their previous, traditionally protective and regenerative function.

The family has become more and more dysfunctional, the impact of which can still be felt today, as its ability to respond to the challenges of the information society and to fend off the negative effects of the globalized world has significantly deteriorated. In the socialist era, the family was considered an institution that "retreats to private life and faces the public"[6]. The background of this negative opinion was the experience that the value system of the "earlier old world", the disadvantageous social situation or the privileges are preserved by the family, passing the approach from generation to generation that makes this possible. (By the way, this further reduced not only the involvement of families, but also the willingness of individuals and communities to assume responsibility and contribute.[7])

The forerunners of this were, for example, criticisms of the functioning of the socialist economy, which initially believed that the root of the problems lay in the cult of personality. But from the 1980s, other approaches also emerged. Their common feature is that they did not question the main tenets and theoretical frameworks of the socialist state system, either from a political or ideological point of view. "Acknowledging and accepting the Marxian idea that the operation of the economy has a predominant role in the entire organization of society – more attention should be paid to the analysis of the operating models of the socialist economy with the preconception that the principles are correct, but the practice is not capable of these principles for its consistent realization."[8]

By the 1980s, the region was showing signs of a serious political and economic crisis. The experts' opinions are divided as to what the roots of economic problems can be determined.

6 Ferge, 1982, p. 189.
7 Hankiss, 1982, p. 28.
8 Herédi, 1985, p. 235.

It is a fact that the so-called 'Complex program'[9] developed for the countries of the socialist sphere of interest was not able to compensate for the decline in trade between the member countries and the fact that economic attention was mainly directed towards the more technically advanced western states. There was also the question of whether economies based on full employment, often with a more backward structure, would have been able to operate successfully on the world market.

2. Shared experience – the social and political changes and its shock effects

The common point of connection between the countries of the examined region is not only previous historical similarities or belonging to a similar interest group after the World War II, but also all the difficulties that appeared together with the separation from the Soviet sphere of interest and with joining to the Council of Europe, and later to the European Union.

In 1990 and the following period, the communist-socialist parties and their political power disappeared in the Czech Republic, Poland, Hungary and Romania, while similar processes took place in the former Yugoslavia. The political changes, although they took place in different countries at different times, form and depth, typically generated very marked social, economic and social changes.

Similar social psychological experience of the former socialist country is the trauma of the transition to the new political-economic system. This started with a severe economic downturn in each of the countries and was typically accompanied by the impoverishment of a significant part of the citizens.

The disintegration of the former Soviet bloc, the changes in the political and economic system that took place almost at the same time, created the multi-party system based on free elections, which resulted in the democratization of society, and the establishment of the 'rule of law' in all affected Central and Eastern Europe (CEE) countries. But the birth of ideological pluralism was also a very important result. At the same time, the transition to a market economy took place.

2.1. Characteristics of political and economic 'system change' in the region

The 'great transition' made communities already struggling with countless internal conflicts and social problems very vulnerable.

The fact that there are changes in direction in the world economy is not an unprecedented story. From a historical perspective, the transition from the Middle Ages to

9 The aim of the complex program first adopted in 1971 was the development of economic integration between the socialist countries, for which 15-20 years were allocated. Among the most important target programs were the satisfaction of raw material and energy needs, the modernization of the machinery industry or the development of transport, while for example the new complex program adopted in 1985 focused on scientific and technical improvement. See more at Rákos, 1971.

the New Age, and from pre-capitalism to capitalism, affected European societies in a similar way.

At the same time, these can be seen as slow processes[10] even when measured on a historical scale. Cases of China or West Germany could be an example from the modern history. The former in the era after the leadership of Mao Tse-Tung, and the latter in the period after World War II had faced significant challenges. However, while in China none of this was accompanied by a drastic change in political direction and sufficient time was available, in West Germany the processes took place relatively quickly. This was partly made possible by the Marshall Plan provided by the winning countries, partly by the fact that the transformation did not affect all spheres of society.

The countries of Central and East-Central Europe serve as a unique example from this point of view, because we do not find such a similar major transition in history, when processes appeared in a short period of time in every structure of society, economy and politics at the same time, in parallel. In practice, all of this means that development started simultaneously in the countries in the direction of the construction of the market economic system and the creation of democracy in politics. In order to create the conditions for these processes, partly as a result of their results, the legal system, economic and political regulators underwent significant changes, as did the ideology that forms the basis of the exercise of power, and the value system (that provided the framework for social existence).

The political transition was typically non-violent, except in Romania, where demonstrations began on December 15, 1989, and eventually spread throughout the country. The Romanian secret service (Department of State Security), the Securitate, had serious clashes with the demonstrators. Although the army also got involved in this to protect the existing order, its several units also defected to the revolutionaries. The leader of the former political regime that collapsed in just 5 days, President Nicolae Ceaușescu – who had been the general secretary of the Romanian Communist Party since 1965 – was brought before a summary court (immediate trial) and executed on December 25.

In contrast to the West German transition given as an example, these processes in the region were not preceded by war or foreign military occupation. The processes affected all segments of society at the same time and shook them with such an elemental force that they had a serious negative impact on the daily lives of the vast majority of citizens in almost all areas.

One of the reasons for this is the "amazing" speed[11] of the processes. With regard to societies that are otherwise typically 'closed', there was not enough time to get used to the new conditions. It is also partly due to this that the negative effects caused by the economic, political, institutional, legal – i.e., structural and organizational – changes that took place in just 10 (15) years can still be seen to this day.

10 Kornai, 2005, p. 916.
11 Kornai, 2005, p. 915.

Before the birth of the political change, there were already signs of serious economic changes. At the beginning of 1991, after the political independence of countries with socialist influence, the Soviet Union introduced a ban on barter transactions, which were a typical form of trade between themselves. Partly because of this, by September 1991 trade among the Comecon states practically collapsed, which led to the official declaration of the organization's termination on September 26. (At the same time, the two banks which helped earlier to COMECON, faced real challenges only now, during the war in Ukraine in 2022. In protest against Russia, Bulgaria, the Czech Republic, Romania and Slovakia have indicated their intention to withdraw from the International Investment Bank (IIB), of which 9 former socialist countries are members. In April 2022, the Czech Republic, in May 2022, Poland withdrew from the board of the International Bank for Economic Cooperation (IBEC), expressing concern that this organization could help avoid economic sanctions against Russia.)

In this connection, an important question arises: whether there were common causes or similar characteristics that enabled the rapid course of transformation in these CEE-countries?

It can be stated, that there were some special circumstances in the region. It is a fact that by the 1980s, the socialist state system in each of the countries showed the signs of crisis, although to varying degrees. The prevailing regulation and ideology limited those who wanted to achieve changes in the economic field; thus, the demand for independent businesses was also strongly present in the economy. Although the countries – albeit within a narrow framework – typically provided the opportunity to implement them. Thus, for example, in Hungary, from 1981, the legislation enabled the establishment of economic work communities, which, as a new organizational form of small businesses, could provide consumer and other services or engage in small-scale production (but could not carry out commercial activities).

The partial opening of the borders, travel to Western European countries, and the opportunity for those who settled abroad during or after the wars to visit their homeland facilitated the flow of information or the fact that citizens could get a more accurate picture of the standard of living in Western countries. This served as an additional catalyst for transformation.

However, the fact that the majority of society had neither economic nor political resistance to the changes is also a function of other external circumstances. In the meantime, Mikhail Gorbachev became the General Secretary of the Soviet Communist Party, and from 1990 he was the President of the Soviet Union. He initiated significant reforms within the country, which eventually led to the dissolution of the Soviet Union. Thus, those exercising power in the region' countries also lost their background support, and thus the chance to act more decisively against the changes. Symbolic processes took place, such as the demolition of the 'Berlin Wall', which separated the two parts of Berlin and thus expressed the division of Germany. The 'wall' was the part of the Second World War history, as one of the mementos of the Cold War following World War II.

The rapidity of the transition was partly facilitated by the fact that countless forms of state organization were available as "know-how" among the Western European countries.

At the same time, it cannot be denied that these countries and the actors of the world economy saw the territory of Central and Central Eastern Europe as a new market and provided a strong driving force for the transformation of the economy. The financial background of the processes was partly provided by the birth of cooperation with the International Monetary Fund (IMF) and the World Bank, which required a number of conditions, legal harmonization and political-institutional transformation in order to achieve the earliest possible accession to the European Union.

The ideological receptiveness was also high as a result of the measures of the socialist period. There were no families or only in a small number, which had memories and experiences the capitalist economic system (and social values) of the years before World War II.

While from a historical point of view both the formation of the capitalist system and the development of modern parliamentary democracy typically took centuries, the two parallel processes had 10-15 years for the Central and East-Central European countries. This duration from historical point of view is very short.

The next similar characteristic was the compulsion to join the Council of Europe, and later the European Union and to meet the expectations associated with this process.

Although Council of Europe was established as an integration organization after the 2nd World War, at May 5 1949, it had only 23 member states before 1989, because of the continent's historical-political division. Hungary – as a catalysator country in the democratization processes of the region – got a Special Guest status from Council of Europe (CoE) already in June 1989, and became (firstly in the CEE-region) member state of CoE in 1990.

In 2004, it – with the Czech Republic, Poland, Slovakia and Slovenia – is admitted to the European Union, while Romania and Bulgaria joined the organization in 2007 and Croatia in 2013. Serbia, along with Montenegro and other countries, is currently in candidate status.

While from a socio-historical point of view the processes that took place can be evaluated as part of a positive development process, from the point of view of the important part of the population, they proved to be a real trauma.

Although the financial situation and standard of living of the people living in these countries was significantly lower than that of the inhabitants of Western Europe, the society was free from significant material (and other conspicuous) differences.

However, after the system change, partly due to the market acquisition techniques of the Western European countries and the actors of the international economy, the lack of regulation of privatization, and the low financial self-determination competencies and knowledge of the citizens, the vast majority of the population was either in a worse financial situation, or their real income – the market conditions based on, with frantically rising prices – remained unchanged.

Full employment made it possible for the low-educated, unskilled strata to participate in the world of work. It was precisely this most vulnerable group that there was no longer a need – as a result of the closure of production plants, their inefficient operation, the rise of new technologies after privatization, etc. The unemployment rate jumped significantly, for example in Poland it reached 20% by the beginning of the 2000s, and 19.2% in Slovakia. (At the same the unemployment rate was 7.7% in the "old" 15 countries of the EU.)[12]

The previously fixed prices changed continuously after the system change, the bank interest rates became extremely high, not only the job, but also the security of housing disappeared.

At the same time, significant inequalities also developed in the income distribution. The so-called GINI-coefficient is used to measure this[13]. (Where income is equal, the value is 0, while in the case of complete inequality[14] it is 100.) Before the system change, this measure was below the EU 15 average in Central and Central Eastern European countries. (For example, it was 22.5 in Hungary, 19.8 in the Czech Republic, and 21 in Slovenia.) After the political transition, however, by the beginning of the 2000s, it significantly worsened (with 40% in Estonia, 38% in Slovakia, 28% in Poland). Slovenia (16%) and Hungary (19%) seemed to be 'refreshing' exceptions.

All of this meant a marked change in the distribution of incomes and, in this connection, consumption, with the enrichment of a very narrow segment of society and the loss of opportunities for the great majority. At the same time, a multitude of human tragedies took place, the experience of which was made more difficult by the increasingly powerful new value system. This suggested that only those who meet the expectations of the new social order can count on success who are sufficiently creative, enterprising and do not adhere to outdated norms such as sticking to one workplace and taking responsibility for the working community. In other words, the cause of failure is to be found in the given person, the cause of their difficult life situation is their own lack of competence[15]. All of this brought the loneliness of coping with difficulties, the deterioration of self-esteem and self-image, which indirectly made it more difficult to cope with new challenges. The traumatic nature of these experiences was not diminished by the increased range of democratic rights and civil liberties they received.

2.2. A crisis of confidence

All of these processes led to a deteriorating general well-being of society, a loss of trust in those exercising power and in the institutions embodying the new political order. Citizens who were left alone with their problems and were previously accustomed to the caring role of the state and the livelihood and housing security provided by it,

12 Kornai, 2005, p. 925.
13 Kornai, 2005, p. 923.
14 For example, where all income is received by only one household.
15 See Beck, 1986.

were suddenly – without any prior preparation, knowledge or experience – faced with the difficulty of an extremely rapidly changing world, where, in addition to the loss of the basic sense of security, self-care and active participation challenges should have been met. All of this led to the fact that "every third person in the region was dissatisfied, or indeed very dissatisfied" regarding their own life in the period following the regime change.[16]

However, distrust towards institutions and those exercising power was not only a consequence of traumatic experiences. In addition to the economic, social and material differences that have never been experienced before, the consumer and lifestyle differences that are becoming very obvious, the disappointment with the new social and economic systems (assumed to be successful based on the Western worldview), the frustration (due to the insufficiently effective operation of democratic institutions) led people's opinion in this direction.

And the media – now in the hope of the greatest possible 'readership' – constantly broadcasted about political abuses, economic corruption, other forms of crime, and the enrichment of others in objectionable ways. At the same time, the criminal law consequences in the majority of cases – partly due to the lack of regulation and insufficient detection – were not met. This gave rise to further dissatisfaction, since these cases also violated the interests of the community and the general sense of justice, yet the law did not react to it.

As a result of all this, in Lithuania, for example, by the beginning of the 2000s, only 10% of citizens trusted the parliament; but the Czech Republic also showed a similarly low rate (12.2%). Slovakian citizens showed the highest trust index (42.8%). In the case of the civil sphere, trust was typically higher (for example, 49.6% in Hungary – compared to 34% measured in connection with the parliament). However, even so, only 21.8% of the population in the Czech Republic and 25.3% in Slovenia considered this sphere reliable. The rest of Western Europe had a much higher trust index (EU-15: 39.1%, 41.1%)[17].

2.3. The specific challenges of transformation

The specialties of coping with difficulties there were similar obstacle in the states of the region. Partly due to the decision-making powers assumed by the state, partly due to the caring attitude, the ability of individuals to take care of themselves has been significantly reduced. Generations have become accustomed to living in a certain degree of security, the framework for which was provided by the socialist state. This caring attitude was further enhanced by the creation of centralized, state-maintained institutional networks in certain areas (e.g., in connection with the children or elderly care or other forms of social services), which – although in varying quality – provided an adequate background, taking the burden off families.

16 Kornai, 2005, p. 927.
17 Kornai, 2005, p. 927.

The socialist state did not support (in fact, hindered) self-organization, it weakened community activity, spontaneous manifestations, and the creation of those living spaces that could have been decisive from the point of view of community existence. With such antecedents, the population socialized to these conditions faced completely unexpected expectations: the state did not hold their hand, did not protect them, did not guide them. They should have recognized the legalities of the constantly changing market, should have made thoughtful, long-term financial decisions, or even should have taken steps for their future self-care.

3. Changes in crime, interpretations of crime and response to crime

Crime is generally of great interest in all societies; this became even stronger in the former socialist countries, where the news was previously filtered, taking care of the citizens' "image of the country", after the system change. The media responded immediately to this public demand[18]. The sudden increase in the number of media has not been accompanied by the preservation of quality journalism; the rights of the affected parties or the reality of the news have often not been taken into account. The reporting of negative news became more and more prevalent. The reason for this is that "the 'bad news media' operating on the assumption that crime and exposés of corruption and ineffectiveness of state officials, including the police and criminal justice system, sells more papers"[19].

The special relationship with state property was also partly connected with this. Even though it was given increased protection by the criminal law, the people did not feel that this was theirs, and thus they were more tolerant in relation to acts against state property.

3.1. Concept of crime in the socialist era

Thanks to the crime picture and conceptual approach of the socialist countries, as well as the changes in the criminal statistics, it is possible to record several specific features that are specific only to this region, but at the same time, they serve with partial explanation for the changes of the criminal policy.

Perhaps the most striking feature is the political and ideological approach to crime. The central element of the Marxist approach to crime is the critique of the capitalist social system, and the approach that the crime one of the forms of class struggle. Behaviors that are against the interests of the ruling class are prohibited by criminal law. According to some theories, the task of criminal law is directly to ensure that the rich get away with punishment – but it takes decisive action against the poor.

18 See Sajó, 1986, p. 285.
19 Caparini and Marenin, 2005.

This approach continued to exist in the second half of the 20th century, partly with a different content. This means that, according to the new theoretical point of view, the political forces that have obtained a majority in the legislature partly by means of criminalization and partly by shaping criminal policy (especially law enforcement policy) influence the chance becoming offender. In connection with this situation, certain groups will have a greater chance of committing illegal behavior and of detecting by the police action.

Other radical criminological theory[20] formed on the basis of neo-Marxist theory – although many criticisms were leveled against it – directly aimed to break away from the traditional theoretical framework. According to his point of view, the basis of crime is the inequalities of capitalist society, the different property and power relations, so the real solution is not to change the rules of criminal law, but to transform the entire social system. And this can be achieved by abolishing capitalism.

The tenets of the socialist criminological theories prevailing in Western Europe echoed in the concept of crime in the socialist countries, but in some cases, they appeared in a much more radical form.

According to the communist and socialist understanding of the post-World War II period, crime can be traced back to the unjust capitalist system. The fact that even in socialism there are still criminals is basically the result of the fact that the way of thinking of these people is still connected to the capitalist environment, their cognitive development is lagging behind their existential development. That is why criminals are actually enemies of the people, and since their illegal behavior actually stems from a hostile perception of socialism or their inadequate ideological maturity, they must be dealt with strictly[21].

Crime is alien to the new, socialist-communist type of person, which is able to act consciously, with a certain knowledge of Marxist-Engelsian ideas[22].

Since the main cause of crime is to be found in the capitalist economic system, the injustices of which will disappear in the socialist or communist era that ensures equal goods – just as the state and the law will cease to exist in the 'near future' – crime will no longer characterize societies. As a result, only people who have some sort of psychological problem behind them commit crimes. Thus, crime will not be considered a social or mass phenomenon in the future.

The power of this approach to crime is clearly demonstrated by the fact that, for example, in Hungary, even the teaching of the subject of criminology at universities has been discontinued for a short period.

Although this approach to crime did not appear so sharply in all socialist countries of Central and Central Eastern Europe, at the same time, it can generally be said

20 Vig, 2019, p. 201.
21 Lévay, 2019, pp. 268–269.
22 Łoś, 2002.

that the powerful, ideological approach and the prevalence of the so-called 'Rudiment theory' were typical in the region[23].

The criminological approach to explanation of crime changed during the decades of socialism along with the change in political perception, and moved further and further away from the power-ideological approach, giving way to traditionally accepted explanations of crime. "*In Hungary, for example, it became accepted by the 1970s that „a) crime is a social mass-phenomenon even in the socialist system, b) crime is not alien from the socialist social order but a necessary part of it, basically determined by the existing socialist conditions.*"[24]

This was partly due to the fact that, according to criminal statistics, the majority of the perpetrators were not enemies of the people – in fact, they came from the very social class (worker, peasant) that played a prominent role in the construction of socialist societies. On the other hand – as the experience in Poland shows – the "'Socialist man' could never become a social norm because Poles viewed it as grounded in alien concepts lacking rational or moral bases. 'Socialist man' was simply not thinkable: neither as a model nor as a person."[25]

Behind many of the behaviors ordered to be punished by the proletarian dictatorship, there was no affirming force of public opinion.

The common feature of these crimes is that they were not found in the criminal laws of the respective countries before the period of the socialist system. Only is enough to think of the period after World War II, when Stalinism was more strongly present in the countries of the region. The interest of the state power raised it to the level of behaviors dangerous to society – and with it, also ordered to punish – e.g., such behaviors, like resistance to the collectivization of agriculture; or the fact that someone did not have a job was considered behavior against socialist morality and the "perpetrator" became punishable. In this period, the concept of sin was far removed from the concept of sin of the earlier historical period of the region (or indeed from its religious content).

In addition, there were other operating mechanisms affecting the former socialist countries. For example, 'deficit management' can be classified as such. In connection with this, corruption based on barter became a kind of 'social game'[26], in which a significant part of the population knew themselves well, and in which – within the framework provided by their own abilities and social situation – they themselves could participate. In this context, it was in the interest of individual citizens that the other party violates the norms, because it benefits both parties involved[27]. These norm-violating behaviors were first tolerated and then tacitly accepted.

23 Korinek, 2010, p. 173.
24 Vigh, 1994, p. 93.
25 Łoś, 2002.
26 Hankiss, 1982, p. 28.
27 Sajó, 1986, pp. 226–227.

3.2. Effects of regime change on response to crime

"*High social costs, arose from the rapid economic transition of the early 1990s and those kinds of social and socio-psychological problems were not handled adequately. This led to disappointment, decline of trust in democracy and heavy loss of credibility of the political elites. Euroscepticism in the CEECs originates from the people's skeptical view of life in general.*"[28] One of the most important elements of the many connection points affecting the countries of the region is the negative impact of system change on the crime situation and the related need for public safety.

The social and economic transformation was typically accompanied by the impoverishment of a significant part of the citizens (this affected 80% of the population in Hungary[29], for example). The multiplication of the number of economic abuses were typical because of the uncertain and inadequately regulated economic conditions.

As a consequence of the opening of the country's borders, new forms of crime appeared, often such serious, violent behavior that society had not faced before. "*All post-socialist societies experienced an explosion of regular and transnational organised crime involved in smuggling drugs, people, arms, or conventional contraband such as cars, and in some areas, the criminalisation of the economy through growth of the shadow economy and links between organised crime and corrupt state officials.*"[30] In this situation, the typically under-resourced, understaffing low public trust and prestige police should have been successful during the fight against criminality. (In later, different forms of criminal activities (prostitution, drug trafficking, etc.), which originating from the CEE-countries, targeted the western member states of EU.[31])

This caused further deterioration of public safety. Unemployment and difficulties in making a living led to an increase in the number of crimes against property – and with it the crime rate – to an unprecedented extent and speed.

The lack of trust also stems from the inefficiency and inefficiency of the functioning of the justice system, especially the police, perceived by the population. Although in 1996[32] 73% of Western European respondents were satisfied with the police performance, this number was among the Central and Eastern European respondents only 33%.

The uncertainty, the frustration feeling in connection with failures, the negative socio-psychological effects of the system change, the disappointment in the new social order and the lack of trust in the effective functioning of the state and judicial bodies caused an increase the fear of crime. (Citizens of Central and East-Central European countries felt least safe: 53% of them felt their circumstances a bit unsafe or very unsafe.[33])

28 Flamm, 2012.
29 Kolosi and Róbert, 1992, p. 37.
30 Solomon and Foglesong, 2000, p. 76.
31 See more at Kerezsi, 2004.
32 Alvazzi del Frate, 2004, pp. 70–71.
33 Zvekic, 1998, p. 82.

The fear was further increased by the media's distorted image of crime[34], as well as the elevation of public safety questions to the political arena.

After the 'top'-years 1990' the criminal activity decreased to 2000 in certain categories as police and state authorities became more adept at dealing with crime, including organized crime, and as political and socio-economic conditions began to stabilize. At the same time, the citizens' demand for public order and public safety remained.

As Caparini and Marenin pointed out "in contexts where public fear of crime reaches high levels, public, media and political parties can create pressure for punitive crime control policies as 'law and order politics' comes to dominate the political agenda, leading to calls from certain political parties, media and members of the public for more punitive crime control policies."[35]

4. Conclusion

The socialist state system before 1990 can be described with a number of common characteristics. The most important political framework was the dictatorial system without free elections. The specific extent of this – i.e., whether there was a hard or soft dictatorship in the given country – depended on a number of historical factors.

Instead of a market economy, the most important feature of the socialist economic operation is the planned economy, where the operation of the economy was not regulated by 'supply and demand', but rather by political goals and principles. The countries – although they belonged to the great socialist family – were not completely united ideologically. At the same time, all of them were characterized by ideological hegemony referring to Marxism-Leninism instead of pluralism of ideas, thoughts, and lifestyles.

The disintegration of the former Soviet bloc, the changes in the political and economic system that took place almost at the same time, created the multi-party system based on free elections, which resulted in the democratization of society, and the establishment of the 'rule of law' in all affected CEE countries[36]. But the birth of ideological pluralism was also a very important result. At the same time, the transition to a market economy took place.

One of the defining common experiences of the examined region is the transformation of the former political system, the process of system change. In the case of Central and East-Central European countries, this typically took place in 1989/1990 and the following few years. The similar, often shocking historical experiences led to the same socio-psychological reactions of the nations of the region, despite the different cultural characteristics. The drastic increase in crime after the political,

34 See Korinek, 1997.
35 Caparini and Marenin, 2005.
36 Lévay, 1994.

economic changes[37] and the loss of citizens' sense of security led to the loosing of the trust in regime-changing, then in the European Union – as a consequence of the economic crisis.

This frustration resulted the reborn of the nostalgic feeling for the socialism arose. For example, in 2004 more than 50% of the asked CEECs citizens evaluated the previous communist regime positively. The data was in Slovenia 68% (!), in Hungary 58%, in Poland and Slovakia 51%. The 'best' ration belonged to the Czech Republic (32%).[38]

The cause was, that by entering the European Union,

> "life seemed to still be difficult for individuals to follow the rapidly changing world. The CEECs joined the EU in those hectic times when a big part of the society was not able to and it was not willing to adopt changes of the transformation"[39].

These common effects and experiences resulted in similar criminal policy responses from those exercising political power, the framework of which was also influenced by the connection to the value system and professional position of the Council of Europe and then the European Union[40].

37 However, the issue of public safety is not only in the former socialist states has a special power and need. It is also true in the case of the USA or Western Europe that it has become an extremely important aspect of the citizens, the solution of which is basically expected from those who exercise the state criminal power, and for this purpose they are increasingly willing to renounce the protection of their privacy and a certain range of their acquired human rights.

38 Kornai, 2007, p. 106.

39 Flamm, 2012, p. 320.

40 See more at Lévay, 2004.

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| PART II |

| Chapter 2 |

Czech Republic: National Regulations in the Shadow of a Common Past

Věra KALVODOVÁ – Marek FRYŠTÁK

ABSTRACT

This chapter deals with Czech criminal law and its changes after 1989, when the so-called Velvet Revolution took place. The Velvet Revolution initiated a series of democratic social and economic reforms in Czechoslovakia and has subsequently been reflected in Czech legislation. The reform of the criminal branch of law began in 1990. We can distinguish two phases of this reform. The first is the phase of amendments, and the second is the phase of recodification. These changes were implemented through individual amendments or through a complete recodification. Recodification was implemented in 2009 only for the Criminal Code, while criminal proceedings are still regulated by the 1961 Act, which cannot be considered ideal. In this chapter, the reader will be introduced to the basic principles and background of substantive criminal law and criminal procedure law (e.g., criminal liability, criminal sanctions, and the basic principles and subjects of criminal proceedings as well as their stages). Aspects of so-called prison law, which is closely related to criminal sanctions, and aspects of cooperation between judicial authorities will also be discussed.

KEYWORDS

Czech Republic, criminal law and criminal liability, stages of criminal proceedings, prison law, international judicial cooperation

1. Criminal science in the Czech Republic during the regime change

The democratic social and economic reforms that were introduced in Czechoslovakia after the "Velvet Revolution" in November 1989 has been subsequently reflected in Czechoslovak and, since 1993, Czech legislation. Regarding *criminal law*, the reform of this branch of law began in 1990. We can distinguish two phases of the reform. The first is the phase of *amendments*, and the second is the phase of *recodification*.

Numerous amendments to the Criminal Code and Criminal Procedure Code, reflecting the fact that the Czech Republic became a Member State of the European

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Union in 2004, have been accepted since the beginning of the 1990s.[1] At the same time the recodification of Criminal Substantive Law was initiated, and the concept of three criminal laws was introduced. According to this concept, three bills were prepared: the Act on the Liability of the Youth for Wrongful Acts and on Justice in Matters of the Youth (in short, the Juvenile Justice Act), the new Criminal Code, and the Criminal Liability of Legal Entities Act.

The *Juvenile Justice Act No. 218/2003 Coll*. has been in effect since January 1, 2004. This act provides coherent legal regulation of criminal liability and punishment of juveniles (persons between 15 and 18 years of age) together with the legal regulation of criminal proceedings in cases involving juveniles. This act is related to the matters of minors (children under 15) as well. This law extended the application of the new principle of restorative justice to Czech criminal law.[2]

The process of adoption of the new *Criminal Code* was complicated. The bill from 2005 was accepted by the Chamber of Deputies of the Parliament of the Czech Republic in 2006. Subsequently, the Senate (the second chamber of the Parliament of the Czech Republic) sent it back to the Chamber of Deputies with unacceptable changes, and ultimately, the Chamber of Deputies rejected the bill. The new *Criminal Code* bill has been created over the next two years and was open to public discussion. It was accepted by the Parliament of the Czech Republic in February 2009 and subsequently signed by the president of the Czech Republic. The new *Criminal Code* was published in the Collection of Laws of the Czech Republic under the *No. 40/2009 Coll*. and came into effect on January 1, 2010.[3]

In view of the trends in continental legal systems, the concept of recodification has assumed the introduction of corporate criminal liability, which is a significant change in the existing theoretical concept of criminal liability. *The Act No. 418/2011 Coll. on the Criminal Liability of Legal Entities and on Proceedings against Them* (the Criminal Liability of Legal Entities Act) came into effect on January 1, 2012. This act does regulate not only criminal liability and the system of criminal sanctions but also the specifics of criminal proceedings in cases of legal entities. By passing the act, the Czech Republic joined all other EU member states that had introduced the criminal liability of legal entities. The Czech Republic decided to adopt genuine criminal liability – a model that constitutes a major interference (or even a breakthrough) in principles traditionally present in continental criminal law, both at the level of guilt (the principles of individual and subjective liability) and at the level of punishment. Inevitably, this also affects the field of Criminal Procedure, that is, the criminal proceedings.[4]

At present, the Criminal Procedural Law is also the target of recodification. The current Code of Criminal Procedure, No. 141/1961 Coll., is effective since January 1, 1962. It has been amended numerous times since 1990. The bill outlining the new Code

1 For the most important amendments, see Fryšták, Kalvodová and Provazník, 2015, pp. 9–11.
2 For details, see Žatecká, 2008, pp. 307–308.
3 Regarding the most important changes, see Kalvodová, 2012.
4 See also Kalvodová, 2013.

of Criminal Procedure was prepared by a special commission under the auspices of the Ministry of Justice.

2. The main sources of criminal law

Czech Criminal Law is not based on custom or court decisions. The conditions for criminal liability, punishment, and protective measures as well as for imposing them must be stipulated by law.

As previously mentioned, *Criminal Substantive Law* in the Czech Republic is, for the most part, codified in three acts. *The Criminal Code No. 40//2009 Coll*., as amended (hereinafter "CC"), is the main source of the criminal law regulation. In addition, there is a special legal regulation relating to children and juveniles in the Czech Republic, *The Act on the Liability of Youth for Wrongful Acts and on Justice in Matters of Youth, No. 218/2003 Coll.,* as amended (hereinafter "JJA"), and a special legal regulation relating to legal entities, *Act No. 418/2011 Coll. on the Criminal Liability of Legal Entities and on Proceedings against Them*, as amended (hereinafter "CLLA").

Regarding *the Criminal Law Procedural*, first, it is necessary to mention the *Code of Criminal Procedure,* No. 141/1961 Coll., (hereinafter "CPC"), which provides general legal regulation of criminal proceedings. Moreover, there is also a special legal regulation in the two acts mentioned above – Juvenile Justice Act and the Criminal Liability of Legal Entities Act. The Act on International Judicial Cooperation in Criminal Matters, No. 103/2018 Coll., is also a highly important source.

Criminal rules and criminal procedural rules are also found in other criminal statutes, specifically the following:

- The Act on Serving Terms of Imprisonment, No. 169/1999 Coll. (The Prison Act, hereinafter "PA")
- The Act on Serving Terms of Protective Detention, No. 129/2008 Coll.
- The Act on Probation and Mediation Service, No. 257/2000 Coll.
- The Judicial Rehabilitation Act, No. 119/1990 Coll.
- The Act on Serving of Custody, No. 293/1993 Coll.
- The Act on the Police of the Czech Republic, No. 273/1998 Coll.
- The Public Prosecutor's Office Act, No. 283/1992 Coll,
- The Act on Courts and Judges, No. 2/2002 Coll.
- The Act on International Judicial Cooperation in Criminal Matters, No. 104/2013 Coll.

The Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll.) and the Charter of Fundamentals Rights and Freedoms (Resolution of the Presidium of the Czech National Council No. 2/1993 Coll.) are also very important sources of criminal law regulation, both substantive and procedural.

According to Article 10 of the Constitution of the Czech Republic, the ratified international agreements, whose ratification has been approved by Parliament and

that are binding in the Czech Republic, shall constitute a part of legal order. Should an international agreement create a provision contrary to a law, the international agreement shall be applied.

3. Selected subjects of criminal proceedings

Subjects of criminal proceedings[5] include anybody who is accorded certain procedural rights and obligations within criminal proceedings. The law assigns some subjects the status of a party to the proceedings, which is a narrower term. Each procedural party is a subject; however, not every subject has the status of being a party to the proceedings. A party is, for example, the prosecuting attorney of the person accused.

The court, the state prosecutor's office, and the police authority are identified as "the investigative, prosecuting and adjudicating bodies" or "the bodies involved in the criminal proceedings."

3.1. Courts

In criminal proceedings, courts decide on guilt and punishment, as well as other matters, such as damages. The court system has four levels: district, regional, high, and supreme courts. In criminal proceedings, a case may be adjudicated by a single judge or a bench of three judges, consisting of either the presiding judge and assessors (so-called lay judges) in the case of first-instance district and regional courts or three professional judges in the case of regional courts serving as courts of appeal, as well as the high courts and the Supreme court.

Regarding the courts, the issue of subject-matter and local jurisdiction needs to be raised as well. The district courts are the first-instance courts in cases in which the first-instance competence does not belong to regional courts. Regional courts are the courts of first instance in criminal matters concerning offenses for which the Criminal Code specifies punishments with the lower limit of at least five years of imprisonment or the exceptional punishment. However, regional courts also deal with several offenses for which the lower limit of punishment is lower than five years of imprisonment – this concerns, for instance, the offenses of unauthorized removal of tissues and organs, offenses committed by means of investment instruments, the offense of the breach of regulations regarding economic rules, and the offense of sabotage.

The basic rule for determining the local jurisdiction is based on where a criminal offense is committed. If local jurisdiction cannot be determined in this way, then the proceedings are held by the court within the jurisdiction of which the defendant resides, works, or stays. Where that is not sufficient for determining the local jurisdiction, the competence belongs to the court within the jurisdiction of which the offense came to be known.

5 Section 12 of the CPC.

In the case of a juvenile offender, the proceedings shall be held by the youth court of the district in which the juvenile resides or, if the juvenile has no fixed place of residence, by the court of the district in which the juvenile works. If no such place can be ascertained or if the location is outside the territory of the Czech Republic, the proceedings shall be held by the youth court of the district in which the offense was committed; if the place of the offense cannot be ascertained, the proceedings shall be held by the youth court of the district in which the offense was revealed.

3.2. State prosecuting attorney's office

The state prosecuting attorney's office is a state authority that performs criminal prosecution within criminal proceedings, thereby meeting the principle of legality. It is a body of public prosecution and is closely related to the accusatorial principle, which is manifested by the fact that a criminal prosecution before the court is possible only on the basis of an indictment, a motion for punishment, or a motion for approval of a plea bargain.

The system of the state prosecuting attorney's offices has four levels: district, regional, high and supreme prosecuting attorney's offices. Their subject-matter and local jurisdiction is delimited in the same way as in the case of courts. State prosecuting attorney's offices are not, in the exercise of their competence, subservient to the Ministry of Justice. The mutual relations among the individual prosecuting attorney's offices are regulated in such a way that the higher prosecuting attorney's offices always exercise control (supervision) over lower prosecuting attorney's offices.

In relation to the system of state prosecution in the Czech Republic, it is worth mentioning the amendment to the Criminal Procedure Code made by Act No. 315/2019 Coll., effective from December 1, 2019, whose purpose was to adapt the Council Regulation (EU) 2017/1939 of October 12, 2017, on the establishment of the European Public Prosecutor's Office in Czech criminal proceedings.

Its primary activity is investigating and prosecuting (co-)perpetrators of crimes threatening or damaging the EU's financial interests and bringing them to justice.

The European supreme prosecutor, European prosecutor, and European empowered prosecutor have the same powers and duties as those provided by Czech law to a prosecuting attorney in Czech criminal proceedings.

3.3. Police authorities

Police authorities are understood to be, above all, the various units of the Police of the Czech Republic and, with respect to the proceedings concerning criminal offenses committed by the members of the Czech Republic's security forces, the unit of the General Inspection of Security Forces. The same position is also held by the following: the authorized bodies of the military police in the proceedings concerning criminal offenses committed by members of the armed forces; the authorized bodies of the Prison Service of the Czech Republic in the proceedings concerning criminal offenses committed by members of the Prison Service; the authorized bodies of the Security Intelligence Service in the proceedings concerning criminal offenses committed by

members of the Security Intelligence Service; and the authorized bodies of the Office for Foreign Relations and Information in the proceedings concerning criminal offenses committed by members of the Office for Foreign Relations and Information. The position of police authority is also held by authorized customs bodies in the proceedings concerning criminal offenses committed by violating customs regulations and regulations regarding the importation, exportation, and transit of goods – this authority also applies when the offenses are committed by members of the armed forces or armed units and services – and in the proceedings concerning breaches of legal regulation when placing and obtaining goods in member states of the European Communities, where such goods are transported across the national border of the Czech Republic. Moreover, it applies in cases of violations of tax regulations when customs authorities act as the tax administrators under the Act on the Administration of Taxes and Charges. Unless provided otherwise by the Criminal Procedure Code, these authorities may perform all acts in criminal proceedings that constitute the powers of police authority. The criteria for determining the subject-matter and local jurisdictions of the police authority are derived from the courts' jurisdiction. The subject matter jurisdiction in the case of police authority may also be regulated by internal acts of regulation.

In the case of the Police of the Czech Republic, for instance, the subject matter relevant in police authority is modified by internal acts of regulation. The most frequent entity appearing in the function of police authority is the Police of the Czech Republic.

3.4. The Probation and Mediation Service

The Probation and Mediation Service carries out probation and mediation in cases for which the criminal proceedings are pending.

Probation is the organization and exercise of supervision of the accused, defendant, or convicted person, control of the enforcement of alternative sentences in which some obligations or restrictions have been imposed, monitoring of the behavior of the convicted person during the probationary period of the conditional release from imprisonment, and individual assistance to the accused person and influence on them in terms of leading a proper life. Therefore, it is imposed when the state prosecuting attorney or judge considers it expedient to monitor and control the offender's behavior for a certain period.

In the context of probation, it creates the conditions for a criminal case to be heard in one of the special types of criminal proceedings, for a detention to be replaced by another measure, or for a non-custodial sentence to be imposed and carried out. Thus, it provides the accused with professional guidance and assistance, allows the monitoring and the control of their behavior, and facilitates the cooperation with the family and social environment in which they live and work with the aim of them leading a proper life in the future.

Mediation is an out-of-court settlement of a dispute between the accused and the victim. Mediation enables the accused to express an apology to the victim and atone for the consequences of the crime committed. For the victim, mediation increases the likelihood of prompt compensation by the accused.

4. Main substantive criminal law items

4.1. Fundamental principles of criminal law

Criminal Substantive Law can be defined as a branch of law regulating through its norms primarily the legal relations between those committing crimes and the state with the view of providing just and sufficient protection of the justified interest and relations in society (both individual and public) against wrongdoings by means of punishment and protective measures. The basic function of the criminal law is the protective function. Other functions of the criminal law should also be mentioned, such as the regulative, preventive and repressive functions.

The above-mentioned functions of criminal law represent a framework for the application of its fundamental principles, which form the necessary basis of the creation, interpretation and application of the rules of criminal law. Some principles of criminal law are laid down in the Constitution of the Czech Republic and the Charter of Fundamentals Rights and Freedoms.

Criminal law is based primarily on the following principles:

The principle of legality – nullum crimen, nulla poena sine lege – "only the law shall determine which acts constitute a crime and what penalties or other detriments to rights or property may be imposed on them"[6].

The principle of subsidiarity of criminal repression– the subsidiary role of criminal law (the principle of ultima ratio, ultimum remedium) as a means of the last resort for protecting a society. The criminal liability of the offender and the criminal consequences associated with it may only be applied in socially harmful cases in which the application of liability under another legal regulation is insufficient[7].

The ban of the retroactive jurisdiction in malam partem – the retroactive jurisdiction of a stricter law is not permitted – "the question whether an act is punishable or not shall be considered and penalties shall be imposed in accordance with the law in force at the time when the act was committed. A subsequent law shall be applied if it is more favorable for the offender"[8].

The ban of the analogy in malam partem – the extension of the conditions of criminal lability, sentencing, and protective measures as well as the terms and conditions for their enforcement is not permitted.

The principle of individual criminal liability of the natural person for their own actions.

The principle of liability for the guilt – guilt consists of blameful fulfillment of the characteristics of the body of the crime; the wrongdoer's act must be either intentional[9] or negligent[10].

6 See Charter of Fundamental Rights and Freedoms. Cf. Article 39 Section 12/1 of the Criminal Code (hereinafter referred to as CC).
7 Section 12/2 of the CC.
8 Charter of Fundamental Rights and Freedoms, Article 4/6 Section 16/1 of the CC.
9 Section 15 of the CC.
10 Section 16 of the CC.

The principle of adequacy of punishment – a sanction must be adequate in relation to the nature and seriousness of the criminal offense committed and the offender's personal situation[11]. Where the imposition of a less severe sanction is sufficient, a more severe sanction may not be imposed upon the offender[12] . In line with this principle, unconditional imprisonment has the status of *ultima ratio*; thus, alternative sanctions should primarily be imposed.

The principle of considering the interests of the injured party – in imposing criminal sanctions, the interest protected by the law of such persons aggrieved by the criminal offense shall be taken into account[13]. This principle can be considered an element of the concept of restorative justice.

The ne bis in dem principle – a circumstance that is a legal feature of a criminal offense must not be regarded as aggravating or mitigating[14].

4.2. Criminal liability and obstacles to criminal liability

Criminal liability as such lays in a subsequent reaction of the State to the criminal offense committed in the form of a punishment. The crucial institute of criminal lability is a *criminal offense* as its basis.

A criminal offense is defined in Section 13/1 of the CC. According to this provision, the criminal offense is an illegal act identified as punishable by criminal law and which presents the characteristics set out under such law. Moreover, there is also increasing definition in Section 111 of the CC. According to this section, a criminal offense refers to an act that is judicially punishable and, unless the individual provision of the CC stipulates otherwise, the preparation of that criminal offense, an attempted criminal offense, organization, instigation and aid.

Criminal offense is based on *binary categorization*. According to Section 14/2 of the CC, criminal offenses are divided into minor offenses and crimes. *Minor offenses* refer to all negligent criminal offenses and intentional offenses for which the criminal code stipulates a maximum term of imprisonment of five years. *Crimes* refer to all criminal offenses that are not considered minor offenses. In addition, the CC includes a category for particularly serious crimes. Particularly serious crimes are those for which the Criminal Code stipulates a maximum term of imprisonment of no less than 10 years. The binary categorization should lead to the differentiation of criminal sanctions and will also extend the possibility of imposing the alternative punishments. This categorization will also form the foundation for various types of criminal procedures, such as diversions.

The criminal offenses may occur in three stages: a preparation of the criminal offense, an attempt of the criminal offense, a completion of the criminal offense.

11 Section 38/1 of the CC.
12 Section 38/2 of the CC.
13 Section 38/3 of the CC.
14 Section 39/5 of the CC.

According to the Section 20/1 of the CC, a conduct that is based on the creation of conditions for committing of a particularly serious crime, especially its organization, acquisition, or adaptation of the means or instrument for its commission, in association, unlawful assembly, in the instigating or aiding of such a crime shall be considered *preparation* only if the criminal code expressly stipulates it for the relevant criminal offense and an attempt or completion of a particularly serious crime did not occur.

Attempted criminal offense is defined as any conduct that leads immediately to the completion of a criminal offense and that the offender committed with intention of the committing of a criminal offense even if the completion did not occur[15].

Both preparation and attempted criminal offenses are punishable pursuant to the criminal penalty set out for the particularly serious crime or criminal offense to which they lead unless the criminal code stipulates otherwise[16].

Completed criminal offense refers to fulfillment of all the elements of the criminal offense, including the age and sanity of the offender, protected interests (object), acting, consequences, and causality (on the objective side) and culpability (on the subjective side).

The minimum *age* of criminal liability is defined as 15 years of age. According to Section 25 of the CC, a person who has not reached 15 years of age at the time a criminal offense is committed shall not be held criminally liable. A person gains a criminal liability the day after their 15th birthday. Persons between 15 and 18 years of age are regarded as "juveniles" and fall within a milder system of criminal liability. A person gains a full criminal liability the day after their 18th birthday.

The criminal capacity of an offender also depends on their mental condition. *Sanity* is required as a prerequisite for criminal liability. If, due to their mental disorder, an offender is unable to recognize the danger of their actions or to control them, they shall not be held criminally liable for their act[17].

A diametrically opposite case may serve as an example if the offender themselves is to be blamed for their insanity, referred to as *culpable insanity*, which is regulated by Section 360 of the CC.

Section 360 of the CC describes *three cases of culpable insanity*:

1. *Drunkenness* – this provision is favorable to the offender and takes into consideration their physical condition at the time the crime was committed. They are not fully criminally liable, and their criminal liability is thus reduced.[18]

2. *Actio libera in causa dolosa* – ALIC dolosa – the offender induces within themselves a state of insanity with the intent to commit a crime; they remain fully liable and without limitations for the crime thus committed.[19]

15 Section 21/1 of the CC.
16 Sections 20/2, 21/2 of the CC.
17 Insanity, cf. Section 26 of the CC.
18 Section 360/1 of the CC.
19 Section 360/2 of the CC.

3. *Action libera in causa culposa* – ALIC culposa – the offender induces within themselves a state of insanity and commits a crime via negligence caused by them having induced within themselves a state of insanity; they are also fully criminally liable for the crime thus committed.[20]

The offender´s *acting* is the core of the crime. Its essence is a manifestation of the will of the offender. We distinguish two forms of acting: the act of commission, in which the will is manifested in a physical performance, and the act of omission, in which the will is manifested as an omittance. Not all omissions may be classified as a type of acting (conduct). According to Section 112 of the CC, *the conduct shall also include an act of omission if the offender was obliged to perform with respect to the other law, an official decision or contract, the circumstances, or their situation*. This means that the offender has to be bound by a special duty to perform.

The designation of *special offender* can be required when certain criminal offenses are committed. For example, only a Czech citizen can commit the crime of High Treason[21], only a public official can commit a crime pursuant to Section 329 of the CC (Abuse of Powers by a Public Official), and only a mother of a newborn baby can be the perpetrator of a crime pursuant to Section 142 of the CC (Infanticide).

The *consequence* of a criminal offense can be defined as the violation or endangering of an interest protected by the criminal code.

There is no criminal liability without the *causal relationship* between the offender´s acting and the consequence. The Czech theory and practice is based on the so-called Theory of Necessary Condition (conditio sine qua non). In the sense of this theory, the act of an offender is the cause of a consequence if the consequence would not occur without the act or if it would have occurred substantially different.[22]

In some cases, additional objective elements may be required, such as the manner in which the criminal offense was committed or the place and the time at which it was committed.

There is also no criminal liability without *culpability* (the principle of liability for guilt). According to Section 13/2, the intention is required as a regular condition of punishability, unless the Criminal Code expressly provides that the negligence is sufficient for committing a crime. We distinguish two forms of culpability, intent[23] and negligence[24], which are further divided into direct and indirect intent and willful and unwillful negligence. Both forms of negligence can reach a degree of gross negligence. According to Section 16 Paragraph 2, a criminal offense is committed out of gross negligence if an offender`s approach to the requirement for due diligence attest to the evident irresponsibility of the offender in the interest protected by criminal law.[25]

20 Section 360/2 of the CC.
21 Section 309 of the CC.
22 Diblíková, 2002, p. 14.
23 Section 15 of the CC.
24 Section 16 of the CC.
25 Penal Code, 2011, p. 5.

As previously mentioned, the commission of a criminal offense requires intentional culpability as a standard condition. However, according to Section 17 of the CC, circumstances that qualify the application of a more severe penalty shall be taken into account

a) if it is a more severe consequence and even if the offender caused it due to negligence, except for cases in which criminal law requires intentional fault
b) if it is another fact and even if the offender was unaware of such a fact, although they should have been aware of it considering the circumstances and personal situation, except for cases in which criminal law requires that the offender was aware such a fact.[26]

In addition to fault (guilt), other characteristics such as motive or goal may be required.

Regarding the *organization, instigation, and aid*, they are three forms of *participation* in a completed or attempted criminal offense[27]. The participation is based on the principle of accessory, which refers to the following:

An *Organizer* is a person who intentionally organizes or directs the committing of a crime.

An *Instigator i*s a person who intentionally instigates another person's commission of a crime.

An *Aider* is a person who intentionally grants another person assistance in committing a criminal offense, particularly by providing the means for committing the criminal offense in question, removing obstacles, giving advice, strengthening the person's intent, or promising help after the commission of a criminal offense.

It is also necessary to mention *special legal regulation in matters of juveniles*. A criminal offense committed by a juvenile is called a *transgression*[28]. It is not divided into minor offenses and crimes. In addition to age and sanity, a particular level of intellectual and moral maturity is required as a prerequisite for a juvenile to be held criminally liable. The criminal liability of juveniles is a relative type of liability, meaning that not everyone who has reached the age of 15 and is sane can be considered criminally liable. According to Section 5/1 of the Juvenile Justice Act (JJA), a juvenile who, at the time of committing the action, did not command the necessary level of intellectual and moral maturity to be able to recognize its illegality or to control their conduct shall not be held criminally liable for the action.

Regarding *legal entities*, the Act on Criminal Liability of Legal Persons (hereinafter referred to as "CLLE") provides that a criminal offense committed by a legal person is an illegal act committed in its interest or in the course of its activities by one of the persons listed in Section 8/1 of the CLLE, for example, a statutory body or its member, a person in a managerial position who performs directing or controlling

26 Penal Code, 2011, p. 6.
27 Section 24 of the CC.
28 Section 6/1 of the JJA.

activities, a person who influences the management of a legal entity, or an employee in the performance of work tasks.[29] The liability of a legal entity is conditioned by the imputability of the actions of said persons to the legal entity[30]. According to Section 8/3, not finding a concrete natural person who acted in way mentioned in Section 8/1 and 2 does not influence the criminal liability of the legal entity. A legal person shall be released from criminal liability if the legal person has made every effort that may be required of it to prevent the commission of an offense. A legal entity may commit all criminal offenses specified in the criminal code, except for those that are exhaustively stipulated in Section 7 of the CLLC. It is also necessary to mention that when exercising a public authority, the Czech Republic, as the state and local self-governing unit, is expressly excluded from criminal liability[31].

A criminal offense may only be an illegal act. There are circumstances excluding illegality in the criminal code – *extreme distress*, *necessary defense*, *consent of a victim*, *admissible risk*, and *the justified use of a weapon*.[32] In addition, the criminal code regulates the reason for a lapse of criminal liability – *effective repentance*[33] and its special cases[34] as well as *limitation of criminal liability*[35].

4.3. The system of criminal law sanctions

We can distinguish three relatively separate sanction systems in relation to the three possible groups of offenders in Czech criminal law: adults, juveniles and legal entities.

The system of criminal sanctions for adults and legal entities is based on the concept of dualism of sanctions and consists of punishments and protective measures.

Punishment can be imposed by a criminal court on a perpetrator of a criminal offense.

Protective measures can be imposed by a criminal court either in criminal or in civil procedure on a perpetrator of a criminal offense or an act otherwise classified as criminal (for example, if the offender is insane or a person under 15).

Punishment may only be imposed in accordance with the law (the principle of legality). Section 52/1 of the CC stipulates numerous types of punishment for adult offenders: a sentence of imprisonment; house arrest; community service; forfeiture of property; a pecuniary penalty; forfeiture of an item; prohibition from undertaking activities; prohibition from breeding and possessing animals; prohibition from residence; prohibition from entry to sporting, cultural, and other social events; deprivation of titles of honor and awards; deprivation of a military rank; banishment.

There are three forms of sentences of imprisonment in the Criminal Code: an unconditional prison sentence, a conditional prison sentence, and a conditional

29 For more, see Fryšták et al., 2016, pp. 24–26.
30 Section 8/2 of the CLLE.
31 Section 6/1 of the CLLC.
32 See Sections 28–32 of the CC.
33 Section 33 of the CC.
34 Sections 197, 242, 362 of the CC.
35 Section 34 of the CC.

prison sentence with supervision. Exceptional punishment is a special type of prison sentence. It has two forms: a prison sentence for over 20 to 30 years and a life prison sentence.

Protective measures are protective treatment, security detention, confiscation of an item, confiscation of a portion of property, and protective education[36]. The imposition of protective education is governed by the JJA. Protective treatment may not be imposed in addition to a security detention.

The enumeration of punishments for legal entities is listed in Section 15/1 of the CCLE. The following punishments may be imposed upon a legal entity that commits criminal offenses: winding-up (dissolution) of the company; forfeiture of property; pecuniary punishment; forfeiture of an item; prohibition from undertaking activities; prohibition from breeding and possessing animals; prohibition from the performance of public contracts or participation in public tender; a ban on the acceptance of subsidies; the publication of the judgment.

Regarding protective measures, a confiscation of an item and a confiscation of a portion of property may be imposed on legal entities[37].

It is evident that legal entities may be subject to the same sanctions as natural persons (i.e., a pecuniary punishment, prohibition from undertaking activities, confiscation of property, or confiscation of an item) or to sanctions that are quite specific.[38] The sanctions may be imposed individually or simultaneously. The only exception that is explicitly banned[39] is the concurrent imposition of a pecuniary punishment and the forfeiture of property.

The system of criminal sanctions for juveniles is based on the concept of the monism of sanctions. It consists of a united system of measures: educational, protective, and criminal[40].

The *educational measures* are as follows: a) supervision of a probation officer; b) probation program; c) educational duties; d) upbringing restrictions; e) admonition with warning.

Educational measures can be imposed on a juvenile against whom the proceedings are conducted after their approval during these proceedings prior to the court deciding on their guilt. These measures will manage the juvenile's way of life and thus support and safeguard their upbringing.

Protective measures refer to protective treatment, security detention, confiscation of an item and protective upbringing. Their purpose is to positively influence the mental, ethical, and social development of the juvenile and to protect the society from wrongdoings committed by juveniles.

The *criminal measures* are as follows: community service activities; financial measures; financial measures with conditional suspension of sentence; forfeiture

36 Section 98 of the CC.
37 Section 15/2 of the CCLE.
38 Kalvodová, 2013, p. 2262.
39 Section 15/3 of the CCLE.
40 Section 10/1 of the JJA.

of an item; prohibition from undertaking activities; prohibition from breeding and possessing animals; banishment; house arrest; prohibition from entry to sporting, cultural, and other social events; imprisonment conditionally suspended for a probationary period (conditional sentence); imprisonment conditionally suspended for a probationary period under supervision; unconditional imprisonment.

Criminal measures can be used only if special procedures and measures, particularly those that restore violated social relations and contribute to the prevention of unlawful actions, are unlikely to result in achieving the purpose of the JJA[41]. The JJA also stipulates certain special conditions and different levels of penalties for imposing criminal measures on juveniles compared with adult offenders.[42]

4.4. Trends related to the special part of the Criminal Code

The special part of the Czech Criminal Code contains 13 chapters. Most of them are separated into divisions. The systematic arrangement of the special part is based on the typical relations and interests being protected. Priority is given to the protection of the fundamental human rights and freedoms of an individual over the collective interests of society and the state.

The special part of the Criminal Code, both previous and current, has also undergone many changes as a result of political, social, and economic changes since the early 1990s. On one hand, a number of criminal acts have been abolished, such as Instigation, Subversion of the Republic, Leaving the Country, Speculation, and Dishonoring the Socialist State, the extended protection of socialist proprietorship based on the ruling ideology of the Communist party. On the other hand, many new criminal offenses have been gradually introduced into the Criminal Code in response to the new social phenomena and changes, including those regarding the protection of life and health, human sexual dignity, children, the environment, economic and property criminal offenses, and combating terrorism and organized crime.

Of the many changes that have been implemented, we emphasize those outlined below.

Criminal offenses against life and health (Chapter I) were expanded and segmented into five divisions: Criminal Offenses against Life, Criminal Offenses against Health, Criminal offenses Endangering Life and Health, Criminal Offenses against Pregnancy of a Women, Criminal Offenses Relating to the Unauthorized Handling of Human Tissues and Organs, and Human Embryos and the Human Genome. Two types of crime referred to as qualified (i.e., more severely punished) crimes related to murder were introduced into the Criminal Code,[43] and another new criminal offense, Manslaughter in Section 141, was introduced as a so-called privileged (i.e., less severely punished) murder-related crime.

41 Section 10/2 of the JJA.
42 For further details, see Fryšták, Kalvodová and Provazník, 2015, pp. 87 et seq.
43 Sections 140 Paragraphs 2 and 3.

The criminal offenses of Sexual Coercion, Prostitution Endangering the Moral Development of Children, Participation in Pornographic Performances, and the Establishment of Illicit Contact with a Child were introduced in Chapter III, which regulates the Crimes against Human Dignity in the Sexual Field. The substance of the crime of rape has also been extended.

Moreover, *the criminal law protection of the environment* has been extended. Criminal acts against the environment have been included in a separate chapter, Chapter VIII. The most recent criminal offense is the Breeding of Animals in Unsuitable Conditions in Section 302a of the CC, introduced by the amendment to Criminal Code No.114/2020 Coll. This amendment tightened the criminal penalty for animal cruelty.

The area of economics and property criminal offenses includes in Chapters VI and V, for example, Misuse of Information in Business Relations (Insider Trading), Unlicensed Operation of a Lottery or Similar Game of Chance, Fraudulent Manipulation of Public Tender and Public Auction, special types of fraud such as Insurance Fraud, Credit Fraud, Subsidy Fraud, Money Laundering and Damage to Financial Interests of the European Union.

Finally, it is necessary to mention the amendment to Criminal Code No. 333/2020 Coll., which introduced *new limits on the amount of damage* for the purposes of the criminal code. The basic damage limit (damage that is not negligible) was increased from CZK 5,000 to CZK 10,000, which led to a significant decriminalization, especially of property and economic criminal offenses.

5. Main rules of criminal procedure

5.1. General principles of criminal proceedings

The fundamental principles of criminal procedure[44] are certain specific legal principles and guiding legal ideas that govern criminal proceedings. The principles are either common to the entire criminal procedure (e.g., the principle of due process of law, a speedy trial, or the guarantee of the right to a defense) or specific to the initiation of criminal proceedings (e.g., the principle of formality, legality, or impeachment) or to the taking of evidence (e.g., the principle of search or free evaluation of evidence). The principles may not be enforced with the same intensity throughout the proceedings. They are most strongly manifested at the most important stage of criminal proceedings, namely the main trial.

a) The principle of legality

Nobody may be prosecuted for any reason other than lawful ones or in any other way than the one provided for by the Criminal Procedure Code. This principle is an implementation of the general principle of the legality of the exercise of state power,

44 Section 2 of the CPC.

consisting in the fact that state power serves all citizens and may be exercised only in cases that are within the limits and in the manner prescribed by law. This is a guarantee that citizens will not be prosecuted without a reason to.

b) The principle of the presumption of innocence

Until a defendant in criminal proceedings is found guilty under the final and conclusive court judgment, they cannot be viewed as guilty. The investigative, prosecuting and adjudicating bodies must treat the accused person as innocent until the final and conclusive judgment of conviction issued by a court.

The principle of presumption of innocence is related to the principle of in dubio pro reo (the benefit of the doubt). This means that when there are doubts regarding the guilt of the defendant and those doubts cannot be removed by further evidence, the decision must be in favor of the defendant. Moreover, the defendant cannot be convicted unless their guilt is proved. Furthermore, the defendant is not obliged to prove their innocence or any other fact that is important for the criminal proceedings. No conclusions concerning the defendant's guilt can be drawn from the defendant's activity or passivity.

c) Principles of legality and officiality

Under the legality principle, a state prosecuting attorney is obliged to prosecute all criminal offenses that come to their attention unless provided otherwise by law or a declared international treaty that is binding upon the Czech Republic. The opposing principle is the opportunity principle, under which the criminal proceedings are initiated, continued, or concluded only when such a course of action is opportune (i.e., purposeful). The principle of opportunity involves, among other factors, criminal prosecution with the consent of the injured party. The principle of opportunity is not explicit within the Czech criminal proceedings, despite that it is manifested in it.

d) Principle of speed

Criminal cases must be dealt with as soon as possible and without undue delay; in particular, custodial matters and matters in which property has been seized, if it is necessary due to the nature and value of the seized property, shall be handled with great speed.

One specific manifestation of this principle is the existence of periods of time for keeping a person in custody, handing over a detained person to a court and observing the length of examination and investigation.

e) Principle of the inadmissibility of petitions

The content of complaints that interfere with the performance of the duties of investigative, prosecuting and adjudicating bodies shall not be taken into account. This principle is based on the rule that a petition cannot interfere with the independence of the court. Therefore, it is not permissible to interfere with the rights and obligations of the law enforcement authorities to ensure their independence.

f) Principle to search

The investigative, prosecuting and adjudicating bodies investigate, even without being motioned to do so by the parties, with equal care and considering all circumstances for the benefit and to the detriment of the person who is prosecuted. They proceed so out of their official duty. The principle to search follows from the principle of officiality with respect to the evidentiary proceedings. The Criminal Prosecution Code provides the parties the possibility to make suggestions about the search and production of evidence during the evidentiary proceedings (principle of equality of arms). The defendant may thus, for instance, propose that certain evidence is to be produced, for example, clarification of a fact that is relevant with a respect to guilt and that may serve as evidence for the defendant's benefit.

g) Principle of the discretionary weighing of evidence

The investigative, prosecuting, and adjudicating bodies assess the evidence according to their own internal conviction based on careful consideration of all circumstances. They weigh all of the evidence individually and in aggregate. The assessment of evidence is a cognitive activity of the bodies involved in criminal proceedings, and the discretionary weighing of evidence is built on their internal conviction. There should be no outside interference in the process of evaluating evidence and the competent authority should not feel obliged to respect any view of the evaluation of evidence other than its own.

The internal conviction is expressed in the written version of the judgment, specifically in the justification of judgment. In this document, the court shall briefly explain which facts it has taken as proven, on which evidence it has based its findings of fact, and what considerations it has followed in assessing the evidence adduced, in particular whether they are contradictory. The reasoning must also show how the court dealt with the defense and why it did not comply with requests for further evidence.

h) Principle of cooperation with citizen associations

The investigative, prosecuting and adjudicating bodies cooperate with citizen associations, drawing on their educational potential. These associations may participate in the education of persons who have been conditionally discharged under supervision, persons whose criminal prosecution was conditionally discontinued, conditionally sentenced persons, persons conditionally sentenced to a term of imprisonment under supervision and persons released on parole. They also help to form suitable conditions to enable the convicted persons to live a proper life after their release. The Criminal Procedure Code also includes the possibility that, in certain cases, a citizen association may provide a guarantee to prevent a person from being taken into custody. The citizen association thus assumes a guarantee for the further behavior of the accused.

i) Accusatorial principle

Criminal prosecution before the court is possible only on the basis of a charge, a motion for punishment, or a motion for approval of a plea agreement brought by a

state prosecuting attorney who leads the public prosecution in the proceedings before the court. The accusatorial principle consists in the fact that a court may deal with a matter only on the basis of a charge brought by the prosecuting attorney. The charge is, in essence, the only motion that can initiate judicial proceedings. Thus, the court may not deal with a case on its own, and there is no one apart from the state prosecuting attorney who may file the motion (bring the charge) on the basis of which a court can become active in the matter.

j) Principle of publicity

Criminal matters are heard in open court so that citizens can participate and follow the proceedings. In the case of juveniles, criminal proceedings are closed to the public.

During the main trial, the public may be excluded only in cases expressly stated by the Criminal Procedure Code. The reasons for excluding the public include the cases of a threat of disclosure of classified facts protected under a special law, a threat to the undisturbed course of the hearing, a threat to morality, or cases in which the exclusion is for the sake of safety or some other crucial interest of witnesses. When the public is not excluded, the court may deny access to the main trial to minor persons and those who might disturb the proceedings (e.g., drunk, or aggressive persons). The court may also perform measures necessary to prevent the overcrowding of the courtroom. Persons who disturb the peace may be compelled to leave. The judgment must always be pronounced publicly.

k) Principle of orality

Proceedings before the court are oral. Evidence from witnesses, experts and the accused is generally obtained by questioning these persons. However, in certain cases, the Code of Criminal Procedure allows for the evidence provided by these persons to be taken by reading out the record of their previous testimony (an exception to the principle of orality) if they deviate from their original testimony or refuse to testify or if witnesses refuse to testify in court. However, an interview cannot be replaced by a written communication; such a communication is documentary evidence.

l) Principle of immediacy

When deciding at the main trial (in both open and closed sessions), the court may take into account only the evidence that is produced during the hearing. The principle of immediacy gives rise to two procedural rules. The first is the rule of the impossibility of changing the composition of the court. For this reason, a substitute judge is sometimes appointed in complex cases. The second rule – the rule of the impossibility to discontinue a court trial – aims to ensure that the court decides on the basis of findings and perceptions obtained in the proceedings in question. However, this does not infer the impossibility of adjourning the trial.

The doctrine also states the requirement that the court draw evidence from a source as close as possible to the fact being established (e.g., to hear directly from

the person who personally witnessed a particular event, not from the person to whom the person confided what they witnessed). Such a requirement is entirely appropriate, though it is not specifically mentioned in the statutory expression of the principle.

m) Principle of obtaining the right to a defense

One who is criminally prosecuted must be informed of the right allowing them to assert their full defense as well as their right to choose their defense counsel. All of the bodies involved in criminal proceedings are obliged to enable such criminally prosecuted persons to exercise these rights. In certain cases, the Criminal Procedure Code provides for the obligation to have defense counsel regardless of whether the defendant wishes to. This concerns the situation in which, during the pre-trial proceedings, the defendant is retained in custody, is serving a term of imprisonment, is deprived of legal capacity or is of a limited legal capacity, or there are doubts as to the defendant's physical or mental defects such that the defendant is unable to properly defend themselves. If the defendant fails to choose counsel or counsel is not chosen by the defendant's spouse, partner, or sibling, counsel is appointed by the court. A juvenile must always have a defense counsel.

n) Principle of establishing the facts without reasonable doubt

The investigative, prosecuting and adjudicating bodies act in harmony with their rights and obligations provided for in the Criminal Procedure Code and in cooperation with the parties to establish the facts of the case that are beyond reasonable doubt and to the extent necessary for making their decisions. The defendant's confession does not remove the obligation of the bodies involved in criminal proceedings to review all material circumstances of the case because a defendant may also use lying as a strategy for their defense. During the pre-trial proceedings, the bodies involved in criminal proceedings carefully assess – in the manner stated in the Criminal Procedure Code and even without the parties being motioned to do so – all the circumstances for the benefit and to the detriment of the person against whom the proceedings are led. During the court proceedings, to support their position, the state prosecuting attorney and the defendant may propose and produce evidence. The prosecuting attorney has the expressed statutory obligation to prove the defendant's guilt. This, however, does not extinguish the court's obligation to supplement the evidence produced to the extent necessary for the court's decision.

o) Principles of evidence

The production of evidence reflects the fundamental principles of criminal proceedings, for example, the principle to search, the principle of the presumption of innocence, the principle of establishing the facts without reasonable doubt, the principle of discretionary weighing of evidence, and the principles of orality and immediacy.

p) The right to be instructed

The person against whom criminal proceedings are conducted must be instructed in every stage of the proceedings about their rights enabling them to fully exercise their defense and that they may choose defense counsel; all authorities involved in criminal proceedings are obliged to enable full exercise of the person's rights such that the person concerned can effectively exercise their rights.

q) The right to use one's mother language

The investigative, prosecuting and adjudicating bodies in criminal proceedings conduct the proceedings and the issue decisions in the Czech language. Any person who declares that they do not speak Czech is entitled to use their mother language or a language they declare they understand before the authorities involved in criminal proceedings. If the content of a statement or a written document needs to be translated or if the accused declares that they do not speak the language of the proceedings, they shall be assigned an interpreter.

In principle, it is sufficient that the person concerned declares that they do not know the Czech language; they are not obliged to prove their ignorance in any way, and the competent law enforcement authority is not called upon to examine the person's level of knowledge of the Czech language. On the other hand, this does not exclude the possibility that the prosecuting authority may refuse to allow the use of another language by a person who clearly knows the Czech language.

r) The rights of the injured party

The investigative, prosecuting and adjudicating bodies shall afford the victim the full exercise of their rights, which must be made known to them in a manner appropriate and intelligible under the law to enable them to obtain the satisfaction of their claims; they shall conduct the proceedings with due regard for the victim and with an inquiry into the person's personality.

Although criminal proceedings can provide a degree of satisfaction for the victim, they can also often be a traumatic experience linked to the need to relive in some way the harm to which the offense has exposed them.

5.2. Stages of criminal proceedings

The stages of criminal proceedings refer to the progress of criminal proceedings along a timeline. They can be divided into the pre-trial stage, which includes pre-trial proceedings, and the trial stage, which includes the preliminary hearing of the charges, the main trial, remedial proceedings and enforcement proceedings. The pre-trial stage is intended to enable a qualified preparation of a given criminal case in such way, that it can stand in the proceedings before the court.

The trial stage of the proceedings follows the pre-trial stage when the state prosecutor files a charge (or a motion for punishment or for approval of a plea agreement), which must be dealt with by the court.

The trial stage is the core of criminal proceedings and its main aim is to arrive at a final and conclusive decision on the merits of the case and to ensure its enforcement. At this stage, the most important issues, that is guilt and punishment, are decided and the decisions already taken by the court are reviewed.

A criminal case does not have to go through all of the stages of the criminal proceedings. For example, a preliminary hearing for the charge may not be ordered in a particular case because there are no legal grounds for it. Moreover, the case may be decided during the pre-trial proceedings, in which case the main trial will not take place at all. Similarly, a decision in favor of the defendant may be given on appeal, and there is no reason for an enforcement procedure because no sentence has been imposed by the judgment.

5.2.1. Pre-trial proceedings

The Czech criminal procedure is characterized by the pre-trial stage of criminal proceedings[45], represented by preparatory proceedings. This identifies the stage of criminal proceedings that begins with the writing of the entry on the commencement of acts in criminal proceedings or the immediately preceding performance of exigent and unrepeatable acts. Where no such acts are performed, preparatory proceedings are understood to refer to the stage from the commencement of criminal prosecution to the bringing of the charges, the transfer of the case to some other authority, the discontinuance of criminal proceedings or issuance of a decision, or the occurrence of some other fact that effects the discontinuation of criminal prosecution prior to bringing the charges. These proceedings include the clarification and review of facts indicating that a crime has been committed as well as the investigation.

The aim of pre-trial proceedings is to verify the suspicion that a crime has been committed and obtain relevant information for bringing charges. If there is no reason for bringing the charges, then the proceedings serve as a source for some other decision taken by the prosecuting attorney in the same matter. They should aim to obtain and document only evidence that cannot be obtained during the main trial or that can, if obtained at a later stage of the proceedings, become corrupt or lost. The pre-trial proceedings thus cannot replace the court's activities.

The proceedings are divided into the steps taken before the commencement of criminal prosecution[46] and those that are taken after the commencement of criminal prosecution[47].

5.2.1.1 Steps before the commencement of criminal prosecution

This stage is referred to as a verification. It is an activity performed by a police authority and has mostly a non-procedural nature. The purpose of the verification is

45 Section 157 of the CPC.
46 Sections 158 et seq. of the CPC.
47 Sections 161 et seq. of the CPC.

to obtain information primarily by searching and then to assess the information and decide whether the criminal proceedings should be continued.

5.2.1.2 Steps after the commencement of criminal prosecution

This stage is referred to as investigation. It forms an obligatory part of criminal prosecution before the bringing of the charges, the transfer of the case to some other authority, or the discontinuance of criminal proceedings and includes the approval of a settlement and a conditional stoppage of criminal prosecution before the charges are brought. The investigation has a solely procedural nature. While it is being carried out, the full right to defense is respected, for example, through the participation of the defense counsel (or the selected or appointed counsel) in the individual acts of investigation. The investigation typically follows the verification, except in such cases in which the police authority has such information at its disposal that makes it possible for criminal prosecution to be initiated without delay, for example, when the offender is caught immediately during the commission of the crime. The purpose of the investigation is to establish whether there are facts based on which the accused can be brought before court and the case can be decided during the trial stage. The investigation results in the decision by the police authority regarding whether to submit a request to the prosecuting attorney to have the case heard by the court, or to avoid a judicial hearing of the case.

5.2.1.3 Summary pre-trial proceedings

Since January 1, 2002, the Criminal Procedure Code has allowed simpler criminal cases to be dealt with in so-called summary pre-trial proceedings[48] and then in simplified proceedings before the court.

The offense must be one of those that is being tried in the first instance by a district court and for which the statutory penalty does not exceed five years. Moreover, the suspect must have been caught in the act or immediately after the act, or it must be expected that the suspect can be brought to trial within 14 days at the latest.

The prosecution of the accused is not commenced by an order, but it is sufficient if the suspect is informed by the start of the interrogation at the latest of the offense of which they are suspected and what the offense is believed to be. The formal commencement of criminal proceedings is only the subsequent filing of a petition for punishment with the court.

In the summary pre-trial proceedings, the police questions the suspect and, in a simple form, obtains the evidence necessary to decide on guilt and punishment. The case must then be submitted to the prosecuting attorney within 14 days (this period may be extended by the prosecuting attorney but for no more than 10 days).

If the prosecuting attorney finds grounds for referring the suspect to court, they shall file a motion for punishment with the court. As with the charge, the motion for punishment must be in writing but does not need to contain reasons. If

48 Sections 179 et seq. of the CPC.

the prosecuting attorney does not find grounds for referring the suspect to court, they may postpone, suspend, or refer the case to another (e.g., misdemeanor) authority.

If summary pre-trial proceedings have been held, the proceedings before the court are also simplified. The simplification consists primarily in the fact that if the accused and the public prosecutor declare at the main hearing that they consider the facts stated in the motion for punishment to be undisputed, there is no need to conduct further evidence. Otherwise, however, the court may proceed as in "classical" proceedings; that is, it may also issue a penalty order, discontinue the case, suspend it, refer it to another authority, or approve a settlement.

If the case has been the subject of a summary pre-trial and a simplified trial, this has no effect on the enforcement procedure, which is the same as in "classical" proceedings.

5.2.2. Trial stage[49]

5.2.2.1 Preliminary hearing of charges

This is a separate and optional phase of criminal proceedings that follows the pre-trial proceedings.

The task of this already judicial stage of the proceedings is for the court to assess whether the charge (or the proposal for punishment or for approval of a plea bargain) submitted by the state prosecutor to the court provides a reliable basis for further proceedings, whether the pre-trial proceedings were conducted in accordance with the law, and whether the results of the proceedings sufficiently justify bringing the accused before the court.

The purpose of the preliminary hearing is, inter alia, to prevent a criminal case from being tried before a court even if the charges do not allow it, for example, if the provisions ensuring the accused's right to a defense have been violated.[50]

5.2.2.2 Main trial

The main trial[51] is obligatory and the most important stage in the entire criminal proceedings. The aim is to decide on guilt and punishment with respect to the charges brought. The case should be decided in a period of time as short as possible, ideally without adjournment. During the main trial, the court establishes, in the presence of the parties, whether the facts stated in the charges do exist and whether a decision regarding the guilt and the punishment of the accused person may be made on the basis of such facts.

The main trial is held in front of either a single judge or a bench of three judges. A single judge hears cases concerning crimes with a maximum punishment of five

49 Sections 180 et seq. of the CPC.
50 Sections 185 et seq. of the CPC.
51 Sections 196 et seq. of the CPC.

years of imprisonment. In other cases, the matter is adjudicated by a bench. The main trial is held during the constant presence of the single judge or all members of the bench, a clerk taking records (the recorder), and the defense counsel.

The main trial may be held in the absence of the defendant only if the court believes that the case can be reliably decided and the purpose of the criminal proceedings attained even without the defendant's presence, provided that the charges were duly served to the defendant and the defendant was duly and in time summoned to the main trial; the defendant was questioned about the act that forms the subject of the charge by some of the bodies involved in the criminal proceedings, the provision on the commencement of criminal prosecution was followed, and the accused person was informed of the option to inspect the case files and submit proposals to supplement the investigation. The main trial may not be held in the absence of the defendant if the defendant is in custody or serving a term of imprisonment or in the case of criminal offenses punishable under the Criminal Code for which the term of imprisonment has an upper limit of more than five years. The above-mentioned does not apply if the defendant requests that the main trial may be held in their absence. In cases of compulsory defense, the main trial may not be held without the presence of the defense counsel.

As a rule, the main trial is held in open court unless the public or a specific individual is excluded.

The public may be excluded from the main trial, for example, if the public hearing of the case would endanger confidential information protected by a special act, morality, the smooth course of proceedings, or the safety or other important interests of the witnesses. Juveniles and individuals who disrupt order in the courtroom may be excluded from the main trial.

5.2.2.3 Remedial measures and proceedings on remedial measures

The immediate purpose of remedial proceedings is to rectify a particular decision that is faulty. The broader purpose is the review of the decision-making process of the first-instance authorities and the unification of the decision-making practice of bodies involved in criminal proceedings. As far as its general purpose is concerned, remedial proceedings represent one of the tools for maintaining the fundamental principles of criminal proceedings. The proceedings on remedial measure are characterized by the principles outlined below.

a) Appellative and cassation principles

When applying the appellative principle, the authority dealing with a remedial measure will, in case of finding a fault in the challenged decision, cancel the decision, rectify the faults, and issue a new, faultless decision. In contrast, the cassation principle means that the authority dealing with a remedial measure will, in case of finding a fault in the challenged decision, cancel the decision and return the case to the first-instance body to be adjudicated.

b) Principle of beneficium cohaesionis

This is the rule of the so-called benefit in correlation, which means that the authority deciding the remedial measure must also apply the decision with respect to a person who did not file the remedial measure as long as the reason justifying the decision for the benefit of the person who had filed the remedial measure is of benefit to such a person as well.

c) Principle of the prohibition of reformation in peius

This principle prohibits the alteration of a decision to the detriment of the person who seeks the remedial measure or for whose benefit the remedial measure was filed.

d) Principle of devolution

The principle of devolution means that the remedial measure is decided by a different authority – one that is usually superior to the authority that issued the challenged decision. In Czech criminal proceedings, the remedial measures are, by rule, decided by bodies that have a higher instance or a procedural function.

Superiority in terms of instance is typical of the courts. The complaints against a resolution of the police authority are decided by the prosecuting attorney.

e) Principle of suspension

The principle of suspension means that the remedial measure has the effect of suspending the enforcement of the decision. The remedial measures have this suspensory effect when the absence of such an effect would cause irreparable damage.

5.2.2.3.1 Regular remedial measures

The regular remedial measures[52] are directed against decisions that have not yet become final and conclusive. They include appeal, complaint against a resolution and protest.

5.2.2.3.2 Extraordinary remedial measures

These constitute an exception to the principle under which decisions in criminal proceedings are unchangeable and binding. The institute of extraordinary remedial measures[53] is a significant interference in the legal force of decisions, the stability of legal relations and, eventually, the principle of legal certainty as well. For these reasons, the extraordinary remedial measures should be applied only in the case of illegal decisions and when such illegality is so significant and serious that it questions the purpose of criminal proceedings. Extraordinary remedial measures include appellate review, complaint for a breach of law and re-trial.

52 Sections 141 et seq., Sections 245 et seq. of the CPC.
53 Sections 265 et seq. of the CPC.

5.2.3. Enforcement proceedings

During the criminal proceedings, investigative, prosecuting and adjudicating bodies issue various decisions that create rights or impose specific obligations. What almost all such decisions have in common is that they need to be factually executed so that they are not simply formal acts with no direct enforceability. However, the enforcement of a decision (e.g., enforcement proceedings[54], also known as proceedings to compel the enforcement of judgment) does not have to follow each individual decision of investigative, prosecuting and adjudicating bodies because the nature of some of the decisions makes enforcement impossible, such as a decision not to proceed with a case when the verification stage is completed.

The enforcement of a decision includes an element of state coercion. Where the content of the decision (as specified in the statement) is made voluntarily (e.g., the person upon whom the duty to surrender something that is important for criminal proceedings is imposed does in fact surrender that thing), the actual enforcement of the decision is not necessary. The purpose of enforcement proceedings is to implement the content of the decisions made by the investigative, prosecuting and adjudicating bodies. The enforcement proceedings constitute an independent procedural stage in criminal proceedings only in cases of enforcement of judicial decisions and primarily where judgments of conviction are concerned. In that case, the enforcement proceedings represent the culmination of the criminal process.

Decisions are enforced – or ordered to be enforced – by the authority that makes the decision. In judicial proceedings, a decision made by a panel of judges is enforced or ordered to be enforced by the presiding judge. The decisions relating to the execution of sentences and protective measures are typically enforced by courts that decide as first-instance courts. The measures necessary for the execution of sentences and protective measures as well as the collection of costs of the criminal proceedings, which primarily concerns informing other bodies and persons that are instrumental in cooperating in the enforcement of the abovementioned decisions, are typically made by the presiding judge of the panel on the first-instance court.

5.3. Possibilities for diversion

5.3.1. Agreement on guilt and punishment / plea bargaining

Plea bargaining[55] is available for all crimes; however, it is not possible in a fugitive proceeding.

If the outcomes of the investigation sufficiently substantiate a conclusion that the act has occurred, that this act is a criminal offense, and that it was committed by the accused person, the prosecuting attorney may initiate negotiations on an agreement

54 Sections 315 et seq. of the CPC.
55 Sections 175, and 314 et seq. of the CPC.

on the guilt and punishment upon a motion brought by the accused person and even without such a motion.

One condition of negotiating the agreement on guilt and punishment is a declaration from the accused person that they have committed the act that they are being prosecuted for, if there are no reasonable doubts regarding the truthfulness of their declaration in consideration of the evidence obtained thus far as well as other outcomes of the pre-trial proceedings. The agreement on guilt and punishment is negotiated by the prosecuting attorney with the accused person in the presence of their defense counsel only under the obligation to have defense counsel.

However, this does not preclude the head of trial chamber, after ordering the main trial and delivering the charge to the accused, from asking the accused whether they are interested in entering into a plea bargain with the prosecuting attorney. Therefore, it is possible for the prosecuting attorney to negotiate a plea bargain with the accused after the charge has been handed down. If a plea bargain has not been reached, the main trial will continue with evidence.

5.3.2. Conditional discontinuation of criminal prosecution

A decision of conditional discontinuance[56] of criminal prosecution may be issued if the following conditions are met: the proceedings concern a misdemeanor (i.e., all negligence and intentional offenses with a maximum penalty of up to five years); the consent of the accused and their confession, compensation of the damage by the accused if caused by the act, the conclusion of a compensation agreement with the victim, or other measures necessary to compensate for the damage; the release of the unjust enrichment obtained by the offense; and when, in view of the defendant's personality, taking into account their previous life and the circumstances of the case, such a decision can reasonably be considered sufficient.

If justified by the nature and gravity of the offense committed, the circumstances of its commission, or the circumstances of the accused, the accused may be required, in addition to complying with the above conditions, to refrain from certain activities in connection with which they committed the offense during the probationary period or to deposit a sum of money intended for financial assistance to the victims of their crime on the account of the court and, in pre-trial proceedings, on the account of the prosecuting attorney's office. In such a case, the probationary period may last up to five years.

This procedural institute may be used by the court and, in pre-trial proceedings, by the public prosecutor, subject to the fulfillment of the statutory conditions and with the prior consent of the accused.

The decision on the conditional discontinuance of criminal prosecution shall specify the period for which the criminal prosecution is conditionally discontinued. This probationary period shall range from six months to two or five years.

56 Sections 307 et seq. of the CPC.

5.3.3. Settlement

The court, or the prosecutor attorney in the pre-trial proceedings, may decide on the approval of settlement[57] if the accused is prosecuted for a misdemeanor (when the law calls for the imprisonment with a maximum sentence of five years).

The purpose of a settlement is, above all, to ensure that the accused consistently atones for all the harmful consequences the offense has caused the victim, and this interest is given greater weight than the interest in punishing the offender. A certain element of criminal repression is contained in the fact that the accused is ordered to make a further pecuniary contribution over and above the amount of the damage when that contribution serves a useful purpose.

The condition for approving the settlement is that the offender declares that they committed the act for which they are being prosecuted, will compensate the victim for damages caused by the crime, or will undertake the necessary steps to redress it, possibly otherwise rectify damage caused by the crime and pay to the account of the court a financial sum intended for a fund for crime victims.

5.3.4. Criminal order

The issuance of a criminal order[58] is a summary written procedure that does not involve taking evidence and does not include the parties' participation. The criminal warrant is issued in proceedings before a single judge. It can be characterized as a means of simplifying and expediting criminal proceedings in cases of lesser factual and legal complexity in which the purpose of the criminal proceedings can be achieved without a formal main trial. The Code of Criminal Procedure attributes the nature of a conviction to this form of decision. The effects of the pronouncement of the judgment are triggered by the delivery of the criminal order to the accused.

The basic prerequisite for the issue of a criminal order is that the facts are reliably established by the established evidence. If a protest is filed within eight days of service of the criminal order, the criminal order warrant shall be revoked and a main trial shall be ordered.

5.3.5. Conditional cessation of prosecution

A conditional cessation of prosecution[59] is a form of warning given to a suspect before their case is brought to court for prosecution should they fail to learn, fail to comply with the conditions imposed, or reoffend.

For this institution to apply, restitution for the damage, if any, caused by the act must be paid before the relevant decision is made.

The suspect is placed on a probation for a period of six months to two years. The suspect is also ordered to exercise a reasonable restraint and lead a proper life during the period of the probation. If the suspect leads a proper life during the probationary

57 Sections 309 et seq. of the CPC.
58 Sections 314e et seq. of the CPC.
59 Sections 179g et seq. of the CPC.

period, fulfills the obligation to make reparations and complies with the other restrictions imposed, the prosecuting attorney which imposed the conditional suspension of prosecution shall decide they proved themselves.

If necessary, even during the probationary period, the police authority, which has thus far conducted the summary preparatory proceedings, shall be ordered to initiate and proceed with the prosecution.

5.3.6. Withdrawal from juvenile prosecution

The Juvenile Justice Act added to the already existing types of diversion for juveniles also the institute of withdrawal from juvenile prosecution.[60] This type of diversion consists in the fact that, provided that the conditions imposed by the law are met, the prosecuting attorney may withdraw from the criminal prosecution during the pre-trial proceedings and from juvenile court during the main trial and, at the same time, discontinue the criminal prosecution due to the absence of public interest in further prosecution of the juvenile.

A decision to withdraw from prosecution may be issued for offenses in which the maximum term of imprisonment does not exceed three years, there is no public interest in the further prosecution of the juvenile, prosecution is not expedient and punishment is not necessary to deter the juvenile from committing further offenses.

In particular, the prosecution may be waived if the juvenile has already successfully completed an appropriate probation program; has fully, or at least partially compensated the victim for the damage caused by the offense, and the victim has agreed to such compensation; or has been given a warning, and such a solution can be considered sufficient for the purpose of the proceedings.

6. Prison law in the Czech Republic

6.1. General principles and the aim of penitentiary law

According to Section 55/3 of the CC, the term of imprisonment shall be served in prisons in accordance with another act, referring to Prison Act No. 169/1999 Coll., as amended (hereinafter referred to as "PA"). The service of a term of imprisonment is also governed by the Criminal Code, Criminal Procedure Code and Prison Rules.

The purpose of serving a prison sentence is to act on convicts in such a way as to reduce the risk of recidivism and allow them to lead self-sufficient lives in accordance with the law after release, to protect society from criminals and to prevent them from committing further criminal activities[61].

The main principles of serving a prison sentence are set out in Section 2 of the PA. According to this provision, a punishment can only be carried out such way that it respects the dignity of the convict and reduces the harmful effects of imprisonment.

60 Sections 70 et seq. of the JJA.
61 Section 1/2 of the PA.

Convicts must be treated in such a way as to preserve their health and to support the development of abilities and skills that will help them return to society and enable them to lead a self-sufficient life in accordance with the law.

Other principles are also applied, such as the principle of legality, the principle of humanity, the prohibition of torture and degradation of human dignity, the principle of the equal rights of convicts and the sentence of imprisonment in principle without delay and without interruption.

6.2. The Czech prison system

The prison system is a system of state institutions. The Prison Service of the Czech Republic, established by Act No. 555/1992 Coll. as amended, administers the prison system. The Prison Service is a department of the Ministry of Justice. The Minister of Justice manages the Prison Service through a Director General, who is responsible for the operation of the Prison Service.

A term of imprisonment is served in one of the two basic types (categories) of prisons: *guarded prisons* and *high security prisons*[62]. These categories are distinguished according to the method of external guarding and security. In addition to these basic types of prisons, there are special prisons designed for juveniles.

When imposing a sentence of imprisonment, the court shall concurrently specify the type of prison in which the sentence will be served. The essential criteria for its decision are the seriousness of the crime and the criminal record of the offender[63]. While the offender is serving their prison sentence, the court may also change the type of prison. Its decision depends on the convict's behavior while serving their imprisonment term[64].

A *guarded prison* is divided into three wards according to security level:

- with a low level of security
- with a medium level of security
- with a high level of security.

The director of prison decides on the placement of a convict in a specific ward, taking into account the recommendation of the expert commission[65]. The basic criterion for the placement of a convict is the degree of the external and internal risks. The prison director may decide to change the placement of the convicted person on the basis of a change in the degree of such risk [66].

Regarding the matter of ensuring the external security, in the low- and medium-security wards of guarded prisons, armed guards are not used to prevent the escape of the convicts. In juvenile prisons, high-security wards and high-security prisons, armed guards are used to prevent such escape.

62 Section 56/1 of the CC, Section 8 Paragraph 1 of the PA.
63 Section 56/2, 3 of the CC.
64 Section 57 of the CC.
65 Section 12a/2 of the PA.
66 Section 11a of the Prison Rules.

The convicts are typically locked in cells during an eight-hour sleeping period. The director of the prison may extend this period for reasons of security and order.

The differences between the types of prisons and among the wards of guarded prisons in terms of ensuring of internal security are reflected in the following rules:

Low-security wards of guarded prisons: a) Free movement inside the institution without limitations is permitted. b) As a rule, work is allocated outside the institution; a tutor is provided at least once per week. c) Free movement outside the institution after work with no supervision (sport, culture) is possible. d) As a rule, visits without surveillance are allowed.

Medium-security wards of guarded prisons: a) As a rule, movement inside the institution occurs under the supervision of an employee of the Prison Service; free movement can be permitted. b) Work is allocated outside of the institution; an employee of the Prison Service conducts a check at least once per hour. c) Movement outside the institution after work (sports, culture) is possible under supervision. d) As a rule, visits with no surveillance are allowed.

High-security wards of guarded prisons: a) Organized movement inside the institution must be under the supervision of an employee of the Prison Service; free movement cannot be permitted. b) As a rule, the convicts work either inside the prison or outside the prison at guarded workplaces and an employee of the Prison Service supervises once every 45 minutes. c) Movement outside the institution after work (sports, culture) is possible under supervision. d) As a rule, visits with surveillance are allowed.

High-security prison: a) Organized movement inside the institution is permitted under the supervision of a guard. b) The convicts work at workplaces inside the prison or in their cells; supervision is performed once every 30 minutes. c) Free movement is not permitted. d) As a rule, visits with surveillance are allowed.

Prisons for juveniles: a) Organized movement inside the institution is permitted under the supervision of an employee of the Prison Service. b) As a rule, the convicts work inside the prison, but work outside the prison can be permitted; supervision is performed once every 30 minutes. c) Movement outside the institution after work (sports, culture) is possible under supervision. d) As a rule, visits with surveillance are allowed.

6.3. Treatment of convicts (educational, reintegration, and resocialization tools)

The Prison Act guarantees the *rights* of prisoners. Basic social rights include regular meals, a bed and a place for personal belongings, eight hours a day for sleeping, time for personal ablution and cleaning, at least one hour for walking, adequate spare time, and medical treatment. The prisoners are provided with prison clothes suitable for the weather conditions and sufficient to protect their health. Visits, correspondence, use of the phone and spiritual and social services are also granted. The prisoners have the right to receive visiting relatives for a total of three hours in one calendar month.

The convicts can read books, newspapers and magazines, they can play games and so on. They are entitled to order daily newspapers, magazines and books at their

own expense and may borrow various publications, including legal regulations. They also have the right to buy food and personal belongings in the prison shop. Each prisoner has the right to receive a parcel containing food and personal articles weighing up to 5 kg once every six months.

When discussing the rights of convicts, it is necessary to mention the Section 26 of the PA, which reads as follows: "*In order to his rights and justified interest, the prisoner may file complaints and applications to the authorities responsible for dealing with such cases. A prison director is obliged to ensure that such application and complaints are immediately delivered to the appropriate recipients*." Prison Service staff are obliged to safeguard the rights of prisoners serving their sentence.[67]

The Prison Act also sets out obligations for convicts. According to Section 38, the convicts must maintain order and discipline. For example, drinking alcohol and using drugs, gambling and tattooing oneself or others are prohibited. The prisoners are obliged to work if the prison has work for them to do. The prisons create conditions for assigning work to prisoners in their own workshops, in manufacturing centers, or in companies outside the prison. The written consent of the prisoners is required so that the prison can order them to work for a company that is not run by the State (that is, for a private firm).

To achieve the purpose of serving the sentence, the prison shall establish a treatment program for each convicted person. The treatment program is divided into work activities, educational activities, special educational activities, hobby activities and the area of creating external relations. Based on a comprehensive report on the convict, the prison chooses a program that seems appropriate for that convict, particularly in terms of minimizing the identified risks.

An important part of the resocialization of the convicts is the exit section, in which convicts are placed six months before the expected end of their sentence. The director of the prison places the convicts in the exit section based on the recommendation of the professional staff. The main purpose of this section is to prepare convicts for life after release from prison.

7. Cooperation among the Member States of the European Union – the Act on International Judicial Cooperation

The forms of cooperation among the Member States of the European Union are regulated by Act No. 104/2013 Coll. on International Judicial Cooperation, which entered into force on January 1, 2014.

Certain general principles apply to the implementation of international judicial cooperation in criminal matters. The first is the principle of reciprocity. This principle means that the requested State shall provide cooperation to the same extent as the requesting State would have provided it to the requested State. Another important

67 Diblíková, 2002, p. 123.

principle is the principle of the protection of public order or the protection of the interests of the State (Section 5 of the Act on International Judicial Cooperation in Criminal Matters). According to this principle, the requested state is not obliged to comply with the request if doing so would violate a provision of the requested state's legal order that must be insisted upon without reservation. Other principles then apply to the particular types of international judicial cooperation in criminal matters, such as the extradition proceedings.

Such forms of cooperation include the following: the European Arrest Warrant, the European freezing order, the EU asset or evidence seizure order, etc.; specific types of legal aid; cross-border persecution; cross-border surveillance; covert investigations; cross-border interception; temporary transfer abroad for the purpose of carrying out procedural acts; temporary transfer from abroad for the same purpose; seizure and transfer of items; seizure of other property and seizure of property; preliminary seizure of property; joint investigation team; interrogation by videophone and telephone; provision of criminal record information; use of data from the Schengen Information System.

In relation to international judicial cooperation in criminal matters, one should also mention the European Judicial Network (EJN), whose aim is primarily to help improve judicial cooperation among the Member States of the European Union, particularly in the fight against serious crime (organized crime, corruption, illegal drug trafficking, or terrorism), by promoting informal direct contact between judicial authorities and authorities responsible for judicial cooperation and the prosecution of serious crime within the Member States.

In addition, one should mention the European AntiFraud Office (OLAF), which is responsible for protecting the financial and economic interests of the European Union, combating fraud and corruption, conducting administrative investigations and cooperating with the competent authorities of the EU Member States in investigations, and of EUROJUST, whose task is to contribute to the proper coordination and facilitation of judicial cooperation among the competent national authorities in the investigation and prosecution of serious crime, particularly organized crime, affecting two or more Member States.

The contact point for the EJN, OLAF, and EUROJUST is the designated state prosecuting attorneys of the Supreme State Prosecutor's Office.

8. Conclusion

In conclusion, we summarize this paper by stating that Czech criminal law, both substantive and procedural, has undergone considerable development since the early 1990s. At present, almost 33 years after November 1989, the criminal law is still developing. While the recodification of the substantive criminal law has been completed with the adoption of three key criminal codes, the recodification of the procedural criminal law is still in the process of preparation.

The most significant changes to the Criminal Code of 2009, in comparison with the previous Criminal Code, are as follows:

- The explicit definition of some basic principles of criminal law
- The introduction of a formal concept of a criminal act with the material corrective of the principle of the subsidiarity of criminal repression
- The binary categorization of criminal offenses into crimes and minor offenses, which should lead to the differentiation of criminal sanctions and will also extend the possibility of imposing alternative punishments; this new categorization will also form the foundation for various type of criminal procedure, such as diversions
- Emphasizing the philosophy of the imprisonment as an ultima ratio and the idea of alternative punishments as well as the extension of the system of alternative punishment (house arrest; prohibition of entry to sporting, cultural, and other social events)
- Stricter punishment in cases of the most serious crimes – the maximum term of imprisonment as a regular sentence was increased from 15 to 20 years; the principle of aggravation in cases of pluralistic criminal activity (concurrence and recidivism) was extended as well
- A new systematic arrangement of the special part of the Criminal Code such that priority is given to the protection of fundamental human rights and freedoms of an individual over the collective interests of society and the state, as mentioned above.[68]

In general, the new Criminal Code considers the development of legal theory and practice, reflects the main changes in other legal areas and focuses on establishing the most appropriate system for the protection of society against criminal offenses.

The criminal liability of legal entities has brought a new dimension to criminal law. As already stated above, the criminal liability of legal entities creates a significant interference with the fundamental principles of criminal law, namely with the principle of individual liability of the natural persons for their own actions, the principle of liability for guilt, and the principle of the personality of punishment.

The adoption of the Juvenile Justice Act was a highly positive step. The law follows the legislation of 1931, which was very progressive at the time. It takes into account the specifics of juvenile delinquents and provides a wide space for the application of elements of restorative justice.

It can be concluded that the reform of criminal law has been successfully completed with the adoption of these codes. Further development of criminal law is linked to the development of society as a whole. The legislature should be judicious in any changes to the legislation and consistently respect the principle of criminal law as the ultima ratio.

68 Fryšták, Kalvodová and Provazník, 2015, pp. 18–19; see also Kalvodová, 2012, pp. 259–263.

The current legislation on criminal procedural law contained in the Criminal Procedure Code dates back to the early 1960s. Although it has been amended numerous times, its current form does not correspond with the needs of criminal procedure in the early 21st century. Therefore, a new legislation on criminal procedure is necessary.

The Criminal Procedure Code received its first major revision soon after 1989, in the context of fundamental social changes, when the most serious shortcomings of the Criminal Procedure Code, which could not stand up under the new conditions of a democratic state governed by the rule of law and a market economy, were removed. However, under the pressure of the immediate demands of practice, it was not possible to proceed to the recodification of the criminal procedural law, and therefore, more, or fewer amendments were made to the Criminal Procedure Code.

However, a considerable number of problems persist to this day that hinder the effective conduct of criminal proceedings. These problems are primarily the complexity and lengthiness of criminal proceedings. This, coupled with the high demands on the formal aspects of proof, renders the criminal justice system unable to cope with some very serious forms of crime and leads it to struggling even with ordinary crime.

In March 2014, the Working Commission on the New Criminal Procedure Code, composed of experts in criminal procedural law, initiated its work. The Commission is composed of practitioners, specifically, judges, state prosecuting attorneys, defense counsel and representatives of the Ministry of the Interior and the Police of the Czech Republic as well as experts from the academic sphere, to ensure that different views on criminal procedure are represented in the Commission and that the best possible result can be achieved on the basis of discussion, which is to lead to modern and comprehensive regulation of criminal procedure.

The new legislation will be drafted using the approved substantive plans of 2004 and 2008 to create a modern code of criminal procedure organically linked to the existing Criminal Code, with which it forms conceptual unity. The work on the new Criminal Procedure Code has not yet finished.

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| Chapter 3 |

Croatia: National Regulations in the Shadow of a Common Past

Davor DERENČINOVIĆ – Marta DRAGIČEVIĆ PRTENJAČA

ABSTRACT

Croatia is relatively small country with population of approx. 4 million inhabitants. It is a European country, and is part of the Central and Eastern Europe. The area of the state is 56, 594 km2 by land, and 31,479 km2 by sea (interior waters and territorial sea), in total 88,073 km2 which makes Croatia one of the medium-sized European countries. It was a part of Yugoslavia till 1991. After its independence, Croatia shifted from socialist regime to democracy, and the law reform followed. Croatia has enacted new Constitution in compliance with all international standards, abolishing the death penalty. In the beginning of its independence, it has taken existing legislature of Yugoslavia, but later it has been working on its own legislature and reform of the judiciary and (criminal) law system. So, in past few decades it has gone through a significant law reform, among other law areas criminal law was also significantly affected and influenced by the state law reform. Many new laws were enacted regulating area of criminal law, as well as the laws regulating some issues relevant for criminal law (both substantive or procedural, and penitentiary as well). The main laws in field of criminal law (in broader sense) are Penal code (subsequently: PC) for Substantive criminal law, Criminal Procedure Act (subsequently: CPA) for Criminal procedural law and Penitentiary Act (subsequently: PA) for Penitentiary law.

In this paper (report) will be presented some key information about Croatia, Croatia's judiciary system and criminal law system and reform.

KEYWORDS

Croatia, judiciary system, criminal law, criminal procedural law, penitentiary law

1. Introduction – general, geopolitical and socio-economic frame of Croatia

1.1. General information

Croatia (officially the Republic of Croatia) is a European country, located in the north-western part of the Balkan Peninsula,[1] in the south-eastern Europe. It is part of the Central and Eastern Europe in geopolitical sense, geographically located in

1 See Lampe et al., 2022.

Derenčinović, D., Dragičević Prtenjača, M. (2022) 'Croatia: National Regulations in the Shadow of a Common Past' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 71–98. https://doi.org/10.54171/2022.evcs.cls_3

the southern part of Central Europe and in the northern part of the Mediterranean.[2] Croatia is highly geographically diverse crescent-shaped country, and its capital is Zagreb, located in the north.[3] Its land area spreads over 56,594 km2,[4] while its interior sea waters and territorial see covers 31,479 km2 totaling in 88,073 km2,[5] which makes Croatia one of the medium-sized European countries.[6] Croatia shares borders with Slovenia and Hungary to the north, Serbia and Bosnia and Herzegovina to the east, Montenegro to the south, and it also shares a sea border with Italy on the west.[7]

1.2. Political organization and structure

Croatia is a parliamentary democracy. It is republic by its governmental organisation, and in economic terms is focused on market economy.[8] Croatian political system is based on the principle of triple separation of powers divided into *legislative* (the Parliament), *executive* (Government and the President) and *judicial power.*

The highest legal act in Croatia is the Constitution of the Republic of Croatia (hereinafter: Constitution) since the first democratic multi-party parliamentary elections held in the spring of 1990.[9] It is called the Christmas Constitution because of its promulgation on December 22, 1990.[10] The fundamental rights and freedoms are guaranteed by the Constitution, e.g. freedom of speech, religion, information, and association, the equality of nationalities,[11] cultural autonomy, along with the right to use one's own language and script (the latter specifically intended for the Serb minority), are also guaranteed.[12]

As it was mentioned executive power in Croatia is divided between the Government of the Republic of Croatia (*Vlada*) and the President of the Republic of Croatia.[13]

The President represents the Republic of Croatia at home and abroad. He is responsible for the defence of the territorial integrity and independence of the country and

2 Information available at: https://migracije.hr/general-information-on-the-republic-of-croatia/?lang=en (Accessed: 23 September 2021). Hereinafter referred to as: *General information on the Republic of Croatia.*

3 See Lampe et al., 2022.

4 See *Hrvatska (no date)* enciklopedija.hr [Online]. Available at: https://www.enciklopedija.hr/natuknica.aspx?id=26390 (Accessed: 10 September 2022). Hereinafter referred to as *Hrvatska.*

5 Munivrana Vajda and Ivičević Karas, 2016, p. 15.
And see *General information on the Republic of Croatia.*

6 *General information on the Republic of Croatia.*

7 Horvatić and Derenčinović, 2002, p. 5.

8 Ibid.

9 Horvatić, Derenčinović and Cvitanović, 2016, p. 92.

10 Ibid.

11 See Constitution of the Republic of Croatia, OG 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14; available at: https://www.zakon.hr/z/94/Ustav-Republike-Hrvatske (Accessed: 10 September 2021).

12 See *Government and society* in: Lampe et. al, 2022. Available at: https://www.britannica.com/place/Croatia/Government-and-society (Accessed: 10 September 2021). Hereinafter referred to as *Government and society.*

13 Munivrana Vajda and Ivičević Karas, 2016, p. 17.

cares for the stability of state power.[14] The President is elected on the basis of direct and secret elections by popular vote for a period of five years (and is limited to two terms).[15] At the beginning the 1990 Constitution granted the President very broad powers; this "super President" had an authority to appoint and dismiss the Prime minister, who was nominally responsible to both the Parliament and the President but was actually directly dependent on the President.[16] "Constitutional amendments in 2000 reduced the importance of the President, who henceforth served solely as head of state".[17] Also these reform increased the power of the parliament and of the prime minister, who is now the head of Government. The President continues to nominate the prime minister, but the Parliament *(Sabor*) must confirm the appointment. In addition, the prime minister is usually the head of the leading party in the Sabor.[18]

The Government, headed by the Prime Minister, proposes laws and other acts to the Croatian Parliament.[19] It also proposes the state budget and the final account, implements laws and other decisions of the Croatian Parliament, issues regulations for the execution of laws, conducts external and internal politics, directs and supervises the work of state administration, cares about the country's economic development, directs the activities and development of public services and performs other tasks defined by the Constitution and laws. [20]

The Croatian Parliament is a representative body of citizens and a holder of legislative authority.[21] The 1990 Constitution changed

> "the structure of the Sabor (parliament) from a tricameral body in the Yugoslav system to a bicameral body consisting of the House of Representatives (lower house) and the House of Districts (upper house). Constitutional amendments in 2001 abolished the upper house, thereby rendering the Sabor a unicameral body".[22]

Parliament (*Sabor*) consists of a 100 -160 members (currently 151)[23], who are elected from party lists for a period of four years on the basis of universal and equal electoral rights by secret ballots.[24] In addition, a certain percentage of places are "reserved for national minorities and for representatives of Croats living outside the country".[25]

14 Munivrana Vajda and Ivičević Karas, 2016, p. 17; Constitution of Croatia (Arts. 94–106).
15 See *Government and society,* Lampe et. al, 2022.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 See *General information on the Republic of Croatia, n.d.*; *Hrvatska*. Also see Munivrana Vajda and Ivičević Karas, 2016, p. 17.
21 See *General information on the Republic of Croatia*.
22 See *Government and society,* Lampe et. al, 2022.
23 Information available at: https://www.sabor.hr/en/mps (Accessed: 10 September 2021).
24 See *General information on the Republic of Croatia*.
25 See *Government and society,* Lampe et. al, 2022.

1.3. Population, language and religion

The new census has been conducted recently in 2021, and preliminary data show a significant decrease in population.[26] Today Croatia has a population of 3.888.529,[27] and by the previous census conducted in 2011, Croatia had a population of 4,284,889.[28]

In Croatia there is a variety of ethnic groups which coexist within the Croatia.[29] Croats constitute about "nine-tenths (90%) of the population, and Serbs make the largest minority group".[30] In addition to the Croats and the Serbs, there are "small groups of Bosnian Muslims (Bosniaks), Hungarians, Italians, and Slovenes as well as a few thousand Albanians, Austrians, Bulgarians, Czechs, Germans, and other nationalities".[31] By some "estimations Croatian diaspora counts more than two million people worldwide".[32]

Official language in Croatia is Croatian (which is South Slavic language of the Indo-European family),[33] and alphabet is Latin. The Constitution of the Republic of Croatia, grantees rights to use other languages and scripts (alphabets), e.g. Cyrillic etc. The Croatian language is one of the 24 official languages[34] of the European Union.[35]

There is "traditionally a close correlation between ethnic identity and religious affiliation".[36] The Croatian Constitution guarantees rights and freedoms to all persons in the Republic of Croatia, among other rights and freedoms the freedom of conscience, free expression of religion or belief and equality before the law, regardless of their religion. A vast majority of the Croatian population declare themselves to be members of the (Roman) Catholic Church and more Western-influenced, and other declare themselves as members of the Serbian Orthodox Church, Islam (Bosniaks constitute most of the Muslim population), Protestants, nonreligious or atheists.[37]

1.4. Economy

Croatia is an independent country since 1991. Before its independence it was republic in federation of Yugoslavia (Socialist Federative Republic of Yugoslavia; SFRJ which consisted out of six republics and two autonomous provinces).[38] The Yugoslav Government was actually "*self-governed socialism*", private ownership wasn't known and

26 Preliminary data have been released on Friday 14th January 2022 by the Croatian Bureau of Statistics; available at: https://popis2021.hr/ (Accessed: 17 January 2022).
27 Ibid.
28 See *General information on the Republic of Croatia*.
29 See Lampe et al., 2022.
30 Ibid.
31 See *People of Croatia*. in: Lampe et. al, 2022. Available at: https://www.britannica.com/place/Croatia/People (Accessed: 2 August 2022). Hereinafter referred to as *People of Croatia*.
32 *General information on the Republic of Croatia*.
33 See *People of Croatia*, Lampe et. al, 2022.
34 Information available at: https://europa.eu/european-union/about-eu/eu-languages_en (Accessed: 10 September 2021).
35 *General information on the Republic of Croatia*.
36 See *People of Croatia*, Lampe et. al, 2022.
37 See *General information on the Republic of Croatia*. See also *People of Croatia*, Lampe et. al, 2022.
38 Dolezal, 2010, pp. 59–61; see more in Roksandić Vidlička, 2017, pp. 123–159.

economy was based on state – property.[39]Demise of communism in Croatia led to restructuring of economic and political system.[40] It shifted from the socialist self-management system to market-oriented capitalism.[41] This transition wasn't easy, nor in political restructuring neither in economic. So, it took time. This transition lasted from 1990 to 2000, and some authors consider it still ongoing.[42] During that time Croatia shifted from communist regime to a democracy.[43] Also it shifted form state-property system to private ownership concept.[44]

It can be said that the privatisation of state-owned companies in Croatia started in 1991, and was going throughout four phases. From 1991 to 1994, from 1994 to 1998, from 1998 to 2000, and from 2000 forwards.[45] This transition was marked by some negative consequences such as: "irrational transformation of the biggest corporative systems without clear cost-benefit analyses" and "allowing individuals (very often on the nepotism basis) to buy state-owned companies with no clear strategy for developing them further, and investing in them".[46]

The problem of solvency and international debt mostly inherited from the former Yugoslavia tried to be resolved, so actions after year 2000 weren't so popular. Sale of state-owned enterprises to private owners started, different acts were done to establish functioning markets, and create stable prices, interest rates, and currency,[47] but none of this wasn't easy going. Such situation deterred foreign investment, and is well known how these investments have positive effect on economic growth.[48]

By World bank GDP contraction in Croatia in 2020 (8.4 percent)

> "was one of the largest in the European Union (EU) and in the Europe and Central Asia region. Going forward, EU funding through various sources aimed at restarting the economy and weathering the crises should play a key role in supporting the country's economic recovery".[49]

World bank also concludes how "Croatia will need to use EU funds effectively for priority investments and accelerate reforms to address long-standing structural issues".[50] In addition, it highlights the risks evolving from Covid-19 pandemic arguing how "although the vaccination program has started, the situation remains highly

39 Dolezal, 2010, pp. 59–61; see more in Roksandić Vidlička, 2017, pp. 123–159.
40 See *Economy of Croatia*.
41 Ibid.
42 Roksandić Vidlička, 2017, pp. 123–159.
43 Dolezal, 2010, p. 61.
44 Ibid.
45 Ibid.
46 Dolezal, 2010, p. 62; for more and different phase division see Roksandić Vidlička, 2017, p. 122.
47 Dolezal, 2010, p. 66.
48 Ibid.
49 See The World Bank in Croatia.
50 Ibid.

uncertain because of vaccine supply bottlenecks and the recent increase in infections due to the new virus variants".[51] Further notes how

> "Croatia still lags behind its EU peers. Strengthening long-term growth is critical to accelerating the income convergence. This will require diversifying the economy toward more knowledge-based sectors and addressing the economy's structural issues, including public sector governance, education outcomes, and the efficiency of the judiciary. On the fiscal front, the surge in public debt in 2020, reflecting the economic downturn and a large fiscal stimulus package, calls for fiscal prudence and greater efforts to increase the effectiveness and efficiency of public spending over the coming years".[52]

Due to the COVID-19 pandemic, as Prime Minister Plenković stated "the coronavirus pandemic had led to the greatest health and economic crisis since World War II" and it cost Croatia cca 35 billion HRK (4 681 175 473 billion Euro).[53]

1.5. Short historical roots and background

Croatia was part of the Austro-Hungarian Monarchy since Vienna concluded the Austro-Hungarian Compromise with Budapest in 1867.[54] Istria and Dalmatia "were included in the Austrian part of the Monarchy, and Croatia became the Hungarian part of the Monarchy".[55]

In 1868 agreement was achieved between Croatia and Hungary, called the 'Nagodba'.[56] Formally Croatian "statehood was recognized, but in fact Croatia didn't have real jurisdiction over its affairs".[57]

Croatia joined the State of Slovenes, Croats and Serbs, at the end of the First World War in 1918.[58] It became part of the Kingdom of Serbs, Croats and Slovenes (the Kingdom of Yugoslavia from 1929).

After the Second World War, Croatia became one of the federal units of the newly established FNRJ (Federal People's Republic of Yugoslavia), later called the SFRY (Socialist Federal Republic of Yugoslavia), in 1945.[59]

Croatia became "an independent state on 25 June 1991 based on democratic multiparty elections held in 1990 (the Multi-Party State Parliament was constituted on 30 May 1990), and was internationally recognized as a state on 15 January 1992".[60] Croatia

51 Ibid.
52 Ibid.
53 See Croatia quickly back on road to economic recovery.
54 See *History of Croatia*.
55 Ibid.
56 Ibid.
57 Ibid.
58 See General information on the Republic of Croatia; and for details also see Independent Croatia.
59 Ibid.
60 Ibid.

is a member of the United Nations since 1992, the Organization for European Security and Cooperation since 1992, the Council of Europe since 1996, the World Trade Organization since 2000, the North Atlantic Treaty Organisation (NATO) since 2009 and the European Union from July, 1st 2013.[61]

2. Introduction to the Croatian justice system

2.1. Courts

Courts in Croatia are autonomous and independent, bound only by the Constitution, applicable international treaties, laws and other valid sources of law.[62] In Croatia by Courts Act (hereinafter: CA)[63] there are courts of the regular jurisdiction and special jurisdiction.[64] Courts of the regular jurisdiction are municipal courts and the county courts.[65] Courts of the special jurisdiction are commercial courts, High Commercial Court, administrative courts, the High Administrative Court of the Republic of Croatia, High Misdemeanour Court of the Republic of Croatia and the High Criminal Court of the Republic of the Croatia, which began with its work on 1. January 2021.[66] The highest court in Croatia, or the court of highest jurisdiction is the Supreme Court of the Republic of Croatia.[67]

Its main function is to ensure the uniform application of laws, but it also decides upon legal remedies when so prescribed by law, decides on extraordinary legal remedies and on conflicts of jurisdiction, discusses current issues of case law, proposes areas for the training of judges and acts in other cases when so proscribed by the law.[68]

Since January 1st 2021. we have a new court High Criminal Court which is higher than county court, but is lower than the Supreme Court.[69] It is totally new step and it just began with its work.[70]

County and municipal courts have jurisdiction in accordance to the administrative division of the territory. It means that country courts have jurisdiction over one

61 Ibid.
62 Art. 115 of the Constitution.
63 The Courts Act OG 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20.
64 Art. 14 para. 1 CA.
65 Art. 14 para. 2 CA.
66 Art. 14 para. 3 CA; also about inception of the High Criminal Court see decision of the Constitutional court (U-I-4658/2019 and U-I-4659/2019, November 3rd 2020.; OG 130/2020) on https://narodne-novine.nn.hr/clanci/sluzbeni/full/2020_11_130_2484.html (Accessed: 4 October 2021).
67 Art. 14 para. 4 CA.
68 Art. 20 CA and see Judicial Power.
69 By Art. 26.a CA it decides in the second instance on appeals against decisions of county courts in criminal cases, and performs other tasks specified by law. See https://sudovi.hr/en/vksrh/about-courts/about-court (Accessed: 4 October 2021); also see Art. 19e of CPA, which further expands its jurisdiction to decide in the third instance cases (in accordance with the Art. 490 para. 1. al. 2. CPA).
70 For more information see https://sudovi.hr/en/vksrh (Accessed: 4 October 2021).

or more counties and municipal courts have jurisdiction over one or more municipalities and town.[71]

Table: Structure *of the Judicial Power in Croatia*[72]

SUPREME COURT OF THE REPUBLIC OF CROATIA				
COUNTY COURTS	HIGH MISDEMEANOUR COURT OF THE REPUBLIC OF CROATIA	HIGH COMMERCIAL COURT OF THE REPUBLIC OF CROATIA	HIGH ADMINISTRATIVE COURT OF THE REPUBLIC OF CROATIA	HIGH CRIMINAL COURT OF THE REPUBLIC OF CROATIA
MUNICIPAL COURTS	MUNICIPAL MISDEMEANOUR COURTS	COMMERCIAL COURTS	ADMINISTRATIVE COURTS	

■ regular courts ■ specialized courts

The Supreme Court is the highest legal authority in all but constitutional matters, which are decided by the Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Court).[73]

Constitutional Court decides on the constitutionality of acts and has the right to revoke the acts if it considers them unconstitutional, but it doesn't represent the formal judicial authority in the Republic of Croatia.[74] It is sort of the special court, out of the normal judicial jurisdiction,[75] an independent body, separated from the three branches of power –legislative, executive and judicial. It is composed out of thirteen judges elected by the Parliament of the Republic of Croatia (*Sabor*), from prominent jurists (judges, public prosecutors, lawyers and university professors of law), for a term of eight years.[76] It's primary function is to assure the conformity of all laws and other regulations to the Constitution, but also "it decides upon constitutional petitions against individual decisions taken by different bodies where such decisions violate human rights and fundamental freedoms, as well as on the jurisdictional disputes between the legislative, executive and judicial branches".[77]

71 Munivrana Vajda and Ivičević Karas, 2016, p. 18; also see Art. 15 CA.
72 The table is taken form the reference Judicial Power.
73 Constitutional Law on the Constitutional Court of the Republic of Croatia, OG 99/99, 29/02, 49/02.
74 Omejec, 2002, pp. 141–189.
75 Ibid.
76 Art. 122 of the Constitution, OG 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.
77 See Munivrana Vajda and Ivičević Karas, 2016, p. 18; Art. 125 of the Constitution.

2.2. Judges (Justices)

Justices are trained professionals appointed for life,[78] and they enjoy immunity and may only be removed from office at their own request. Other reason for their removal are, if they are permanently incapacitated or if they reach age of seventy which is the age of the retirement.[79]

If judges are convicted for a criminal offence making a judge unworthy of holding judicial office or if National Judicial Council (its jurisdiction is regulated with the Law on National Judicial Council; hereinafter: LNJC)[80] so decides due to a grave disciplinary offence, they can also be removed from the duty.[81] The autonomy, independence and impartiality of judges, its appointment, promotion, transfer but also their liability and disciplinary accountability is monitored and ensured by the National Judicial Council.[82] Usually judges in first instance sit alone (one judge), but in some cases they can sit in panels (when is so prescribed by law), and at the high instance courts (courts of appeals) judges usually sit in panels of three or five.[83]

2.3. Criminal justice system

Criminal justice system and its jurisdiction is slightly different form general principles reflecting judiciary and justices. It is all related to the severity of the committed offences. In criminal cases, composition of the court departs from the above mentioned general rule since it depends on the gravity of the offence, when the judge will sit alone, and when in panel. In Croatia in criminal matters as a prat of legal tradition, lay judges participate in conducting trials in panels equally with judges.[84] In some cases when sever criminal offence are committed and tried then lay judges do not sit in panels but only (specialized) judges does.

Primarily, the rules of the jurisdiction of courts in criminal matters are envisaged in the Criminal Procedure Act (hereinafter: CPA),[85] while the CA only supplements the CPA.[86]

So municipal and county courts of general jurisdiction both hold trials in criminal matters but its jurisdiction diverse to the rule of the stipulated sanctions. Municipal courts as first instance courts have jurisdiction over criminal offences for which a fine or imprisonment up to twelve years is prescribed by law, and county courts as first instance courts conduct trials for criminal offences for which imprisonment of more

78 Arts. 118–120 of the Constitution and Art. 8 CA.
79 Art. 120 of the Constitution.
80 The Law on National Judicial Council OG 116/10, 57/11, 130/11, 13/13, 28/13, 82/15, 67/18, 126/19; see also Art. 121 of the Constitution.
81 Arts. 118–120 of the Constitution and Art. 8 CA.
82 Art. 1 LNJC.
83 Art. 7 CA.
84 Art. 118 of the Constitution and Art. 392 CPA.
85 Criminal Procedure Act, OG 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19.
86 Munivrana Vajda and Ivičević Karas, 2016, pp. 22–23.

than twelve years or long-term imprisonment is prescribed, as well as in cases (for committed criminal offences) when its jurisdiction is prescribed by a law.[87]

The High Criminal Court of the Republic of the Croatia decides in the second instance on appeals against decisions of county courts in criminal cases, and performs other tasks specified by law and Art. 19e of CPA, further expands its jurisdiction to decide in the third instance cases.[88]

The Supreme Court's jurisdiction in criminal matters refers to the third instance when deciding on appeals against judgments of the second instance courts It also decides on extraordinary legal remedies and in other cases when so proscribed by the law.[89]

2.3.1. The Prosecution Service- the State Attorney's Office, the Office for the Suppression of Corruption and Organized Crime, the European Public Prosecutor's Office

The State Attorney's Office is an 'autonomous and independent judiciary body empowered and duty-bound to act against perpetrators of criminal and other offences and to take legal acts when property of the Republic of Croatia is in question and take legal remedies for protection the Constitution and law'.[90] Further, its jurisdiction is regulated with State Attorney's Act (hereinafter: SAA)[91] Although its primary mission is to be the public prosecution service and prosecute criminal offences and misdemeanours it also has jurisdiction in some civil law cases for the protection of the state property.[92] Therefore, in State Attorney's Office there are two substantive divisions: criminal and civil.[93]

In cases of criminal matters regulations for the work of State Attorney's Office are supplemented with the provisions of the special laws, primarily CPA and the Law on the Office for the Suppression of Corruption and Organized Crime (hereinafter: LOSCOC)[94] which regulates the jurisdiction of the special Office for Prevention of the Corruption and Organized crime cases. That is special *sui generis* State Attorney's Office which jurisdiction is only for corruption-related criminal offences or organized crime offences.

Hence, the State Attorney's Office is organized according to the principle of a vertical hierarchical structure, and at the head of the State Attorney's Office is State Attorney General who runs and represents the State Attorney's Office and is responsible for its work, and he is appointed by Croatian Parliament.[95] He has his

87 Arts. 19.a–19.d CPA.
88 Art. 19e CPA in accordance with the Art. 490 para. 1. al. 2. CPA.
89 Art. 19f CPA.
90 Art. 121 a of the Constitution.
91 State Attorney's Act, OG 67/18.
92 Art. 121.a of the Constitution and Art. 3 SAA.
93 Art. 14 SAA. There is also an Office of the State Attorney General which is an administrative body which deals with administrate things within the State Attorney's Office.
94 The Law on the Office for the Suppression of Corruption and Organized Crime, OG 76/09, 116/10, 145/10, 57/11, 136/12, 148/13, 70/17; see also Horvatić and Derenčinović, 2002, p. 11.
95 Art. 12 para. 1, and Art. 21 SAA.
The State Attorney General is appointed by the Croatian Parliament, with the mandate of the four years upon nomination by the Government, and after having opinion of the special Committee of Croatian Parliament in which jurisdiction is judiciary. Art. 121.a para. 2 of the Constitution.

deputies- called deputy of the State Attorney General. There are also county and municipal State Attorney's offices.[96] They are headed by County State Attorney with his/hers deputies and Municipal State Attorneys with his/hers deputies,[97] who have been appointed by State Attorney Council.[98] There are 15 County State Attorney's offices in Croatia, and 25 Municipal State Attorney's Offices.[99] As *Munivrana Vajda and Ivičević Karas* note

> "therefore, the superior state attorney may give a mandatory instruction to a state attorney deputy or subordinate state attorney, including an instruction on how to proceed in concrete cases when necessary. The superior state attorney may assume a case from his deputy or from the subordinated state attorney, or confide a case to his deputy or to subordinated state attorney". [100]

Territorial jurisdiction and the subject matter are regulated in accordance with jurisdiction provisions of the courts. The State Attorney's Office and the Office for the Prevention of Corruption and Organized Crime[101] cover prosecution for all criminal offences committed on the territory of the Republic of Croatia.

There has been a new enhanced role of the State Attorney's Office regarding the pre-trial proceedings. In 2008, the new Criminal Procedure Act has been enacted. By its provisions the state attorney has a role of *dominus litis* (the master of the procedure) as he is the 'authority conducting the proceedings in the pre-trial proceedings'.[102]

Today by besides his roll of the prosecutor (to conduct evidentiary actions, in order to collect evidence for the indictment) the state attorney has a particular function[103] which oblige him to examine and determine facts not only which can lead to the indictment but also those which are favourable for the defendant.

As *Ivičević Karas and Munivrana Vajda* note "the state attorney is a party of the prosecution *stricto sensu* only at the stage of trial, and not during the pre-trial proceedings".[104] By this Law (CPA2008) legislator abolished the usual, classical, tradi-

96 Art. 12 para. 2 SAA.
97 Art. 88 SAA.
County state attorneys, municipal state attorneys and their deputies are appointed in accordance with the Constitution and other laws, by the State Attorney Council. It also decides upon their disciplinary accountability. State Attorneys Council is composed out of 11 members, 7 which are state attorney's deputies, two are members of the Croatia Parliament and two are university professors. Art. 121. a paras. 3 and 6 of the Constitution.
98 For more see the Law on State Attorney Council, OG, 67/18, 126/19.
99 See *Izvješće Glavnog Državnog odvjetnika Republike Hrvatske o radu državnih odvjetništava u 2020. godini*, p. 10.
100 Munivrana Vajda and Ivičević Karas, 2016, p. 21.
101 Munivrana Vajda and Ivičević Karas call that office Anti-Corruption and Organized Crime Prevention Office. Munivrana Vajda and Ivičević Karas, 2016, p. 21.
102 Munivrana Vajda and Ivičević Karas, 2016, p. 22.
103 Art. 9 paras. 1 and 2 CPA.
104 Munivrana Vajda and Ivičević Karas, 2016, p. 22.

tional model of judicial investigation conducted by the investigating judge.[105] The role of the investigating judge has changed, and shifted only to the supervised function for the actions of the state attorney providing judicial control over the state attorney's investigative power, because he doesn't investigate, but he also has the obligation to assure judicial control especially with regard of the human rights and fundamental freedoms. The investigative judge is also in charge of application of coercive measures during the pre-trial proceedings, e.g. pre-trial detention.[106]

The establishment of the European Public Prosecutor's Office (EPPO) has its beginnings in 1995, but the most important legal basis for its instalment was Lisbon Treaty (2007) which opened the door for "the 2013 Commission legislative proposal and the final Council decision on the Regulation establishing the EPPO in 2017".[107] EPPO only prosecute PIF offences (such as fraud, corruption, money laundering and misappropriation[108]) ,[109] and "operates as a fully independent single office across all participating EU countries, and combines European and national law-enforcement efforts".[110] It started with its work recently on 1 June 2021.[111]

105 Ivičević Karas, Bonačić and Burić, 2020, pp. 20, 21; Munivrana Vajda and Ivičević Karas, 2016, p. 21.

106 Munivrana Vajda and Ivičević Karas, 2016, p. 22.

107 De Angelis, 2019, pp. 272–275.

108 See *Reporting a crime to the EPPO*.

109 De Angelis, 2019, pp. 272– 275.

110 See *Structure and characteristics*.
"The European Public Prosecutor's Office is composed of two levels: the central level and the decentralised (national) level. The central level, with its headquarters in Luxembourg, consists of: the European Chief Prosecutor; 22 European Prosecutors (one per participating EU country), two of whom function as Deputies for the European Chief Prosecutor; and the Administrative Director. The European Chief Prosecutor and the 22 European Prosecutors constitute the College of the EPPO. The prosecutors and the Administrative Director are assisted in their work by a number of experts in areas including administrative, technical, operational and legal-technical support. The decentralised level consists of the European Delegated Prosecutors (EDPs) in the 22 participating EU Member States. The central level supervises the investigations and prosecutions carried out by the EDPs at the national level, who operate with complete independence from their national authorities."
The procedural acts of the European Public Prosecutor's Office are subject to judicial review by the national courts. The European Court of Justice – by way of preliminary rulings or judicial reviews of the EPPO acts – has residual powers to ensure a consistent application of EU law, and the Zakon o provedbi Uredbe Vijeća (EU) 2017/1939 od 12. listopada 2017. o provedbi pojačane suradnje u vezi s osnivanjem ureda Europskog javnog tužitelja (»EPPO«), OG 146/20 [Online]. Available at: https://www.zakon.hr/z/2734/Zakon-o-provedbi-Uredbe-Vije%C4%87a-%28EU%29-2017-1939-od-12.-listopada-2017.-o-provedbi-poja%C4%8Dane-suradnje-u-vezi-s-osnivanjem-ureda-Europskog-javnog-tu%C5%BEitelja-%28%C2%BBEPPO%C2%AB%29 (Accessed: 29 October 2021).
For more about EPPO see Josipović, 2020, pp. 111–115; Munivrana Vajda, 2020, pp. 117–119; Konforta, 2020, pp. 165–185; Burić, 2020, pp. 209–213; Lažetić, 2020, pp. 187–208; Rošić, 2020, pp. 233–243; Gluščić, 2020, pp. 247–249; Bonačić, 2020, pp. 303–324; Ivičević Karas, 2020, pp. 287–301.

111 See *Structure and characteristics*.

2.3.2. The Police

Usually police officers act upon the order of the state attorney (or their deputies), when suspicion about criminal offences occurs. Police is competent for detecting and preventing of criminal offences, and its competences and powers are regulated in the Act on Police Affaires and Powers (hereinafter: APAP).[112]

Thus, once there is suspicion that criminal offence had been committed which is to be prosecuted *ex officio*, the CPA regulation are the main provisions for the actions of the police during evidentiary actions.[113] Some police officers may be appointed as investigators in criminal proceedings after its beginning (of criminal prosecution),[114] by provisions of the Law on Police (hereinafter: LP)[115] and SAA if there is need for their involvement. Such investigators can then take very complex evidentiary actions for severe criminal offences.

The police is within the Ministry of Interior, and is central service which conducts actions under the law and other regulations,[116] and also protects Croatian citizens, their constitutional rights and freedoms.[117] Police administration units are established in each county and within each police administration there is a criminal investigation department. Only in larger police administrations there are departments of The National Police Office for Suppression of Corruption and Organized Crime (hereinafter: POCOC),[118] which monitors and studies certain manifestations of corruption, organized crime and terrorism, their trends and manner of execution.[119] POCOC can conduct more complex criminal investigations of corruption, organized crime and terrorism in close cooperation with the Office for the Prevention of Corruption and Organized Crime and state attorney's offices, as well as with and other competent state bodies.[120] POCOC preforms activities at the national level of complex and organized crime cases, especially in the criminal investigations conducted in the area of two or more police administrations, or which require a joint international police investigation and which are conducted in the territory of several countries.[121]

112 The Act on Police Affairs and Powers, OG 76/09, 92/14, 70/19.
113 Munivrana Vajda and Ivičević Karas, 2016, p. 21.
114 Art. 56 SAA.
115 The Law on Police, OG, 34/11, 130/12, 89/14, 151/14, 33/15, 121/16, 66/19.
116 Art. 2 para. 1 LP.
117 Art. 2 para. 2 LP.
118 Munivrana Vajda and Ivičević Karas, 2016, p. 21.
119 For more see https://mup.gov.hr/UserDocsImages/minstarstvo/USTROJ_MUP_RH/PNUSKOK.pdf (Accessed: 4 October 2021).
120 Ibid.
121 Ibid.

3. Criminal law

Croatia n criminal law is a public law, since it regulates relationships between individual and the state.[122] It "sets of rules governing the content and the scope of the state punitive power *(ius puniendi*)."[123] Criminal law in a broader sense can be divided into three parts: substantive criminal law, procedural criminal law and penitentiary law (executive criminal law).

Substantive criminal law which is usually refer to as 'criminal law' is mainly regulated in Penal code (subsequently: PC).[124] Penal code consists of so-called general part and special part. General part contains a set of principles and provisions regulating main institutes of criminal law, such as elements of criminal offence, self-defence, necessity etc. There are also provisions on perpetrators and other presumptions for punishability and criminal law sanctions in general part. PC consists also of special part which contains criminal offences. In addition, it must be noted that some criminal offences are stipulated in some other acts (e.g. The Company Act,[125] the Law on Prevention of Disorders at Sports Competitions[126]).

Procedural criminal law comprehends provisions of the criminal proceedings which are regulated primary by Criminal Procedure Act (subsequently: CPA)[127]. The purpose of the criminal procedure is to enable application of substantive criminal law and to determine whether the criminal offence has been committed, who is the perpetrator and can the punishment or other sanction be imposed through some procedural regulation. It regulates conditions for undertaking all sorts of actions (prescribed by the CPA), the persons who can participate in the procedure, as well as who is authorized to take pre-trail actions and actions during the procedure, forms of actions and consequences for violations of procedural norms, and other features of criminal proceedings. Due to the form sometimes it can be heard or used by the name 'formal criminal law'.[128]

Penitentiary (executive criminal) law governing the execution of criminal sanctions and sentences and the main law for this filed is Penitentiary Act (subsequently: PA)[129].

122 Horvatić, Derenčinović and Cvitanović, 2016, p. 36.
123 Munivrana Vajda and Ivičević Karas, 2016, p. 18; for *ius puniendi* and criminal law also see Horvatić, Derenčinović and Cvitanović, 2016, p. 36.
124 Penal Code, OG 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.
125 Arts. 624–626, 628 of the Company Act, OG, 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19.
126 Arts. 31.a–31.d of the Law on Prevention of Disorders at Sports Competitions, OG, 117/03, 71/06, 43/09, 34/11.
127 Criminal Procedure Act, OG 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19.
128 Ivičević Karas, Bonačić and Burić, 2020, pp. 19, 20.
129 Penitentiary Act, OG 14/21.

Interestingly in Croatia at its faculties substantive and procedural law are taught separately at the different departments. So at the Faculty of Law, University of Zagreb, we have Department of criminal law, and Department of criminal procedural law.

3.1. Sources of criminal law

Sources of criminal law can be divided in international and national sources.

3.1.1. International sources

Croatian Constitution explicitly proclaims the provisions of the treaties as a part of the domestic legal order.[130] So authorities which apply the norms are obliged to apply the provisions of the treaties. By *Ivičević Karas and Munivarna Vajda's* opinion "whether an international treaty would be applied directly by the domestic courts depends on the nature of its norms. If the treaty contains self-executing norms, they are to be applied directly by the domestic courts".[131] There are numerous international legal documents which have been applied in Croatian legal system. To mention just few of them: the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR; 1950); UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990); Statute of International Criminal Tribunal for the Former Yugoslavia (1993), the Rome Statute of the International Criminal Court (1998); United Nations Convention for the Suppression of the Financing of Terrorism (1999); Council of Europe Criminal Law Convention on Corruption (1999); Council of Europe Civil Law Convention on Corruption (1999); United Nations Convention against Transnational Organized Crime (and the Protocols Thereto; 2000); Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw Convention; 2005); Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention; 2011) etc.

Also, European Union Law applies in Croatia, and by explicit provision of the Constitution "all the legal acts and decisions accepted by the Republic of Croatia in European Union Institutions shall be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire'*.[132] But it must be noted how there is growing trend of Directives which are to be applied in criminal law matters (e.g. Directive 2011/93 – Combating the sexual abuse and sexual exploitation of children

130 International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Art. 134 of the Constitution.

131 Munivrana Vajda and Ivičević Karas, 2016, p. 27.

132 Art. 141.c of the Constitution.

and child pornography;[133] Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime,[134] etc.).

The Treaty of Lisbon entered into force on 1 December 2009, and strongly effected judicial cooperation in criminal matters and as well the substantive criminal law. Criminal law from intergovernmental cooperation "in justice and home affairs (the so-called third pillar of the Maastricht Treaty)"[135] became totally under EU law and policies,[136] with the aim of establishing an area of freedom, security and justice.[137] Most of the former framework decisions in the field of substantive criminal law have turned into legal acts (directives and in addition the regulation as well)[138] of the Union (by the Art. 288 TFEU, and Art. 82-86 TFEU).[139] EU Charter of Fundamental Rights became legally binding when the Lisbon Treaty entered into force. [140]

3.1.2. National sources

3.1.2.1. The Constitution

One of the main sources of the criminal law is the fundamental act of the state the Constitution. It provides the main framework for criminal law giving the instructions to the legislator which human rights and fundamental freedoms (one of the most importance) are to be protected by criminal law. It also proclaims the fundamental principles of criminal substantive (e.g. principle of legality – *nullum crimen nulla poena sine lege*[141]*;* the principle of *non bis in idem*[142]) and procedural law (e.g. presumption of innocence,[143] the right to a fair trial[144]) which are further elaborated in criminal law. Also as it is shown before in the text it contains the provision on state authority organization, judicial system, State Attorney's Office etc.

133 Directive 2011/93 – Combating the sexual abuse and sexual exploitation of children and child pornography; available at: https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vjs5ga5k7lyc (Accessed: 7 October 2021).
134 Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; available at: https://www.refworld.org/docid/52eb66354.html (Accessed: 7 October 2021).
135 Wahl and Riehle, 2019, p. 226.
136 Csonka and Landwehr, 2019, pp. 261–267.
137 Wahl and Riehle, 2019, p. 226.
138 More information see Davoli, 2022.
139 Csonka and Landwehr, 2019, pp. 261–267.
140 Wahl and Riehle, 2019, p. 226.
141 Art. 31 of the Constitution.
142 Art. 31 para. 2 of the Constitution.
143 Art. 28 of the Constitution.
144 Art. 29 of the Constitution.

3.1.2.2. Legislation

The most important laws, for criminal law, as it was mentioned before, are Penal Code (PC) for substantive criminal law, Criminal Procedure Act (CPA) for criminal procedural law and Penitentiary Act (PA) for penitentiary law. Besides these main laws, there are numerous secondary laws regulating issues relevant for criminal law in broader sense. For example already mentioned the Courts Act, the Law on the Office for the Prevention of Corruption and Organized Crime, the State Attorney's Act, etc., but also some unmentioned and yet very important laws such as the Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization (subsequently: the Law on Exemption)[145] which was passed in 2011.[146] It can be said how this Law is controversial and is of special interest in Croatia because it is actually retroactive in its nature. It regulates abolition of the statute of limitation (retroactively) for criminal offences of war profiteering (which didn't exist till this law entered into force) and criminal offences committed during privatization and ownership transformation and its application would have very serious implications after so long time.[147] This law as *Roksandić Vidlička* notes

> "refers only to those privatization and ownership transformation crimes that took place in the transformation and privatization process – but only during (1) the Homeland War, (2) peaceful reintegration, (3) warfare, and (4) a direct threat to the independence and territorial integrity of the state, the same applies to war-profiteering cases....".[148]

Also, there are the Juvenile Courts Act (hereinafter: JCA),[149] the Law on Legal Consequences of Conviction, Criminal Records and Rehabilitation (hereinafter: LLCCCRR)[150] and the Law on the Responsibility of Legal Persons for Criminal Offences (hereinafter: LRLPCO or the Law on the Responsibility of Legal Persons).[151] Criminal responsibility of legal persons (entities) was introduced into the Croatian criminal law in 2003, and the LRLPCO entered into force in March 25th 2004, and ever since the principle *societas delinquere non potest*[152] has been abandoned in Croatian criminal law.

145 The Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization, OG, 57/11.
146 Roksandić Vidlička, 2017, p. 116; also see Getoš Kalac and Bezić, 2017, pp. 242–266.
147 For more about this law see Cvitanović, Derenčinović and Dragičević Prtenjača, 2019, pp. 459–486.
148 Roksandić Vidlička, 2017, p. 132.
149 The Juvenile Courts Act, OG, 84/11, 143/12, 148/13, 56/15, 126/19.
150 The Law on Legal Consequences of Conviction, Criminal Records and Rehabilitation, OG 143/12, 105/15, 32/17.
151 The Law on the Responsibility of Legal Persons for Criminal Offences, OG, 151/03, 110/07, 45/11, 143/12.
152 Cvitanović et al., 2018, p. 347.

It must be noted how court decisions aren't a source of criminal law in accordance with continental legal tradition.

By opinion of some scholars (*Ivičević Karas and Munivrana Vajda*) the court decisions can be source of law to some point and in certain cases. They note that

> "there are four exceptions to the rule that court decisions are not a source of law.
> A first exception concerns legal opinion adopted at the session of all judges, or judges of the criminal division of the Supreme Court or the county court. The adopted legal opinion is mandatory for all panels in second instance (Art. 40, para. 2 CA).
> Another two exceptions concern legal opinions contained in a decision of the Constitutional Court or in a decision of the European Court of Human Rights (subsequently: ECtHR). Legal opinion contained in a decision of the Constitutional court, brought upon the constitutional complaint, in which the Constitutional court found a violation of constitutional rights and freedoms, is a source of law for all state authorities, including the courts.
> Similarly, the legal opinion of the ECtHR on violation of Convention rights and freedoms is a source of law for all domestic courts in criminal proceedings.
> Finally, national courts are also bound by the interpretation of the European Union law given in the judgment of the European Court of Justice rendered in the preliminary ruling procedure".[153]

3.2. Historical development of criminal law

Croatia was for a long time, as it was already mentioned earlier in the text, the part of the Hungarian Monarchy, and later on, Habsburg and Austro-Hungarian Monarchy, and that has influenced the development of its substantive and procedural criminal law.[154]

3.2.1. Substantive criminal law

During long period of time till the nineteenth century, there wasn't any statutory law, but criminal law was a mixture of Hungarian-Croatian customary law, which was later codified in Tripartitum and *Corpus iuris Hungarici*.[155] The year 1852 was very important for (Croatian) criminal law, because at that time the Austrian Criminal Code entered into force. It remained in force until 1918.

It was mentioned earlier that in 1918 Croatia became part of the State of Slovenes, Croats and Serbs, later named the Kingdom of Serbs, Croats and Slovenes (the Kingdom of Yugoslavia from 1929). That fact influenced the law, so from that year on (1918) the Serbian Penal Code (from 1860) was the main source of the substantive

153 Munivrana Vajda and Ivičević Karas, 2016, p. 28, para. 62.
154 Munivrana Vajda and Ivičević Karas, 2016, p. 25.
155 Horvatić, Derenčinović and Cvitanović, 2016, pp. 91–93; and also see Munivrana Vajda and Ivičević Karas, 2016, p. 25.

criminal law, altogether with some other laws, such as martial law- the Military Penal Code (from 1901).[156] Nevertheless in Croatia in field of juvenile criminal justice there was Governor's Order for Croatia, Slavonia and Dalmatia on the punishment and protection of youth from 1918, which was enacted in form of the law in 1922.

In 1929 new criminal code has entered into force – a Yugoslav Penal Code, which was very influenced by German criminal code.

During the time of the Second World War there was so called parallel criminal jurisdiction between two coexisting systems as *Ivičević Karas and Munivrana Vajda* noted

> "that of the Independent State of Croatia, a puppet state of Nazi Germany and Italy, which did not enact a new criminal code, but did introduce some special acts such as those on racial discrimination and courts martial, and at the same time, regular courts continued to apply the criminal legislation of the Kingdom of Yugoslavia".[157]

Later on, after 1945, when Yugoslavia became a socialist country (after the Second World War), and Croatia was one of the federal units of the SFRY (Socialist Federal Republic of Yugoslavia), the new Penal code entered into force in 1947 under the strong Soviet influence, regulating only general part of the criminal law.[158] Very soon in 1951 a new Penal code which was drafted after Swiss Penal code entered into force.[159] Penal code from 1951 was in force till 1977 when new Penal codes were enacted. It must be noted how in 1974 there were radical constitutional changes which reflected to the criminal law as well. The legislative competences were divided between the SFRJ and states (federal units).[160] It resulted with two parallel jurisdictions, one of the Federation and one of the states. But criminal law of the Federation also applied as dominant (criminal) law in the federal units (states). So there was the Penal Code of the SFRJ which regulated mostly the provisions of the general part and some important (for the SFRJ) criminal offences or chapters of the special part. Yet to states (federal units) authority was left regulation mostly of the special part provision (criminal offences). Such situation contributed to the enactment of the Penal Code of the Republic of Croatia, which was drafted taking as a model German Penal Code.

3.2.1.1. Substantive criminal law – present day

After gaining the independence in 1991, Croatia has taken existing legislation in field of (substantive) criminal law, till the 1997 when entirely new Croatian Penal Code was enacted. It remained in force until 2012 (with a numerous amendments).[161] In 2011

156 Munivrana Vajda and Ivičević Karas, 2016, p. 25.
157 Munivrana Vajda and Ivičević Karas, 2016, p. 26.
158 Horvatić and Derenčinović, 2002, p. 8.
159 Horvatić, Derenčinović and Cvitanović, 2016, pp. 91–93.
160 See Horvatić, Derenčinović and Cvitanović, 2016, pp. 91–93; Munivrana Vajda and Ivičević Karas, 2016, p. 26; Horvatić and Derenčinović, 2002, p. 8.
161 Horvatić, Derenčinović and Cvitanović, 2016, pp. 95–96.

new Criminal code was enacted which entered into force in 2013 (January 1st). There was *vacatio legis* of two years (for most of the legislation it is just eight days since the promulgation). The time of *vacatio legis* (of two years) gives the idea of the comprehensiveness of the reform which was taken regarding substantive criminal law, especially bearing in mind that usual vacation legis is eight days. This Penal Code is still in force, after being amended eight times.[162] The reform comprehends both general and special part of the Penal code, all institutes of the criminal law were reconsidered, and new division of the chapters in special part was introduced. Some entirely new chapters, especially ones regarding economic crime and sexual offenses of abuse of children were created. In general part some new sanctions were introduced (some alternative sanctions, statutes of limitations were prolonged, etc.

Croatian Penal code is divided into two main parts – general part (contain main principles, rules and institutes; Art. 1-87 PC) and special part (containing definitions of criminal offences; Art. 88-380 PC). However, PC is not an exhaustive codification of substantive criminal law. This means that provisions of substantive criminal law can be found in other laws – Juvenile Courts Act, Law on the Responsibility of Legal Persons for Criminal Offences, etc. Additionally, criminal offences are regulated also in separate legislation (afore-mentioned Company Act).[163]

(Substantive) Criminal law is right of the state to punish (*ius puniendi)* those who do not respect its regulation and to deter general public to abstain from violating the most precious values of the constitutional order. It is repressive by its nature, but also in the same time it has the preventive function and purpose (special and general deterrence).[164] Substantive criminal law is an autonomous branch of law, notwithstanding its deep ties with, for instance, family law, corporate law, tax law etc.

Nevertheless it has its own criminal definitions of notions[165] and areas of regulation as offences against life, sexual offences etc.[166] Also in Croatian (substantive) criminal law there are some other additional principles as *ultima ratio* principle, subsidiarity and fragmentation.[167] This means that the criminal law protects only some fragments of the legal values and only from the most severe violations. Ultima ratio nature of criminal law means that those values cannot be protected by the other, less intrusive and repressive means.

There isn't special definition of criminal sanctions in Croatian Penal Code, but they comprehend punishments (monetary sanctions and custodial sanctions), security (safety) measures, some modifications of the sanctions (as protective surveillance, and suspended sentence) and educational measures (only for juvenile perpetrators).

162 Munivrana Vajda and Ivičević Karas, 2016, pp. 25–26.
163 Munivrana Vajda and Ivičević Karas, 2016, p. 29; Horvatić, Derenčinović and Cvitanović, 2016, pp. 32–33.
164 See Art. 41 PC and also Munivrana Vajda and Ivičević Karas, 2016, p. 20.
165 See Art. 87 PC.
166 Horvatić, Derenčinović and Cvitanović, 2016, pp. 35–36; see also Munivrana Vajda and Ivičević Karas, 2016, p. 21.
167 Horvatić, Derenčinović and Cvitanović, 2016, pp. 33–34.

In Croatia there is only one category of criminal offences, and aren't divided according to severity and degree of seriousness, like in some countries of common law system e.g. in the UK law where there is division on Summary offences, Triable either way offences, Indictable Only offences.[168] Some offences in their definitions refer to additional legislation which is mostly not the criminal in nature, but regulates different areas of life. Such offences are called the 'blank criminal offences' containing the 'blank disposition' (merely the fact that refers to additional legislation), and to understand all elements of such criminal offences that additional legislation must be consulted. The best example of such an offence is the criminal offence of the Causing a road traffic accident (Art. 227. PC) which stipulates and refers to perpetrators 'violating traffic safety regulations'. Traffic safety regulations are stipulated in the Road Traffic Safety Act (hereinafter: RTSA)[169] which regulates misdemeanours. Sometimes, there are situations of overlapping between criminal offences and misdemeanours mostly in cases of domestic violence which is regulated as criminal offence of Domestic Violence (Art. 179.a PC) and in the Law on Protection from Domestic Violence (which regulates the misdemeanours).[170] The reason lies in fact, that some situations are hard to correctly legally qualify and the same conduct sometimes is qualified as misdemeanour and sometimes as criminal offence. Also, until the ECtHR judgment *Maresti v. Croatia*[171] it was possible to have parallel proceedings both for misdemeanour and at the same time for the criminal offence, as long as the punishments can be included in each other. This is not the case anymore and Croatia has because of this judgment changed its criminal (substantive and procedural) and misdemeanour law. But new ECtHR case law, *A. and B. v. Norway*, changed the reasoning toward the earlier possibility of including punishments in each other.[172]

3.2.2. Procedural criminal law

The first Croatian CPA was enacted yet during the time of Austro-Hungarian Empire, in 1875, and it was drafted and influenced by the Austrian CPA (from 1873). It was in force till the 1929 when Yugoslav CPA was enacted, but fundamental principles and some provisions regulating criminal procedure remained unchanged.[173]

168 Sočanac et al., 2017, p. 128; also see Martin, 2007, p. 3.

169 The Law on the Responsibility of Legal Persons, OG, 67/08, 48/10, 74/11, 80/13, 158/13, 92/14, 64/15, 108/17, 70/19, 42/20.

170 The Law on Protection from Domestic Violence, OG, 70/17, 126/19, 84/21.

171 ECtHR judgment *Maresti v. Croatia* (Appl. no. 55759/07), 25 June 2009, (final 25/09/2009). Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20MARESTI%20v.%20CROATIA\%22%22],%22itemid%22:[%22001-93260%22]} (Accessed: 6 October 2021).

172 ECtHR judgment *A. and B. v. Norway* (Appl. no. 24130/11 and 29758/11), 15 November 2016). Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22a.%20and%20B%20v.%20Norway%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-168972%22]} (Accessed: 9 October 2021).

173 Munivrana Vajda and Ivičević Karas, 2016, p. 26.

As *Ivičević Karas, Bonačić and Burić* note

> "historically, the unification of criminal procedure in Croatia is associated with the Habsburg Monarchy and Bach's absolutism. In 1853 a new Criminal Procedure Act, based on inquisitorial type of criminal procedure, was introduced for the whole Monarchy (except for the Military frontier). After the end of the absolutism the criminal procedure in Croatia was again particularized and governed by three acts: Austrian, Croatian and Hungarian Criminal Procedure Act".[174]

Hence, in 1948, the new CPA was enacted and it was under the strong influence of the Soviet procedural model so it was regressive comparing to CPA from 1929; but already in 1953 the new CPA was enacted with almost the same features as the CPA from 1929 (and 1875).[175] The CPA from 1953 was several time amended and the most important amendment was in 1967 when defendants' rights were reinforced and the nature of the proceedings was shifted to adversarial.[176] Following the constitutional reform the new CPA was enacted in 1976 and the crucial amendment was in 1985 by which additionally guarantees were made for defence rights and more equal procedural positions of both parties in the proceedings.[177]

After the independence, Croatia took over the existing regulation in field of criminal procedural law altogether with the CPA from 1976 which was in force till the new Croatian CPA was enacted in 1997 (entered into force in 1998). It was amended several times, till the new CPA in 2008 was enacted. It is still in force with numerous amendments (eleven). This has been criticized by both scholars and practitioners. Besides, procedural provisions can be found in other relevant legislation e.g. the State Attorney's Act (SAA), the Act on Police Affaires (APAP), the Law on the Office for the Suppression of Corruption and Organized Crime (LOSCOC), the Law on Exemption, the Witness protection Act,[178] the Law on Probation,[179] the Law on International Legal Assistance in Criminal Matters,[180] the Law on Judicial Cooperation in Criminal Matters with Member States European Union,[181] the Juvenile Courts Act (JCA) etc.[182]

174 Ivičević Karas, Bonačić and Burić, 2020, p. 20.
175 Horvatić and Derenčinović, 2002, p. 11; Munivrana Vajda and Ivičević Karas, 2016, p. 26; and Ivičević Karas, Bonačić and Burić, 2020, p. 20.
176 Horvatić and Derenčinović, 2002, p. 11; Munivrana Vajda and Ivičević Karas, 2016, p. 26.
177 Horvatić and Derenčinović, 2002, p. 11; Munivrana Vajda and Ivičević Karas, 2016, p. 26.
178 The Witness protection Act, OG 163/03, 18/11, 73/17.
179 The Law on probation, OG, 99/18.
180 The Law on International Legal Assistance in Criminal Matters, OG, 178/04.
181 The Law on Judicial Cooperation in Criminal Matters with Member States European Union, OG 91/10, 81/13, 124/13, 26/15, 102/17, 68/18, 70/19, 141/20.
182 Đurđević, 2011, p. 314.

3.2.2.1. Procedural Criminal Law – present day

Croatian criminal procedure has traditionally been a mixture of adversarial and inquisitorial features, but by the CPA in 2008 the criminal procedure was reformed especially its pre-trial proceedings. The traditional judicial investigation was replaced with the state attorney's (prosecutorial) investigation.[183] It also introduced the new notion of "criminal prosecution" for the initial phase of the procedure and new subjects in pre-trial procedure: judge of investigation, who was mentioned earlier in the text, and the investigator, in charge of taking evidentiary actions at the request of State Attorney.[184] Also this reform disturbed the balance between the defendant's fundamental rights on (a fair trial) and efficient prosecution in favour to efficiency.[185]

So by *Ivičević Karas, Bonačić and Burić*

> "the three key objectives of the 2008 reform were:
> a) the reform of the pre-trial procedure by introducing prosecutorial investigation,
> b) the acceleration of the process, and
> c) the improvement of procedural rules".[186]

Authors agree with the statement of *Ivičević Karas, Bonačić and Burić* who note that quality of the law wasn't good, and merely fact that "118 articles were amended before the law came into force in 2009"[187] confirms such statement.

The Croatian Constitutional court revised the provisions of CPA in 2012,[188] and found over forty of its provisions unconstitutional and vacated.[189]

This decision among other reasons (transposition of the EU directives and implementation of the standards of the ECtHR) led to so many amendments. The decision of the Constitutional court obliged the legislator to harmonized the CPA with Constitution and ECHR standards. So as *Ivičević Karas and Munivrana Vajda* noted the

> "harmonization implicated the need to restructure proceedings, especially in the pre-trial phase, and to assure the compliance of the CPA provisions with the constitutional principles of proportionality, judicial control over the state

183 Munivrana Vajda and Ivičević Karas, 2016, p. 26; also see Đurđević, 2011, p. 311.
184 Ivičević Karas, Bonačić and Burić, 2020, p. 20; also see Đurđević, 2011, p. 311.
185 Munivrana Vajda and Ivičević Karas, 2016, p. 25.
186 Ivičević Karas, Bonačić and Burić, 2020, p. 20.
187 Ibid.
188 Đurđević, 2012, pp. 419–434.
189 In its decision with regard to pre-trial procedure the Constitutional Court found that preliminary investigations should not be called "criminal prosecution", because it could contribute "to the misperception of the public about this initial phase of fact finding, i.e. about persons appearing before the competent authorities at that stage." The Court also found that there are structural deficiencies regarding the judicial control of the criminal prosecution and investigation and established the positive obligation to the legislator to introduce judicial protection in pre-trial proceedings. Ivičević Karas, Bonačić and Burić, 2020, p. 20.

> attorney's investigative and prosecutorial authorities, fair trial guarantees, the protection of personal liberty and the respect for privacy, and with the principle of legality in criminal procedure law".[190]

After the decision of the Constitutional court CPA was amended in 2013. This is considered to be one of the largest reforms, and CPA has been largely improved.[191]

3.3. Statistical Overview

In Croatia in a few recent years, according to data of the Croatian Bureau of Statistics (hereinafter: CBS; which publishes annual statistics on perpetrators of criminal offences, reports, accusations and convictions) there has been a decline of the persons reported for criminal offences (in 2018-54070; in 2019 -52670). In 2020 there was a total of 48,272 alleged crime reports. This was a decrease of 8.3% in comparison to 2019. Also regarding accused persons in 2020 was even larger decrease (than for the reported persons) of 10.4% (total of 13,615) and of 11.5% with regard to the convicted persons (total of 11,634) in comparison with 2019.[192] Notwithstanding this obvious decrease, it has to be taken into account that these figures do not represent the real number of committed criminal offences, as there is always a dark number or non-reported crimes.[193]

The most frequent criminal offences in 2020 were criminal offences against property (share of reported persons was as high as 30.8%, whereas the share of convicted persons for this group of criminal offences was 31.9%).

The most frequently imposed penalty, by far was the suspended sentence of imprisonment (80.5%), followed by unsuspended imprisonment (16.6%) and fine (2%).

The prison population on 31 December 2020 according to the Prison System Directorate of the Ministry of Justice and Public Administration amounted to 2,128 persons (stock data).[194] A great majority were men (2,023), with only 5% of the prison population being women (105). During 2020 a total of twenty juveniles (only one female) served the sentence of juvenile imprisonment (flow data).[195]

4. Conclusion

The Croatian criminal justice system has been changed over the past decades. Since gaining independence, Croatia shifted from single-party socialist regime to multi-party democratic state governed by the rule of law. The legal reforms, particularly in

190 Munivrana Vajda and Ivičević Karas, 2016, p. 25.
191 Ibid.
192 Information available at: https://www.dzs.hr/ (Accessed: 6 October 2021).
193 About dark number of criminal offences in Croatia see Derenčinović and Getoš, 2008, pp. 7, 9; also see Getoš Kalac and Pribisalić, 2020, pp. 637–673; see Derenčinović, 2008, pp. 172–185.
194 Government of the Republic of Croatia, 2021, p. 12.
195 Ibid., p. 17.

the field of criminal law, followed major political reforms. This transition was very dynamic and turbulent, mainly because of the Homeland war and the privatization of previously state-owned companies. After proclaiming independence, Croatia took the existing criminal law legislation of Yugoslavia into its own system, while simultaneously working on the reform to create its own system. In the process of constitutional reform, Croatia abolished the death penalty in 1990. Hence, the reform influenced the substantive criminal law as well, seeking new solutions and adapting to the new situation of the newly established state. As a result, the new legislation in the field of criminal law, both substantive (PC) and procedural (PCA), was enacted in 1997 and entered into force in 1998 (January 1st).

Many other laws mentioned in the text relevant to the criminal law were enforced during the past two decades. However, in comparison, some of them had more advanced solutions than others. Therefore, the latter were subject to frequent amending procedures. Criminal legislation in Croatia has also been influenced by the fact that the country joined the European Union (1st July 2013). Therefore, the requirement to transpose the EU directives and to harmonize its legislation with *acquis communautaire* but also with other relevant international legal standards and treaties (United Nations, Council of Europe), is something that will also in the future have an impact on the domestic criminal justice system.

To conclude, Croatia has a relatively modern criminal legislation corresponding to the most recent international legal standards. However, there have been some challenges in its implementation. These challenges should be addressed through further adjustments of the criminal justice system, law enforcement and judiciary education, and enhanced international cooperation in criminal matters.

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| Chapter 4 |

Poland: National Regulations in the Shadow of the Common Past – Criminal Law

Marcin WIELEC

ABSTRACT

Criminal law regulations in each country are among the most delicate and most important legal acts for the functioning of the society. Criminal liability determined in the course of criminal proceedings is the most controversial type of legal liability because unlike other types, it allows, in the majesty of the law, for the deepest type of interference with the status of a free individual, specifically, the status of their rights. Additionally, the positive result of criminal proceedings, namely the statement that someone did indeed commit a crime, has very serious consequences. This is because in general, criminal law is public law, wherein this interference with individuals' rights and freedoms is most apparent. Therefore, on the one hand, in the area of criminal law, there must be a specific balance between the necessity to interfere with the rights of an individual by a public authority and the securing of these rights against possible abuses of this authority. On the other hand, the area of criminal law is particularly susceptible to a wide variety of historical events as well as political, social, and economic influences. This primarily regards time in the sense of historical events, the specificity of the period, or simply the attitude of public authorities toward an individual in society. In this line of thought, analyses showing the general characteristics of each criminal law system, in this case, the system functioning in Poland, are recent and highly interesting.

KEYWORDS

Poland, penal system, criminal law, criminal proceedings, the evolution of criminal law in Poland

1. Brief historical outline of Polish basic legal acts in the area of criminal law

1.1. Penal Code of 1932

The first code of criminal law in the history of Polish law is the Act of July 11, 1932, the Penal Code [1], which in Poland is commonly referred to as the criminal code of Juliusz Makarewicz, taken from the name and surname of a highly regarded Polish

1 Journal of Laws 1932 No. 60, item 571.

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lawyer and co-creator of this legal act. It is among the most exceptional legal regulations in Polish legal thought. This code is the result of the work of the Codification Commission established by a law enacted on June 3, 1919, and operating until the beginning of World War II. At that time, Poland was under partitions for many years, and the legal system was not uniform because it was dependent on the systems of the relevant partitioners (Germany, Russia, and Prussia). Therefore, after Poland regained independence, the above-mentioned Commission was appointed, with the purpose of, inter alia, preparation of draft uniform legislation for all Polish territories in the field of civil and criminal law. It needs to be highlighted that the code at that time appeared to be a very modern legal act and was widely respected. It was often emphasized that "this code has such features as clarity, syntheticity of approaches, consistency, even considering it to be technically perfect (...)."[2] The Code consisted of 295 articles divided into 42 chapters and was divided into two related parts: a) the general part, which contained provisions regulating the basic concepts, institutions, and principles of criminal law and b) the detailed part, which regulated the conditions for criminal liability, covering a variety of defined crimes and penalties. The Code provided for the heaviest penalty, the death penalty, for three types of crimes: aggravated war treason, subversive action during war (guerrillas), and murder.[3] Overall, the main and most innovative principles contained in this code were the principle of equality before the law and humanitarianism, the principle of individuality in criminal liability, that is, separate treatment of the responsibility of the perpetrator, assistant, and instigator, and the principle of subjectivism of criminal liability, that is, taking into account the motives of the perpetrators of prohibited acts.[4]

1.2. Decree on crimes particularly dangerous in the period of state reconstruction

The times after the Second World War meant that the penal legislation in Poland underwent enormous changes, unfortunately mostly to the detriment of citizens. While the 1932 Penal Code was a model and became a legend for Polish criminal law order, the post-war criminal law regulations were very negatively assessed. At that time, the authorities in Poland were controlled by the communists, which likely had a major impact on the design of the new criminal law system. Among other things, *the Decree of June 13, 1946, on crimes particularly dangerous in the period of state reconstruction* was introduced. It was also known as the Small Penal Code. The vast majority of this legal act by the communist authorities of the People's Republic of Poland was intended to fight political opponents in the newly designed Polish system. This legal act suspended some provisions of the special part of the above-mentioned Penal Code of 1932 for the duration of its validity. It was characterized by considerable severity and the possibility of considerable abuse in the interpretation of its provisions. Among other things, this concerned the crime of disseminating false information,

2 Koredczuk, 2011, p. 47.
3 Grześkowiak, 1989, p. 153.
4 Bojarski, 2008, p. 8.

on the basis of which there were often convictions for extremely trivial acts, such as telling jokes or advocating satire on political topics.[5] The Small Penal Code included the death penalty.[6] It was in force until December 31, 1969, when the 1969 Penal Code entered into force.

1.3. Penal Code of 1969

The next criminal code in the Polish legal system was the 1969 Penal Code. It was introduced by the *Act of April 19, 1969, the Penal Code*[7] and was in force from January 1, 1970, to August 31, 1998. It was a completely different legal act compared with the 1932 Penal Code and the aforementioned Decree of 1946. The motives for introducing the new codification of criminal law had their origins in the social, political, geopolitical, and economic transformations of that time.[8] After the experience of previous years, characterized by overly severe penal sanctions, a different approach to the problem of criminal law in the state was adopted. When designing the new penal code, completely different priorities were chosen. Referring to the 1969 Penal Code, it was emphasized that "the main objectives of this Penal Code were to ease the penal repression for crimes of lesser quality (petty crime) and to limit the use of short-term imprisonment sentences. It introduced a differentiation of criminal liability for a crime according to the degree of severity of the crimes committed, and on the other hand, it assumed severe punishment of perpetrators of crimes with a high degree of social danger of an act and extensive use of freedom measures against perpetrators of minor crimes, especially by eliminating short-term imprisonment sentences."[9] In the 1969 Penal Code, new institutions were introduced that were previously unknown in Polish criminal law, such as the restriction of liberty and conditional discontinuation of criminal proceedings. The Code was divided into three parts: a) the general part, which contained the basic principles of incurring criminal liability, b) a detailed part, which contained descriptions of types of offenses and the penalties for committing them, and c) the military part, which contained the principles of soldiers incurring criminal liability along with a list of crimes and penalties pertaining to soldiers.

1.4. Criminal Code of 1997

The currently binding penal code is the Penal Code introduced by the Act of June 6, 1997,[10] which replaced the previously mentioned Penal Code of 1969. The main assumption of the 1997 Penal Code is the general directive of using the provisions of criminal law as a last resort, which results directly from the provision of Article 31 section 3 of the Constitution, according to which restrictions on the exercise of constitutional rights and freedoms may be established only by statute and only if

5 More in Siemaszko, 2015.
6 Mielink, 2017, p. 178.
7 Journal Of Laws of 1969 No. 13, item 94.
8 Grześkowiak, 2020, p. 131.
9 Melezini, 2019, p. 895.
10 Journal of Laws 1997 No 88, item 553.

they are necessary in a democratic state for its safety or public order or for the protection of the environment, health, and public morality or the freedoms and rights of others. These limitations cannot affect the substance of freedoms and rights. On this basis, the principle was introduced that in the case of offenses subject to alternative sanctions, priority is given to non-isolation sanctions. The application of so-called probation measures (i.e., measures subjecting the perpetrator to a trial) such as conditional suspension of the proceedings and conditional suspension of the execution of the sentence, with the simultaneous tightening of criminal liability for the most serious crimes, added the life imprisonment to the list of penalties. In the new penal code, the death penalty has been abolished. From the recent changes that have occurred in the provisions of the Penal Code of 1997, the introduction of the so-called extended confiscation is worth mentioning. It is a completely new and recently (2017) introduced institution that is undoubtedly an avant-garde and much needed legal solution.[11] This institution transfers the burden of proving the legal sources of property to the accused. The point is that in the event of a conviction for a crime in the commission of which the perpetrator has obtained, even indirectly, a material benefit of significant value, the court may order the forfeiture of the enterprise owned by the perpetrator or its equivalent if the enterprise was used to commit the crime or conceal the benefit obtained from it.

1.5. The Code of Criminal Procedure of 1928

The first codification of procedural criminal law in Poland is the Code of Criminal Procedure of 1928. It was introduced in the years of regaining independence, during which the process of the arduous consolidation of legal regulations after the partition period was carried out. Criminal proceedings at that time were regulated by various sources of criminal procedural law and, similarly to criminal law, there was a need for unification. This codification took place on March 19, 1928, through the adoption of the Code of Criminal Procedure.[12] One of the most important elements characterizing the Code of Criminal Procedure of 1928 is based on the model of the so-called reformed process, which was the basis for the introduction of the now known form of mixed process, in which, on an investigative basis[13] – preparatory proceedings are centered on an adversarial (complaints) basis[14] – the main, that is, court, procedure is founded[15]. This model will be repeated in subsequent codifications of Polish criminal proceedings. One of the priorities for the authors of the 1928 Code of Criminal Procedure was also to create fairly extensive procedural guarantees for parties.[16]

11 For example, in Poland in 2019, the provisions on extended confiscation were applied in 668 cases, and the seized property was worth over PLN 2.1 billion.
12 Journal of Laws 1928 No.33, item. 313.
13 Baj, 2011, p. 69.
14 Materniak–Pawłowska, 2013, p. 271.
15 Koredczuk, 2014, p. 339; Łuszczyk, 2012, p. 134.
16 Cieślak, 1969, pp. 27–39; Pasek, 2019a, pp. 183, 203; Pasek, 2019b.

1.6. Code of Criminal Procedure of 1969

Another code of criminal procedure was the Code of Criminal Procedure[17] of 1969. This legal act somewhat softened the position of public authorities in criminal proceedings, including the prosecutor, which is apparent, although the prosecutor's position remained very strong.[18] This was manifested, inter alia, by the fact that they could have applied temporary detention on its own in the course of preparatory proceedings.[19] Nonetheless, in the Code of 1969, an inquisitive, secret preparatory procedure remained, which was excessively complex in relation to the court proceedings. The strong role of the preparatory proceedings was ultimately to lead to the fact that the results of the preparatory proceedings were to be crucial for a court decision.[20] Notably, although the Code of 1969 referred to some extent to the codification of 1928, "these changes were – generally speaking – a small step towards better protection of the rule of law, some modernization and limited democratization of proceedings [...]."[21]

1.7. 1997 Code of Criminal Procedure

Ultimately, after the changes to the Polish system initiated after 1989, the binding Code of Criminal Procedure of 1997 was established. The provisions of this code strengthened the position of the court as an independent judicial factor, the procedural powers of the prosecutor's office were reduced, the right of the aggrieved party to court was detailed, the positions of the aggrieved and the accused were adjusted to international standards, the so-called consensual approaches to ending criminal proceedings was emphasized, and so on. The weakening of the prosecution authority was made at the expense of the powers of the court, which was the only entity that could apply, inter alia, temporary arrest, both at the stage of preparatory and judicial proceedings. The prosecutor can only apply for pre-trial detention; however, the decision is always at the discretion of the court.[22] Other new institutions in criminal proceedings were also introduced to combat newly emerging, highly complex types of crimes. Among other things, the institution of an anonymous witness (incognito witness) was introduced, whereby a witness who was questioned in the course of criminal proceedings could have withheld or anonymized data revealing their identity due to a well-founded fear of a threat to life, health, freedom, or substantial property of a witness or a person close to them.[23] These data were only at the disposal of the court or prosecutor. Another of these new institutions is the institution of a crown witness who, as a participant in the criminal procedure, in order to improve their procedural situation, agreed to testify as a witness in exchange for waiving or mitigating the penalty.[24]

17 Journal of Laws 1969 No.13, item 96.
18 Skorupka, 2010, p. 195.
19 Murzynowski, 1984, p. 16.
20 Jasiński, 2010, p. 139.
21 Grzegorczyk and Tylman, 2014, p. 25.
22 Dąbkiewicz, 2013, p. 110.
23 Wielec, 2020, p. 193.
24 Ocieczek, 2016, p. 30.

2. Main legal sources in the area of criminal law (applicable law)

Criminal law is a specific area of legal regulation in each country. Broadly understood criminal law is an area that defines the rules of incurring criminal liability for a criminal act, the rules of excluding criminal liability (e.g., so-called counterclaims), the catalog of penal measures and penalties provided for regarding a criminal act, the rules for conducting criminal proceedings, and the rules for implementing the decisions of trial proceedings taken in the course of criminal proceedings.

With the above in mind, criminal law in Poland consists of three basic segments.

1. *Material criminal law,* the basic source of which is the Act of 6 June 1997 – Penal Code, which provides for the basic rules of individuals incurring criminal liability, including the description of the crime, circumstances excluding the unlawfulness of the act, the rules of imposing a penalty, issues related to the statute of limitations for incurring criminal liability, provision of a catalog of penalties and penal measures, and so on. In addition to the criminal code, there is also the so-called non-code penal law, which create separate acts from the penal code containing relevant penal provisions. The non-code penal law in Poland includes the Act of August 21, 1997, on the protection of animals[25] the Act of April 27, 2001, the Environmental Protection Law,[26] and the Act of August 29, 1997, the Banking Law.[27]
2. *Formal criminal law,* the basic source of which is the Act of June 6, 1997 – Code of Criminal Procedure.[28] Formal criminal law is also referred to as procedural criminal law, criminal trial, or criminal procedure. Formal criminal law is a set of legal provisions regulating the rules of conduct of public authorities in criminal cases, the rules of their initiation and conduct, and the mode and forms of individual procedural actions. It provides for a list of rights and obligations of procedural bodies, specifying the catalog of procedural parties along with their rights and duties as well as one of procedural authorities and other participants in criminal proceedings. Moreover, it provides for the rules of collecting, recording, and introducing the collected evidence into criminal proceedings.[29] There is a close relationship between formal and substantive criminal law. Formal criminal law plays an auxiliary role in substantive criminal law, activating and implementing it.[30]

25 Journal Of Laws 1997 No. 111, item 724.
26 Journal Of Laws of 2001 No. 62, item 627.
27 Journal Of Laws 2021, item 2439.
28 Journal Of Laws 1997 No. 89, item 555.
29 Skorupka, 2017, p. 26.
30 Dudka and Paluszkiewicz, 2021, p. 22.

3. *Executive penal law,* the source of which is the Act of June 6, 1997, Executive Penal Code.[31] The Code contains provisions necessary for the enforcement of penalties imposed in criminal proceedings or other decisions taken therein.[32] The provisions of the Executive Penal Code contain rules on the execution of penalties, penal measures, compensatory measures (to redress damage caused by a crime), precautionary measures, other decisions made in criminal proceedings, and so on.[33]

3. Relevant (most important) institutions (e.g., the courts, the prosecutor's office) and their roles and powers

The most important institutions participating in criminal proceedings in the doctrine of Polish criminal proceedings are called procedural bodies, which are further defined as state bodies equipped with appropriate powers and entitled to issue decisions at certain stages of the criminal process, often regardless of other powers assigned to them.[34]

When presenting the most important institutions of criminal proceedings, it should be noted that the construction of Polish criminal proceedings is important. Polish criminal proceedings consist of three stages, in which the organs of the criminal process function properly.

These stages are as follows:

Stage 1 is preparatory proceedings – regulated in the Code of Criminal Procedure

Stage 2 is court proceedings – regulated in the Code of Criminal Procedure

Stage 3 is executive proceedings – regulated in the Executive Penal Code

The above-mentioned stages are characterized later in the article, while here, the analysis covers the individual institutions relevant to the above-mentioned stages of criminal proceedings.

Ad. Stage 1) The most important bodies of preparatory proceedings are, among others, as follows:

The public prosecutor, who is the primary body for preparatory proceedings, conducts and supervises the preparatory proceedings. The main tasks of a public prosecutor within the framework of preparatory proceedings include the initiation and conduct of preparatory proceedings or the ordering of another authorized body to initiate or

31 Journal Of Laws 1997 No. 90, item 557.
32 Gerecka–Żołyńska and Sych, 2014, p. 17.
33 Kuć, 2017, p. 19.
34 Hofmański and Waltoś, 2016, p. 154.

conduct such proceedings as well as to perform the activities of a public prosecutor before a court.

The organizational structure of the Polish prosecutor's office is not without significance here. The basis for the operation of the public prosecutor's office is the Act of January 28, 2016, on the Public Prosecutor's Office.[35] It introduces the structure of the prosecution service, which consists of the following:

a) *The National Public Prosecutor's Office,* which is the highest unit in the hierarchy of the public prosecutor's office, is managed by the National Public Prosecutor. The main tasks of the National Public Prosecutor's Office include ensuring the participation of the public prosecutor in proceedings before the Constitutional Tribunal, the Supreme Court, and the Supreme Administrative Court, conducting and supervising preparatory proceedings, exercising instance and service supervision over proceedings in lower-level prosecutor's offices, and coordination of official supervision over preparatory proceedings conducted by other organizational units of the public prosecutor's office.

b) *Regional public prosecutor's office*. The main tasks of the regional public prosecutor's office include ensuring the participation of the public prosecutor in proceedings conducted pursuant to the Act before common courts and administrative courts, for example, voivodeship administrative courts, conducting and supervising preparatory proceedings in cases of prosecuting the most serious financial, economic, and fiscal crimes and against economic turnover in relation to property of great value, and supervising proceedings conducted in lower-level prosecutor's offices.

c) *District prosecutor's offices.* The main tasks of the district public prosecutor's office include ensuring the participation of the public prosecutor in proceedings conducted pursuant to the Act before common courts, in units in which military affairs departments have been established, and before military courts; conducting and supervising preparatory proceedings in cases involving serious criminal, financial, and fiscal crimes; and exercising supervision over proceedings in district public prosecutor's offices.

d) *Local prosecutor's offices*. The basic tasks of the local public prosecutor's office include ensuring the participation of a public prosecutor in proceedings before courts and conducting and supervising preparatory proceedings.

Police and other authorities such as the Border Guard, the Internal Security Agency, the National Revenue Administration, the Central Anticorruption Bureau, and the Military Police perform the role of bodies conducting preparatory proceedings under the supervision of a prosecutor in the form of an investigation or assisting a public prosecutor in conducting preparatory proceedings in the form of an investigation. Their main activities include checking, recording, and detection, that is, taking evidence.

35 Journal Of Laws of 2016, item 177.

The court is admittedly the main body of judicial proceedings but has some quite important competences at the stage of preparatory proceedings, including applying preventive measures and performing supervisory and control functions in relation to activities performed by the prosecutor and, for example, by the police during the preparatory proceedings.

Ad. Stage 2) The most important bodies of court proceedings include the following:
a) The court, which, at this stage, has a pivotal role. At the stage of court proceedings, the court plays the role of the main body that, based on the evidence and findings, determines the scope of criminal liability.

b) The Public Prosecutor, who, at the stage of court proceedings, acts as a public prosecutor and thus formulates, submits, and supports the indictment before the court.

Ad. Stage 3) The most important organs of enforcement proceedings are as follows:
a) Court of first instance. This is the court that issues the judgment at first instance. Its basic competences include, inter alia, referring a decision to execute, discontinuing or suspending execution, adjudicating on the seizure of a sentence, and matters relating to the execution of penalties: fines, restriction of liberty, and penal and protective measures. It also decides on the execution of the penalty of deprivation of liberty, including on postponement of its performance, conditional release from serving a sentence, granting a break in serving a sentence, and so on.

b) Penitentiary court. The district court always has jurisdiction over the place where the convict is staying. Their main competences include settling all issues related to the execution of the imprisonment sentence.

c) The president of the court or an authorized judge, who issues orders or takes decisions in matters that do not require issuing a decision in current matters related to enforcement proceedings.

d) The penitentiary judge, who participates in making procedural decisions related to, inter alia, the execution of a penalty of deprivation of liberty, temporary arrest, a precautionary measure consisting of placing an individual in a psychiatric institution and other means of isolation, and making certain decisions, for example, consenting to extend the duration of a disciplinary penalty in an isolation cell. They also have supervisory functions and thus make decisions regarding the supervision of the legality and correctness of the execution of penalties and measures related to the deprivation of liberty.

e) The court professional probation officer and head of the probation team of the court service. The main model of probation service functions on the basis of the Act on probation officers,[36] and in executive proceedings, their main tasks include ensuring the enforcement of the penalty of the restriction of liberty, carrying out activities related to organizing and controlling the execution of penalties with the use

36 Journal of Laws 2001 No. 98, item 1071.

of electronic supervision or performing important tasks related to the performance of supervision in connection with the imposed measures consisting of subjecting the convict (perpetrator) to a sample (the so-called means of probation).

4. Main principles of substantive criminal law

The main principles of incurring criminal liability in Poland are contained in the Penal Code. This code consists of a) the general part, containing the basic regulations relevant to criminal law, such as the definition of the offense, types of crime, age of the perpetrator, catalog of penalties and penal measures, and so on, b) the detailed part, specifying particular types of offenses, and c) the military part, containing regulations relevant to soldiers incurring criminal liability.

Pursuant to the provisions of the Criminal Code, only those who commit an act prohibited under penalty of the statute in force at the time of its commission are subject to criminal liability. On the other hand, a prohibited act, the social harmfulness of which is negligible, is not a crime. The perpetrator of the prohibited act also has not committed a crime if the fault cannot be attributed to them at the time of the act.

The Polish Penal Code introduces the following classification of crimes, according to which the crime is a crime or a misdemeanor. The crime is a prohibited act punishable by imprisonment for not less than three years or a more severe penalty. A misdemeanor is a prohibited act subject to a fine of more than 30 daily rates or more than PLN 5,000, a penalty of restriction of liberty for more than one month, or a penalty of deprivation of liberty for more than one month.

Regarding the age capacity to be criminally liable, the Criminal Code clearly indicates that the person who commits an offense after the age of 17 is generally subject to criminal liability. Minors who, after the age of 15, commit extremely serious prohibited acts, such as assassination of the president or murder, may be liable as an adult in regard to the principles set out in this code if the circumstances of the case and the degree of development of the perpetrator as well as their properties and personal conditions support it and, in particular, if the previous educational or corrective measures were ineffective. Nevertheless, regarding a perpetrator who commits an offense after reaching the age of 17 but before the age of 18, the court uses educational, therapeutic, or corrective measures provided for minors rather than punishment if the circumstances of the case and the degree of development of the perpetrator, their properties, and their personal conditions call for such an approach.

The Polish Penal Code also provides for circumstances excluding criminal liability. These are the so-called counters. Among them, the most famous are the countertypes of necessary defense, which consist in the fact that those who, in necessary defense, fend off a direct, unlawful attack on any good protected by law have not committed a crime. If the limits of necessary defense are exceeded, in particular, when the perpetrator used a method of defense disproportionate to the danger of an

attack, the court may apply extraordinary mitigation of punishment and even withdraw from its imposition. Moreover, there is no penalty for anyone who exceeds the limits of self-defense, repels an attack consisting in breaking into an apartment, flat, house, or an adjacent fenced area, or repels an attack preceded by breaking into these places unless they have exceeded the limits of necessary defense in a significantly disproportionate manner. Those who exceed the limits of necessary defense under the influence of fear or agitation justified by the circumstances of the attack are not subject to punishment.

The second known counter-type is the state of higher necessity, according to which one who acts to remove an immediate danger to any good protected by law has not committed a crime if the danger cannot be otherwise avoided and the consecrated good is of lower value than the rescued good. Moreover, no one commits a crime who, while saving a good protected by law, sacrifices a good that does not obviously have a higher value than the saved good. If the boundaries of the state of necessity are exceeded, the court may apply extraordinary mitigation of punishment and even withdraw from its imposition.

The Penal Code contains a catalog of penalties. According to its provisions, the penalties are a fine, restriction of freedom, deprivation of liberty, 25 years imprisonment, and life imprisonment.

The detailed part of the Polish Criminal Code contains specific types of crimes. These include the following crime groups: 1) crimes against peace, humanity, and war crimes, 2) crimes against the Republic of Poland, 3) crimes against national defense, 4) crimes against life and health, 5) crimes against public safety, 6) crimes against safety in communication, 7) crimes against the environment, 8) crimes against freedom, 9) offenses against freedom of conscience and religion, 10) crimes against sexual freedom and decency, 11) crimes against family and care, 12) crimes against honor and bodily inviolability, 13) crimes against the rights of people performing paid work, 14) crimes against the activities of state institutions and local government, 15) crimes against the administration of justice, 16) crimes against elections and referendums, 17) crimes against public order, 18) offenses against the protection of information, 19) offenses against the credibility of documents, 20) crimes against property, 21) crimes against economic turnover and property interests in civil law turnover, and 22) crimes against trading in money and securities.

In the military part, general provisions on the criminal liability of soldiers and specific groups of crimes were specified, such as 1) offenses against the obligation to perform military service, 2) crimes against the rules of military discipline, 3) crimes against the rules of dealing with subordinates, 4) crimes against the rules of handling weapons and armed military equipment, 5) offenses against the principles of the performance of service, and 6) crimes against military property.

In the Polish criminal law system, it is also possible to use alternative dispute resolution (ADR), that is, to conduct proceedings without the participation of common courts with the help of independent third parties, namely an arbitrator or a mediator. In criminal matters, such an institution is mediation, which can be described as a

voluntary and confidential method of resolving disputes arising as a result of a crime through communication between the aggrieved party and the suspect/accused with the help of an impartial and neutral mediator.[37] Mediation can cover all crimes.[38] Most of the legal basis for mediation is provided by the provisions of the Criminal Code and the Code of Criminal Procedure as well as the Ordinance of the Minister of Justice of May 7, 2015, on mediation proceedings in criminal cases.[39]

5. Main principles of formal criminal law (criminal procedure)

5.1. General principles and the purpose of criminal proceedings

The aims of Polish criminal proceedings are as follows: 1) to detect the perpetrator of the crime be detected and apply criminal liability as well as to ensure that an innocent person is not held responsible; 2) by the correct application of measures provided for in criminal law and the disclosure of the circumstances conducive to the commission of a crime, the tasks of criminal proceedings should be achieved not only in terms of combating crimes but also in terms of preventing them and strengthening respect for the law and the principles of social coexistence; 3) the legally protected interests of the aggrieved party are taken into account while respecting their dignity; 4) the case is resolved within a reasonable time.[40]

There are 10 important rules of criminal procedure. The first is the *principle of truth*, which is regulated in the provision of Article 2 Paragraph 2 of the Code of Criminal Procedure, according to which all decisions should be based on true factual findings. The second is the *principle of participation in criminal proceedings of the social factor,* which, in Poland, refers to lay judges. This principle is regulated in Article 3 of the Code of Criminal Procedure and stipulates that, within the limits specified in the Act, criminal proceedings are conducted with the participation of the social factor. There are no jurors in Polish criminal proceedings. The third is the *principle of objectivity,* which is derived from Article 4 of the Code of Criminal Procedure, according to which the authorities conducting criminal proceedings are obliged to investigate and take into account circumstances both in favor of and against the accused. The fourth is *the principle of presumption of innocence* set out in Article 5 of the Code of Criminal Procedure, according to which the accused is presumed innocent until proven guilty and confirmed by a final sentence. Fifth, *the in dubio pro reo principle* is also set out in Article 5 of the Code of Criminal Procedure, according to which irremovable doubts are resolved in favor of the accused. The sixth is *the principle of the right to defense*, regulated in Article 6 of the Code of Criminal Procedure, according to which the accused has the right to a defense, including the right to use the help of a defense lawyer,

37 Sławicki, 2020, p. 26.
38 See Postępowanie mediacyjne w sprawach karnych.
39 Journal of Laws 2015, item 716.
40 Zagrodnik et al., 2019, p. 29.

about which they should be instructed. A defense counsel in criminal proceedings may be an advocate or a legal advisor. The seventh is *the principle of free evaluation of evidence*, regulated in Article 7 of the Code of Criminal Procedure, according to which the authorities of the procedure form their conviction based on all of the provided evidence, freely assessed, taking into account the principles of correct reasoning and indications of knowledge and life experience. The eighth is *the principle of ex officio* operation, as defined in Article 9 of the Code of Criminal Procedure, according to which procedural organs conduct the proceedings and perform acts ex officio unless the law makes them dependent on the request of a specific person, institution, or body or on the authorization of the authority. The parties and other directly affected persons may submit requests to perform activities that the authority may or is obliged to undertake ex officio. The ninth is *the principle of legalism*, indicated in Article 10 of the Code of Criminal Procedure, according to which the authority established to prosecute crimes is obliged to initiate and conduct preparatory proceedings, and the public prosecutor is obliged to bring and support charges for an act prosecuted ex officio. Except in cases stipulated in statutes or international law, no one may be released from liability for a committed crime; Finally, the 10th is *the principle of complaints*, as defined in Article 14 of the Code of Criminal Procedure, according to which the initiation of court proceedings takes place at the request of an authorized prosecutor or other authorized entity.

5.2. The stages of the criminal procedure (their role and main features)

Poland has a mixed-type criminal proceedings model. This means that some of the criminal proceedings in Poland are conducted as a process with elements of inquisitiveness (secret, mostly written, etc.); this is the first stage of criminal proceedings, referred to as preparatory proceedings. The second stage, known as court proceedings, is conducted as a trial with elements of an adversarial procedure (open form and, in most of the oral proceedings of the parties' pending litigation, before a judicial authority).

5.2.1. Preparatory proceedings

The main purposes of the pre-trial investigation are 1) determining whether a prohibited act has been committed and whether it constitutes a crime, 2) detection and, if necessary, apprehension of the perpetrator, 3) collecting personal identification data and data on a person's criminal record, 4) explanation of the circumstances of the case, including determination of aggrieved parties and the extent of the damage, and 5) collecting, securing, and, to the extent necessary, recording evidence for the court.

The preparatory proceedings distinguish between two phases: the stage of proceedings in the case (Latin: *in rem*), covering only the issuance of a decision to initiate preparatory proceedings without a specific indication of the suspect, and the phase against a specific person (Latin *in personam*), covering further steps, namely indicating a specific perpetrator of the crime, which is done by issuing an order on the

presentation of charges. The order to present the charges is issued if the data existing at the time of the initiation of the investigation or collected in its course sufficiently justify the suspicion that the act was committed by a specific person. The decision on presenting the charges contains the indication of the suspect as well as the precise description of the alleged offense and its legal qualification. The preparatory proceedings are divided into inquiry, which is the basic form of preparatory proceedings and is conducted in cases involving more serious offenses, and investigations, which are a simplified form of preparatory proceedings and are conducted for offenses of lesser severity. Therefore, the inquisition is conducted in the following cases: 1) in which the recognition in the first instance is within the competence of the regional court, 2) for offenses for which the suspect is a judge, a prosecutor, a police officer, or an officer with the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the State Protection Service, the Marshal's Guard, the Customs and Treasury Service, or the Central Anti-Corruption Bureau, 3) for offenses for which the suspect is an officer of the Border Guard, Military Gendarmerie, a financial body of a preparatory proceeding, or a body superior to a financial body of a preparatory proceeding in matters falling within the competence of these bodies or offenses committed by these officers in connection with the performance of official duties, 4) for offenses that are not under investigation, and 5) for offenses under investigation if the prosecutor so decides due to the importance or complexity of the case. The inquiry should be completed within three months. In justified cases, the inquiry period may be extended for a further period determined by the prosecutor supervising the inquiry or the prosecutor directly superior to the prosecutor conducting the inquiry but not for longer than one year. In particularly justified cases, the competent prosecutor superior to the prosecutor supervising or conducting the inquiry may extend its period for a further specified period. The prosecutor conducts the inquiry. However, they may entrust the police with carrying out the inquiry in full or to a certain extent or with performing individual steps. The investigation is conducted in cases involving offenses within the jurisdiction of a district court and punishable by a penalty not exceeding five years of imprisonment; however, in the case of offenses against property, this is only the case when the value of the subject of the crime or the damage caused or threatened does not exceed PLN 200,000 and for offenses such as burglary and fraud if the value of the subject of the crime or the damage caused or threatened does not exceed PLN 200,000. The investigation is typically carried out by the police unless it is conducted by the prosecutor. An investigation should be completed within two months. The public prosecutor may extend this period to three months and, in particularly justified cases, for a further specified period.

5.2.2. Court proceedings

Court proceedings are the culminating part of criminal proceedings. The leading authority here is the court, whose task is to determine, based on the evidence submitted to it, the final scope of the criminal liability of the accused.

The structure of courts in criminal proceedings is built on the principle of hierarchy and instance. The instance has control functions; for example, the judicial authority issuing a decision on the resolution of a conflict situation issues decisions in the first instance, while a party dissatisfied with this verdict has the opportunity to check/control the entire process, thus bringing appropriate appeals (e.g., a complaint/appeal). The two-instance procedure results from Article 176 of the Polish Constitution, according to which court proceedings have at least two instances. In Polish criminal proceedings, the appeal process that triggers the instance procedure in criminal cases is an appeal. This is referred to as an ordinary remedy against a still-not-final judgment. Specifically, it is provided based on the judgment of the court of first instance to the parties, and the deadline for bringing it is 14 days, which, for each entitled person, begins on the date of service of the judgment with justification. There are also extraordinary means of appeal in the Polish criminal procedure, which are measures of extraordinary control and are available as actions against final judgments. An example is a cassation appeal examined by the Supreme Court. The deadline for submitting a cassation appeal for the parties is 30 days from the date of delivery of the judgment with justification. An application for the service of a judgment with a statement of reasons should be submitted to the court that issued the judgment within the deadline of seven days from the date of delivery of the judgment.

Generally, courts in Poland are divided into *common courts*, which deal with common cases, and *special courts*, which deal with administrative and military matters. Criminal cases are included in common courts unless the case concerns a soldier, in which case they are handled by a military court. Generally, the basic act regulating the organization, system, and rules of functioning of common courts is the Act of July 27, 2001 – the Law on the System of Common Courts.[41] Issues of jurisdiction and competence of courts in criminal matters are primarily regulated by the provisions of the Code of Criminal Procedure.

a) *Regional Courts* – As a rule, these are the first instance in criminal matters. The district court decides in the first instance in all cases except for those transferred by law to the jurisdiction of another court.

b) *District Courts* – As a rule, these are second instance to decisions of district courts, but the district court may also adjudicate in the first instance in cases enumerated in the Code of Criminal Procedure for the following crimes: crimes specified in the Penal Code and specific acts; certain offenses specified in the provisions of the Penal Code, such as Article 148 paragraph 4 of the Criminal Code – murder, Article 149 of the Criminal Code – infanticide, Article 158 paragraph 3 of the Penal Code – participation in a fight or battery, Article 258 of the Penal Code – participation in an organized group or a criminal association, and Article 299 of the Penal Code – money laundering of the Criminal Code.

41 Journal Of Laws 2001 No. 98, item 1070.

c) *Courts of Appeal* – These are courts that hear appeals against judgments and orders issued in the first instance in a regional court as well as other matters referred to them by an act.

At the top of the judiciary power in general – regardless of the type of case – is the Supreme Court, which is the supreme judicial body; it supervises the activity of courts in the scope of adjudication and performs other activities specified in the Constitution and acts. The activities of the Supreme Court do not include supervision over the administrative judiciary, which, in Poland, forms the system of special courts and consist of the Voivodship Administrative Court as the first instance and the Supreme Administrative Court as the second instance in administrative cases. Regarding criminal proceedings, however, the Supreme Court has a Criminal Chamber, the jurisdiction of which includes cases heard on the basis of the provisions of the Code of Criminal Procedure, the Fiscal Penal Code, the Code of Conduct in misdemeanor cases, and military penal cases.

5.3. Possibility of initial conviction in Polish criminal procedure

There are institutions in the Polish criminal procedure that assume a significant shortening of the conducting of criminal proceedings by considering and assessing the incurrence of criminal liability even before the final judgment is issued. This relates to situations in which institutions are applied that recognize the finding of, for example, guilt in committing a crime before the final judgment is issued.

The first institution is the so-called voluntary submission to criminal liability of the perpetrator. It is an institution from the Code of Criminal Procedure[42], also known as a conviction without a trial. According to its assumptions, if the accused pleads guilty, and in the light of their explanations, the circumstances of the crime and guilt do not raise any doubts, and if the attitude of the accused indicates that the objectives of the proceedings will be achieved, further actions may be omitted. The prosecutor, rather than the bill of indictment, then requests that the court issue a conviction at the meeting and adjudicate penalties or other measures agreed to with the accused for the alleged offense, taking into account the legally protected interests of the victim as well.

The second institution is the institution of voluntary submission to punishment, also based on the Code of Criminal Procedure[43]. The essence of this institution is that until the end of the first questioning of all of the accused at the main trial, the accused who was charged with an offense punishable by a penalty not exceeding 15 years of imprisonment may file a motion for a conviction and a specific penalty, measure, etc., without provision of evidence. The court may grant a conviction when the circumstances of the offense and guilt raise no doubts and the objectives of the proceedings will be achieved despite the fact that the trial has not been held in full.

42 Article 335.
43 Article 387.

The third institution is preventive measures. In a sense, the preliminary assessment of a prohibited act takes place with the use of preventive measures,[44] which are defined as measures that can be used to secure the proper course of the proceedings and, exceptionally, to prevent the accused from committing a new, serious crime.[45] They can only be used when the collected evidence shows a high probability that the accused committed the crime.[46] The most famous and controversial preventive measure is temporary arrest. In Polish criminal proceedings, pre-trial detention may be imposed only on the basis of a court order. Pre-trial detention is applied in preparatory proceedings at the request of the public prosecutor by the district court in the district of which the proceedings are conducted and, in urgent cases, also by another district court. The application for pre-trial detention mentions evidence indicating a high probability that the accused has committed a crime, the circumstances supporting the existence of threats to the proper course of the proceedings or the possibility of the accused committing a new, serious crime, and a specific basis for the application of this preventive measure and the need to apply it. Supervision over the correctness of detention and execution of preventive measures is exercised by the court and, in the preparatory proceedings, by the prosecutor as well. Pre-trial detention shall not apply if another preventive measure is sufficient. As a rule, pre-trial detention and other preventive measures may be applied if there is a well-founded fear of the accused's flight or hiding, especially when their identity cannot be established or they do not have a permanent residence in the country and there is a justified fear that they will be persuaded by someone to giving false testimony or explanations or obstruct criminal proceedings in any other unlawful way.

On the other hand, if the accused is accused of committing a crime or a misdemeanor punishable by a maximum term of imprisonment of at least eight years or if the court of first instance sentenced them to imprisonment for a term of not less than three years, the need to apply pre-trial detention to secure the proper course of the proceedings may be justified by the threat of severe punishment of the accused. A preventive measure may also be exceptionally applied when there is a well-founded fear that the accused, who has been charged with committing a crime or willful misconduct, will commit a crime against life, health, or public safety, especially when they have threatened to commit such a crime. On the other hand, if special considerations do not prevent it, pre-trial detention should be waived, especially when depriving the accused of liberty would cause a serious threat to the life or health or would have extremely severe consequences for them or their immediate family.

44 The catalog of preventive measures in the Polish Code of Criminal Procedure is as follows: temporary arrest, bail, social bail, police supervision, order for the accused to leave the flat, preventive measures under Article 276 of the Code of Criminal Procedure (suspension of official duties or refraining from a specific activity or from driving a specific type of vehicle or prohibition from applying for public contracts for the duration of the procedure), and prohibition from leaving the country.

45 Wielec, 2016, p. 51.

46 Wiliński, 2020, p. 367.

Pre-trial detention shall not be applied when, on the basis of the circumstances of the case, it can be foreseen that the court will impose a conditional suspension or a lighter imprisonment on the accused or that the period of pre-trial detention will exceed the estimated duration of the imprisonment sentence without conditional suspension. Pre-trial detention may not be applied if the offense is punishable by a term of imprisonment not exceeding one year. In the preparatory proceedings, the court, while applying pre-trial detention, sets its term for a period not longer than three months. If, due to the particular circumstances of the case, it was not possible to complete the preparatory proceedings within three months, at the request of the public prosecutor, the court of first instance competent to hear the case may extend the pre-trial detention, if necessary, for a period that may not exceed 12 months in total. The total period of pre-trial detention until the first sentence is issued by the court of first instance may not exceed two years.

5.4. Main features of executive criminal law

5.4.1. General principles and purpose of penitentiary law

The main principles of executive criminal law are a) *the rule of law,* which states that all bodies involved in enforcement proceedings are obliged to comply with the provisions of the law, that is, in principle, the provisions of the Executive Penal Code and implementing acts issued on its basis, b) *the principle of humanity and respect for human dignity,* which is expressed in the provision of Article 4 of the Code of Criminal Procedure, according to which penalties, punitive measures, compensatory measures, forfeiture, precautionary measures, and preventive measures are carried out in a humane manner, respecting the human dignity of the convict; Use of torture or inhuman or degrading treatment and punishment of the convicted person is prohibited, the convicted person retains civil rights and freedoms, and their limitation may only result from the act and from the final judgment issued on its basis; c) *the principle of cooperation with the society,* which results from Article 38 of the Code of Criminal Procedure, according to which associations, foundations, organizations, and institutions may cooperate in the implementation of penalties and penal, compensatory, protective, and preventive measures, in particular, those related to the deprivation of liberty, as well as churches and other religious associations and trustworthy people; d) *the principle of the sentenced person's subjectivity,* which is expressed directly in Article 5 of the Code of Criminal Procedure, according to which the convict is the subject of the rights and obligations specified in this code; e) *the principle of judicial* control of extrajudicial bodies of enforcement proceedings, resulting from Article 7 of the Code of Criminal Procedure, according to which a convicted person may appeal to the court against the decision of the body of enforcement proceedings on the grounds of its inconsistency with the law; f) *the principle of individualization* in the execution of penalties, according to which enforcement proceedings should be tailored to the individual requirements of a given convict in order to rehabilitate them; g) *the principle of social rehabilitation,* according to which executive proceedings should aim

at achieving the goals of social rehabilitation understood as a set of methods and principles of rehabilitation proceedings that take place in specific organizational conditions and the implementation of which is aimed at contributing to a change in the prisoner's personality in the area of their attitude, which, in turn, is aimed at preventing them from committing another crime by making an effort to re-adapt to and reintegrate into society.[47]

When referring to penitentiary law, it should be noted that this is an area of law within executive criminal law, which consists of provisions specifying the rules for the implementation of isolation instruments applied to specific entities, such as imprisonment and temporary arrest. Penitentiary law is part of the penitentiary policy, which, in turn, "forms part of the state policy relating to the execution of the penalty of deprivation of liberty and other measures leading to deprivation of liberty as a legal reaction to the violation of the legal order."[48] In light of this, the objective of penitentiary law is to ensure the proper execution of imprisonment and pre-trial detention.

5.4.2. The prison system in Poland

The prison system in Poland includes the principles of operation and organization of prisons and types of systems for serving a sentence of imprisonment.[49] In Poland, prisons are subordinate to the Minister of Justice. The main legal act in this area is the Executive Penal Code. It introduces the following types of prisons in which imprisonment is imposed: juvenile prison; first-time-prisoner prison; prison for penitentiary recidivists; penal facility for military arrest.

Moreover, there are types of prisons such as the following: closed-type prisons; semi-open prisons; open-type prisons.

The indicated prisons differ in the degree of security, the isolation of convicts, and the resulting obligations and rights to movement inside and outside the establishment.[50]

Convicts serve a sentence of imprisonment in these prisons in one of three systems:

1) Programmed impact, in which convicted adolescents as well as convicted adults serve their sentence, who, after being presented with a draft of the impact program, agree to participate in its development and implementation. The programs of impact specify the types of employment and education of convicts, their contact with their family and other relatives, their use of free time, the possibility of fulfilling their obligations, and other undertakings necessary to prepare them for their return to society.

47 Machel, 2003, p. 50.
48 Przesławski, 2018, p. 393.
49 Pawela, 2003, p. 199.
50 Hołda and Hołda, 2004, p. 97.

2) Therapeutic, which is for sentenced prisoners with non-psychotic mental disorders, including those convicted of crimes against sexual freedom and decency specified in the Penal Code, committed in connection with disorders of sexual preferences, mental handicap, and addiction to alcohol or other intoxicants or psychotropic substances, as well as physical disability requiring specialist intervention, especially psychological, medical, or rehabilitation care.

3) Ordinary, in which the convicted person may use employment, education, and cultural, educational, and sports activities available in the prison.

The Polish prison system also includes an electronic supervision system,[51] which means that the execution of penalties, punitive measures, and precautionary measures may be carried out with the use of electronic supervision. The electronic supervision system is a set of procedures and technical measures used to perform electronic supervision. In this system, it is possible to control the presence of the convict on certain days of the week and the hours they spend in a place indicated by the court (stationary supervision); the current place of stay of the convict, regardless of where the convicted person is (mobile supervision); and the convicted person's maintaining a certain minimum distance from another person indicated by the court (proximity supervision).

5.4.3. Educational and reintegration tools and tools for rehabilitation

Among the tools aimed at the readaptation of the convict, work can be mentioned first.[52] Recently, this element has been significantly exhibited in Poland. Among other things, a special program called "Work for Prisoners" is currently being implemented. This program was initiated by Deputy Minister of Justice Patryk Jaki in 2016 and implemented by the Prison Service with the aim of supporting broadly understood social re-adaptation of people in prisons and detention centers as well as their professional activation. The basis for the functioning of the program is composed of the provisions of the following legal acts: the Act of August 28, 1997, on the employment of persons deprived of liberty,[53] the Act of June 6, 1997, the Executive Penal Code,[54] the Regulation of the Minister of Justice of May 30, 2017, on the Fund for the Vocational Activation of Inmates and the Development of Prison Work Establishments,[55] and before that, the Ordinance of the Minister of Justice of January 23, 2012. The program includes three basic pillars that determine its activities: a) construction of production halls in prisons, b) extending the scope of the possibility of unpaid work by prisoners for local governments, and c) discounts for entrepreneurs employing prisoners.[56]

51 Staśkiewicz, 2020, p. 45.
52 Wielec, 2004, p. 195.
53 Journal Of Laws of 2014, item 1116.
54 Journal Of Laws 1997 No. 90, item 557.
55 Journal Of Laws of 2017, item 1069.
56 See Program "Praca dla więźniów."

Another element is inmates' engagement in re-education activity. The main goal of prisons is educational. The achievement of this goal consists in arranging educational programs in such a way as to achieve effective readaptation of the convict and their safe return to society. This is ensured by appropriate prison staff, including in the form of prison educators, pedagogues, and psychologists.

A third element is the education of the inmate. Pursuant to Article 134 of the Code of Criminal Procedure, the Minister of Justice, in agreement with the minister competent for education and upbringing, has issued an ordinance specifying the manner and procedure for teaching in prisons and detention centers, the conditions and procedure for implementing the obligation to teach and for releasing prisoners from this obligation, and the procedure for paying fees for education outside the prison, taking into account the need to adapt the types and forms by which the convicted person obtains education and professional qualifications = to the conditions of the prison and remand prison, the specificity of teaching in conditions of prison isolation, and the need to ensure discipline and order during education.

6. Comparison with relevant EU documents and major international trends (with particular emphasis on elements of legislation or practices that may be criticized by experts)

Recently, globalization trends, understood as attempts to unify the laws of the Member States, can be found in European Union legislation. Nevertheless, it seems that at present, the introduction of a uniform criminal law or criminal procedure in the European Union countries is impossible for many reasons.

However, increasingly often, the European Union presents the main directions of legislative changes for the Member States. This is explained, among other things, by the fact that new types of crime are emerging that use integration, opening borders, and the free movement of people, capital, or goods. One such initiative is the protection of the witness and the victim in criminal proceedings. Due to doubts regarding concerns related to the effectiveness of providing protection to witnesses and victims in criminal proceedings, the idea emerged in the European Union to create legal acts that, if possible, re-create or improve the existing protection of such individuals. The main legal act in this matter is Directive 2012/29 / EU of the European Parliament and of the Council of October 25, 2012, establishing minimum standards on the rights, support, and protection of crime victims and replacing Council Framework Decision 2001/220 / JHA. The result of the introduction of the above-analyzed directive was Poland's adoption of a separate act organizing protection and assistance for the witness and the victim: the Act of November 28, 2014, on the protection of and assistance for the victim and the witness, which introduced new regulations to the Polish criminal procedure system in terms of the effectiveness and realism of protection for witnesses and victims in the Polish criminal

procedure.[57] The Act defines the principles, conditions, and scope of application of protection and assistance measures for victims and witnesses and their relatives if, in connection with pending or completed criminal proceedings with the participation of the victim or witness or penal fiscal proceedings involving the witness, there is a threat to the life or health of these individuals.

Another effect of European Union law on Polish criminal legislation is the introduction of the institution of the European Arrest Warrant into the provisions of the Code of Criminal Procedure.[58] This instrument was implemented in the Polish legal system on the basis of the Council Framework Decision of June 13, 2002, on the European arrest warrant and the surrender procedure between European Member States. It replaces the long extradition procedures formerly used by the Member States. The European arrest warrant was introduced into the Polish legal system by the Act of March 18, 2004, amending the Act – Penal Code, the Act – Code of Criminal Procedure, and the Act – Code of Petty Offenses.[59] Chapters 65a and 65b were added to the Code of Criminal Procedure, implementing the Framework Decision of the Council of the European Union of June 13, 2002, on the European arrest warrant and procedures for the transfer of persons between Member States.

7. Conclusions

When assessing the criminal law system from the perspective of individual historical periods, it must be acknowledged that the present form of this system is the result of broader political, social, economic, and cultural changes. It is often the case that events that took place at a specific time in Poland had a significant impact on the shaping of the current solutions in the area of criminal law. That is why, for example, the penal code of 1932, created in the period during which Poland regained independence after 123 years of partitions, as well as also other criminal law regulations contained solutions reflecting the trends, challenges, and specificity of the time period during which they were developed. The desire to take advantage of independence and to shape a new legal order in post-partition Poland caused, inter alia, the legendary Penal Code of 1932 to become a new, exceptionally efficient legal act in the criminal law system in Poland.

Completely different times after the war, that is, a period of subsequent historical, exceptionally bad events for Poland, especially the period of Stalinism and communism, influenced the formation of subsequent legal acts in the form of the Criminal Code of 1969. These were no longer legal acts that effectively balanced the arbitrariness of public authority with the guarantees and rights of the individual. The

57 Journal Of Laws of 2015, item 21.
58 Hofmański, 2008, p. 17.
59 Journal Of Laws of 2004, item 626.

construction of penal provisions in these acts was often used as a political tool rather than as an element of an efficient and fair penal policy of the state.

On the other hand, another change in historical conditions at the turn of the 90s resulted in further changes in the area of criminal law, as a result of which a new criminal code was introduced in 1997, which currently remains in force. It is already a legal act that states guarantees resulting from the democratic nature of the state. However, the change in the social and economic reality of the 1990s also forced an appropriate reaction of the state authorities. That is why numerous new institutions were introduced in response to ever new types of crime. An example is that the most frequently committed crimes in Poland today are the so-called financial (tax) crimes. The answer to this type of crime was the introduction of the aforementioned institution of extended confiscation into the criminal code.

The same applies to the provisions of the criminal procedure, which, inter alia, evolved to strengthen the role of the court in criminal proceedings. This is a positive direction because in a democratic state, the court appears as the only body deciding on the freedom of the individual. Therefore, the new Code of Criminal Procedure of 1997 rightly shifted the competence to apply, inter alia, pre-trial detention to a judicial authority, significantly limiting the powers of the prosecutor. On the other hand, as a response to ever new types of crime, especially those that appeared with the change of the Polish system in the 90s, there was an introduction to criminal proceedings, for example, the institution of a crown witness or an anonymous witness. Another trend influencing the shape of the provisions of the criminal procedure is the legislation of the European Union, which, inter alia, resulted in the introduction of the institution of the European Arrest Warrant into the Polish criminal law system as well as increased protection for witnesses and victims, as previously mentioned.

In summary, retrospection makes evident that historical factors, systemic changes, and social and economic changes that occur in the state cause and will result in a specific model of that state's criminal law system.

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| Chapter 5 |

Romania: National Regulations in the Shadow of a Common Past

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ABSTRACT

The rule of law is very difficult to enforce during periods of dictatorship or war. We can have a justice system that functions, as we had before 1989, but that system was confined to upholding the regime in power. Romania experienced a dictatorship for a very long period of time. In the first phase, there was a royal dictatorship from 1938, then a military one, followed by the communist regime until the end of 1989. Since 1945, Romania has been a part of the world where the communist system imposed by the Soviet Union left its mark on criminal justice. The authors of the 1968 Penal Code considered that code to have been adopted "with the purpose of solving uniformly the vast problematic of preventing and punishing the crimes." In a practical regard, the entire legislation was a tool to ensure the success of the regime of communist oppression. In these circumstances, the events that took place in 1989 liberated the spirit of freedom; meanwhile, the consequences of those events took the citizens of the Central and East European countries by surprise, and they were unprepared for the struggle toward democracy and the rule of law. This was the case in Romania when, finally, in 2014, the process of enforcing all fundamental codes was established. In fact, the reform was deeper than the adoption of a new Penal Code, the Code of Criminal Procedure, and the Law on the Execution of Sentences, Educational Measures, and Judicial Measures during Criminal Proceedings. This study presents the main principles, legal institutions, and operational characteristics of the new laws.

KEYWORDS

Romania; criminal justice; Penal Code; Code of Criminal Procedure; Law on the Execution of Sentences, Educational Measures, Judicial Measures during Criminal Proceedings

1. Brief overview

Criminal Law and Criminal Procedure are very closely related to certain values that we share or accept, voluntarily or otherwise, over a period of time. At the same time, they are inextricably linked to the exercise of state sovereignty. However, from this perspective, the states of Central and Eastern Europe had similar experiences, having been assigned to the Soviet sphere of influence at the end of World War II.

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From the perspective of historical developments, Romania had a fairly modern penal code; however, the Criminal Code of Carol II[1] was amended successively, especially after 1945. These changes were the practical basis for the adoption of a new Criminal Code in 1968[2], with a new structure and a new approach to criminal justice. During the same period, a new Code of Criminal Procedure was adopted.

Furthermore, after the 1989 Revolution, Romania attempted to revise and adapt the criminal legislation to meet the criteria of a democratic legislation. As the path was highly sinuous, there are certain milestones of evolution that must be highlighted.

First, reform was conducted in 1996 through Law no. 140/1996 on modifying the Penal Code and Law no. 141/1996 on amending and supplementing the Code of Criminal Procedure. Regarding the Penal Code, through this change, offenses such as the following were criminalized: "Propaganda in favor of the totalitarian state," Article 166, and "Actions against the constitutional order," Article 166 index 1; moreover, the former offenses against public property were repealed with the idea of ensuring the same treatment for public and private property from the perspective of the Penal Law. Furthermore, the modification on the Code of Criminal Procedure updated the provisions to a certain extent – for example, Article 91 indices 1 to 5 introduced another means of proof in the Criminal procedure: audio-video recordings.

The next milestone was the modification in the prosecutor`s competence to decide arrest as a preventive measure in 2003.[3] The decision to change the procedural regulation was caused by the European Court of Human Rights (ECHR) jurisprudence and, from national/internal perspective, was not easy to accept and implement.

In 2004, a new Penal Code was adopted by the Romanian Parliament, but it never entered into force, as its enforcement was postponed several times and ultimately repealed.[4]

Law no. 202 from 2010 was intended to be a small justice reform, introducing, among other provisions meant to make the administration of justice more efficient, a procedure for admitting guilt.[5]

Following changes to the existing national regulation framework and taking into consideration the effect of the ECHR decisions in criminal matters, the need for a new Penal Code and a new Code of Criminal Procedure arose.

The adoption of the new Criminal Code pursued a number of objectives, among them, the repealing of some criminalizing texts from special legislation, the elimination of the unnecessary overlap of some texts that protect the same social values, adapting the punishment, decriminalization of certain facts provided in

1 The Criminal Code of 1936, titled the Criminal Code "Carol II," published in the Official Gazette, part I, No. 73 of 27 March 1936.

2 The Official Bulletin no 79 – 79 bis 21 June 1968.

3 Law no. 281/2003 regarding the amendment and completion of the Code of Criminal Procedure and of some special laws.

4 Criminal Code of 2004 repealed by Law no. 286/2009 on the Penal Code.

5 Spânu, 2020.

the special legislation and their contravention where appropriate, and respecting the principle of minimum intervention, which states that the criminal law of any rule of law requires recourse to the criminal protection mechanism only in situations in which the protection provided by the regulations of other branches of law is insufficient.[6]

Regarding the Code of Criminal Procedure,[7] the new provisions were intended to meet the requirements of the time, such as accelerating criminal proceedings, simplifying them, and creating a unified jurisprudence in line with the jurisprudence of the European Court of Human Rights. The new code aimed to lead to the objective of predictability of judicial proceedings deriving from the European Convention for the Protection of Human Rights and Fundamental Freedoms and from the jurisprudence of the ECHR.

1.1. Main (legal) sources (legislation in force)

The first national legal source is the Romanian Constitution, title II "Fundamental rights, freedoms and duties" Articles 15 – 60 and title III "Public Authorities"– chapter VI "Judicial Authority" Articles 124 – 147. One of most important and relevant provisions is Article 20 of the Romanian Constitution,[8] which regulates the supremacy of the most favorable provision regarding Human Rights.

The main legal sources are the Penal Code[9] and the Code of Criminal Procedure[10]. The legal framework in our area of interest is completed with Law 254/2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings and Law 252/2013 on the organization and operation of the probation system.

Regarding the judicial and investigative authorities, the following norms must be mentioned: Law no. 304/2004 on judicial organization, Law no. 303/2004 on the status of judges and prosecutors, Government Emergency Ordinance no. 43/2002 on the National Anticorruption Department, Government Emergency Ordinance no. 78/2016 for the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism as well as for the modification and completion of some normative acts, and Law no. 218/2002 on the organization and functioning of the Romanian police.

6 Explanatory memorandum of the Penal Code.
7 Explanatory memorandum of the Code of Criminal Procedure.
8 Article 20 – International Human Rights treaties: "(1) The constitutional provisions regarding the rights and freedoms of the citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the covenants and with the other treaties to which Romania is a party. (2) If there are inconsistencies between the pacts and treaties on fundamental human rights, to which Romania is a party, and domestic laws, international regulations shall take precedence, unless the Constitution or domestic laws contain more favorable provisions".
9 Law no. 286/2009.
10 Law no. 135/2010.

An important actor in recent years was the Constitutional Court, which has the competence to enforce the constitutionality control of the laws and as well as the exception of (un)constitutionality[11].

Legal assistance during criminal investigation and justice procedures is performed according to Law 51/1995 for the organization and exercise of the legal profession.

An important criminal provision is also found in special laws regulating criminal aspects, such as Law no. 241/2005 for preventing and combating tax evasion, Law no. 129/2019 for preventing and combating money laundering and terrorist financing, and Law no. 143/2000 on preventing and combating illicit drug trafficking and consumption. Furthermore, there are laws that regulate civil or administrative aspects and also contain criminal law provisions, such as Law 8/1996 on copyright and related rights, which criminalizes certain offenses in Articles 193 – 200,[12] or the Forestry Code of 2008[13], which also criminalizes certain offenses in Articles 68 and 106 – 110.

1.2. Relevant institutions and their role

The judicial system consists of courts on three main levels: city court, which functions in most of the cities in Romania; Tribunals, which function in each county; 14 Courts of Appeal; and the High Court of Cassation and Justice. Additionally, there are prosecutor`s offices next to each court that supervise criminal investigation or, in certain cases of serious offenses, perform it themselves. The general investigation body is the police through special agents and offices appointed by the Ministry of Interior Affairs.

Regarding investigative and prosecution bodies, there are two special bodies within the Prosecutor's Office next to the High Court of Cassation and Justice: the National Anticorruption Directorate and the Directorate for the Investigation of Organized Crime and Terrorism.

Probation services are located next to each Tribunal aiming primarily to contribute to the accomplishment of the act of justice in the interest of the community in order to rehabilitate the offenders, to reduce the risk of committing new crimes and increase the degree of security in the community, to reduce the social costs of the execution of sanctions and criminal measures by decreasing the population in penitentiary units, to capitalize on the socioeconomic potential of criminals, and to maintain the safety of the community.

11 Law no. 47/1992 on the organization and functioning of the Constitutional Court.
12 Miheș and Mihăilă, 2018.
13 Law no. 46/2008.

2. Main substantive criminal law items

2.1. General principles: The general principles of criminal liability

The general principles of substantive Criminal Law are inserted within Articles 1 and 2 of the Penal Code: "Legality of criminalization" and "Legality of criminal law sanctions."

The principle of the legality of criminalization means that criminal law stipulates the facts that constitute crimes, and no person may be criminally sanctioned for an act that was not provided for by criminal law as of the date when it was committed.

The legality of criminal law sanctions refers to the idea that *"(1) the criminal law provides the applicable punishments and the educational measures that can be taken against the persons who have committed crimes, as well as the security measures that can be taken against the persons who have committed deeds provided by the criminal law. (2) A punishment may not be enforced or an educational or safety measure may not be taken if it was not provided for by the criminal law on the date when the deed was committed. No punishment may be established and applied outside its general limits."*[14]

Other fundamental principles or rules of Criminal Law can be included in this category of principles: the personal nature of penal responsibility, the idea that penal responsibility is based on the guiltiness of the person, the individualization of penal responsibility, the principle of humanism, equal treatment, and non bis in idem.[15]

2.2. Grounds for impunity

To activate penal responsibility, certain criteria must be met. In Romania, the doctrine identified three features of an active subject based on interpretation of the Penal Code. First, an active subject of a criminal offense can be a natural person or a legal entity.

Second, the minimum age to activate criminal responsibility is 14 years. The threshold of 14 years of age means that minors who, at the time they committed the offense, are under 14 years age are considered without (sufficient) discernment to be trialed as criminal offenders.[16] Persons who are 14–16 years old can be criminally liable only if it is proved that they committed the act with discernment. If the person has reached the age of 16, they are criminally liable according to the law (just as an adult).[17]

Third, discernment is an important criterion of impunity and the liberty of will and liberty to act. The existence of discernment is presumed, except in the aforementioned situations. Furthermore, the mental state of the defendant should be examined in cases of certain serious offense (ex. Murder) and when there are serious doubts as to their mental capability. A person has liberty of will and liberty to act

14 Article 2 of the Penal Code.
15 Mirișan and Domocoș, 2019, pp. 15–20; Antoniu and Toader, 2015, pp. 33–53.
16 Antoniu and Toader, 2015, pp. 340–343.
17 Article 113 of the Penal Code; Antoniu and Toader, 2015, pp. 340–343.

when that person acted freely, without constraint, according to their own beliefs and decisions.[18]

2.3. Definition of criminal act

The definition of an offense according to Article 15 of the Penal Code is as follows: *"The criminal offense is the act provided by the criminal law, perpetrated with guilt, unjustified and imputable to the person who committed it. The criminal offense is the sole basis of criminal liability."*

Based on this definition, the essential features of a criminal offense can be deduced: 1) it is be provided for by law, 2) the act should be perpetrated with guilt, 3) the act is unjustified, 4) the act is imputable to the person who committed it.

The first feature means that the criminal offense is the sole basis of criminal liability. If the act is not criminalized by a law, then criminal responsibility cannot enter the discussion. In this regard, that the doctrine and practice speak of typicity of the perpetrated act must be noted. A correspondence of the factual elements of the act with the features of the act as described in the criminal law must be established[19]

The second condition is that the act should be performed with guilt as regards the state of mind of the active subject (*mens rea*). An action only constitutes an offense if committed under the form of guilt required by criminal law.[20] The subject must be aware that they are breaching the law as well as of the consequences of the act. In Romanian Criminal Law, there are three forms of guilt: intention, culpa, and praeter intentionem.

Intention can refer to direct intention when the subject can foresee the outcome of their act and acts under the expectation of causing such an outcome by perpetrating the act or indirect intention when the subject can foresee the outcome of their act and, while not intending to produce it, nevertheless accepts the likelihood that it will occur.

Culpa (fault) includes two forms: criminal negligence – the subject cannot foresee the outcome of their actions, though they should and could have done so – and indulgence – the subject can foresee the outcome of their actions but does not accept it, believing without reason that such an outcome will not occur.

Oblique intent *(praeter intentionem)* exists when an act consisting of an intentional action or inaction causes more serious unintended consequences and is attributable to the perpetrator.

On the other hand, the act consisting of an action or inaction shall constitute an offense when committed with direct intent. The act committed with basic intent *(culpa)* constitutes an offense only when the law specifically establishes it as such.[21]

18 Mirisan and Domocos, 2019, p. 123.
19 Ibid., p. 117.
20 Article 16 of the Penal Code; Antoniu and Toader, 2015, pp. 340–343; Mirisan and Domocos, 2019, pp. 146–155.
21 Article 16 last paragraph of the Penal Code.

Finally, an express provision covering the committing the crime of commission by omission is included. A commission offense that involves the production of a result is also considered to have been committed by omission when there is a legal or contractual obligation to act, and the perpetrator of the omission, through a previous action or inaction, created, for the protected social value, a state of danger that facilitated the production of the result.

2.4. Types of offenders

As mentioned above, the active subject of the criminal offense can be either a natural person or a legal entity.

According to Article 135 of the Penal Code, legal entities, except for state and public authorities, shall be responsible for offenses committed in the performance of the object of activity of legal entities or in their interest or on their behalf. Public institutions shall not be held criminally liable for offenses committed in the performance of activities that cannot be the object of the private domain. In addition, it is important to highlight that the criminal liability of legal entities does not exclude the criminal liability of the individual participating in the commission of the same act.

The Penal Code does not expressly limit the offenses that can perpetrated by legal entities; therefore, any offense can be committed by a legal entity.[22]

In certain cases, as provided for by the Penal Code, there are special requirements for an active subject such as that the perpetrator should be a public official in the case of duty offenses or an accountant, director, or legal representative of a company in the case of offenses related to, for example, tax evasion.

Legal persons without legal personality and individual enterprises cannot be criminally liable under the conditions provided by Article 135 of the Penal Code.[23]

Procedure in cases with juvenile offenders. In cases with underaged offenders, there are criminal liability limits imposed by Article 113 of the Penal Code, as described above.

Both during the criminal investigation and during the trial, the project stipulates the obligation to summon the probation service as well as the general directorate of social assistance and child protection in the locality where the hearing takes place.

In accordance with the new approach of the Penal Code, according to which only non-custodial or non-custodial educational measures may be taken against a juvenile who has committed a crime, the procedures for enforcing these measures have been reconsidered.[24]

The trial is conducted in accordance with the rules of the adversarial process regarding the order of the judicial investigation, and for the additional protection of

22 Antoniu and Toader, 2015, pp. 379–380.

23 HCCJ decision no. 1/2016, preliminary ruling for resolving an issue of law, issued on 13.01.2016, Official Gazette no. 138 from February 23, 2016.

24 Antoniu and Toader, 2015, p. 343.

the minor before the court, the rule of a single hearing is provided, with the possibility of re-hearing in duly justified cases.

In cases in which juvenile defendants are tried together with adult defendants, the jurisdiction always belongs to the specialized court for juveniles and family.

2.5. Sanctioning system, possibilities of diversion, alternative sanctions, restorative elements, mediation

2.5.1. Sanctioning system

Criminal law sanctions have certain characteristics: they are necessary in regard to the defense of the values protected by criminal law, and they are mandatory when criminal responsibility was established; they are stipulated only by criminal law, and they are enforced only by penal judicial authorities; their enforcement implies a diminishing of the human rights and liberties; they have a inflictive effect; and they are enforced with the purpose of preventing the perpetration of such acts in the future by either the same offenders or other future offenders.[25]

The sanctioning system provided in our Penal Code consists of three categories of sanctions: penalties (punishments), educational measures enforced on juvenile offenders, and safety measures.

The most important part of the sanctioning system may be the main penalties as defined by Article 53 of the Penal Code: life imprisonment, imprisonment, and fines. In addition, our Penal Code provides for additional punishments and complementary punishments. An additional punishment consists in the prohibition of the exercise of certain rights from the moment of the final conviction and until the execution or considered execution of the custodial sentence.[26]

Complementary punishments are prohibition of the exercise of certain rights, military degradation, and publication of the conviction decision. These punishments are ordered by the court to supplement the effect of the main sentences and usually occur after the execution of the main sentences.[27]

Notably, penalties (punishments) are under the strict regime of legality in the sense that the punishment is provided only by criminal law. The punishment provided by law refers to the punishment provided in the text of the law that incriminates the deed committed in the consumed form without considering the causes of reduction or increase of the punishment.[28]

The regime of life imprisonment is determined by Penal Code, primarily Article 56 – 59 of the Penal Code. Life imprisonment consists of imprisonment for an indefinite period and is carried out in accordance with the law on the execution of sentences.

25 Mirisan, and Domocos, 2019, p. 292.
26 Article 54 of the Penal Code.
27 Toader, 2014, p. 212.
28 Article 2 of the Penal Code; Article 141 of the Penal Code; Miheș, 2015, pp. 331–371.

There is a limit as regards setting this punishment in terms of the age of the defendant at the time of conviction. The defendant, if they have reached the age of 65, shall be sentenced to 30 years imprisonment and to the prohibition of the exercise of certain rights for the maximum term rather than life imprisonment.

Practically speaking, this punishment is not enforced entirely for an indefinite period from the moment of conviction because it can be replaced in certain conditions. The sentence of life imprisonment may be replaced by imprisonment for 30 years and the penalty of prohibition of the exercise of certain rights for its maximum duration, if the defendant has been well behaved throughout the execution of their sentence, has fully fulfilled the civil obligations established by the conviction (unless they prove that they had no possibility of fulfilling them), and they have made constant and obvious progress toward social reintegration if the person sentenced to life imprisonment reaches the age of 65 during the execution of the sentence.[29]

According to Article 60 of the Penal Code, imprisonment consists of deprivation of liberty for a fixed period, between 15 days and 30 years, and is executed according to the law on the execution of sentences.

Fines set by criminal courts refer to the amount of money that the convict is obliged to pay to the state.

The amount of the fine shall be determined by the system of fine days.[30] The amount corresponding to a fine day, between 10 and 500 lei, is multiplied by the number of fine days, which can be between 30 and 400 days. The court establishes the number of fine days according to the general criteria for individualizing the punishment. The amount corresponding to a fine day shall be determined considering the material situation of the convicted person as well as their legal obligations to the persons in their care.[31]

Fines can also be enforced if the committed crime was aimed at obtaining a patrimonial benefit, and if the punishment provided by law is only a fine or the court opts for the application of this punishment, the special limits of the fine days may be increased by one third. In addition, the fine can be set by the court together with the imprisonment sentence if the committed crime was aimed at obtaining a patrimonial benefit. These are options of the court.[32]

Moreover, our code provides for replacement of the fine with imprisonment[33] if the convicted person, in bad faith, does not execute the penalty of the fine in whole or in part; in such a case, the number of unexecuted fine days shall be replaced by an appropriate number of days in prison.

29 In the case of commutation or replacement of life imprisonment with imprisonment, the period of imprisonment executed shall be deemed to have been served as part of the imprisonment sentence.

30 Article 61 of the Penal Code.

31 Streteanu and Nitu, 2018, pp. 299–310.

32 Ibid.

33 Article 64 of the Penal Code.

In this situation, if the unfulfilled fine was accompanied by imprisonment, the number of non-enforced fine days shall be replaced by an appropriate number of days of imprisonment, which shall be added to the imprisonment sentence, the resulting punishment being considered a single punishment. In the case of replacing the penalty of the fine with the punishment of imprisonment, under the aforementioned conditions mentioned, one day of fine corresponds to one day of imprisonment.[34]

Finally, there are situations in which the fine sentence cannot be executed. In these cases, Article 64 of the Penal Code provides for the rule of execution of the fine by performing unpaid work for the benefit of the community. The essence here is the consent of the convicted person to perform the unpaid work (community services).

When such consent is provided, the court shall replace the obligation to pay the unexecuted fine with the obligation to perform unpaid work for the benefit of the community except if, due to their state of health, the person is unable to perform this work. A fine day corresponds to one day of community service. If the fine replaced accompanied the prison sentence, the obligation to work for the benefit of the community is executed after the execution of the prison sentence.

The coordination of the execution of the work obligation for the benefit of the community is carried out by the probation service.

The court shall replace the fine days not executed by community service with an appropriate number of days in prison if a) the convicted person does not perform the obligation to work for the benefit of the community under the conditions established by the court or b) the convicted person commits a new crime discovered before the full execution of the work obligation for the benefit of the community. Fine days replaced by imprisonment that are not served via community service on the date of final conviction for the new offense shall be added to the sentence for the new offense.[35]

The ordered execution of the work for the benefit of the community shall cease to pay the fine corresponding to the remaining unexecuted fine days.

2.5.2. Alternative sanctioning

The (new) Penal Code does provide for alternative sanctions such as waiving the sentence, postponing the sentence, and suspending the execution of the custodial sentence.[36]

The court may order the *waiver of the sentence*[37] if the following conditions are met: the crime committed is of low gravity, considering the nature and extent of the consequences produced, the means used, the manner and circumstances in which it

34 Streteanu and Nitu, 2018, p. 317.

35 If the convicted person in the situation provided in par. (1) does not consent to the performance of unpaid work for the benefit of the community, the unexecuted fine is replaced by imprisonment according to Article 63 of the Penal Code; Streteanu and Nitu, 2018, pp. 317–323.

36 For additional details, please see Streteanu and Nitu, 2018, pp. 450–575; Antoniu and Toader, 2015, pp. 157–231.

37 Article 80 of the Penal Code.

was committed, the reason, and the purpose pursued; or, considering the character of the offender, their conduct before the crime, the effort they made to mitigate or reduce the consequences of the crime, and their likelihood of correction, the court determines that the application of a punishment would be inappropriate due to the consequences.

However, it is not possible to order the waiver of the application of the punishment if the offender has previously suffered a conviction or for which the rehabilitation intervened, or the rehabilitation term was fulfilled. In addition, it is not possible if the same offender has also been ordered to waive the application of the sentence in the last two years prior to the date of committing the crime for which they are being tried or if the offender has evaded criminal prosecution or trial or has attempted to thwart the determination of the truth or the identification and prosecution of the perpetrator or participants.

Waiver of the sentence cannot be ordered if the punishment provided by law for the committed crime is imprisonment for more than five years. In the case of concurrence of offenses, the waiver of the application of the punishment may be ordered if, for each concurrent offense, the aforementioned conditions mentioned are met.

The court may order the *postponement of the enforcing of the sentence,*[38] establishing a term of supervision, if the established punishment, including in the case of concurrence of offenses, is a fine or imprisonment for a maximum of two years; the offender has not previously been sentenced to imprisonment, the rehabilitation intervened, or the rehabilitation term was fulfilled; the offender has agreed to perform unpaid work for the benefit of the community; or, considering the offender's character, their conduct, the efforts they made to mitigate or reduce the consequences of the crime, and their likelihood of correction, the court considers that the immediate application of a sentence is not necessary and supervision of their conduct for a specified period is sufficient.

The application of the sentence may not be postponed if the punishment provided by law for the crime committed is seven years or more or if the offender has evaded criminal prosecution or trial or attempted to thwart the truth or identify and prosecute the author or participants.

The court is obliged to present the reasons that determined the postponement of the application of the punishment and to warn the offender regarding their future conduct and the consequences to which they will be exposed if they commit further crimes or do not comply with supervision measures or surveillance.

Moreover, the court shall order a term of supervision of two years calculated from the date of the final decision by which the postponement of the application of the punishment was ordered. During the term of supervision, the person against whom the application of the sentence has been postponed must observe the supervision measures and execute the obligations incumbent on them under the conditions set by the court.

38 Article 83 of the Penal Code.

The court may order the *suspension of the execution of the sentence under supervision*[39] if the following conditions are met: the punishment applied, including in the case of concurrence of offenses, is imprisonment for a maximum of three years[40]; the offender has not previously been sentenced to more than one year in prison, or the rehabilitation intervened, or the rehabilitation term was fulfilled; the offender has agreed to perform unpaid work for the benefit of the community; in consideration of the character of the offender, their conduct before the crime, the efforts they made to mitigate or reduce the consequences of the crime, and their likelihood of correction, the court considers the application of the sentence to be sufficient and believes that, even without its execution, the convict will not commit any other crimes, but it is necessary to supervise their conduct for a certain period.

However, the court cannot order this alternative sanction if the penalty applied is only a fine; if the enforcement of the punishment was initially postponed, but the postponement was later revoked; if the offender has evaded criminal prosecution or trial or has attempted to thwart the determination of the truth or the identification and prosecution of the perpetrator or participants.[41]

In addition, it is obligatory to present the reasons on which the conviction was based as well as those that led to the suspension of the execution of the sentence and to warn the convict regarding their future conduct and the consequences to which they will be exposed if they commit crimes or do not comply with their obligations during the term of supervision.

The court orders a term of supervision between two and four years but may not be less than the duration of the sentence applied. The term of supervision shall be calculated based on the date when the decision by which the suspension of the execution of the sentence under supervision was pronounced became final. During the term of supervision, the convicted person must observe the supervision measures and execute the obligations incumbent on them, under the conditions established by the court.

Finally, *mediation* is possible in criminal law cases involving offenses for which, according to the law, the withdrawal of the prior complaint or the reconciliation of the parties removes criminal liability.

39 Article 91 of the Penal Code.

40 Decision no. 13 from May 7, 2019, issued by the High Court of Cassation and Justice on interpretation of law: "in case of cancellation of the postponement of the application of a sentence, followed by the suspension under supervision of the execution of the resulting main sentence, the term of supervision, established according to the provisions of art. 92 of the Criminal Code, is calculated from the date of finality of the decision ordering the suspension under supervision of the execution of the resulting main punishment".

41 In the unitary interpretation and application of the provisions of Article 91 paragraph (3) of the Criminal Code, when the penalty of a fine is added to the prison sentence, the criminal fine is executed, even if the execution of the prison sentence has been suspended under supervision.

2.6. Highlights of the special part of substantive criminal law

2.6.1. Offenses against property

Over the last 32 years, the reformulation of some texts and resettlement of crimes aimed at protecting the patrimony of the natural person or of legal persons was, unfortunately, a continuous process. As previously mentioned, since 1997, the special protection of public property was repealed through Law no. 140/1996. It took a long period of time for the general society and doctrine and practitioners "*to be become acquainted*" with the new reality, in which the rules of democratic society mean equal treatment of different forms of assets and property, irrespective of their owner or user.

Working through that process, later, in the (new) Penal Code, the title "Offenses against the patrimony," which includes the regulation criminalizing offenses against the patrimony of the persons, was divided into four chapters: "Theft," "Robbery and Piracy," "Offenses against property by disregard of trust," "Fraud by computer systems and electronic means of payment," and "Destruction and disturbance of possession."

First, the "old/classic" offenses, such as theft, robbery, and piracy, were updated and redefined in regard to both the content and the sanctioning. For example, the sanction for theft was reduced by nine years, with the simultaneous introduction of the alternative punishment of the criminal fine.[42] Thus, there was a need to decrease the severity of the sanctions, although at present, this tendency is, generally speaking, arising again.[43] Another aspect is that for most of the offenses provided for under this title, criminal prosecution can be initiated only on the victim's prior complaint, an aspect that, should not be valid for most offenses.

This title also covered the main offenses in relation to the protection of assets and property, including provisions from special laws[44]. For example, bankruptcy and fraudulent bankruptcy in Law no. 85/2008, the law of insolvency, were included here under Article 255 and 256; computer fraud from Law 161/2003 was covered in Article 249; and the offenses provided for in Law no. 365/2002 on electronic commerce, "Carrying out financial operations fraudulently," were included in Article 250, those in "Illegal operations with non-cash payment instruments" in Article 250 index 1, and those in "Acceptance of financial operations carried out fraudulently" in Article 251.

Furthermore, new offenses are criminalized in Article 239, "Abuse of trust by fraud of creditors," in Article 245, "Insurance fraud," in Article 246, "Diversion of public auctions," and in Article 247, "The patrimonial exploitation of a vulnerable person."

42 In the former regulation, the punishment for theft was imprisonment for a period ranging from one to 12 years, and in the present form of Article 228 of the Penal Code, theft shall be punished by imprisonment for a period ranging from six months to three years or by a fine.

43 Cioclei, 2020.

44 Bodea and Bodea, 2018, p. 191.

Although under the communist regime, embezzlement was considered an offense against public property and then modified to be considered an offense against the assets (patrimony) of legal entities, in the new code, it is integrated into the chapter dedicated to "Duty Offenses."[45]

One of the debates in the doctrine and in practice was the relationship between the offense of misrepresentation[46] and the crime of computer fraud[47]. The stakes of this debates can easily be seen in the different sanctioning regime: in cases of aggravated misrepresentation, the sanction is imprisonment for a period ranging from six months to three years for the basic form of the offense and from one to five years in cases of the aggravating form, which is perpetrated by fraudulent means. In cases of computer fraud, the sanction is imprisonment for a period ranging from two to seven years.[48] In an attempt to resolve these debates, the High Court of Cassation and Justice ruled on the question "The publication of fictitious online advertisements, which has resulted in damage, without intervening in the computer system or the computer data processed by it, achieves the typical conditions of the crime of computer fraud, provided by Article 249 of the Criminal Code (in the alternative way of 'entering computer data'), or of the crime of deception, provided by Article 244 paragraph (2) of the Criminal Code (in the alternative way 'by other fraudulent means')?"[49] The law is interpreted within decision no. 37/2021[50]: "*It establishes that the publication of fictitious online announcements that resulted in a damage, without intervening on the computer system or on the computer data processed by it, achieves the typical conditions of the crime of deception, provided by article 244 of the Criminal Code.*"

2.6.2. Offenses of corruption and duty offenses

The previous Criminal Code of 1968 regulated offenses that are detrimental to activities of public interest or to other activities regulated by the law in Title VI of the special part; the most numerous texts of the Criminal Code are found under this title, which presents a wide range of criminal offenses united by the same generic legal object: the social relations the existence of which is ensured by defending social values such as the functioning of state and public entities, the legal interests of persons, the carrying out of justice, and the safety of traffic on the roads.[51]

Taking into account the evolution of the criminal phenomenon, particularly in the sphere of public servant duties, as well as the international acts in this field to which the state has adhered, Parliament adopted Law no. 78/2000 on the prevention,

45 Ibid., p. 426.
46 Article 215 of the Penal Code.
47 Article 249 of the Penal Code.
48 Mihes, 2021; Zlati, 2020; Kadar, 2019, p. 202; Cioclei, 2017, p. 380.
49 Decision no. 37/2021 of the High Court of Cassation and Justice is available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/244415 (Accessed: 05 March 2022).
50 Decision no. 37/2021 of the High Court of Cassation and Justice is available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/244415 (Accessed: 05 March 2022).
51 For details, please see Mirișan and Miheș, 2019, pp. 373–386.

detection, and sanctioning of corruption. This law established in Article 5 a classification of the offenses that are its object of regulation, grouping them into four categories: a) corruption offenses – those stipulated in Articles 254–257 of the previous Penal Code and Articles 61 and 82 of law no. 78 from 2000, as well as offenses provided for in special laws as specific modalities of these crimes; b) crimes assimilated into corruption offenses – those stipulated in Articles 10–13 of Law no. 78 from 2000; c) offenses directly connected to corruption offenses – those referred to in Article 17 of Law no. 78 from 2000; and d) offenses against the financial interests of the European Union – those stipulated in Articles 18/1–18/5 of Law no. 78 from 2000.

The new Penal Code included the corruption offenses in Title V of the special part, "Corruption and offenses in public positions," which is structured in two chapters: "Corruption offenses", in Articles 289–294, and "Duty offenses in public positions", in Articles 295–309.

Another important aspect is related to the offense of abuse in office by a public official. The legal text stipulated that "The act of a civil servant who, in the exercise of his duties, does not perform an act or perform it in a defective manner and thereby causes damage or injury to the legitimate rights or interests of a natural or legal person shall be punished with imprisonment from 2 to 7 years and a ban on exercising the right to hold a position of public office." In Decision of the Constitutional Court no. 405 of June 15, 2016,[52] the exception of unconstitutionality regarding the provisions of Article 297 paragraph (1) of the Criminal Code was admitted, with the decision stating that they are constitutional insofar as the phrase "performs in a defective manner" in their content means "performs in violation of the law." The court considered the legal text to be imprecise and the law to be the only grounds for criminal responsibility in the sense that not just any violation of any norm can trigger criminal responsibility, but only a violation of a law. In other cases, disciplinary,[53] patrimonial, or other forms of responsibility should be activated. Consequently, the judicial practice did consider the convictions based on this text only when a normative act with a force of law was violated.

2.6.3. Sexual offense, with particular look at minors

Another aspect that was subject to many changes was the provisions related to the sex crimes and family violence.

Recently, the legal framework for sexual offenses was amended regarding a significant number of such offenses covered by Law no. 217/2020,[54] which recently entered into force.

The above-mentioned law amends the provisions of Article 153 of the Penal Code regarding the prescription of criminal liability from the Criminal Code and those

52 Published in the Official Gazette no. 517 on July 8, 2016, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/179919 (Accessed: 05 March 2022).

53 Chipea, 2017, pp. 291–292.

54 Published in the Official Gazette no. 1012 on October 30, 2020.

of Article 154 on the statute of limitations for criminal liability in regard to establishing criminal liability for acts of rape[55] and sexual intercourse with a minor[56] as imprescriptible.[57]

Other amendments refer to the articles related to regulating the following offenses: pimping and rape; sexual assault; sexual intercourse with a minor; sexual corruption of minors; recruitment of minors for sexual purposes; and child pornography and aggravating circumstances related to these offenses.

The changes are intended to offer better protection to underage victims of sexual offenses.

This issue should be viewed the light of the *Report on the practice of courts and prosecutor's offices attached to them in investigating and resolving cases of crimes against sexual life with minor victims*[58].

3. Main rules of the criminal procedure

3.1. General principles: The aim of criminal procedure

The rules of criminal procedure aim to ensure the efficient exercise of the attributions of the judicial bodies with the guarantee of the rights of the parties and of the other participants in the criminal process to respect the provisions of the Constitution, of the constitutive treaties of the European Union, and of the treaties on fundamental human rights to which Romania is a party[59].

The fundamental principles as provided in the Code of Criminal Procedure[60] were systematized as follows:[61] the *principle of legality of criminal proceedings*, *the separation of judicial functions, the presumption of innocence, in dubio pro reo, determining the truth, ne bis in idem, obligation to initiate and exercise criminal proceedings* except for certain cases in which the principle of opportunity may intervene,[62] *the fair character and reasonable term of the criminal trial*, and *the right to liberty and security during the criminal proceedings*.

55 Article 218 of the Criminal Code.

56 Article 220 of the Criminal Code.

57 This amendment was unsuccessfully challenged by the Romanian government in front of the Constitutional Court.

58 See Report on the practice of courts and prosecutor's offices attached to them in investigating and resolving cases of crimes against sexual life with minor victims.

59 Article 1 paragraph 2 of the Code of Criminal Procedure.

60 Articles 2–13.

61 Volonciu and Uzlău, 2014, pp. 4–38.

62 There are cases, under the conditions expressly provided by law, in which the prosecutor may waive the exercise of the criminal action if, in relation to the concrete elements of the case, there is no public interest in achieving its object. In the cases expressly provided by law, the prosecutor shall initiate and exercise the criminal action after the introduction of the prior complaint of the injured person or after obtaining the authorization or notification of the competent body or after fulfilling another condition provided by law.

Furthermore, *the right to a defense* includes the following: the parties to the main proceedings shall have the right to defend themselves or to be assisted by a lawyer and the right to benefit from the time and facilities necessary for the preparation of the defense, the right to be informed immediately and before being heard regarding the act for which the criminal investigation is carried out and its legal classification, the right to be informed immediately of the act for which the criminal action against them was initiated and its legal classification, and the right to make no statement.[63]

The principle of respect for human dignity and privacy means that any person who is being prosecuted or tried shall be treated with respect for human dignity; respect for privacy, inviolability of the home, and secrecy of correspondence are guaranteed. In a democratic society, restriction on the exercise of these rights is permitted only in accordance with the law and if it is necessary.

Other principles regard the official language and the right to an interpreter as well as the application of the criminal procedural law in time and space to the acts performed and to the measures ordered on Romanian territory, with the exceptions provided by law. In criminal proceedings, criminal procedural law shall apply to the acts performed and the measures ordered, beginning from the moment of its entry into force until the moment of ending its force, except for the situations provided for in the transitional provisions.

3.2. Stages of criminal procedure

The stages of the criminal procedure correspond to the different functions. The judicial functions are exercised ex officio, unless, by law, it is otherwise provided for. As a general rule, in carrying out the same criminal trial, the exercise of a judicial function is incompatible with the exercise of another judicial function.

The criminal investigation is carried out by the prosecutor and the criminal investigation bodies, which collect the evidence necessary to ascertain whether there are grounds for prosecution.

During the phase of carrying out the criminal investigation, the function of disposition over the fundamental rights and freedoms of the person is exercised by the special appointed judge of rights and liberties. The judge appointed with attributions in this respect shall decide on the acts and measures within the criminal investigation that restrict the fundamental rights and freedoms of the person, except for in the situations provided for by law.

After completing the investigation, the prosecutor draws up the indictment (prosecution act) that is sent to court so that the judge of the preliminary chamber can rule on the legality of the act of summons and the evidence on which it is based as well as on the legality of the solutions of non-trial in accordance with the law.

After confirming the prosecution (indictment) act from legality standpoint, the actual criminal trial phase begins. This phase is carried out by the court with legally constituted panels.

63 Volonciu and Uzlău, 2014, pp. 4–38.

The Preliminary Chamber was subject to a great deal of debate in the doctrine and issued contradictory decisions in practice. The Preliminary Chamber was a novelty in our criminal procedure; thus, naturally, its features caused substantial debate.[64]

The object of the preliminary chamber procedure is the verification of the legality of the notification of the court as well as of the administration of the evidence or of the execution of the acts by the criminal investigation bodies.

Regarding the Preliminary Chamber proceedings, the Constitutional Court of Romania[65] ruled that the legislative solution contained in Article 345 paragraph (1) of the Code of Criminal Procedure, which does not allow the judge of the preliminary chamber, in resolving the requests and exceptions formulated or the exceptions raised ex officio, to administer other means of proof other than "any new documents presented," is unconstitutional.

Furthermore, upon request or ex officio, the judge of the preliminary chamber shall rule on the taking, maintenance, replacement, revocation, or termination of preventive measures. In cases in which a preventive measure has been ordered against the defendant, the judge of the preliminary chamber of the court made notification using the indictment act.

This provision was also challenged, and the Constitutional Court admitted the exception of unconstitutionality of the provisions of Article 348 paragraph (2) and found that the phrase "or, as the case may be, the judge of the preliminary chamber of the hierarchically superior court or the competent panel of the High Court of Cassation and Justice, invested with resolving the appeal" in their content was unconstitutional.

Other provisions that were challenged immediately upon adoption of the new code concern the procedure in the preliminary chamber, which previously had taken place in the council chamber without the participation of the parties and the prosecutor, and the judge decided on the requests or exceptions invoked under the same conditions.

Another provision that was challenged refers to the fact that any exceptions raised ex officio or the prosecutor's response to the exceptions raised were not communicated to the defendant. In practice, the person being trialed was deprived of hearing the possible exceptions raised ex officio or the prosecution's opinion of the exceptions raised by the parties or ex officio. Instead, all of the exceptions raised in the case were communicated to the prosecutor allow them to express their point of view.[66] The effect of this decision by the Constitutional Court was that the debates and the ruling in the preliminary chamber or on appeal, which account for nearly the entire procedure,

64 Șandru and Mareș, 2018; Stan, 2016; Voicu and Atasiei, 2014, p. 885; Zarafiu, 2017, p. 59.

65 Decision no. 802/2017, available at: https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_802_2017.pdf (Accessed: 05 March 2022).

66 Decision no. 641/2014, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/163600 (Accessed: 05 March 2022).

became subject to the general procedural rules, which respect the three principles of fairness of the procedure: orality, publicity, and adversarial proceedings.[67]

3.3. Possibilities for diversion

The prosecutor has the option to waive the criminal investigation when there is no public interest for its continuation.[68]

The waiver of criminal prosecution may be applied in the case of offenses for which the law provides for the penalty of a fine or imprisonment for a maximum of seven years. The prosecutor may waive the criminal prosecution when they find that there is no public interest in prosecuting.[69]

The public interest is analyzed in relation to the content of the deed and the concrete circumstances of committing the deed; the manner and means of committing the act; purpose pursued; the consequences produced or that could have been produced by committing the crime; the efforts of the criminal investigation bodies necessary for the development of the criminal process in relation to the gravity of the deed and to the time elapsed from the date of its commission; the procedural attitude of the injured person; the existence of a clear disproportion between the expenses that the criminal trial would entail and the gravity of the consequences produced or that could have been produced by committing the crime; when the perpetrator is known, the character of the suspect or the defendant, the conduct prior to the crime, the attitude of the suspect or defendant after the crime, and their effort to mitigate or reduce the consequences of the crime.

It is not possible to waive criminal prosecution for crimes that resulted in the death of the victim.

The prosecutor may, after consultation with the suspect or defendant, order that they perform one or more of the obligations under the law outlined below.

3.4. Significant changes to sentencing practices

According to Article 349 of the Code of Criminal Procedure, the court resolves the case brought before the court with the guarantee of respecting the rights of the procedural subjects and ensuring the administration of evidence for the complete clarification of the circumstances of the case to determine the truth in full compliance with the law.

The court can resolve the case only based on the evidence administered in the criminal investigation phase if the defendant requests this and fully acknowledges the facts retained in their charge and if the court considers that the evidence is sufficient to determine the truth and fair settlement of a case in which the criminal action concerns an offense punishable by life imprisonment.

67 Chiriță, no date; Decision 599/2014, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/163597 (Accessed: 05 March 2022).

68 Article 314 paragraph 1 letter "b" of the Code of Criminal Procedure (CoCP).

69 Article 318 CoCP.

Furthermore, the principles of orality, directness, and, contradictorily, publicity of the court hearing are enriched within the criminal procedure law.

Given the space limitations of this article, it is critical to highlight a change of significance importance. Before last year, the decisions ruled by the courts were issued in short (at the moment), and then after a period of time, those decisions were fully motivated, and these full decisions were sent to the parties. Practically speaking, the criminal sentence was enforced and executed before the parties (the convicted person, the injured party, the prosecutor, etc.) were informed of the reasoning behind the court's decision.

The Constitutional Court admitted the constitutional exception and ruled that the provisions in the Code of Criminal Procedure that allow the sentence to be enforced before publishing or communicating the reasoning behind the sentence were unconstitutional: "Therefore, the Court finds that the drafting of the judgment by which the case is settled by the first court, respectively of the judgment by which the court rules on the appeal (reasoning in fact and in law) after the ruling of the minute (solution) in question, 'within 30 days of the ruling' or after a period of time which may well exceed the said time limit, the person convicted shall be deprived of the guarantees of the performance of the act of justice, prejudice the right of access to court and the right to a trial fair. At the same time, the Court finds that the enforcement of a final judgment prior to its factual and legal reasons is contrary to the constitutional and conventional provisions on individual liberty and security of person and to those who uphold human dignity and justice as supreme values in the state of law."[70]

In this case, the provisions of the code were changed, and Article 406 of the Code of Criminal Procedure, in its present version, stipulates that the judgment must be drafted at the time of its delivery.

4. Main features of the execution of sanctions

4.1. General principles: The aim of penitentiary law

The execution of sentences and custodial measures is carried out in accordance with the provisions of the Criminal Code, the Code of Criminal Procedure, and Law no 254/2013,[71] bearing in mind that the purpose of the execution of sentences and educational measures exercising the deprivation of liberty is to prevent the commission of new crimes.

The execution of sentences and educational measures exercising the deprivation of liberty is aimed at forming an acceptable attitude toward the rule of law, the rules of social coexistence, and work to facilitate detainees' and inmates' reintegration into society.

70 Decision no. 233/2021, available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/242296 (Accessed: 05 March 2022).

71 Published in the Official Gazette 514 on August 14, 2013.

Regarding the execution of sanctions, the following principles are also taken into account: punishments and custodial measures are executed in conditions that ensure the respect of human dignity; subjecting any person serving a sentence or other measure of deprivation of liberty to torture, inhuman or degrading treatment, or other ill-treatment is forbidden; discrimination during the execution of sentences and custodial measures is prohibited; the exercise of the rights of detainees, except for those who have been prohibited according to the law, by the final conviction as well as those the non-exercise or restricted exercise of which results inherently from the deprivation of liberty or for reasons of maintaining security of detention.

According to Article 8 and 9 of Law no. 254/2013, one or more judges are appointed every year as designated judges for supervision of the deprivation of liberty.

4.2. The prison system

The penalties of life imprisonment and imprisonment are to be served in designated places called penitentiaries. The penitentiaries are established by a government decision, have legal personality, and are subordinate to the National Administration of Penitentiaries.

The penitentiary in which the convicted person executes their custodial sentence shall be established by the National Administration of Penitentiaries and should be located as close as possible to the convicted person's place of residence, considering the execution regime, the security measures to be taken, their identified social reintegration needs, their sex, and their age.[72]

The prison system also includes special penitentiaries: penitentiaries for young people, penitentiaries for women, and hospital penitentiaries.

4.3. The main characteristics of the regulation

The general conditions include rules related to the security of detention, the utilization of handcuffs and other restriction devices, and other rules with the purpose on ensuring the carrying out of the sentence and avoiding danger for the convicts, the personnel working in the penitentiary, and society.

For each convicted person, a certain regime for the execution of custodial sentences shall be established by the commission responsible for establishing, individualizing, and changing the regime of the execution of custodial sentences within the penitentiary, respecting fundamental human rights and the criteria set out by Article 39 of Law 254/2013. The regime of execution includes the set of rules underlying the execution of custodial sentences and is based on the progressive and regressive systems (the convicted persons passing from one regime to another under the conditions provided for by the present law).

72 Decision no. 15/2018 of the High Court of Cassation and Justice: "The competent court the place of detention is at the date of the application, regardless of whether the place of detention is represented by the initially established penitentiary or by the penitentiary established by the definitive or temporary transfer of the convicted person." Available at: https://www.iccj.ro/2018/09/17/decizia-nr-15-din-17-septembrie-2018/ (Accessed: 5 March 2022).

The regimes for the execution of custodial sentences are differentiated in relation to the degree of restriction of convicted persons' freedom of movement, the manner of granting rights and carrying out activities, and the conditions of detention.

There are four types of regimes for the execution of custodial sentences: a) Maximum security regime[73] – in the case of an imprisonment sentence of more than 13 years as well as for those who pose a risk to the security of the penitentiary b) Closed regime[74] – in the case of an imprisonment sentence of more than three but not exceeding 13 years as well as for detainees who are hospitalized in penitentiary -hospitals and the infirmaries c) The semi-open regime[75] – shall initially apply to persons sentenced to imprisonment of more than one but not exceeding three years d) The open regime[76] – initially applies to persons sentenced to imprisonment for a maximum of one year.

According to Article 42 of Law 254/2013, during the execution of their sentence, convicted young people are included in special educational programs as well as provided psychological and social assistance, depending on their age and personality.[77] These special programs provided in paragraph 1 are carried out by the staff of the education and psychosocial assistance services within the penitentiaries with the participation of probation counselors, volunteers, associations, and foundations as well as other representatives of civil society. When the convicted young people are transferred to an adult penitentiary, the education and psychosocial assistance needs of the convicted person are reassessed.

In addition to the penitentiary system, there is a system of educational centers for underage (juvenile) convicted persons. Generally, the principles mentioned above shall apply mutatis mutandis to the implementation of custodial educational measures depriving of liberty.

The execution of educational measures depriving of liberty is aimed at the reintegration into society of the interned persons and their accountability in regard to assuming their own actions and as well as preventing the commission of new crimes. The educational measures of deprivation of liberty are executed in conditions that do not restrict the exercise of the right to privacy more than is inherent in their execution.[78]

These sentences are enforced either in an educational center or in a detention center.

During the execution of the educational measures, the maintenance and development of the inmate's ties with the family and the community are ensured as is their

73 Article 36 of Law 254/2013.
74 Article 37.
75 Article 38.
76 Article 39.
77 For the purposes of this law, convicted persons who have not reached the age of 21 are considered young.
78 Article 135 of Law 254/2013.

involvement in recuperative approaches adapted to their psychosomatic particularities and personal development needs.

Imprisoned persons receive protection and assistance in educational, professional, psychological, social, medical, and physical terms, depending on age, sex, and personality and in the interest of personal development provided by specialized personnel.

4.4. Educational, reintegration, and resocialization tools

Chapter VII of Law 254/2013 regulates the educational activities, psychological and social assistance, school training, university education, and vocational training of convicted persons.[79]

A convicted person may be released on parole before the full execution of their custodial sentence if they meet the conditions provided for in Article 99 or Article 100 of the Criminal Code. The part of the sentence duration that is considered to have been executed based on the work performed and/or the school training and professional training is shorter than the period actually spent in jail.[80]

Convicted persons who are well behaved and who have made the necessary efforts in the work performed or in the activities of education; moral-religious, cultural, therapeutic, psychological counseling, and social assistance; and school and vocational training can be awarded certain rewards based on the procedure established by the decision of the Director General of the National Administration of Penitentiaries.

Moreover, in the case of violation of the rules of the detention place, certain disciplinary sanctions can be imposed following the procedure regulated by law.

Social reintegration activities and programs in the case of underage convicted persons is destined for their reintegration and social responsibility. The educational, psychological, and social assistance specific to educational and detention centers is a structured set of programs and activities that offers the inmate the opportunity to acquire skills that lead to the adoption of constructive, autonomous, and responsible behavior in the community.

Educational, psychological, and social assistance includes the following components: school training, vocational guidance and training, educational activities, psychological and social assistance, moral-religious, individual, and group activities, as well as activities to maintain an active lifestyle.

Furthermore, the educational center, respectively the detention center, submits a personalized social report to the County Agency for Employment of the administrative-territorial unit in which the interned person has their domicile for a person who has three months remaining until the fulfillment of the term, at which point they acquire a vocation and can be released on probation.

79 Articles 89–93 of Law 254/2013.

80 As a number of convicts have published so called scientific papers and unjustifiably obtained the benefit of an early release, the legislator had to intervene, and Article 96 index 1 was introduced, regulating the procedure for the elaboration of published scientific papers or patented inventions.

Law 252/2013 on the organization and operation of the probation system must also be mentioned here.[81] The main duties of the probation counselors are set by Article 32 of Law 252/2013: perform the evaluation of the defendants, of the minors in the execution of an educational measure, and of the supervised persons ex officio or at the request of the judicial bodies according to the law; assist the court in the process of individualization of punishments and educational measures; coordinate the process of supervising the observance of the measures and the execution of the obligations established in the task of the supervised persons ordered by the court; coordinate the process of supervising the observance of one of the following non-custodial educational measures: civic training internship, supervision, weekend recording, and daily assistance; and coordinate the execution of a fine through performing unpaid work for the benefit of the community.

5. Comparison with relevant EU documents and main international trends

European legislation and practice influenced the evolution of the legislative framework in Romania. Particularly in regard to Criminal Law, the jurisprudence of the ECHR and, later, the process of Romania's integration of into the European Union substantially impacted both substantive criminal law provisions and criminal procedure regulations.

For the purpose of the present paper, I chose to present three such aspects, as outlined below.

First, I must remind the reader that the process of harmonization with European documents and jurisprudence was a sinuous process with many obstacles, particularly those of a subjective nature. Strictly speaking, from the perspective of national sovereignty, the reluctance was understandably, but in retrospect, the progress of our penal legislation and procedure can be seen. Nevertheless, the Romanian experience did show that even European practice and regulations could be turned around and used to undermine the rule of law.

5.1. Extended confiscation

Extended confiscation is among the penal sanctions under the category of safety measures.[82] A new institution for the Romanian criminal law system, namely the institution of extended confiscation, was introduced by Law no. 63/2012 for the amendment and completion of the Criminal Code of Romania and Law no. 286/2009 on the Criminal Code, transposing the Decision Council Framework Decision 2005/212 / JHA of February 24, 2005, on confiscation of products, tools, and goods related to the crime, as well as in Article 118 index 2 of the Criminal Code of 1968 and Article 112 index1 of Law no. 286/2009 on the Criminal Code.

81 Official Gazette 512 from August 14, 2013.
82 Hotca, 2012; Streteanu, 2012; Gorunescu and Toader, 2012.

These provisions were challenged as being incompatible with the Constitution of Romania based on decisions by the Constitutional Court on the texts contained in the previous Criminal Code[83] as well as on the texts contained in the Criminal Law Code in force[84]. These decisions stated that these legal provisions are compliant with the Fundamental Law. However, the Constitutional Court ruled that the extended confiscation security measure in the Criminal Code does not apply to property (assets) acquired before the entry into force of Law no. 63/2012.

Recently, in 2020, the next step was Law no. 228/2020,[85] which was adopted due to the need to transpose Directive 2014/42/EU of the European Parliament and of the Council of April 3, 2014, on freezing and confiscating instruments and proceeds of crime committed in the European Union. The main changes were as follows: the condition of a sentence of four years of imprisonment; extended confiscation may also be ordered on assets transferred to third parties if those parties knew or should have known that the purpose of the transfer was to avoid confiscation; and in the case of assets that may be subject to special or extended confiscation, the prosecutor shall take precautionary measures to avoid concealment, destruction, alienation, or evasion of the pursuit of such property.

5.2. The problem of the ratio of the prison population

In its jurisprudence, the ECHR sanctioned Romania for unsuitable conditions of detention, the reference moment being represented by the pilot decision in "Rezmiveş and others case vs. Romania."[86]

To respond to this decision and to address the problem of overcrowding in the penitentiary system, Law no. 169 of July 14, 2017, was adopted for the purpose of the amendment and completion of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings.[87]

The newly introduced Article 55 index 1 regulated the "Compensation in case of improper accommodation"[88]: (1) The calculation of the sentence actually executed shall take into account, regardless of the regime of execution of the sentence, as a compensatory measure, the execution of the sentence in improper conditions, in which case, for each period of 30 days executed in improper conditions, even if they are not consecutive, six additional days of the sentence applied shall be considered executed.

Intense debate surrounded this solution, as a significant number of convicted persons were released, and some did commit offenses after being released from

83 Decision no. 356/2014, published in the Official Gazette no. 691 on September 22, 2014; for details, please see Hotca, 2015.

84 Decision no. 11/2015, Published in the Official Gazette no. 102 on February 9, 2015.

85 Law no. 228 of November 2, 2020, published in the Official Gazette no. 1019 on November 2, 2020.

86 Pronounced by the ECHR on April 27, 2017; available at: https://www.juridice.ro/507211/cedo-condamnare-impotriva-romaniei-25-aprilie-201/7-decizia-pilot-ref-situatia-din-penitenciare-prof-univ-dr-iulia-motoc-membru-completul-de-judecata.html (Accessed: 5 March 2022).

87 Published in the Official Gazette no. 571 on July 18, 2017.

88 Law no. 169 of July 14, 2017

prison.[89] The essence of the problem was not solved: new structures to detain convicted persons were never even planned to be build, nor were specific, targeted measures to counter recidivism taken.

Later, in its jurisprudence, the ECHR ruled that the compensatory remedy under Romanian law provided adequate and appropriate redress for unsatisfactory prison conditions (between July 2012 and December 2019).[90] Law no 169/2017 was repealed by Law 240/2019.

5.3. Dispute of Constitutional Court – National courts – EU law

To understand the implications of such disputes as those regarding criminal justice in Romania, two decisions of the Constitutional Court of Romania must first be considered.[91]

Decision no. 51 of February 16, 2016, regarding the exception of unconstitutionality of the provisions of Article 142 paragraph (1) from the Code of Criminal Procedure[92] states the following: The court *"does admit the exception of unconstitutionality (...) and finds that the expression 'or by other specialized bodies of the state' from the provisions of article 142 paragraph (1) from the Criminal Procedure Code is unconstitutional."*

Decision no. 302 of May 4, 2017, regarding the exception of unconstitutionality of the provisions of Article 281 paragraph (1) lit. b) of the Code of Criminal Procedure[93] *"Admits the exception of unconstitutionality raised by (...) and notes that the legislative solution contained in the provisions of article 281 paragraph (1) lit. b) of the Code of criminal procedure, which does not regulate in the category of absolute nullities the violation of the provisions regarding the material competence and according to the person's quality of the criminal investigation body, is unconstitutional."*

Furthermore, the Constitutional Court ruled by decision no. 26/2019[94] that there is legal conflict of constitutional nature between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, the Parliament of Romania,

89 During the period of October 19, 2017, to June 6, 2019, a total of 19,849 persons were released based on compensatory appeal. Regarding recidivism, 39 rapists out of the total of 566 detainees convicted of rape who were released based on the compensatory appeal reoffended; 12 detainees convicted of aggravated murder, seven detainees convicted of child trafficking, and 186 convicted of robbery reoffended. Moreover, during this period, a total of 1,299 persons were re-arrested; Grigore, 2019.

90 Motions No. 14224/15 and 50977/15, Gheorghe-Marius Dîrjan against Romania and Marian-Valentin Ștefan v. Romania, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202610%22] (Accessed: 5 March 2022).

91 After the enforcement of the new codes, the Constitutional Court of Romania became an actual "negative" legislator, admitting over 70 unconstitutionality exceptions against various provisions on the nature of criminal law and criminal procedure.

92 Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/176576 (Accessed: 5 March 2022).

93 Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/191291 (Accessed: 5 March 2022).

94 Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/211779 (Accessed 5 March 2022).

the High Court of Cassation and Justice and the other courts, mainly because of the involvment of secret (inteligence) services in the criminal investigation, without having the legal compentence and atribution as regarding criminal investigation and prosecution.

Because of these decisions, recordings made by the Romanian Intelligence Service were annulled as evidence and were removed from the respective files, especially in cases in which the mandate to create those recordings was enforced by the technical service of the Romanian Intelligence Service and not by the police.

According to Article 147 paragraph (4) of the Constitution, "the decisions of the Constitutional Court are and remain generally binding" – they are mandatory for the general public and courts, and when they are not observed, the magistrates can be subject to disciplinary action.

In this context, several notifications were sent to the European Court of Justice by a number of judges from Romania, asking, essentially, how to position themselves in relation to the decisions of the Constitutional Court and how the dispute can be resolved.

The ECJ ruled in connected cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19[95] in the direction of reassuring the supremacy of EU law[96], affirming the necessity of an independent constitutional court and that EU law must be interpreted as precluding a national rule or practice according to which national courts governed by common law are bound by the decisions of the national constitutional court independent of that constitutional court.[97]

The dispute has not been resolved entirely at this time, as the Constitutional Court issued a press communicate[98] re-affirming the generally binding nature of its decisions.

In my opinion, the solution would be that the High Court of Cassation and Justice should issue a decision regarding the interpretation of the law, resolving the dispute. Regardless, the decisions in the casefiles pending trial in lower courts will ultimately be challenged in the highest court; thus, resolving the dispute will be within its competence.

95 Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0357 2117 79 (Accessed: 5 March 2022).

96 Patrăuș, 2021, p. 76.

97 "Articles 2 and 19 (1), second subparagraph, TEU, and Decision 2006/928 must be interpreted as not precluding national rules or practice according to which decisions of the national constitutional court are binding on the courts of common law, provided that that national law guarantees the independence of the said constitutional court in particular from the legislative and executive powers as required by those provisions. Instead, those provisions of the EU Treaty and that decision must be interpreted as precluding a national regulation according to which any failure to comply with the decisions of the national constitutional court by ordinary national courts is liable to disciplinary action." "The principle of the supremacy of European Union law must be interpreted as precluding a national rule or practice according to which national courts governed by common law are bound by the decisions of the national constitutional court and may not, therefore for the risk of disciplinary ex officio the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to the second subparagraph of Article 19 (1) TEU, Article 325 (1) TFEU or Decision 2006/928".

98 Available at: https://www.ccr.ro/2021/12/23/ (Accessed 5 March 2022).

6. Conclusion

Criminal Justice in Romania took certain important steps toward modern justice. The pressure from European practices, bodies, and regulations was constant and pushed politicians to initiate reforms. The enforcement of the new codes was a major step; however, the process of modernizing criminal justice should continue.

In particular, toward implementing practical solutions there is an increase of using new technologies in administering criminal justice, in investigation, and in research and documentation, in the process of judgement and executing the sentences. However, technology works in our favor and is not a replacement for the human factor. Justice should remain human-centered and dictated by human decision making.

Romania has many similarities with the other countries in Central and Eastern Europe, most being self-evident as they arise from the "soviet era." State-centered and public property-oriented codes are now a modern instrument of criminal justice. Carrying out this process is not easy.

One of the first issues that comes to mind when speaking about criminal justice in Romania is the indecision caused by the political factor. For example, we ratified the ECHR in 1994, and regarding the criminal justice aspects, we began observing the regulations stipulated in the ECHR in 2003; the indecision regarding protecting minors and family relations and that regarding properly regulating duty offenses since the aforementioned decision of unconstitutionality in 2016 (six years before the writing of this article). Another peculiar aspect is the fact that the Institute of Criminology was reinstated only a few years ago (in 2018).

Moreover, regarding the criminal procedure, although it is faster than 10 years ago, criminal investigation and criminal trials often exceeding a reasonable timeframe.[99]

I cannot conclude this paper without reminding the reader of the situation of minors, who are subject to several offenses – from sexual offenses to trafficking and even violence against a family member. A recent report by the Superior Council of Magistrates acknowledged the problem; however, there remains more to be done.

Essentially, criminal justice lacks a long-term policy vision; every government wants to shape Criminal Law and Criminal Procedure according to its own interests, and the counterbalance among the power of the states does not yet function efficiently.

99 Gherasim, 2020.

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| Chapter 6 |

Serbia: Criminal Law of the Republic of Serbia

Tatjana BUGARSKI

ABSTRACT

The criminal legislation of the Republic of Serbia has a legal tradition of nearly a century. Moving through its development, today, it is at the level of modern criminal justice systems, which is largely in line with generally accepted international legal standards that ensure effective legislation while protecting and ensuring basic human rights. Intensive reforms of criminal legislation in the Republic of Serbia started at the beginning of the 21st century. Although legislative interventions in the field of criminal law have been highly intensive both quantitatively and qualitatively over the last two decades, it must be stated that the same trend is noticeable in other European countries, even those that traditionally have stable criminal legislation. The development of criminal legislation is, on the one hand, conditioned by the harmonization of criminal legislation with the law and standards of the European Union, while, on the other hand, the legislature is guided by other reasons because regardless of how much one strives for stable criminal legislation, one cannot deny the dynamic character of crime, the intensity of which is accompanied by social, political, economic, and other changes that have accelerated in the modern world. The paper presents an overview of the criminal legislation of the Republic of Serbia regarding the following issues: a brief history of its development, the primary legal sources, relevant institutions, and a comparison with relevant EU documents and key international trends.

KEYWORDS

Republic of Serbia, relevant institutions of criminal justice, criminal law. criminal procedure law, execution of criminal sanctions

1. Brief history of development

Criminal law in medieval Serbia had the general characteristics of the European law of the time.[1] Through customary and particular law, it developed from a private to a state reaction.

The first sources of criminal law in Serbia are sporadically found in legal monuments of the 12th and 13th centuries. The first and most important written source of

1 On the development of criminal law in Serbia, see Stojanović, 2020, pp. 31–37.

Bugarski, T. (2022) 'Serbia: Criminal Law of the Republic of Serbia' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 157–204. https://doi.org/10.54171/2022.evcs.cls_6

Serbian medieval law is Dušan's Code from 1349 (amended in 1354), which contained a large number of criminal law provisions according to which crime was considered a public matter and not a private one. After Serbia fell under Turkish rule in 1459, all of the laws that were valid in the territory of Serbia up to that point ceased to apply, and Sharia law was applied, while only remnants of medieval Serbian criminal law were preserved through customs.

At the beginning of the 19th century, during the First Serbian Uprising (1804), the Code of Proteus Mateja Nenadović (1804) was passed, which incorporated certain criminal law provisions, and in 1807, Karađorđe's Criminal Code was passed. In the period up to 1860, there was no single regulation that regulated the matter of criminal law, but criminal law provisions were contained in various laws and bylaws, the most important of which is the Criminal Code for Police Offenses from 1850.

The first modern criminal law was passed in 1860, the Criminal Code for the Principality of Serbia (amended several times), which was created based on the model of the Prussian Criminal Code from 1851. Sociopolitical and state changes conditioned the adoption of the new Criminal Code for the Kingdom of Serbs, Croats, and Slovenes in 1929. Prior to the creation of the Kingdom of Serbs, Croats, and Slovenes, there had been six legal areas, including criminal law.

During the Second World War, several regulations were passed in the liberated territories, which initiated the construction of a new legal order. The most important written source of criminal law from that period was the Decree on Military Courts (1944). In the period after the Second World War, the Criminal Code of 1947 and the Criminal Code of the Federal People's Republic of Yugoslavia of 1951 were adopted (both were amended several times). The Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) from 1974 provided for the division of legislative competence between the federation and federal units; thus, nine criminal laws entered into force on July 1, 1977. Along with some innovations, criminal codes have taken over the solutions of the amended 1951 Criminal Code. The Criminal Code in force in Serbia was amended several times until the enactment of the current Criminal Code in 2005, which entered into force on January 1, 2006.

Regarding criminal procedural legislation in Serbia, the first integral codification was passed in the 19th century. The Code of Criminal Procedure of 1865 was the first code of its kind, after which seven other codes were passed to date[2].

The historical development of criminal procedure legislation has been dynamic. It moved from the organization of criminal proceedings in the spirit of the inquisitorial procedure (1865), through the modern procedure of the liberal state (1929), a repressive procedure (1948), and a mixed-type procedure (1976), all of which were largely developed under the influence of German-Austrian criminal procedure. Since the period after the Second World War, these have been strict laws, which have been

2 The Code of Criminal Procedure 1929, the Code of Criminal Procedure 1948, the Code of Criminal Procedure 1953, the Code of Criminal Procedure 1976, the Criminal Procedure Code 2001, the Criminal Procedure Code 2006, and the Criminal Procedure Code 2011.

amended several times but without modification of the basic conceptual mechanisms. Their concept was accompanied by the Criminal Procedure Code from 2001, which represents the beginning of the reform of criminal procedural legislation.

This Code has been amended a significant number of times, which is not a specificity of procedural legislation. The most extensive changes that significantly altered the character of the previous positive criminal procedure were made in 2009. The greatest specificity in the historical development was the adoption of the completely new Criminal Procedure Code in 2006, the implementation of which was largely postponed for a year after its adoption and then again for another longer period until it was repealed entirely.

The main characteristics of this law were the introduction of public prosecutorial investigation, which, until that time, had traditionally been the responsibility of the investigating judge (with the exception of the CPC of 1948), and procedural mechanisms aimed at creating conditions for faster and more efficient criminal proceedings, the number of alternatives to detention, and other aspects. After an extremely long vacasio legis, which, except for a few provisions, lasted for a year, the implementation of this law was postponed on two occasions, after which a decision was made to repeal it with the explanation that the conditions for its implementation were not met (primarily due to the fact that the Public Prosecutor's Office was not ready to take over the investigation either in technically or in terms of personnel).

Finally, the new Criminal Procedure Code was adopted in 2011, which introduced radical changes in criminal procedure compared to traditional codes. These changes are reflected in the introduction of a modified accusatory criminal procedure as well as specific elements of the party model. The adoption of this Code was accompanied by an intense reaction and criticism of new legal solutions not only by Serbian legal theory but also by numerous experts in practice. The concept of the new Code was criticized particularly because it eliminated the principle of truth from criminal proceedings, entrusted the investigation to the public prosecutor, and introduced elements of parallel investigation, enabling any out-of-court evidence to be easily and almost routinely used directly at the main trial. The theory went so far as to point out the unconstitutionality of certain provisions.

However, this Code entered into force on the eighth day from the day of its publication in the "Official Gazette of the Republic of Serbia," though the beginning of its application was postponed. Its full implementation began on October 1, 2013, excepting portions regarding criminal proceedings. For those, a special law stipulates that the public prosecutor's office of special jurisdiction will act. Hence, the implementation began on January 15, 2012.

Criminal executive law, as part of the criminal law system of Serbia, began its independent development after the Second World War with the enactment of the Law on the Execution of Sentences 1948, the Law on the Execution of Sentences, Security Measures and Educational and Corrective Measures of 1951, the Law on the Execution of Criminal Sanctions of 1977, and the Law on the Execution of Criminal Sanctions of 2005.

The current Law on the Execution of Criminal Sanctions was passed in 2014.

2. Main (legal) sources (legislation in force)

The criminal substantive law of the Republic of Serbia is regulated by the *Criminal Code* (CC) from 2005, which entered into force on January 1, 2006.[3] The Code brought novelties among the criminal law regulations, yet it also represented a certain continuity in relation to the previous criminal legislation. However, this Code has been amended nine times thus far, and the work of the Working Group for Amendments to the Criminal Code, which was formed in 2021, is underway. Therefore, it is almost certain that, although the work of this Working Group has not yet been completed, the 10th amendment to the Code will follow.

Having in mind the quantity and especially the quality of changes in the law (among which, for example, the changes from 2012 represented a discontinuity compared to the changes from 2009[4]), the period since the adoption of the current Criminal Code has been very turbulent, which is highly atypical for criminal legislation and its nature.

Criminal law in Serbia, which has been subject to frequent changes and additions, can be said to be unstable compared to previous decades, when this was one of the most stable branches of law. The reasons for intensive reform efforts are both substantive and formal in nature. They include new forms of crime; overall social, political and economic changes as well as the need to eliminate inaccuracies and omissions that are, as a rule, the result of changes in the law over a very short period of time; and harmonization of criminal legislation with the law and standards of the European Union and the relevant conventions of the Council of Europe, given that Serbia has undertaken certain obligations arising from ratified international treaties, membership in the Council of Europe, and EU requirements as part of the accession process and its candidate status, which also apply to criminal law.[5]

Amendments to the Criminal Code covered both the general and special parts, and because criminal acts are prescribed by other laws, these laws are subject to frequent changes as well. The reform of a special crime is primarily defined by several negative characteristics: prescribing heavier penalties for a large number of crimes; pronounced criminalization, namely, prescribing new crimes; the absence of both partial (narrowing and specifying the criminal zone) and complete decriminalization; and violation of the unity between the provisions of the general and special parts of criminal law.[6] In general, criminal law reforms have moved in two general directions: expanding the incrimination zone and tightening penalties.

One of the major changes in criminal law is that concerning the most severe punishment. Namely, until 2019, the most severe prescribed prison sentence in Serbia

3 *Official Gazette of RS*, No. 85/2005, 88/2005 – amended, 107/2005 – amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, and 35/2019.
4 See Stojanović, 2013.
5 Ibid., p. 120.
6 See Deli, 2014.

was a sentence of 30 to 40 years. It was prescribed instead of the death penalty for the most serious crimes and was not often imposed in practice. Bearing in mind that it could be pronounced only for a perpetrator who had turned 21 at the time of the commission of the crime, it is to be expected that a certain number of the convicted would serve this sentence for the rest of their lives. However, in 2019, life imprisonment was introduced in Serbia as a replacement for this sentence for the most serious crimes and the most serious forms of crime in addition to regular imprisonment. This sentence cannot be imposed on a person who has not reached the age of 21 at the time of the commission of the criminal offense.

The *Criminal Procedure Code (CPC)*[7] is the main source of criminal procedural law in the Republic of Serbia and has been changed several times thus far; in December 2021, a new Working Group was formed to amend the Criminal Procedure Code to harmonize it with the EU acquis. The Code regulates the rules of criminal procedure (both general and special criminal procedures) for the trial of adult perpetrators of criminal offenses. Its goal is not to convict anyone who is innocent but, rather, to convict perpetrators by applying the appropriate sanction under the conditions prescribed by substantive criminal law. In addition, the CPC determines the rules on conditional release, rehabilitation, termination of security measures and legal consequences of conviction, exercising the rights of persons deprived of their liberty and unjustly convicted, confiscation of property, resolving property claims, and issuing arrest warrants.

The *Law on Juvenile Criminal Offenders and the Criminal Protection of Juveniles*[8] contains provisions that apply to juvenile perpetrators of criminal offenses as well as provisions related to substantive criminal law, competent authorities for enforcement, criminal proceedings, and execution of criminal sanctions against these perpetrators of criminal offenses. The provisions of this Law accordingly apply to adults who are tried for criminal offenses they committed as minors (when the conditions provided by law are met) as well as to persons who committed the respective criminal offense as adults. The law also contains special provisions on the protection of children and minors as victims in criminal proceedings.

Along with the basic sources, there are additional sources of criminal procedural law (termed secondary criminal procedural legislation), which include laws relating to certain criminal procedural entities such as the court, public prosecutor, and defense counsel. These include the Law on the Organization of Courts, the Law on Judges, the Law on the High Judicial Council, the Law on the State Council of Prosecutors, the Law on Seats and Areas of Courts and Public Prosecutor's Offices, the Law on Advocacy, and so on. In addition, secondary criminal procedural legislation includes sources that regulate important issues related to the conduct of criminal proceedings, such as the Law on Official Use of Languages and Scripts; the Law on International Legal

7 *Official Gazette of RS*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – decision of Constitutional Court and 62/2021 – decision of Constitutional Court.
8 *Official Gazette of RS*, No. 85/2005.

Assistance in Criminal Matters; the Law on Cooperation with International Criminal Courts; the Law on Organization and Competences of State Bodies in War Crimes Proceedings; the Law on Organization and Competences of State Bodies for Combating High-Tech Crime; the Law on Organization and Competences of State Bodies in Combating Organized Crime, Terrorism, and Corruption; the Law on Programs for the Protection of Participants in Criminal Procedures; and the Law on Police.

The procedure for the execution of criminal sanctions is regulated by the *Law on the Execution of Criminal Sanctions (LECS)*.[9] This law regulates the execution procedure for criminal sanctions against adults, the rights and obligations of persons against whom criminal sanctions are executed, the organization of the Administration for Execution of Criminal Sanctions, supervision of its operations, execution of imposed sanctions for economic and misdemeanor crimes, confiscation of criminal proceedings, and the application of detention measures. The provisions of this Law are applied in criminal sanctions against the juvenile execution procedure as well as in the execution procedure of imprisonment imposed for misdemeanors unless otherwise determined by a special law.

Unlike certain areas of criminal law that can be regulated only by law, the execution of a prison sentence is regulated by a large number of regulations of different legal force. In addition to the law in the field of the execution of imprisonment, bylaws regulating the area of imprisonment execution are important, such as the Rulebook on Treatment, Treatment Programs, Classification, and Subsequent Classification of Convicts; the Rulebook on Sending Convicts, Misdemeanors, and Detainees to Prisons for the Execution of Criminal Sanctions; the Rulebook on the Work of Convicted Persons; the Rulebook on Clothing, Footwear, Underwear, and Bedding of Convicted Persons; the Rulebook on House Rules of Penitentiaries and District Prisons; the Rulebook on Measures to Maintain Order and Security in Penitentiaries; the Rulebook on Disciplinary Procedure against Convicted Persons; and the Decree on the Establishment of Institutions for the Execution of Criminal Sanctions in the Republic of Serbia. The Law of Enforcement of the Prison Sentence for Criminal Offenses of Organized Crime[10] regulates the execution procedure of imprisonment for criminal offenses that, in terms of the Law on Organization and Competences of State Bodies in Suppressing Organized Crime, are considered criminal acts of organized crime; this law also regulates the organization and competence of state bodies in sentence executions, the position of convicts, and supervision over imprisonment execution.

Under the conditions provided by this Law, in ti, its provisions shall also apply to the execution of a prison sentence for the following: a) the criminal offense of terrorism referred to in Article 312 of the Criminal Code and the criminal offense of international terrorism referred to in Article 391 of the Criminal Code b) criminal offenses under Article 370 to 384 and Article 385 and 386 of the Criminal Code c) grave breaches of international humanitarian law committed in the territory of the former

9 *Official Gazette of RS*, No. 55/2014, 35/2019.
10 *Official Gazette of RS* No. 72/09, 101/2010.

Yugoslavia since January 1, 1991, as set out in the Statute of the International Criminal Tribunal for the Former Yugoslavia d) the criminal offense of assistance to the perpetrator after the commission of the criminal offense referred to in Article 333 of the Criminal Code if it was committed in connection with the criminal offenses referred to in items 2) and 3) of this paragraph (in Article 1).

For the execution of the sentence of imprisonment for criminal offenses referred to in Article 1, Paragraph 1 and 2 of this Law, a special department for serving a prison sentence for criminal offenses of organized crime shall be established in a closed penitentiary-correctional institution with special security (hereinafter: the Special Department). For adults who are sentenced to imprisonment for criminal offenses under Article 1 Paragraph 1 and 2 of this Law, the security measure of compulsory psychiatric treatment and custody in a health institution, compulsory treatment of alcoholics and drug addicts, and treatment during the execution of a prison sentence and special rooms under supervision are provided in the Special Prison Hospital, in Article 2.

3. Relevant institutions

3.1. Court of law

According to the principle of division of power into legislative, executive, and judicial power over the territory of the Republic of Serbia, judicial power is a special and unique branch of power exercised by courts.

Courts are autonomous and independent state bodies that exercise judicial power on the basis of the Constitution, laws and other general acts when provided by law, generally accepted rules of international law, and ratified international treaties.

Judicial power in the Republic of Serbia is vested in courts of general and special jurisdiction[11] the establishment, organization, jurisdiction, and composition of which are regulated by law. Temporary, indirect, or extraordinary courts are prohibited by the Constitution[12]. Within the courts of general jurisdiction, there are criminal departments in which criminal matters are tried. The function of the trial is performed by the court, and it includes conducting criminal proceedings and adjudicating criminal matters, provided that it does not extend to the area of execution of criminal sanctions because this area is within the domain of special administrative bodies. Exceptionally, courts may engage in some interventions in the field of executing criminal sanctions. For example, the court supervises the implementation of security measures of mandatory psychiatric treatment and custody in health institutions.

In the Republic of Serbia, judicial power in criminal matters is entrusted to courts of general jurisdiction.

11 Courts of special jurisdiction are commercial courts, the Commercial Appellate Court, minor offense courts, the High Minor Offenses Court, and the Administrative Court.

12 Article 143 Paragraph 3. *Official Gazette of RS*, No. 98/2006.

There are four types of courts that are competent in criminal matters:

1. Basic courts, which are courts of a lower rank[13], established for the territory of a town or one or several municipalities by the Law on the Seats and Territorial Jurisdictions of Courts and Public Prosecutor's Offices[14]
2. High courts, which are courts of a higher rank, established for the territory of one or several basic courts by the Law on the Seats and Territorial Jurisdictions of Courts and Public Prosecutor's Offices
3. Appellate courts, which are established for the territory of several high courts; There are four appellate courts: Novi Sad, Belgrade, Kragujevac, and Niš
4. The Supreme Court of Cassation, which is the court of highest instance in the Republic of Serbia, with its seat in Belgrade

Rules on the substantive jurisdiction of courts in criminal procedure are contained in the Law on the Organization of Courts (LOC).[15]

Basic courts adjudicate in *the first instance* in connection with criminal offenses that are punishable, as the principal penalty, by a fine or imprisonment of up to 10 years unless some such offenses fall under the jurisdiction of another court. They also decide on requests to suspend a security measure or legal consequences of the conviction for criminal offenses under its competence[16].

A *high court* in *the first instance*

1. adjudicates in connection with criminal offenses punishable by imprisonment of more than 10 years as the principal penalty;
2. adjudicates in connection with criminal offenses against the Army of Serbia; disclosure of state secrets; incitement to change of constitutional order by use of force; provoking national, racial, and religious hatred and intolerance; violation of territorial sovereignty; conspiracy for anti-constitutional activity; organization and incitement of genocide and war crimes; damaging the reputation of the Republic of Serbia; damaging the reputation of a foreign state or an international organization; money laundering; disclosure of official secrets; violation of law by judges, public prosecutors, or their deputies; endangerment of air traffic safety; murder in the heat of passion; rape; copulation with a powerless person; copulation by abuse of authority; abduction; trafficking minors for the purpose of adoption; violent conduct at sports

13 The division of courts in the first instance into courts of lower and higher rank was carried out according to the gravity of criminal offenses. In the Republic of Serbia, within the courts of the first instance, the basic courts are the courts of lower rank, and the higher courts are the courts of higher rank.

14 *Official Gazette of RS*, No. 101/2013.

15 *Official Gazette of RS*, Nos. 116/2008, 104/2009, 101/2010, 31/2011 – other Law, 78/2011 – other Law, 101/2011, 101/2013, 106/2015, 40/2015 – other Law, 13/2016, 108/2016, 113/2017, 65/2018- Decision of Constitutional Court of RS, 87/2018, and 88/2018- Decision of Constitutional Court of RS.

16 Article 22 Paragraph 1 LOC.

events; accepting bribes; abuse of the position of the responsible person[17] and criminal offenses for which a special law determines the jurisdiction of the higher court; and abuse in public procurement[18];

3. adjudicates in juvenile criminal proceedings[19].

Moreover, a high court acts as *second instance,* deciding on appeals against decisions taken by basic courts 1. on imposing measures to secure the presence of defendants, 2. for criminal offenses punishable by a fine and imprisonment for up to five years[20].

In terms of Article 24 LOC, appellate courts decide on appeals against a) decisions of high courts; b) decisions of basic courts in criminal proceedings unless under the jurisdiction of a high court to decide on the appeal concerned.

As for the Jurisdiction of the Supreme Court of Cassation, the Law differs for trial jurisdiction[21] and jurisdiction outside the trial[22]. The Supreme Court of Cassation decides on extraordinary legal remedies filed against the Republic of Serbia's court decisions and in other matters set forth by law. Furthermore, the Supreme Court of Cassation shall decide on conflicts of jurisdiction between courts if this does not fall under the jurisdiction of any other court as well as on court jurisdiction transfer to facilitate proceedings or due to some other important reasons[23]. The Supreme Court of Cassation determines general legal views to ensure uniform application of the law by courts, reviews the application of law and other regulations as well as the work of courts, appoints judges of the Constitutional Court, provides opinions on candidates for the President of the Supreme Court of Cassation, and exercises other competences set forth by law[24].

In addition to the rules in LOC and according to the provisions of special organizational laws, the jurisdiction of the High Court in Belgrade, specifically, some of its departments, to judge in the first instance for the territory of the Republic of Serbia has been established: a) Special Department for organized crime, terrorism, and other particularly serious crimes in terms of the Law on the Organization and Competence of State Authorities for Suppressing Organized crime, Terrorism, and Corruption[25]; b) Special Department for war crimes in terms of the Law on the Organization and Competence of the Government Authorities in War Crimes Proceedings[26]; c) Special

17 Article 234 Paragraph 3 of the Criminal Code.
18 Article 234a Paragraph 3 of the Criminal Code.
19 Article 23 Paragraph 1 LOC.
20 Article 23 Paragraph 2 LOC.
21 Article 30.
22 Article 31.
23 Article 30.
24 Article 31.
25 *Official Gazette of RS*, No. 94/2016, and 87/2018 – other Law.
26 *Official Gazette of RS*, No. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 – other Law, and 6/2015.

Department for cybercrime in terms of the Law on the Organization and Competence of Government Authorities Combating Cyber Crime[27].

Moreover, military departments have been established in the High Court in Novi Sad, Belgrade, and Niš. They are competent to try such crimes, which were previously under the jurisdiction of military courts. That aligns with the Law on taking over the jurisdiction of military courts, military prosecutor's offices, and the military attorney's office.[28]

Finally, special departments for the suppression of corruption have been formed at the higher courts in Novi Sad, Belgrade, Kraljevo, and Niš in terms of the Law on Organization and Competence of State Authorities in the Suppression of Organized Crime, Terrorism, and Corruption.

3.2. Public Prosecutor's Office

The Public Prosecutor's Office of the Republic of Serbia has a hierarchical organizational structure, with the Republic Public Prosecutor's Office based in Belgrade at the top.

Lower public prosecutor's offices include the following: appellate public prosecutor's offices (Belgrade, Nis, Novi Sad, and Kragujevac), higher public prosecutor's offices, basic public prosecutor's offices, and public prosecutor's offices with special competencies (Prosecutor's Office for Organized Crime and Prosecutor's Office for War Crimes). The substantive and territorial jurisdiction of public prosecutor's offices corresponds to the substantive and territorial jurisdiction of courts, except in the case of the Republic Public Prosecutor's Office (RJT) and special jurisdiction prosecutor's offices established for the territory of the Republic of Serbia.

In addition, there are forms of specialization of public prosecutors. For high-tech crime, the Higher Public Prosecutor's Office in Belgrade is responsible for the entire territory of the Republic. Republic Public Prosecutor's Office military departments have been established within the Higher Public Prosecutor's Offices in Belgrade, Novi Sad, and Niš. Moreover, special departments for combating corruption have been established within Public Prosecutor's offices in Belgrade, Novi Sad, Niš, and Kraljevo.

The Law on the Public Prosecutor's Office[29] regulates the organization and competence of public prosecutor's offices, conditions, and procedures for the election and termination of the public prosecutor and deputy public prosecutor; the rights and duties of the public prosecutor and deputy public prosecutor; evaluation of their work, promotion, and disciplinary responsibility; performance of the tasks of judicial and prosecutorial administration in the public prosecutor's offices; providing funds

27 *Official Gazette of RS*, No. 61/2005, and 104/2009.

28 *Official Gazette of RS*, No. 137/2004.

29 Article 1. *Official Gazette of* RS, No. 116/2008, 104/2009, 101/2010, 78/2011 – other Law, 101/2011, 38/2012 – Decision of Constitutional Court of RS, 121/2012, 101/2013, 111/2014 – Decision of Constitutional Court of RS, 117/2014, 106/2015 and 63/2016 – Decision of Constitutional Court of RS.

for the work of public prosecutor's offices; and other issues of importance for the work of these offices.

The Public Prosecutor's Office is an independent state body (judicial-administrative) that prosecutes perpetrators of criminal offenses and other criminal offenses and takes measures to protect constitutionality and legality[30]. However, the public prosecutor also acts in civil, administrative, executive, non-litigious, and other proceedings, performing actions to which they are authorized by special laws[31].

In addition, the Public Prosecutor's Office may initiate a procedure of constitutionality and legality[32]. The public prosecutor in criminal proceedings undertakes actions personally or through their deputy. Regarding criminal proceedings for which a prison sentence of up to five years is prescribed, the public prosecutor may also take actions through a prosecutor's associate and, in criminal proceedings for which the sentence is prescribed imprisonment for up to eight years, through a senior prosecutor's associate.[33]

3.3. Authorities responsible for the execution of criminal sanctions

In the Republic of Serbia, there are various state bodies responsible for the execution of criminal sanctions, depending on the type of sanctions. Although their competencies and scope of work differ, given that they participate in the enforcement procedure, they all form a system of state bodies for the execution of criminal sanctions. These include the Directorate for the Execution of Criminal Sanctions, the court, the police, the inspection, and health institutions.[34] The police, inspection, and healthcare institutions may have ancillary or exclusive competence in the procedure of execution of criminal sanctions.[35]

The *Directorate for the Execution of Criminal Sanctions* (the body within the ministry responsible for justice[36]) organizes, implements, and supervises the execution of imprisonment, juvenile imprisonment, work in the public interest, suspended sentences with protective supervision, security measures of mandatory psychiatric

30 Article 2.

31 Article 26 Paragraph 2.

32 Article 168 Paragraph 1 of the RS Constitution.

33 Article 48 of the CPC. The title of prosecutorial associate can be acquired by a person who has passed the bar exam, and the title of senior prosecutor's associate can be acquired by a person who has at least two years of work experience in the legal profession after passing the bar exam (Article 120). Although this legal solution is directly contrary to Article 159 Paragraph 4 of the RS Constitution, according to which the public prosecutor is replaced by deputy public prosecutors, this provision in the CPC has survived with the explanation that it strengthens the human resources of the public prosecutor's office, which has been performing investigative activities since the CPC 2011. This legal solution has been the subject of serious, vigorous, and completely justified criticism from the scientific and professional public.

34 On the bodies responsible for the execution of criminal sanctions, see Drakić and Milić, 2019, pp. 17–20.

35 Ibid., p. 20.

36 The internal organization, organization, and scope of the organizational units within the Administration shall be prescribed by the Government.

treatment and custody, obligatory treatment of drug addicts and alcoholics, and educational measures related to sending to an educational-correctional home[37].

Moreover, the Directorate implements the measure of detention and other measures to ensure the presence of the accused and the unhindered conduct of criminal proceedings in accordance with the law; they also perform other tasks determined by law. The administration is involved in the procedures of social reintegration and admission of convicts. In performing its tasks, the Administration cooperates with appropriate institutions, associations, and organizations that deal with problems related to the execution of criminal sanctions.

Within the Administration are the following institutes for the execution of criminal sanctions: 1) penitentiary and district prison, 2) penitentiary for women, 3) penitentiary for juveniles, 4) special prison hospital, and 5) correctional facility.

The institutions provide the following services: 1) treatment service, 2) security service, 3) training and employment service, 4) health care service, 5) general affairs service.

The execution of non-institutional sanctions (house arrest, punishment in the form of work in the public interest, a conditional sentence with protective supervision, and conditional release under supervision) is within the competence of the *Trust Service* established within the Directorate for Execution of Criminal Sanctions. The organizational structure of the Trustee Service implies the establishment of trustee offices for the area of territorial jurisdiction of one or more courts.

The court has a specific role in the procedure for the execution of criminal sanctions, such as security measures of a medical nature, security measures for object confiscation, or a fine execution. In addition, the court decides on the postponement of the execution of a prison sentence, conditional release, termination of the prison sentence, and so on. The LECS introduced a new institute: a *judge for the execution of criminal sanctions*.

In each higher court, in accordance with this law, the president of the court shall appoint a judge for the execution of criminal sanctions from the judges of that court. In the cases for which they are competent, the enforcement judge acts as a single judge. The enforcement judge may be assisted by a special professional service provided by the employees of the court. The Enforcement Judge, in accordance with the Rules of Procedure, keeps special records of the cases in which they act. The Enforcement Judge protects the rights of detainees, convicts, persons sentenced to security of mandatory psychiatric treatment and custody in a health institution, and mandatory treatment of drug addicts or alcoholics when conducted in an institution; monitors the legality of criminal sanctions; and ensures equal treatment of these persons before the law. Therefore, the enforcement judge now decides on certain rights and obligations that were once determined by prison authorities.

In the event of a change in the place of execution of a prison sentence or detention measure, the higher court shall have jurisdiction over further treatment of the

37 Article 12 Paragraph 1 of the LECS.

convicted or detained person according to the seat of the institution to which the convicted or detained person was transferred. The execution judge from the seat of the institution where the convicted or detained person was transferred from shall immediately submit the case file to the execution judge at the seat of the institution to which the convicted or detained person was transferred to[38].

4. Main substantive criminal law

4.1. General principles

Criminal law in the Republic of Serbia is based on the principles of legality, legitimacy, individual subjective responsibility, humanity, fairness, and proportionality.[39] These principles are the result of the historical development of the criminal law, and today, the criminal law of Serbia can be justifiably said to be in line with contemporary criminal law standards.

The first chapter of the Criminal Code contains the basic principles of criminal law: a) No Criminal Offense or Punishment Without Law: No one can be punished or have any other criminal sanction imposed on them for an offense that did not constitute a criminal offense at the time that it was committed, nor may a punishment or other criminal sanction be imposed that was not applicable at the time the criminal offense was committed[40]; b) No Punishment Without Guilt: Punishment and caution can be imposed only on an offender who is guilty of the committed criminal offense[41]; c) Basis and Scope of Criminal Law Compulsion: Protection of a human being and other fundamental social values constitute the basis and scope for defining criminal acts and imposing and enforcing criminal sanctions to the degree necessary for the suppression of these offenses[42].

4.2. General part

Criminal offense is defined by the Criminal Code[43] as an act that is provided by law as a criminal offense, is unlawful, and is perpetrated with guilt.

The notion of a criminal offense defined in this way has four elements: action, prescription of the criminal offense by law, unlawfulness, and guilt (culpability). The definition of a criminal offense according to the law is an objective-subjective notion of a criminal offense, which is in line with the newer theory of criminal law. This norm can be successfully applied in practice; therefore, it is not merely declarative.[44] The action of a criminal act is the basic element of the concept, while the other

38 Article 35.
39 Stojanović, 2020, pp. 20–31.
40 Article 1.
41 Article 2.
42 Article 3.
43 Article 14 Paragraph 1 of the Criminal Code.
44 Ibid., p. 92.

elements are only in the function of the first element because they define it more closely. Nevertheless, without them, there is no criminal act. Consequently, they are obligatory. These four elements have a specific order that cannot be changed because it represents a way to determine the realization of the elements of the crime.

The Criminal Code provides several grounds for the exclusion of criminal offenses, whereby the so-called "justifications" exclude the unlawfulness of the act, and the so-called "excuses" exclude guilt (culpability). There is no criminal offense if unlawfulness and guilt are excluded, despite the fact all other features of a criminal offense determined by law are present[45]. The grounds for excluding unlawfulness are an act of minor significance, self-defense, and extreme necessity.[46] The grounds for excluding guilt (culpability) are insanity, mistake of fact, and mistake of law.

In Article 18, the Code states that an offense is *not considered a criminal offense* if, despite having elements of a criminal offense, it represents an *offense of minor significance*. An offense of minor significance is the one in which the degree of the offender's responsibility is not high, the consequences are absent, insignificant, or eliminated by the offender, and the general purpose of imposing criminal sanctions does not require sanctioning. Nevertheless, these provisions may be applied only to criminal offenses carrying imprisonment sentence of up to three years or a fine.

In Article 19, the Code regulates *self-defense*. It is stated that an act committed in self-defense *is not a criminal offense*. Self-defense is such a defense as is necessary for the perpetrator to repel a concurrent unlawful attack on their, or on another person's, legally protected rights. However, for a perpetrator who has exceeded the limits of self-defense, the punishment may be mitigated, whereby a perpetrator who exceeds the limit of self-defense due to extreme provocation or fear caused by assault may be acquitted.

If an act is committed in *extreme necessity*, it *does not constitute a criminal offense*. Extreme necessity exists when an act is committed by the perpetrator to repel from themselves or the other person a concurrent unprovoked danger that could not be otherwise repelled, and the damage inflicted does not exceed the damage threatened. However, there is no extreme necessity if the offender was under obligation to expose themselves to imminent danger. Punishment of a perpetrator, who caused the danger themselves, both due to negligence and having exceeded the limits of extreme necessity, may be mitigated. Moreover, a perpetrator who has exceeded the limits of extreme necessity under particularly extenuating circumstances may receive remittance of the punishment[47].

An act committed *under irresistible force is not a criminal offense*. In this case, a person using irresistible force shall be considered the perpetrator of the criminal

45 Article 14 Paragraph 2 of the CC.

46 Not all grounds for excluding wrongdoing are provided for in the general part of Criminal Code: performing official duties, acting on the order of a superior, receiving the consent of the injured party, permitted risk, parental right to care for a child, undertaking medical procedures, and many other factors are defined in other branches of law. On this, see Stojanović, 2020, pp. 153–161.

47 Article 20.

offense. If a criminal offense is committed under force that is not irresistible or under threat, the offender may be punished more leniently[48].

According to the criminal legislation of the Republic of Serbia, guilt is an obligatory element of the general concept of a criminal offense, which is why the issue of criminal responsibility is reduced to the issue of guilt.[49] Guilt exists if the perpetrator was sane at the time of the act, and if they acted with intent (or out of negligence if it is explicitly provided by law in Article 22 of the Criminal Code), and they were aware or were obliged to be aware and could have been aware that their act is forbidden.[50] Guilt is tripartite; that is, it consists of sanity, intent or negligence, and awareness of unlawfulness or duty and possibility of said state of mind (Unrechtbewusstsein). If one of the three listed elements is missing, there is no guilt.

Because there is no criminal offense without culpability[51], in cases of grounds for excluding culpability, the Code prescribes that an act is not considered a criminal offense.

There is *no criminal offense* if a perpetrator was in a state of *mental incompetence*, that is, if they were unable to understand the significance of their act or unable to control their actions due to mental illness, temporary mental disorder, mental retardation, or other severe mental disorder (insanity) whereby a perpetrator of a criminal offense whose ability to understand the significance of their act or to control their actions was substantially diminished due to any of these conditions may be given a mitigated sentence (substantially diminished mental competence; in Article 23).

An act shall not be considered *a criminal offense* if it was a result of an unavoidable *mistake of fact*, which exists in cases in which the perpetrator was not required to avoid or could not have avoided a mistake in a particular circumstance that is a statutory element of the criminal offense, or regarding a particular circumstance that, had it existed, would have rendered such act lawful. However, if the perpetrator's mistake was due to negligence, they shall be guilty of a criminal offense committed by negligence if such an offense is provided by law[52]. Moreover, an act shall not be considered a criminal offense if it was done out of the unavoidable *mistake of law*, which exists

48 Article 21.

49 Criminal liability can be bestowed on a natural person who has committed an act that is defined by law as a criminal offense, unlawful, and committed with guilt. The criminal legislation of Serbia also envisages the criminal liability of legal entities (Law on Liability of Legal Entities for Criminal Offenses, Official Gazette of RS No. 97/2008). A legal entity may be liable for criminal offenses from a special part of the Criminal Code and other laws if the conditions for the liability of a legal entity provided by this law are met (Article 2). A legal entity is a domestic or foreign legal entity that is considered a legal entity under the positive law of the Republic. A legal entity is liable for a criminal offense committed by the responsible person within the scope of its activities or authorizations in order to benefit the legal entity. The liability of the legal entity referred to in Paragraph 1 of this Article exists even if the criminal offense is committed in favor of a legal entity by some other natural person acting under the supervision and control of said responsible person. The liability of a legal entity is based on the guilt of the responsible person.

50 Stojanović, 2020, p. 163.

51 Article 14 of the CC.

52 Article 28.

when the perpetrator was not required to be or could not be aware that their act was prohibited. However, a perpetrator who was unaware that an act was prohibited but should and could have known may be punished leniently[53].

The code regulates *complicity in the criminal offense*.

Co-perpetration exists if several persons jointly take *part* in the commission of a criminal offense through intent or negligence or by carrying out a jointly made decision, executed by another intentional act, significantly contributing to committing a criminal offense, and each is punished as prescribed by law for that offense[54].

Whoever intentionally *incites* another to commit a criminal offense is punished as prescribed by law for such an offense. Moreover, whoever intentionally incites another person to commit a criminal offense while attempting one is punishable by law and, if such an offense has not been attempted at all, is punished for the attempted criminal offense[55]. Anyone *aiding* another with an intent to commit a criminal offense is punished as prescribed by law or by a mitigated penalty for the criminal offense[56].

The Code sets forth limits to the culpability and punishment of accomplices: an accomplice is culpable for a criminal offense within the limits of their intent or negligence, and the inciter and abettor, within the limits of their intent. In this regard, the grounds that exclude the culpability of the perpetrator, in Articles 23, 28, and 29 hereof, do not exclude a criminal offense of co-perpetrators, inciters, or abettors if they are culpable[57]. Furthermore, if a criminal offense remains an attempt, the inciter and abettor are punished for the attempt. If an offender commits a lesser criminal offense compared with the one incited to or abetted and that would have been comprised in such an offense, the inciter and abettor are punished only for the criminal offense that was actually committed[58].

The Code contains special provisions on criminal liability for offenses committed through the media, in Articles 38–41.

The notion of guilt in criminal law should be distinguished from the notion of guilt in criminal procedure, in which guilt is a state of complete certainty that the defendant committed a crime based on established facts presented in accordance with the law, which is determined by a final court decision.

4.3. Sanctioning system

The system of sanctions in the Republic of Serbia includes four types of criminal sanctions: 1. Punishments, 2. Cautionary measures, 3. Security measures, and 4. Educational measures. The general purpose of prescription and imposing of criminal sanctions is to suppress acts that violate or endanger the values protected by criminal legislation. A criminal sanction may not be imposed on a person who has not turned

53 Article 29.
54 Article 33.
55 Article 34.
56 Article 35.
57 Article 36.
58 Article 37.

14 at the time of the commission of an offense. Rehabilitation measures and other criminal sanctions may be imposed on a juvenile under the conditions prescribed by a special law[59].

4.3.1. Punishment

Although the system of criminal sanctions is expanding through the reform of criminal legislation, punishment remains the most important criminal sanction. In addition to the general purpose of criminal sanctions, the Code explicitly defines the purpose of punishment:

1. to prevent an offender from committing criminal offenses and deter them from future commission of criminal offenses (special prevention)
2. to deter others from committing criminal offenses (general prevention)
3. to express social condemnation of the criminal offense, enhance moral strength, and reinforce the obligation to respect the law
4. to achieve justice and proportionality among the committed offense and the severity of the criminal sanction[60]

The types of punishment according to the Code are 1) Life sentence, 2) Imprisonment, 3) Fine, 4) Community service, and 5) Revocation of driver's license.[61] The Code differentiates between principal and secondary penalties in Article 44, stating that a life sentence and imprisonment may be pronounced only as principal sanctions, while a fine, community service, and revocation of a driver's license may be pronounced as both principal and secondary sanctions. If several sanctions are prescribed for a single criminal offense, only one can be pronounced as the principal sanction.

A *life sentence* may be pronounced, in exceptional cases, along with imprisonment, for the most severe criminal offenses and the most severe forms of severe criminal offenses. However, it cannot be pronounced for a person who, at the time of the commission of a criminal offense, is less than 21 years of age[62].

A *sentence of imprisonment* may not be less than 30 days or more than 20 years. A sentence of imprisonment referred to in paragraph 1 of this Article is pronounced in full years and months and, if less than six months, also in days. The court may punish a convicted person with imprisonment of up to one year or impose them to serve the sentence in terms that they shall not leave the living premises[63].

A *fine* may be determined and pronounced either in daily amounts[64] or a particular amount[65]. A fine for criminal offenses committed for gain may be pronounced as

59 Article 4.
60 Article 42.
61 Article 43.
62 Article 44a.
63 Article 45.
64 Article 49.
65 Article 50.

a secondary punishment even when not stipulated by law or when the law stipulates that the perpetrator may be punished with imprisonment or fine, and the court pronounces imprisonment as the principal punishment.

Community service may be imposed for criminal offenses punishable by imprisonment of up to three years or a fine, whereby community service is any socially beneficial work that does not offend human dignity and is not performed for profit. Community service cannot be shorter than 60 hours or longer than 360 hours. Community service shall last 60 hours over the course of one month and shall be performed during a period that cannot be shorter than one month or longer than six months[66].

The *revocation of a driver's license* may be issued to a perpetrator of an offense in whose commission or preparation a motor vehicle was used. The court determines the duration of the penalty, which cannot be less than one or longer than three years, calculated from the day the decision became final. The time spent in prison is not factored into this sentence[67].

4.3.2. Cautionary measures

Cautionary measures include a suspended sentence and judicial admonition. The purpose of a suspended sentence and judicial admonition is to avoid imposing a sentence for smaller criminal offenses on an offender who is guilty when it may be expected that an admonition with the threat of punishment (suspended sentence) or a caution alone (judicial admonition) will have a sufficient effect on the offender to deter them from further commission of criminal offenses[68].

In the case of a *suspended sentence*, the court determines a punishment for the offender and concurrently determines that it shall not be enforced, provided that the convicted person does not commit a new offense during a period set by the court, which may not be shorter than one or longer than five years (probationary period). In the case of a suspended sentence, the court may order that the penalty shall be enforced if the convicted person fails to restore the material gain acquired through committing the offense, fails to compensate damages caused by the offense, or fails to fulfill other obligations provided in provisions of criminal legislation. The court sets the time for fulfilling such obligations within the specified probationary period[69]. In Article 66, the Code sets requirements for pronouncing a suspended sentence.

4.3.3. Security measures

The purpose of security measures is to eliminate the circumstances or conditions that may have an impact on an offender to commit criminal offenses in the future[70], whereby the types of security measures are set out in Article 79.

66 Article 52.
67 Article 53.
68 Article 64.
69 Article 65.
70 Article 78.

The court shall order compulsory psychiatric treatment and confinement in a medical institution to an offender who committed a criminal offense in a state of substantially impaired mental capacity if, due to the committed offense and the state of mental disturbance, the court determines that there is a risk that the offender may commit a more serious criminal offense and that to eliminate this risk, they require medical treatment in such an institution[71]. However, to an offender who has committed an unlawful act provided under law as a criminal offense in a state of mental incapacity, if the court determines that danger exists that the offender may again commit an unlawful act provided under law as a criminal offense and that the treatment at liberty is sufficient to eliminate such a danger, the court orders *compulsory psychiatric treatment at liberty*[72]. The court shall order an offender to undergo compulsory treatment if that offender has committed a criminal offense *due to addiction to narcotics* and if there is a serious danger that they may continue committing criminal offenses due to this addiction[73]. The court orders compulsory treatment to an offender who has committed a criminal offense *due to alcohol abuse addiction* if there is a serious threat that they may continue committing offenses due to their addiction[74].

The court can prohibit an offender from *practicing a particular profession, activity, or all or certain duties* related to the disposition, use, management, or handling of another's property or taking care of that property if it is reasonably believed that the further exercise of that duty would be dangerous[75].

The court may order a *ban on driving a motor vehicle* for an offender who committed a criminal offense related to endangering road safety[76].

The *seizure of objects* may be executed on the object that was intended for or used to commit a criminal offense or that originates from the criminal offense when there is a danger that the object will be re-used to commit a criminal offense. The seizure can be performed if the act is required by the interests of general safety or due to moral reasons proving that the seizure of object is necessary[77].

The court may order *expulsion from the territory of Serbia* for a period of one to 10 years for a foreigner who committed a criminal offense[78].

In the case of conviction for a criminal offense committed by means of the media or resulting in the endangerment of individuals' life and health, where publishing of the judgement would be conductive to eliminating or diminishing such a danger, the court can decide to *publish the judgement* in the same media or other appropriate means, in full or in excerpt, at the expense of the offender[79].

71 Article 81.
72 Article 82.
73 Article 83.
74 Article 84.
75 Article 85.
76 Article 86.
77 Article 87.
78 Article 88.
79 Article 89.

The court can prohibit the offender *from converging with the victim,* prohibit *access to the area around the residence of the victim,* and *prohibit further harassment of or further communication with the victim* if further exercise of such actions of the offender can reasonably be considered to be dangerous for the victim[80].

The court may order a measure of prohibiting the offender of a criminal offense from *attending certain sports events* if the court deems it necessary in order to preserve public safety[81].

The court may issue a decision to terminate the security measure of prohibition of practicing professions, activity or duty, and prohibition of driving a motor vehicle after three years have passed from the day of enforcement thereof[82].

4.4. Special part of substantive criminal law

The Criminal Code regulates criminal offenses, categorized by common group protective object of acts in certain chapters: criminal offenses against life and limb (in Chapter 13), criminal offenses against the freedoms and rights of man and citizen (in Chapter 14), criminal offenses against electoral rights (in Chapter 15), criminal offenses against labor rights (in Chapter 16), criminal offenses against honor and reputation (in Chapter 17), sexual offenses (in Chapter 18), offenses relating to marriage and family (in Chapter 19), criminal offenses against intellectual property (in Chapter 20), offenses against property (in Chapter 21), offenses against economic interests (in Chapter 22), offenses against human health (in Chapter 23), criminal offenses against the environment (in Chapter 24), criminal offenses against general safety of people and property (in Chapter 25), criminal offenses against road traffic safety (in Chapter 26), criminal offenses against computer data security (in Chapter 27), criminal offenses against the constitutional order and security of the Republic of Serbia (in Chapter 28), criminal offenses against government authorities (in Chapter 29), criminal offenses against the judiciary (in Chapter 30), criminal offenses against public peace and order (in Chapter 31), offenses against legal instruments (in Chapter 32), criminal offenses against official duty (in Chapter 33), criminal offenses against humanity and other right guaranteed by international law (in Chapter 34) and criminal offenses against the army of Serbia (in Chapter 35).

By prescribing and applying the special part of criminal law, the protective function of criminal law is realized. The general part is applicable to all crimes regardless of whether they are prescribed in the CC. Therefore, while the Criminal Code is the basic source of a special part of criminal law, when it comes to criminal acts, there are also secondary sources of criminal law.

80 Article 89a.
81 Article 89b.
82 Article 90.

5. Main rules of criminal procedure

5.1. Basic subjects

The basic procedural subjects in criminal proceedings are those who perform basic procedural functions and whose existence is a precondition for the establishment, course, and termination of criminal proceedings. These subjects include the court, the authorized prosecutor, and the defendants.

The three main procedural functions are the judicial, prosecution, and defense functions. The judicial function is performed by the competent court. The prosecution function is performed by an authorized prosecutor, while the defense function is performed by the defendant, with the potential (or mandatory, in some cases) professional assistance of defense counsel.

In criminal procedure, the authorized prosecutor and the offender are referred to as parties.

In addition to the basic procedural subjects, secondary subjects also participate in criminal proceedings with certain rights and duties, including the injured party, a legal or natural person on whom a measure of confiscation of property gain and a guardianship authority should be imposed. In addition to these subjects, the subjects of the attached property claim may also appear in the criminal proceedings, as may other participants (e.g., the representative of the injured party, defense counsel, witnesses).

5.1.1. The court

The trial in criminal matters is entrusted to courts of general jurisdiction, specifically to criminal divisions therein. The Criminal Court does not exist as an organizationally separate and independent form of justice. Rather, it is a functional part of the court of general jurisdiction, participating in criminal proceedings in its various forms, where it performs the function of conducting proceedings and adjudicating criminal matters.[83]

The basic constitutional rule[84] is that the court judges in a panel, with a single judge judging only as an exception. A single judge in the first instance judges for criminal offenses punishable by a fine or imprisonment for up to eight years (abbreviated procedure), and the first instance court panel judges for criminal offenses punishable by over eight years of imprisonment (general criminal proceedings). In the first instance, a small (mixed) panel (one professional and two lay judges) judges for crimes punishable by eight to 20 years in prison, and a large (mixed) panel (two professional and three lay judges) judges for crimes punishable by 30–40 years in prison or life imprisonment.

In the first instance, a small (professional) panel (three professional judges) judges in proceedings for criminal offenses for which a special law stipulates that

83 Škulić, 2014, p. 90.
84 Article 142 Paragraph 6 of the Constitution.

the prosecutor's office has special competencies (organized crime, war crimes, high-tech crime). In the second and third instances, the court always judges as a panel composed exclusively of professional judges.

In the procedure against juvenile offenders, a small court panel (mixed) is used that is composed of a professional judge and two lay judges who are, as a rule, of the opposite sex. In the second instance, a small professional panel (three professional judges) judges, except when the proceedings are conducted at a hearing, in which case the large panel is mixed (two professional judges and three lay judges). In the procedure against juveniles, a professional judge must have special knowledge of children's rights and juvenile delinquency, and opposing judges are selected from the ranks of teachers, educators, and other professionals who have experience working with children and youth.

The rules on the territorial jurisdiction of the courts are prescribed in Articles 23-29 of the Code of Criminal Procedure. Criteria for determining the territorial jurisdiction of the court are envisaged in the CPC. The basic criterion is location where the crime was committed[85]. However, the CPC prescribes two subsidiary criteria: the defendant's temporary or permanent residence and the defendant's place of birth, arrest, or surrender. Special rules are envisaged for criminal offenses committed on domestic vessels or aircraft as well as for criminal offenses committed through means of public information.[86]

The functional competence of the court is determined by the phases and instances of criminal proceedings according to Article 22. As a result, in both the pre-investigation proceedings and the investigation, the judge for the preliminary proceedings adjudicates in cases specified in the Code — for example, they decide on ordering detention or a search of an apartment. The out-of-trial chamber decides on appeals against a judge's decisions for the preliminary proceedings, making decisions outside the main trial, etc.

Either a single judge or a panel adjudicates at the main trial. A single judge adjudicates in the first instance for criminal offenses punishable by a fine or a term of imprisonment of up to eight years. Regarding composition of trial panels, the rules are set forth in Article 21 of CPC.

5.1.2. Authorized prosecutor

The authorized prosecutors under the CPC are the following: a) the public prosecutor (who conducts criminal prosecution ex officio); b) the private prosecutor (who conducts criminal prosecution in relation to private lawsuits); c) the injured party as a prosecutor; 4) the so-called subsidiary prosecutor (when a public prosecutor declares that they are abandoning prosecution[87], they can be replaced by a subsidiary prosecutor under the conditions prescribed by the CPC)

85 Article 23 of the CPC.
86 See Articles 24–27 of the CPC.
87 Article 52 of the CPC.

Public prosecutor — The basic right and the basic duty of a public prosecutor is to prosecute the perpetrators of criminal offenses. Based on Article 43 Paragraph 2 of the CPC, in the case of criminal offenses prosecutable ex officio, the public prosecutor is authorized to 1) manage pre-investigation proceedings, 2) decide to defer or not undertake criminal prosecution, 3) conduct investigations, 4) conclude plea agreements and agreements on giving testimony, 5) file and represent an indictment before a competent court, 6) abandon charges, 7) file appeals against court decisions that are not final and submit extraordinary legal remedies against final court decisions, and 8) conduct other actions when specified by the Code.

Subsidiary prosecutor — One of the basic rights of the injured party is the right to a subsidiary lawsuit. The basic condition for exercising this right is that the public prosecutor waives the criminal prosecution from the moment of the confirmation of the indictment in the general criminal procedure[88], that is, from the moment of the determination of the main trial or hearing for imposing a criminal sanction[89].

If the public prosecutor withdraws from the criminal prosecution before the stated procedural moments, the injured party then has only the right to object directly to the higher public prosecutor in accordance with Article 51 of the CPC. If, after the indictment is confirmed, the public prosecutor declares that they are dismissing charges, the court asks the injured party whether they wish to assume criminal prosecution and represent accusation. If the injured party is not present, the court shall notify them within eight days that the public prosecutor dismissed the charges and advise them that they may declare whether they wish to assume criminal prosecution and represent accusation. The injured party is required to immediately, or within eight days of receiving the notice and advice, declare whether they wish to assume criminal prosecution and represent accusation; if they have not been notified, they must do so within three months of the date on which the public prosecutor stated that they are dismissing the charges.

Should the injured party declare that they shall assume criminal prosecution, the court shall resume the trial or schedule the main hearing. If the injured party does not declare themselves within the time limit or declares that they do not wish to assume criminal prosecution, the court shall issue a ruling discontinuing the proceedings or a judgment dismissing the charges. If the injured party is not present at the preparatory or main hearing and was duly summoned or could not be served the summoning invitation because of a failure to notify the court of a change in permanent or temporary residence, it shall be presumed that they do not wish to assume the prosecution and the court.

An injured party as a subsidiary prosecutor is entitled by Article 58 to 1) represent accusation in accordance with the provisions of this Code, 2) submit a motion and evidence for realizing a restitution claim and a motion for interim measures to secure it, 3) retain a proxy from among attorneys, 4) request the appointment of a proxy,

88 Article 52 of the CPC.
89 Article 497 of the CPC.

and 5) perform other actions provided for by the Code. In addition to these rights, a subsidiary prosecutor also exercises the rights of the public prosecutor, except for those that the public prosecutor has in their capacity as a state authority. However, in the proceedings conducted on the basis of charges brought by a subsidiary prosecutor, the public prosecutor shall be entitled to assume criminal prosecution and representation of the prosecution no later than the end of the main hearing[90].

Private prosecutor — A private prosecutor conducts criminal prosecution only for criminal offenses prosecuted in relation to private lawsuits. A private lawsuit is filed within three months from the day when the injured party discovered the criminal act and the suspect[91]. Private prosecutors are entitled by Article 64 to 1) bring and represent a private lawsuit, 2) submit a motion and evidence to realize a restitution claim as well as a motion for interim measures to secure it, 3) retain a proxy from among attorneys, and 4) undertake other actions provided for by the Code.

In addition to the rights referred to in paragraph 1 of this Article, a private prosecutor shall have the rights to which public prosecutors are entitled, except for those they exercise in their capacity as state authorities.

5.1.3. Defendant

The defendant is the basic procedural subject and party in the criminal proceedings, and they perform the function of defense.

The defendant is entitled by Article 68 CPC 1) to be informed in the shortest possible time, and always prior to the first interrogation, in detail and in a language they understand of the charges against them, the nature and grounds of the accusation, and that everything they say may be used as evidence in proceedings; 2) not to say anything, to refrain from answering a certain question, to present their defense freely, to admit or not admit their culpability; 3) to defend themselves on their own or with the professional assistance of defense counsel, in accordance with the provisions of this Code; 4) to have defense counsel attend the interrogation; 5) to be taken before a court in the shortest possible time and to be tried in an impartial and fair manner and in a reasonable timeframe; 6) to read immediately, prior to the interrogation, the criminal complaint, the crime scene report, and the findings and opinions of expert witnesses; 7) to be given sufficient time and opportunity to prepare their defense; 8) to examine the documents contained in the case file and objects serving as evidence; 9) to collect evidence for their own defense; 10) to state their position in relation to all of the facts and evidence against them and to present facts and evidence in their favor, to question witnesses for the prosecution, and to demand that witnesses for the defense be questioned in their presence under the same conditions as the witnesses for the prosecution; 11) to make use of legal instruments and legal remedies; and 12) to perform other actions provided for by the CPC.

90 Article 62.
91 Article 53 Paragraph 2 of the CPC.

On the other side, a defendant has only two duties: 1) to respond to summons from the authority conducting proceedings and 2) to notify the authority conducting proceedings of the change in their temporary or permanent residence or of their intention to change their temporary or permanent residence.

A defendant may choose and authorize with a power of attorney one or several defense attorneys (maximum 5). However, in several cases, a defendant must have defense counsel (mandatory defense, in Article 74). If, in the cases referred to in Article 74, no defense counsel is chosen or the defendant is left without defense counsel during the criminal proceedings, the public prosecutor or the president of the court before which the proceedings are being conducted shall issue a ruling appointing ex officio defense counsel for the remainder of the proceedings according to the order on the roster of attorneys provided by the competent bar association (ex officio defense counsel, in Article 76). The Code prescribes defense counsel's rights in Article 71 and duties in Article 72.

5.2. General principles of criminal procedure

The basic principles of criminal procedure can be classified according to different criteria. Thus, in the theory of criminal procedural law, the principles are divided into principles related to the function of criminal prosecution, principles related to the function of the trial, and principles related to all three procedural functions.[92] In addition, they can be divided into principles of criminal prosecution, evidentiary principles, principles of criminal proceedings, principles of court decisions, and principles of the purpose and basic manner of conducting criminal proceedings.[93]

Although there are numerous procedural principles, the most important are the principle of formality of criminal prosecution, the principle of legality, the principle of opportunity, the principle of mutability, the principle of in dubio pro reo, and the principle of bis in idem.

Other principles include the principle of immediacy, the principle of free evaluation of evidence, the principle of deliberation, the principle of orality, the principle of publicity, the principle of majority decision-making of the court, the principle of free conviction of the body, the principle of remedy, and the principle of fair trial.

The right of state bodies to prosecute perpetrators of criminal acts in the public interest is derived from the state's right to punishment, regardless of whether it is required by a person whose personal or property right has been violated or endangered by a criminal act (the injured party). In terms of *the principle of formality of criminal prosecution*, the public prosecutor, as the competent state body, has *the right* to undertake criminal prosecution ex officio, regardless of the position of the injured party, including if the injured party objects.

However, there are certain exceptions to the principle of formality: 1) private lawsuit, 2) subsidiary lawsuit, 3) criminal acts that are prosecuted ex officio but at

92 On principles and their classification, see Brkić and Bugarski, 2020, pp. 31–51.
93 See Škulić, 2014, pp. 50–90.

the injured party's motion for criminal prosecution. The motion of the injured party is a condition not only for initiating but also for conducting criminal proceedings in all phases. These are criminal offenses that are prosecuted ex officio but, due to some of their specifics, and due to the lack of dominant public interest that they are always prosecuted without exception, the injured party is given a specific right to their procedural expressed will in the form of proposals for criminal prosecution conditions for the initiation and conduct of criminal proceedings.[94] The motion for criminal prosecution of the injured party[95] shall be submitted to the competent public prosecutor within three months of the date when the injured party learned of the criminal offense and the suspect[96]. The injured party may abandon a motion for criminal prosecution via a statement made to the public prosecutor or the court where the criminal proceedings are being conducted or by the conclusion of the main hearing at the latest. In such a case, the injured party forfeits the right to submit the motion anew[97].

Unlike private and subsidiary lawsuits, which are conducted in accordance with the dispositive principle, the prosecution does not depend on the will of the public prosecutor, as the public prosecution must occur when certain prescribed conditions are met. Namely, the *principle of legality of criminal prosecution* implies that criminal prosecution does not depend on the personal will of the public prosecutor. Essentially, this principle implies that the public prosecutor *is obliged* to undertake criminal prosecution when the factual and legal conditions provided by law are met.

Factual conditions refer to the existence of a certain degree of suspicion that a criminal offense has been committed or that a certain person has committed a criminal offense. Legal conditions refer to the possibility of bringing the suspect's action under a certain criminal offense for an offense for which they are prosecuted ex officio. In some cases, the approval of the competent state body or the proposal of the person prosecuted is required for prosecution. The public prosecutor undertakes criminal prosecution by issuing an appropriate act depending on the procedural form, which may be an order to conduct an investigation[98], an immediate indictment[99], an indictment in summary proceedings[100], or an indictment with a request to hold a criminal sanctions hearing[101].

The principle of legality obliges the public prosecutor to prosecute not only when initiating criminal proceedings but also for the entire duration of criminal proceedings. Therefore, the public prosecutor may withdraw from criminal prosecution during criminal proceedings if the legal conditions for criminal prosecution cease to exist.

94 Ibid., p. 117.
95 Article 6 Paragraph 2 of the CPC.
96 Article 53.
97 Article 54.
98 Article 296.
99 Article 331 Paragraph 5.
100 Article 495.
101 Article 512.

The principle of opportunity is a departure from the principle of legality. In accordance with this principle, the public prosecutor has the discretionary right to decide not to prosecute if, despite the fulfillment of the real and legal conditions, they assess that this is not expedient in the specific case. After fulfilling the legal conditions, in the sense of *the principle of opportunity of criminal prosecution*, the public prosecutor is obliged to undertake criminal prosecution when all legal conditions are met *and if it is expedient in this case*. In such cases, the public prosecutor may decide to defer criminal prosecution or not to undertake it, under conditions regulated by the Code, in Article 6, Paragraph 3.

The core of the principle of opportunity is the discretionary assessment of the public prosecutor; thus, in that sense, it represents a deviation from the principle of legality. Namely, it is a matter of deferring criminal prosecution and dismissal of a criminal complaint after a suspect Europa certain obligations determined by law (conditional opportunity, in Article 283) as well as dismissal of a criminal complaint without prior Europa of obligations by the suspect (unconditional opportunity, in Article 284, Paragraph 3).

Based on the *principle of mutability of criminal prosecution*, the authorized prosecutor has *the right to withdraw* from criminal prosecution during criminal proceedings. Neither the court nor the defendants can oppose the statements of the authorized prosecutor that they are giving up the prosecution. The principle of mutability applies to all authorized prosecutors. The resignation of a private and subsidiary prosecutor may be explicit or tacit[102], while the resignation of a public prosecutor must be explicit, whereby a distinction is made between the waiver of prosecution[103] and the waiver of charges[104].

If the public prosecutor withdraws from the criminal prosecution, the injured party has the right to a subsidiary lawsuit under the conditions prescribed by law. Namely, in terms of Article 51, if, in connection with a criminal offense prosecutable ex officio, the public prosecutor dismisses a criminal complaint, discontinues the investigation, or abandons criminal prosecution until the indictment is confirmed, the persecutor notifies the injured party thereof within eight days and advises the party that they shall be entitled to submit an objection to the immediately higher public prosecutor. The injured party is entitled to submit an objection within eight days of receiving the notification and advice. If the injured party has not been notified, they are entitled to submit an objection within three months of the date on which the public prosecutor dismissed the complaint, discontinued the investigation, or abandoned criminal prosecution. In this case, within 15 days of receiving the objection, an immediately higher public prosecutor denies or upholds the objection via a ruling against which an appeal or objection shall not be allowed. By the ruling upholding the objection, the public prosecutor issues a compulsory

102 Article 61.
103 Article 51.
104 Article 49.

instruction to the competent public prosecutor to conduct or resume criminal prosecution.

In terms of Article 49, the public prosecutor may withdraw charges 1) from the moment of confirmation of the indictment until the conclusion of the main hearing or 2) at a hearing before a second-instance court in accordance with Article 450 Paragraph 5 of this Code. In this case, the injured party shall be entitled to assume criminal prosecution[105] .

Because by withdrawing from the criminal prosecution, the criminal proceedings remain without an authorized prosecutor in terms of the indictment principle, the criminal proceedings ends. In that case, the court makes a decision to suspend the procedure, decides to reject the private lawsuit (before the main trial), or issues a judgment rejecting the accusation (at the main trial). Although these are non-meritorious decisions, they are covered by the principle of ne bis in idem, such that the same person can no longer be prosecuted for the same crime.

The principle of *ne bis in idem* is proclaimed in Article 34 Paragraph 4 of the Constitution as well as in Article 4 of the CPC, so no one can be prosecuted in connection with a criminal offense for which they have been acquitted or convicted by a final decision of a court, for which the indictment has been denied by a final decision, or when the proceedings have been discontinued by a final decision. A possible attempt to initiate criminal proceedings in an already finalized criminal case is prevented by noting the objection of the adjudicated matter (res judicata).

5.3. Stages of criminal procedure

According to the criminal procedure legislation of the Republic of Serbia, there is one general criminal procedure and several special criminal procedures (of which the procedure against juveniles is regulated by a special law, while all others are regulated by the CPC).

The general criminal procedure is intended for the trial of adult perpetrators of criminal offenses for which a prison sentence of over eight years is prescribed. In Serbian criminal procedural law, the general form of criminal procedure[106] has

105 Article 52.

106 The Serbian CPC makes a difference between initiation of criminal prosecution (Article 5 paragraph 2) and initiation of Criminal Proceedings (Article 7). Criminal prosecution is initiated 1) by the first action of the public prosecutor or authorized police personnel based on a request of a public prosecutor, undertaken in accordance with the Code for the purpose of investigating the grounds for suspicion that a criminal offense has been committed or that a certain person has committed a criminal offense; or 2) by the submission of private prosecution. Criminal proceedings are instituted 1) by the issuance of an order on undertaking an investigation (Article 296), 2) by the confirmation of an indictment not preceded by an investigation (Article 341 Paragraph 1), 3) by the issuance of a ruling ordering detention before submitting a motion to indict in summary proceedings (Article 498 paragraph 2), 4) by scheduling a main hearing or a hearing for pronouncing a criminal sanction in summary proceedings (Article 504 Paragraph 1, Article 514 Paragraph 1 and Article 515 Paragraph 1), or 5) by scheduling a main hearing in proceedings for pronouncing a security measure of compulsory psychiatric treatment (Article 523).

two stages: preliminary (pre-trial) proceedings and main proceedings. The pre-trial procedure can have two phases: the investigation phase[107] and the indicting phase[108]. The main procedure consists of the first instance procedure and the procedure for legal remedies. The stages of the first instance procedure are preparation for the main trial, the main trial, and the passing of the verdict. Remedies can be regular or extraordinary. Criminal proceedings do not necessarily have to pass through all stages and phases. Thus, for example, they can be suspended in the investigation phase, in which case there are no further procedural stages. The procedure does not have to go through the phase of legal remedies if none of the authorized persons has stated the legal remedy. The stated stages and phases are characteristic of the general form of criminal procedure.

In addition to the general form, the CPC also prescribes special forms, which differ from the general form in terms of having a special procedural structure. Hence, Serbian law includes an abbreviated procedure in which there is no investigation. The most important special criminal procedure is the abbreviated procedure, which is most widely used in practice,[109] and which is intended for the trial of adult perpetrators of crimes punishable by a fine or imprisonment for up to and including 8 years.

The specificity of the procedural structure of special criminal procedural forms may be based on the omission of certain procedural stages or phases (special simplified criminal procedural forms; the procedure for imposing security measures of mandatory psychiatric treatment) or significant modification of the existing ones (juvenile criminal proceedings).[110]

5.3.1. The pre-investigation procedure

The investigation is preceded by a pre-investigation procedure[111], which is not an integral part of the criminal procedure. The pre-investigation procedure includes the activity of reporting, detecting, and clarifying criminal acts and identifying the perpetrators, with the aim of enabling the public prosecutor to initiate criminal proceedings. This activity presupposes the grounds for suspicion that a criminal offense has been committed that is prosecuted ex officio.

The public prosecutor leads the pre-investigation proceedings, and for the purpose of exercising this authority, they undertake necessary actions aimed at prosecuting the perpetrators of criminal offenses. Apart from the public prosecutor, who is the head of the pre-trial procedure, the bodies of the procedure are: the police, who bear the greatest burden of this part of the procedure, and the pre-trial judge, who decides only on restricting the fundamental rights and freedoms of the suspect against whom the proceedings are conducted (e.g., issuing an order of detention, issuing an order for search, issuing an order to conduct special evidentiary actions).

107 Articles 295–312.
108 Articles 331–343.
109 Almost 2/3 of the procedures are conducted according to the rules on abbreviated procedure.
110 Brkić, 2010, pp. 287–288.
111 Articles 280–294 of the CPC.

Whether criminal proceedings will be initiated depends on the results of the pre-investigation procedure. This procedure is administratively criminalistic, and most of the actions undertaken by the police have a legal basis in the Law on Police.

5.3.1.1. Possibilities of diversion

Diversionary proceedings, that is, alternative out-of-court forms, which aim to relieve the criminal justice system, represent a type of substitute for criminal proceedings and criminal sanctions with more efficient and humane measures against the perpetrator.

The search for less coercive means of combating crime has led to various alternatives to prosecution and procedure, relying on informal social control institutions, aimed primarily at alleviating tensions arising from conflict between perpetrators and the environment and that offer a better response to victim expectations, do not produce stigmatizing effects, better meet the requirements of resocialization, and minimize the role of criminal justice, thus contributing to the rationalization.[112]

There are two groups of diversionary proceedings in Serbian law: those against adults (conditional postponement of criminal prosecution under Article 236 of the CPC, introduced in 2001) and those against minors (non-initiation of criminal proceedings conditioned on execution of educational orders, introduced in 2005).

In the course of pre-investigation, the possibility of deferring criminal prosecution is prescribed in Article 283. It is a matter of conditional opportunity, that is, conditional postponement of criminal prosecution for certain criminal acts if the suspect accepts and Europae the obligations provided by law.

The public prosecutor may defer criminal prosecution for criminal offenses punishable by a fine or a term of imprisonment of up to five years if the suspect accepts one or more of the following obligations: 1) to rectify the detrimental consequence caused by the commission of the criminal offense or indemnify the damage caused, 2) to pay a certain amount of money to the account allocated for the payment of public revenues to be used for humanitarian or other public purposes, 3) to perform certain community service or humanitarian work, 4) to fulfill maintenance obligations that have come due, 5) to submit to an alcohol or drug treatment program, 6) to submit to psychosocial treatment for the purpose of eliminating the causes of violent conduct, and 7) to fulfill an obligation or observe a restriction determined by a final court decision.

In the order deferring criminal prosecution, the public prosecutor shall determine a time limit not exceeding one year during which the suspect must fulfill the obligations undertaken. Oversight of the fulfillment of obligations is performed by an officer of the authority in charge of the execution of criminal sanctions in accordance with the regulation issued by the minister responsible for the judiciary.

If the suspect fulfills the obligation within the prescribed time limit, the public prosecutor dismisses the criminal complaint by a ruling and notifies the injured party thereof, whereby the provision of Article 51 Paragraph 2 is not to be applied.

112 Brkić, 2010, p. 292.

Funds item 2 of this Article is granted to the humanitarian organizations, funds, public institutions or other legal entities, and natural persons upon conducted public tender, which shall be announced by the ministry competent for the judiciary. The public tender is conducted by the committee formed by the minister competent for the judiciary. The committee may, at the request of a natural person and without administering public tender, propose that the funds be granted for the purpose of treatment of a child abroad, unless such funds were provided in the Republic Health Insurance Fund. The administration of the public competition, the criteria for the allocation of funds, and the composition and mode of operation of the committee shall be governed by the act of the ministry competent for the judiciary. The decision on the allocation of funds is rendered by the government.

Article 284 Paragraph 3 regulates the unconditional opportunity. In the case of criminal offenses punishable by a term of imprisonment of up to three years, the public prosecutor may dismiss a criminal complaint if the suspect, as a result of genuine remorse, has prevented the occurrence of damage or has already indemnified the damage in full and if the circumstances of the case are such that the public prosecutor finds that pronouncing a criminal sanction would not be fair. In this case, the provision of Article 51 Paragraph 2 does not apply.

5.3.2. Stage 1 of the criminal procedure: The preliminary (pre-trial) proceedings

5.3.2.1. The investigation phase

The investigation is the first phase of the general criminal procedure conducted by the public prosecutor. This is the greatest novelty introduced by the CPC in 2011 because until then the investigation was led by an investigating judge.

The public prosecutor, who is the body of the procedure at this stage, opens the investigation with an order when there are grounds for suspicion that a criminal offense has been committed ex officio or that a certain person is the perpetrator of the criminal offense. An investigation is underway against an adult perpetrator of a criminal offense prosecuted ex officio. The person against whom the investigation is being conducted because there are grounds for suspicion that they committed the crime they are charged with is termed a suspect. However, an investigation can also be conducted against an unknown perpetrator.

An investigation may be initiated against a specific person for whom there are grounds for suspicion that they have committed a criminal offense or against an unknown perpetrator when there are grounds for suspicion that a criminal offense has been committed.

The aim of the investigation is to collect evidence and data necessary for deciding whether to file an indictment or discontinue proceedings, evidence necessary for establishing the identity of the perpetrator, evidence for which there is risk that it could not be repeated at the main hearing or that its examination would be hampered, and other evidence that could be of benefit to the proceedings

and the examination of which, in view of the circumstances of the case, proves appropriate[113].

An investigation is initiated via an order issued by the competent public prosecutor before or immediately after the first evidentiary action undertaken by the public prosecutor or the police in the pre-investigation proceedings but not later than 30 days after the public prosecutor was notified of the first evidentiary action undertaken by the police[114]. The investigation is conducted by the competent public prosecutor, and they need assistance from the police (forensic, analytical, etc.) or other state authorities in connection with the conduct of the investigation. The latter are required to provide such assistance at their request[115]. Moreover, the public prosecutor may refer conduct of certain evidentiary actions to the police[116].

The CPC specifically regulates the suspect and other participants attending evidentiary actions, the gathering of evidence and other materials by the defense, undertaking evidentiary actions for the benefit of the defense, and becoming acquainted with collected evidence.[117] The CPC defines the differences among suspending an investigation, discontinuing an investigation, and concluding an investigation.[118]

Upon determining that the subject matter of the investigation has been sufficiently clarified, the public prosecutor issues an order on the conclusion of the investigation that will be delivered to the suspect and their defense counsel, if there is one, and notifies the injured party regarding the conclusion of the investigation[119]. If the public prosecutor does not conclude an investigation against a suspect within six months, or within one year in relation to a criminal offense under the jurisdiction of the public prosecutor's office of special jurisdiction year according to a separate law, the persecutor is required to notify the immediately superior public prosecutor of the reasons due to which the investigation has not been concluded[120].

5.3.2.2. The indicting phase

The indicting phase is the second phase of the previous stage of criminal proceedings. It consists of raising and judicial control of the indictment, which requires the court to determine the main trial at which a person, against whom there is a justified suspicion that they have committed a criminal offense, will be tried. As a rule, the indictment is preceded by an investigation, but there may be an exception (direct indictment), and sometimes. it must be filed (shortened procedure) without investigation. As a rule, the indictment is filed before the main trial, but as an exception, it can be stated at the main trial itself.

113 Article 295 Paragraph 2 of the CPC.
114 Article 296 Paragraph 2.
115 Article 298 Paragraph 4.
116 Article 299 Paragraph 4.
117 Articles 300–303.
118 See Articles 307, 308 and 310.
119 Article 310 Paragraph 1.
120 Article 310 Paragraph 2.

The indicting phase consists of two sub-phases: filing an indictment[121] and examining the indictment[122].

Filing an indictment. The public prosecutor files an indictment when there is justified suspicion that a certain person has committed a criminal offense, within 15 days of the date on which the investigation was concluded. In particularly complex cases, this time limit may be extended by another 30 days upon authorization by the immediately superior public prosecutor. In summary, the rule is that the public prosecutor files an indictment after the investigation. However, if the data collected regarding the criminal offense and the perpetrator provide sufficient grounds for filing charges, an indictment may be filed even without an investigation being conducted[123].

The indictment is submitted to the panel[124] of the competent court, which examines whether the indictment has been composed correctly[125]. If an indictment is properly composed, the president of the panel delivers it to the defendant[126], who is entitled to submit a written response within eight days of its the delivery[127].

Examining the Indictment. Rather than the former regular control of the indictment regarding the defendant's objections and an exceptional one at the request of the presiding judge, the CPC introduced one form of judicial control of the indictment, which is conducted ex officio in each case. The panel examines every indictment within 15 days from the expiry of the time limit for submitting a response to the indictment. The panel may reach various decisions when examining an indictment. When the panel determines that better clarification of the state of the matter is required to assess whether the indictment is justified, it may order a supplemental investigation, an investigation to be conducted, or certain evidence to be collected[128]. The panel may also decide by a ruling that the charges are unfounded and that the criminal proceedings are being terminated[129], may reject the charges via a ruling[130], or may confirm the indictment through a ruling[131].

5.3.3. Stage 2 of the criminal procedure: The main procedure

The main procedure is the second stage of the criminal procedure in which the trial is conducted in the true sense of the word. The main procedure can be divided into two phases: the first-instance procedure and the procedure for legal remedies proceedings.

121 Article 331.
122 Article 337.
123 Article 331 Paragraph 5.
124 Article 21 Paragraph 4.
125 Article 332.
126 Articles 333.
127 Article 336.
128 Article 337 Paragraph 3.
129 Article 338.
130 Article 339.
131 Article 341.

5.3.3.1. The first-instance procedure

Proceedings before the first instance court constitute the central part of the main proceedings because, as a rule, the evidence is directly adduced in during this process, and the verdict is judged. This procedure begins with confirmation of the indictment and ends with the delivery of the first instance verdict. This phase has three subphases: preparations for the main hearing[132], the main hearing[133], and the rendering of the decision, pronouncing, and proclaiming the judgment, rendering the judgment in writing, and its delivery[134].

Preparations for the main hearing. The preparation for the main trial is the first phase of the first instance main procedure, which includes all procedural actions from the confirmation of the indictment to the beginning of the main trial.

The president of the panel begins preparations for the main hearing immediately after receiving the confirmed indictment and the case file. The aim of this phase is to enable the beginning and uninterrupted course of the main trial. In this phase, a preparatory hearing is held[135] , the main trial is scheduled, parties and other persons are summoned to the main hearing, and other decisions related to the management of the procedure are made. This part of the procedure is led by the president of the panel before whom the main trial will be held. As a rule, no appeal is allowed against their decisions at this point in the procedure.

At the preparatory hearing, the parties state their positions in relation to the subject-matter of the charges, explain the evidence that will be examined at the main hearing, and propose new evidence in addition to determining the factual and legal questions that will be the subject-matter of discussion at the main hearing. A decision shall be rendered on a plea agreement, on detention, and on discontinuing criminal proceedings as well as on other questions the court finds to be of relevance for holding a main hearing[136].

The president of the panel issues an order before the conclusion of the preparatory hearing, designating the date, hour, and location of the main hearing. If no preparatory hearing was held[137], the president of the panel schedules a main hearing within 30 days at the latest if the defendant is in detention or within 60 days if the defendant is free, counting from the date of reception of the confirmed indictment by the court[138].

Main hearing. The main trial is the central phase of the first-instance criminal proceedings, the aim of which is to try in the true sense of the word.

132 Articles 344–361.
133 Articles 362–415.
134 Articles 418–431.
135 Articles 345–352.
136 Article 344 Paragraph 1.
137 Article 346 Paragraph 3.
138 Article 353.

During the main trial, various procedural actions are taken. The most important are the actions of proving and deciding because the goal of the main trial is, as a rule, the direct presentation of evidence and basing the appropriate court decision on them. At the main trial, the principles of immediacy, orality, contradiction, and publicity are realized.

The CPC prescribes the preconditions for holding the main hearing, which are reduced to the presence of necessary persons, and regulates the consequences of the absence of the prosecutor, the defendant, defense counsel, and a witness, expert witness, or professional consultant.[139]

The course of the main hearing is regulated in Articles 385–415. The *main hearing commences* with the issuance of a ruling on the holding of the main hearing. After prior verification and advice for the defendant on their rights and duties, *the presentation of the charge* and defendant's plea follow.[140] Following the presentation of the charges and the defendant's declaration, the parties and defense council are called to present opening statements unless they have stated their positions and proposed evidence at the preparatory hearing[141].

After that, *evidentiary proceedings commence*[142] . The parties, defense counsel, and the injured party may, until the conclusion of the main hearing, propose that new evidence be examined and may repeat motions that were previously denied[143]. The order of examining the evidence is regulated in Article 396. Moreover, the CPC contains explicit rules on the presentation of the defense, questioning the defendant, the presence of a witness, expert witness, or professional consultant at the examination of evidence; cautioning a witness, expert witness, or professional consultant; examining a witness, expert witness, or professional consultant; presenting written expert findings and opinions, examining evidence away from the main hearing; inspecting the content of documents and recordings; inspecting the content of testimony transcripts; and excluding unlawful evidence.[144]

After examining the final item of evidence, the president of the panel asks the parties, defense counsel, and the injured party whether they have any proposals to amend the evidentiary proceedings. If no one proposes an amendment of the evidentiary proceedings or if the motion is denied, and the panel fails to order any evidence examination, the president of the panel declares the *evidentiary proceedings concluded* [145].

The CPC envisages the possibility of *altering an indictment or filing a new one* and *amending the indictment*. Following the alteration of the indictment, the filing of a new

139 Articles 377–384.
140 Articles 385, 389, 391, 392.
141 Article 393.
142 Articles 394–407.
143 Article 395 Paragraph 1.
144 Articles 397–398, 400–407.
145 Article 408.

indictment, or an amendment of the indictment, the parties and defense counsel may propose supplementing the evidentiary proceedings.[146]

Upon declaring the evidentiary proceedings concluded, the president of the panel shall call upon the prosecutor to make their *closing argument* first, followed by the injured party or their legal representative or proxy, who is then followed by defense counsel and, finally, the defendant.[147] (). The content of the closing arguments is prescribed in Article 413. After the closing arguments have been made, the panel may decide to *resume the evidentiary proceedings* for the purpose of examining additional evidence[148].

If the panel decides not to resume evidentiary proceedings after the closing arguments, the president of the panel declares *the conclusion of the main hearing*[149].

Rendering a decision, pronouncing and proclaiming the judgment, and rendering the judgment in writing and delivery. After announcing that the main hearing has been concluded, the panel retires for deliberation and voting for the purpose of rendering a decision. During the deliberation and voting, the panel may decide to re-open the main hearing and resume the evidentiary proceedings for the purpose of examining additional evidence[150].

If it does not re-open the main hearing, the court *pronounces a judgment* [151]. This judgment may 1) reject the charges (a rejecting judgment), 2) pronounce the defendant not guilty of the charges (an acquittal), or 3) pronounce the defendant guilty (a conviction in Article 421).

The court pronounces *a rejecting judgment* if 1) in the period from the commencement until the conclusion of the main hearing, the prosecutor abandoned the charges, or the injured party abandoned their motion to prosecute; 2) the defendant has already been convicted with a final judgment for the same criminal offense, if they have been acquitted of the charges, or if the charges against them were rejected with a final judgment or the proceedings against them were discontinued by the final decision of the court; 3) the defendant has been released from criminal prosecution by an act of amnesty or a pardon, or prosecution cannot be undertaken due to the expiration of the statute of limitations or other circumstances permanently excluding prosecution[152].

A judgment acquitting the defendant of the charges shall be pronounced by the court if 1) the offense with which they were charged is not a criminal offense, and the necessary conditions for applying a security measure do not exist; or 2) it

146 Articles 409–411.
147 Article 412.
148 Article 414.
149 Article 415 Paragraph 1.
150 Article 415 paragraphs 2–3.
151 Article 418 paragraph 1.
152 Article 422.

was not proved that the defendant had committed the criminal offense they were charged with[153].

After the court has pronounced the judgment, the president of the panel immediately *proclaims it.* However, if the court is unable to pronounce the judgment on the same day following the conclusion of the main hearing, it can postpone the proclamation of the judgment by no longer than three days and, in particularly complex cases, by no longer than eight days, and it can determine the time and place for the proclamation of the judgment.

In the presence of the parties, their legal representatives, proxies, and defense counsel, the president of the panel publicly reads out the summary judgment and briefly relates the reasons for the judgment. After proclaiming the judgment, the president of the panel advises the parties on their right to appeal as well as their right to respond to an appeal. The judgment that has been proclaimed *is rendered in writing and delivered* within 15 days of the date of its proclamation and, in cases for which, under a special law, the prosecutor's office of special jurisdiction is responsible, within 30 days of the date of the proclamation. In particularly complex cases, the president of the panel may ask the president of the court to determine a time limit within which the judgment shall be rendered in writing and delivered [154].

The CPC explicitly regulates the contents of a judgment prepared in writing in Article 428, allowing the lack of rationale or partial rationale of a judgment in some cases in Article 429.

5.3.3.2. The procedure for legal remedies

The right to a legal remedy against a decision determining a right, duty, or clear legal interest is a constitutional right guaranteed by Article 36 Paragraph 2 of the Constitution of the Republic of Serbia. With regard to criminal procedure, according to the CPC, there are three ordinary and two extraordinary legal remedies.

Ordinary legal remedies. Ordinary legal remedies are legal remedies that challenge an illegal or incorrect court decision (judgment or ruling) before it becomes final. These remedies include the following: a) appeal against a first-instance judgment, b) appeal against a second-instance judgment, and c) appeal against a ruling[155].

An appeal against the first-instance judgment is a regular, suspended, devolutionary, and time-bound legal remedy, which can be stated on a legal and factual basis by authorized persons[156]. An appeal may be filed in connection with 1) substantive violations of the provisions of criminal procedure, 2) violations of criminal law, 3) incorrect or incomplete finding of a fact, or 4) the decision on criminal sanctions and other decisions.[157] The CPC regulates appellate proceedings in Articles 442–454 and decisions of the court of second instance in Articles 455–462.

153 Article 423.
154 Articles 426–427.
155 Articles 432–469.
156 Articles 432–433.
157 Articles 438–441.

An appeal against a second-instance judgment is an exception to the rule that no legal remedy can be filed against second-instance final judgments. In this way, this remedy enables a trial in the third instance. An appeal may only be filed against a judgment by which the court of second instance reversed a first-instance judgment that acquitted the defendant of the charges and pronounced a judgment finding the defendant guilty. An appellate court adjudicates an appeal against a judgment of a court of second instance pursuant to the provisions of the Code applicable to second-instance proceedings. Mutatis mutandis application of provisions on procedure before a court of second instance are envisaged.

An appeal against a ruling is a regular legal remedy that enables an authorized person to challenge the correctness and legality of the decision of the body of the procedure (court, public prosecutor, and police). Mutatis mutandis application of provisions on an appeal against a first-instance judgment are envisaged in Article 468.

Extraordinary legal remedies. Extraordinary legal remedies represent exceptions to the principle of ne bis in idem. According to the CPC, there are two extraordinary legal remedies: a) a request to reopen criminal proceedings[158] and b) a request for the protection of legality[159].

A request to reopen criminal proceedings is an extraordinary legal remedy enabling the criminal proceedings concluded by a final judgment to be reopened at the request of an authorized person[160] under the conditions stipulated in the Code. The request is a non-evolving, non-suspensive, and temporally unbound legal remedy. Criminal proceedings concluded with the final judgment may be repeated only to the benefit of the defendant if there are reasons to reopen criminal proceedings as envisaged in Article 473. Reopening, that is, the re-examination of a criminal case and reopening of criminal proceedings, under this extraordinary legal remedy is possible only on a factual basis, when the factual situation that needs to be removed has been erroneously or incompletely established.

A request for the protection of legality is an extraordinary legal remedy that represents an instrument that ensures the rule of law and represents the main barrier to the illegality and unconstitutionality of the actions and decisions of the judiciary. This is a devolving, incomplete, and non-suspensive legal remedy that can be filed against all final decisions in both pre-investigation and criminal proceedings. In addition to final decisions, this legal remedy can also be challenged in proceedings that preceded the decision-making process[161]. A request for the protection of legality may be submitted only by the Republic Public Prosecutor, the defendant, and their defense counsel, that is, the defendant through their defense counsel[162], if, by the final decision or decision in the procedure that preceded its issuance, reasons envisaged in Article 485 occur.

158 Articles 470–481.
159 Articles 482–494.
160 Article 471.
161 Article 482.
162 Article 483.

The Supreme Court of Cassation decides on a request for the protection of legality. However, this court shall decide on a request for the protection of legality submitted in connection with a violation of the law[163] only if it finds that it concerns an issue of importance for correct or uniform application of the law[164].

6. Main features of sanctions execution

According to the valid Criminal Code, the following punishments can be imposed on the perpetrator: 1) life imprisonment, 2) imprisonment, 3) fine, 4) work in the public interest, and 5) revocation of the driver's license.

Although imprisonment is usually served in a penitentiary, there is one exception. Namely, the rule that convicted persons serve a prison sentence exclusively in penitentiary institutions in the Republic of Serbia has not been valid for a long time. Imprisonment can also be executed on the premises where the convict lives. Such a solution was introduced into the Criminal Code in 2009 — so-called house arrest. If the perpetrator is sentenced to up to one year in prison, the court may determine that this sentence will be executed by the convict serving it on the premises where they live upon consideration of certain factors: the perpetrator's personality, their previous life, their behavior after the crime, their degree of guilt, and other circumstances under which they committed the act. Therefore, they can expect that the purpose of punishment will be achieved through this approach as well. A warning measure (court reprimand or suspended sentence) can be imposed on the perpetrator of the criminal offense rather than a punishment.

Positive legal solutions can be considered modern because they provide a framework for the concept of reintegration of criminals into the social environment, which the legislature has opted for.

Bylaws elaborate, concretize, and operationalize the solutions given in the law, determine certain procedures and conditions for the realization of some of the solutions given in the law or prescribed by law, and regulate other issues important for the functioning of the prison system, such as the system of execution of criminal sanctions and execution of non-institutional sanctions and measures.

6.1. Prison institutions

Regarding prisons, there are more than 30 penitentiaries in the Republic of Serbia, which are of different types. However, all penitentiaries have in common that they are filled through their accommodation facilities. On average, there are 8,500 persons deprived of liberty in institutions for the execution of institutional sanctions, of which 5,800 are convicted, 1,800 are detained, 320 were punished via misdemeanor

163 Article 485 Paragraph 1 Item 1.
164 Article 486.

proceedings, 170 are executing a measure of being sent to a correctional facility, 50 are detained juveniles, 180 are convicted, and 80 are detained women.[165]

6.2. Rights of convicted persons

Under the current regulations, the greatest attention is paid to the rights of convicted persons while serving a prison sentence. In such a circumstance, all convicted persons are guaranteed basic rights, and if the convict is well served, the government can also obtain special rights.

The rights of convicted persons have evolved over the last few decades, so today, it can be said that the rights of convicted persons in the Republic of Serbia are at an enviable level. A convict (according to the LECS) who is serving a prison sentence has basic rights, namely 1) the right to humane treatment; 2) the right to accommodation; 3) the right to free time; 4) the right to hygiene; 5) the right to food and drinking water; 6) the right to clothing, underwear, and footwear; 7) the right to submit submissions; 8) the right to correspond; 9) the right to telephone conversations; 10) the right to legal aid; 11) the right to visit and stay in a special room; 12) the right to receive packages; 13) the right to receive remittances; 14) the right to work and rights based on work; 15) the right to healthcare; 16) the right to information; 17) the right to education; 18) the right to exercise religious rights; and 19) the right to a petition, complaint, appeal, and judicial protection. If the convicted behaves well, the government can ensure special rights, such as extended right to receive packages, the number of visits permitted, and the circle of persons who can visit.

At this point, special attention should be paid to a right of convicts that is prescribed by the Criminal Code and that can be realized only in the procedure of serving a prison sentence: the conditional release. A convict who has served two-thirds of their sentence shall be conditionally released from serving the sentence if they have improved in such a way that they can reasonably be expected to behave well at liberty and especially not to serve the sentence until commit a new crime. Conditional release is only a possibility, and whether the convict will be released on parole depends on the court's decision. In assessing whether a convicted person will be released on parole, their conduct while serving their sentence, their fulfillment of work obligations, their working ability, and other circumstances indicating that the convicted person will not commit a new criminal offense during their conditional release are taken into account. According to the Criminal Code, a convict who has been punished twice for serious disciplinary offenses while serving a sentence and whose benefits have been withdrawn cannot be released on parole.

6.3. Resocialization of convicts

According to valid regulations, the resocialization of the convict is carried out from the day when the convict started serving the prison sentence until they serve the

165 See the annual report on the work of the Administration for the Execution of Institutional Sanctions for 2006.

sentence in full. All persons employed in the prison take part, but it is primarily the responsibility of the treatment service, which assesses individual needs, capacity for change, and the convict's risk degree, determines and implements an individualized program of action, and applies methods and procedures, achieving individual prevention. The treatment service determines the treatment program for the convict, coordinates the work of other services and other participants in the implementation of the program, and performs other tasks determined by the LECS. The treatment of the convict includes the application of all planned activities—planned methods, techniques, and procedures undertaken with the aim that the convict adopts a socially acceptable value system and masters the skills for successful inclusion in the community so as not to commit crimes in the future.

It should also be noted that if necessary, the convict is provided with assistance even after release from prison. This assistance depends on the needs of the convict and is reflected, for example, in providing assistance with finding accommodation and food, providing assistance with exercising the right to health and social protection, giving advice on reconciling family relations, providing support and assistance in finding employment and completing schooling, and vocational training. This assistance is necessary to facilitate the convict's free integration into a new life based on respect for social norms and values. Otherwise, the institutional treatment and rehabilitation of the convicted person may be in question.

To harmonize this area with international standards and eliminate shortcomings in the functioning of the execution of criminal sanctions, the process of reforming executive criminal legislation and the implementation of positive practical solutions from regulated systems is underway. One shortcoming of positive legal solutions regarding the execution of a prison sentence is reflected in their inconsistency with the basic principles of the execution of a prison sentence as provided by international documents, such as the European Prison Rules.[166] A large number of returnees in the RS return to committing crimes after serving their prison sentence, which calls into question the realization of the purpose of the prison sentence, including the resocialization of convicts. The reasons should be sought in the conditions in which convicts serve their prison sentences and the assistance provided to them after their release from prison.

In recent decades, the prevailing view is that the institutional execution of criminal sanctions does not affect crime prevention as expected. The causes may be found in failed resocialization and the more dominant influence of negative informal prison structure on prisoners, but also in the inability of prison as an institution to change criminal behavior.[167]

166 Savet Evrope and Stojanović, 2006.
167 Stevanović, 2015.

7. Comparison with relevant EU documents and main international trends

Intensive reforms of criminal legislation in the Republic of Serbia began at the beginning of the 21st century. Namely, the criminal procedure legislation began introducing reforms after the adoption of the Criminal Procedure Code in 2001 and the criminal substantive legislation a few years later, after the adoption of the Criminal Code in 2006. Although the interventions of legislators in the field of criminal law have been very intensive, both quantitatively and qualitatively, over the last two decades, the same trend is noticeable in other European countries, even those that traditionally have stable criminal legislation. The European Union has shown a clear intention to unify the criminal law of member states.

The development of criminal legislation is, on the one hand, conditioned by the harmonization of criminal legislation with the law and standards of the European Union, while, on the other hand, the legislature is guided by other reasons. No matter how much one strives for stable criminal legislation, one cannot deny the dynamic character of crime, the intensity of which is accompanied by social, political, economic, and other changes that have accelerated in the modern world.

With regard to the amendments to the Criminal Code, which included both the general and the special parts, the intensification of criminal repression and the increase in the number of criminal acts is evident. Amendments to the Criminal Code via a special part in 2009 were at the forefront of tougher penalties. However, they also pronounced criminalization, that is, prescribed new crimes, mainly in those areas where criminal law shows its inefficiency and where existing incriminations are not applied or where efforts are made to fully and, as is pointed out in the theory, uncritically fulfill the obligations assumed by signing certain international conventions.[168]

Amendments from 2012 introduced new criminal offenses, such as competing for the outcome of a competition[169], criminal offense in the form of office abuse[170], criminal abuse offense in connection with public procurement[171], and criminal terrorism offenses[172]. The most important amendments from 2016 concern crimes against the economy and new crimes that are a consequence of harmonization with the Istanbul Convention. Due to compliance with this convention, several new crimes were introduced (female genital mutilation, persecution, sexual harassment, and forced marriage). An alignment was also made with the International Convention for the Protection of All Persons from Enforced Disappearance, which Serbia ratified in 2011[173] via EU Framework Decision 2008/913 / JHA of November 28, 2008, on

168 Delić, 2014, p. 198. See also Ristivojević, 2009.
169 Article 208b of the CC.
170 Article 234.
171 Article 234a.
172 Articles 391a, 391b, 391g, and 393a.
173 Official Gazette of RS — International Agreements, No. 1/11.

the fight against certain forms and expressions of racism and xenophobia through criminal law.

Regarding criminal procedure legislation, the reforms began with the adoption of the Criminal Procedure Code in 2001 and its various amendments (as many as eight), following the adoption of a completely new Criminal Procedure Code in 2006 (the implementation of which was twice delayed until it was completely repealed), and the adoption of the Criminal Procedure Code in 2011 (which has already been amended eight times thus far). The CPC from 2011 is undoubtedly the biggest radical turn in the regulation of criminal procedure compared to previous regulations, particularly considering that this Code introduces procedural mechanisms that are completely atypical, not only for the previous criminal procedure system that had existed for decades in Serbia but also for most countries in continental Europe. The current CPC has caused a number of problems in practice since the beginning of its implementation. As some theorists note, the reform of the criminal procedure in Serbia has been ongoing for too long, and unfortunately, it is characterized by extreme inconsistency and "wandering."[174]

Nonetheless, the reform of this Code is required due to the need for its harmonization with the RS Constitution and removal of a large number of solutions that have been rightly sharply criticized in theory and practice. Moreover, further reform is needed to harmonize criminal procedure legislation with relevant EU acts.[175]

In this regard, one of the biggest challenges is compliance with relevant EU directives and framework decisions on the rights of suspects or the accused and the concept, rights, and protection of victims of crime as well as with other relevant international agreements. It is also necessary to improve the efficiency of the procedure, particularly related to the delivery of letters, the recording of trials, and discipline during the procedure, taking into account the standards of the European Union as well as the practice of the European Court of Human Rights and the Constitutional Court of the RS.[176]

The efforts toward further harmonization are confirmed by the work of the two current working groups formed within the Ministry of Justice in 2021 with the task to amend the Criminal Code and the Criminal Procedure Code.

8. Conclusion

The criminal legislation of the Republic of Serbia has a legal tradition of almost a century. Going through its development, today, it has reached the level of modern criminal justice systems, which is largely in line with generally accepted international

174 Škulić, 2011, p. 121.
175 On the reform of the criminal procedure legislation of Serbia, see Škulić, 2011, pp. 54–125.
176 Turanjanin, Kolaković Bojović and Batričević, 2018, p. 19.

legal standards that ensure effective legislation while protecting and ensuring basic human rights.

Having in mind the trend of harmonization of criminal law regulations at the level of the European Union as well as harmonization with relevant EU acts, the Republic of Serbia, as an EU candidate country, has made progress, primarily in the field of criminal substantive law. Regarding criminal procedure law, substantial changes may be Europaea, both for the stated reasons and for the reason of poor legal solutions in the valid CPC. The reform of criminal legislation continues with the active participation of the scientific and professional public. However, regardless of the perceived needs for further development and reforms, Serbia's criminal legislation is in no way less developed compared to the criminal legislation of most European countries.

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| Chapter 7 |

Slovakia: National Regulations in the Shadow of a Common Past

Simona FERENČÍKOVÁ

ABSTRACT

This chapter is devoted to the basics of substantive criminal law and criminal procedural law in Slovakia. Its aim is to define criminal law in the Slovak legal system and to specify the basic areas of its regulation. The chapter focuses on the criminal law itself, its development, and the subject of regulation. Within the scope of substantive criminal law, it focuses on the concept of criminal liability of natural and legal persons and on the system of criminal sanctions, including alternative sanctions. Within the framework of criminal procedural law, it focuses on criminal proceedings, their purpose, basic principles, stages, and alternative punishment in the form of diversions. It also addresses enforcement proceedings, in which it refers to the basic principles of enforcement. It pays special attention to the issue of the prison system. Finally, the legal acts of the European Union, which determined the wording of Slovak criminal law, are discussed. Finally, it evaluates the criminal legislation in the context of the state's criminal policy. The Slovak Republic is known for the strictness of its criminal codes, which is reflected, in particular, in the definition of antisocial behavior and its subsequent designation as crimes for which the Slovak legal system, in comparison with other legal systems in Europe, imposes some of the most severe penalties.

KEYWORDS

Slovakia, criminal law, criminal liability, criminal proceeding, criminal policy

1. The criminal law in the Slovak Republic

Criminal law in the Slovak Republic has long been one of the traditional branches of *public law.* The concept of criminal law depends on its perception – whether it is perceived as a branch of law, a scientific discipline, or a field of study. It is most effective to consider it a branch of law. *Criminal law as a branch of law* is internally divided into substantive criminal law and procedural criminal law. *Substantive criminal law* is a branch of law that protects important social relations by determining what is a crime and which sanction can be imposed for its commission. *Procedural criminal law* is a branch of law that regulates criminal proceeding that act as the procedure

Ferenčíková, S. (2022) 'Slovakia: National Regulations in the Shadow of a Common Past' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 205–224. https://doi.org/10.54171/2022.evcs.cls_7

of law enforcement and judicial authorities in identifying and clarifying crimes and their perpetrators and in punishing those perpetrators fairly.[1]

Based on the concept of criminal law as a branch of law, the *object* of its *regulation* can also be defined. *The object of substantive criminal law* is the regulation of the basis of criminal liability, types of punishments, protective measures, the conditions of their imposition as well as the regulation of various crimes. *The object of procedural criminal law* is the regulation of the procedure of law enforcement authorities and courts as well as other persons involved in the criminal proceedings, in detecting crimes and their perpetrators, in deciding on crimes, in enforcing these decisions, in clarifying the causes of the crime, and in adjusting their rights and obligations.[2] *Criminal protection is a subsidiary (ancillary, supportive)* because it only complements the protection provided to individual protected interests by other non-criminal branches of law, which expresses *the ultima ratio* principle. This principle must be respected when creating the factual elements of criminal acts.

Substantive criminal law and procedural criminal law are inseparably connected. A perpetrator can be punished and the sanctions can be enforced only in the criminal proceedings. Substantive criminal law can only be implemented in a way that establishes procedural criminal law. Criminal policy and legislative activities must provide for compliance among the norms of substantive and procedural criminal law because they come from the same constitutional and criminal-political principles and they have a common goal, a common terminological apparatus, and common institutions. An independent examination of institutions of substantive and procedural law is legitimate only for pedagogical and scientific reasons; however, in terms of legislative and application practice, it is necessary to consider the complexity of solving problems in criminal law.[3]

Via its norms, criminal law regulates the relations that arise from the commission of a crime. These are so-called criminal relations of both a substantive and procedural nature. *A criminal (substantive) relationship* arises between the perpetrator of a crime and the state on the basis of the commission of the crime.[4] *A criminal procedure relationship* arises between law enforcement and a court on the one hand and the person being prosecuted on the other on the basis of a criminal charge (absolute certainty is not needed; reasonable suspicion of the commission of a crime is sufficient).[5] Notably, these relations are established at national, European, and international levels. *The structure of the sources of the criminal law* also corresponds to this. This includes national sources, European sources (primary and secondary law of the European Union), and international sources (primarily international treaties).

1 Ivor, Polák and Záhora, 2021a, p. 22.
2 Ivor, Polák and Záhora, 2021a, pp. 28–29.
3 Ivor, Polák and Záhora, 2021a, p. 23.
4 Madliak, Mihaľov and Štefanková, 2010, p. 35.
5 Ivor, Polák and Záhora, 2021a, p. 24.

Criminal law belongs to the most dynamic branches of law in terms of the quantity of legislative changes. The legislative changes determine both the needs arising from the trends of the state's criminal policy and the needs arising from the harmonization of criminal law with European Union law.

1.1. Development of criminal law in Slovakia

As in the case of the entire legal system, criminal law *has evolved* naturally. In Slovakia, as well as in other post-communist countries, this evolution was influenced by many factors. The codification of criminal law in Czechoslovakia took place via the issuing of Criminal Code no. 86/1950 Coll., Criminal Procedure Code no. 87/1950 Coll., and Criminal Administrative Act no. 88/1950 Coll., while the codification was ideologically focused. The formation of the criminal legislation was determined by the Constitution of the Czechoslovak Socialist Republic from 1960, and after its adoption, new criminal codes were adopted – Criminal Code no. 140/1961 Coll. and Criminal Procedure Code no. 141/1961 Coll – which brought the establishment of new institutes as well as the modification of existing ones. The fundamental changes in criminal law were brought about by the economic and the political transformation in the 1990s associated with the requirement of deideologization of the Criminal Code. The basic factor determining the form of criminal law in the broadest sense was recodification of the criminal law approved by the government of the Slovak Republic in May 2005, resulting in the current criminal codes, such as Criminal Code no. 300/2005 Coll. and Criminal Procedure Code no. 301/2005 Coll. Another factor, European integration, which culminated in Slovakia's integration into the European Union, must also be mentioned.

1.2. The criminal legislation

The basic national source of criminal law is the Constitution of the Slovak Republic, which refers to some basic principles of criminal law, both substantive and procedural. However, the most important sources are *the Criminal Code* and t*he Criminal Procedure Code.* As criminal codes in a concentrated form, they regulate the conception of criminal liability, the system of the criminal sanctions (for natural persons), and the conception of criminal proceedings, both pre-trial and court. In 2016, direct (true) criminal liability of legal persons was introduced into the legislation of the Slovak Republic, specifically by *the Code of the Criminal Liability of legal persons.* This code has become a special code in relation to the Criminal Code and regulates the basics of criminal liability and the system of criminal sanctions only in relation to legal persons as perpetrators of the crime. The Criminal Code applies the subsidiary to issues that the Code of the Criminal Liability of Legal Persons does not regulate. Among the national sources of the criminal law are presidential amnesty decisions as well as the findings of the Constitutional Court of the Slovak Republic that were adopted in the plenary and that annul the criminal law norms. Generally, it is necessary to mention the legislation that regulate the organization of criminal proceedings and the enforcement of the criminal sanctions.

1.3. Institutions and their roles

Criminal theory distinguishes between *the entity in the criminal proceedings* and the side in the criminal proceedings, which is determined by the different procedural positions the parties hold. The entities of the criminal process are factors (state authorities, natural persons, legal persons) who have their own influence over the course of the criminal proceedings and on whom the Criminal Procedure Code imposes certain procedural rights and obligations in order to exercise their influence.[6] It is entirely possible to include the law enforcement authorities and a court among the entities.

The law enforcement authorities are the prosecutor and the police officer.[7] The mission of law enforcement authorities focuses on the inquisitorial, that is, the investigative function. The essence of their activity lies in the detection of the crimes and the identification of their perpetrators in the pre-trial portion of the criminal proceedings.[8] *The prosecutor* in the court proceedings becomes a side and represents the prosecution in the criminal proceedings, while in the pre-trial portion of the criminal proceedings, the prosecutor is the dominus litis (the master of the dispute). *The prosecutor's office* can be considered to be a universal body for the supervision of legality. It is a hierarchically organized system of the state authorities headed by the Attorney General, wherein the relations are governed by the principle of subordination. A special section of the office of the Attorney General is the Special Prosecutor's office, which has a certain degree of autonomy with jurisdiction in matters belonging to the generic jurisdiction of the Specialized Criminal Court.

The Criminal Procedure Code specifies exactly who is considered to be *a police officer* as a law enforcement authority with procedural status. The institution whose members take part in fulfilling the tasks of the criminal proceedings is the *Police Force*. The basic legal framework of the activities of the Police Force and its members is regulated by a separate legal regulation, the Police Force Act. This Act uses the word police officer when discussing members of the Police Force; however, this is synonymous with a police officer as defined by the Criminal Procedure Code. The members of the Police Force – the police officers according to the Criminal Procedure Code – are procedurally independent in matters that they investigate, and they are bound only by the constitution, constitutional acts, acts, generally obligatory legislation, international treaties by which the Slovak Republic is bound, and instructions and commands of the court and the prosecutor to the extent specified in the Criminal Procedure Code.[9]

The court is an independent and an impartial state authority that decides on guilt and punishment, restrictions on fundamental rights and freedoms, remedies

6 Ivor, Polák and Záhora, 2021b, pp. 139–140.

7 In matters belonging to the European Public Prosecutor's Office, the prosecutor is also the European chief prosecutor, the European public prosecutor, the European delegated prosecutor, and the Permanent Chamber (matters of the Attorney General belong to the European Public Prosecutor's Office established by a special regulation or to the European chief prosecutor).

8 Ivor, Polák and Záhora, 2021b, p. 178.

9 Ivor, Polák and Záhora, 2021b, p. 212.

and protective measures. *The system of criminal courts* consists of general courts and a Specialized Criminal Court. The general courts consist of the Supreme Court of the Slovak Republic, the regional courts, the district courts, and the district courts in the seat of the regional court for the purposes of the criminal proceedings. The district courts, including those in the seat of the regional court as well as the Specialized Criminal Court, are the courts of first instance. The regional courts are considered the courts of second instance, that is, courts of a higher degree. The court of higher instance relative to the Specialized Criminal Court is the Supreme Court of the Slovak Republic, which is the superior court for all courts in the Slovak Republic. The courts act as arbitrators in the dispute between the prosecution and the defense. The current legislation favors the management function of the court's activities in the criminal proceedings, including the retention of making decisions. The inquisitorial function in the activities of the courts is significantly reduced, which is reflected in the fact that the court leaves the matter of proving to the sides and itself enters this matter only in the case of facts foreseen by the law.[10]

The probation systems are defined by a relatively wide range of features, with two main probation systems within Europe – one is typical for common law countries (Anglo-American legal system), and one typical for continental legal systems.[11] The birth of probation is connected with the entry of the Slovak Republic to the European Union, while a unique world (together with the Czech Republic) was created, namely the creation of probation and mediation, which are connected under the responsibility of one person – the probation and the mediation officer.[12] The basic legal framework for probation and mediation is Act no. 550/2003 Coll. regarding probation and mediation officers. In the Slovak Republic, a model of integration of probation into the judiciary was chosen.

1.4. Substantive criminal law

The basic principles of substantive criminal law are certain legal principles that form the basis on which the concept of criminal liability and the system of criminal sanctions are based. The Criminal Code does not explicitly define the basic principles in a straightforward form. Rather, they are reflected in the content of individual provisions and institutes of the Criminal Code, especially its general part. The principles can generally be divided into the principles of criminal liability and the principles of punishment. From a general perspective, a relevant principle is *the principle of subsidiarity of criminal repression*, which is based on the status of criminal law as a means of the last instance (ultima ratio) and *the principle nullum crimen sine lege*, which essentially states that there is no crime without a law. This principle includes four partial requirements: 1) the requirement of the legal form of a criminal law norm, 2) the requirement of certainty of the criminal law norm, 3) a prohibition of analogy to

10 Ivor, Polák and Záhora, 2021b, p. 177.
11 Ďurkechová, 2021, p. 126.
12 Ďurkechová, 2021, p. 129.

the detriment of the perpetrator, and 4) a prohibition of retroactivity (a retroactive effect) of the criminal law norm. *The principle ne bis in idem* in its substantive form means the prohibition of the double addition of the same fact in favor of or against the perpetrator.

The basis of criminal liability in the Slovak Republic is committing a crime. *A crime* is legally defined directly in the Criminal Code, while the definition applies equally to natural persons and legal persons. A crime is an illegal act, the signs of which are specified in the Code, unless the Code provides otherwise. It is based on a formal understanding of the crime, when it is sufficient for the occurrence of the criminal liability if the proceedings fulfills the elements of a crime. The legislation comes from *dual division of crimes into misdemeanors and crimes. Crimes* refer only to intentional crimes; they are purely formal, and at the same time, they represent a category of more serious and severe criminal proceedings. *A misdemeanor* is an exception from the formal understanding because in the case of a misdemeanor, the seriousness, which we understand as a material corrective; the material corrective must be assessed. For the formation of criminal liability, the seriousness must be greater than slight in terms of adults and greater than low in terms of juvenile perpetrators. The Criminal Code also exhaustively regulates *the criteria for assessing seriousness.* This can be assessed not only during the pre-trial proceedings but also during the court proceedings. The dual division of crimes determines an application of substantive legal institutes (such as the imposition of sanctions or the modification of criminal rates) as well as application of procedural legal institutes (such as the use of diversions in the criminal proceedings and the forms of investigation).

The perpetrator of the crime is the person who commits the crime. This definition differentiates an individual perpetrator from the accomplices and participants of the crime. The perpetrator of the crime may be a natural person or a legal person according to the conditions determined by a special regulation.

The conditions of the criminal liability must be differentiated depending on whether the perpetrator of the crime is a natural person or a legal person. In the conditions that apply in the Slovak Republic, *the principle of an individual criminal liability* and *the principle of a liability for culpable illegal act* apply to a perpetrator who is a natural person. According to these principles, it is necessary to fulfill the conditions of criminal liability when considering a perpetrator who is a natural person. The conditions required by the law are *age* (generally 14 years; in certain cases of the crime of the sexual abuse, the Criminal Code requires the ages of 15 years and 18 years) and *sanity* (a person can recognize the illegality of their actions and can control theme); sanity is proved by expert evidence (an expert psychiatrist). Only the consequences caused by the perpetrator themselves can be attributed to them. The Slovak law distinguishes between two types of fault: intentional and negligent. The conditions of criminal liability, age and sanity are the obligatory signs of the entity of the crime. They are referred to as circumstances precluding criminal liability according to the Criminal Code; therefore, their negative definitions are regulated in this Code. If any of these conditions is missing, criminal liability does not arise. According to the Criminal

Procedure Code, age is a circumstance of the inadmissibility of criminal prosecution. Sanity must be proven in the criminal proceedings. The establishment of insanity in the pre-trial portion of the criminal proceedings is a reason to stop the criminal prosecution; in the judicial portion of the proceedings, insanity is a reason for acquittal. Criminal theory distinguishes *three categories of perpetrators* according to the factual elements of criminal acts: a general, a special, and a specific perpetrator.

The criminal law differentiates four *categories of the perpetrators in terms of the age*. The first category consists of *the persons under 14 years* (or 15 years). These persons are not criminally responsible for the acts that otherwise show signs of the crime. However, they may be punished by a criminal sanction because protective education can be imposed on them in civil proceedings. The second category consists of *the juvenile perpetrator,* a person from 14 years to 18 years (or from 15 years to 18 years). In relation to the criminal punishment of the juvenile perpetrators, special provisions apply that regulate the differences from the adult perpetrator. These special provisions, which apply to juvenile perpetrators, are regulated in both criminal codes. The criminal liability for a juvenile perpetrator younger than 15 years old (but older than 14 years old) is connected to obtaining a level of intellectual and moral maturity that allows them to recognize the illegality of their act and to control it. This conception is called *conditional (relative) responsibility* and depends on the level of intellectual (a level of thinking) and moral development (personal and moral qualities, a value system) of a juvenile perpetrator at the time the crime was committed.[13] In such cases, the mental state of the juvenile must be examined in the criminal proceedings by an expert in the field of child psychiatry. Insufficient intellectual and moral maturity leads to the cessation of the criminal prosecution. Criminal liability is fully (general criminal liability) acquired by reaching the age of majority – 18 years of the age, at which point a perpetrator becomes *an adult perpetrator.* The fourth and final category consists of *a person close to the age of juvenile* (from 18 years to 21 years) and *an elderly person* (over 60 years). In these cases, age is generally a mitigating circumstance if the person's recognition and control skills are affected by their age.

The principle of the criminal liability of a legal person under the conditions regulated by the law is based on the Code of the Criminal Liability of Legal Persons and means that a legal person may be responsible for exhaustively defined crimes. In the Slovak Republic, a minimum model applies – *Limited criminal liability* – in the determination of the extent of criminalization of a legal person, wherein a legal person is responsible only for exhaustively regulated crimes.

The fault institution for legal persons replaces the institution of attribution. *The conception of the attribution of the criminal liability* of a legal person means that the perpetrator of the crime is a legal person to which a criminally relevant consequence of the natural person is attributed. *The criminal liability of the legal persons* comes from the theory of identification, which is based on the idea of personification of a legal person. In the criminal context, the personification of a legal person indicates that

13 Ivor, Polák and Záhora, 2021a, p. 147.

at the time of the intention to commit the crime and at the time of its commission, the authority of the legal person in question is also a legal person. According to this theory, a legal person may be responsible for the actions of its authorities and representatives. The most significant problem in this theory is determining the criteria for assessing whether a person is the authority of a legal person. According to case law, a delegation of the jurisdiction of the authorities of a legal person to other components of a legal person does not preclude the application of this theory.[14]

To prosecute a legal person as a perpetrator of the crime, several conditions must be cumulatively fulfilled: 1) a crime has been committed for which a legal person may be responsible; 2) a crime is committed in favor of a legal person, on its behalf, within its activities, or through it (alternatively given); 3) a crime is committed by the actions of one of the persons defined in a special regulation (four categories mentioned below)[15] or by the negligence of the supervision or of the control activities of these persons (such as a member of the board, a CEO, an executive manager, or an employee); 4) this is not a legal person whose criminal liability is excluded[16]; 5% a crime is attributable to a legal person. Natural persons may make a legal person criminally liable because the natural person's actions must be carried out on its behalf, through or in its favor, or within its activities. Therefore, the legal person's fault is derived from the natural person's fault, which can be divided into the following categories:

1. *The first category* – the action of the executive manager or the action of a member of the statutory body
2. *The second category* – persons who supervise activities even if they have no other relationship with the legal person
3. *The third category* – the action of a person who is authorized to act on behalf of a legal person (on the basis of contractual representation, such as a procurator or an agent)
4. *The fourth category* – the action of a natural person acting under the authority of a legal person, wherein, by insufficient supervision or control, which were the duties of the legal person, the persons listed in the first three categories enabled such persons to commit a crime, although through negligence[17]

In terms of the fourth category of natural persons, a legal person may be *exculpated* and can thus remove the criminal liability, specifically in two cases: a) a legal person shows that it has a functioning *Compliance program,* and it thus did not neglect any control or supervisory obligations, and b) the so-called *material corrective* is applied if the negligence of the duties of a legal person's authority is negligible.

The system of punishments may be defined as an arrangement – a hierarchy of individual types of punishments according to their severity as well as the affected

14 Ivor, Polák and Záhora, 2021a, p. 499.
15 Article 4 para (1) a) – c) of the Code of the Criminal Liability of the Legal Persons.
16 Article 5 of the Code of the Criminal Liability of the Legal Persons.
17 Ivor, Polák and Záhora, 2021a, pp. 506–507.

interests and mutual relations and bonds between individual punishments.[18] In the Slovak Republic, the *dualism of criminal sanctions* is applied. A criminal sanction is a punishment and a protective measure as two separate categories of sanctions that are equally important and significant.

The catalog of punishments for perpetrators – natural persons is regulated in the Criminal Code[19] and contains 12 types of punishments that can be distinguished according to the affected interests: imprisonment, house arrest, compulsory work, a monetary punishment, forfeiture of property, forfeiture of thing, a ban on activity, a residence ban, the loss of honorary titles and honors, the loss of military and other ranks, and expulsion. *The catalog of punishments for perpetrators – legal persons* is regulated in the Code of the Criminal Liability of Legal Persons[20] and contains nine types of punishments, which can also be distinguished according to the affected interests: the dissolution of a legal person, forfeiture of property, forfeiture of thing, monetary punishment, a ban on activity, a ban on receiving subsidies, a ban on receiving help and support from the funds of the European Union, a ban on participating in the public procurement, and the punishment of publishing a conviction. *The catalog of protective measures* is regulated only in the Criminal Code: protective treatment, protective education, protective supervision, detention, confiscation of property, and confiscation of a portion of property.

Among these punishments, a group of *alternative punishments* can be generated, which, without being connected with an imprisonment, guarantee the fulfillment of the purpose of the punishment in the same way as an unconditional imprisonment. The alternative punishments strengthen the principle that an unconditional imprisonment is an ultima ratio, which should only be applied if other means, that is, punishments without imprisonment, have failed.[21] These may include house arrest, compulsory work, monetary punishment, conditional suspension of a punishment, and conditional suspension of a punishment with probation supervision. The alternative punishments are based on the conception of restorative criminal policy. Their introduction into criminal codes reflected the need for society to react to the failing retributive form of punishment, which proved to be ineffectual due to insufficient results in the areas of the resocialization and correction of the perpetrators. The statistics do not indicate that they have a high degree of applicability.

1.5. Criminal proceedings

The goals of criminal proceedings are essentially the same in all modern states and their legal systems: to duly detect a crime and to punish its perpetrator fairly. The facts must be ascertained via methods that correspond to current scientific knowledge, enriched by the empirical knowledge of law enforcement and the judiciary, taking

18 Szabová, 2021, p. 151.
19 Article 32 of the Penal Code.
20 Article 10 of the Code of the Criminal Liability of the Legal Persons.
21 Ivor, Polák and Záhora, 2021a, pp. 374–375.

into account social interests and needs, but also with respect for the rights, interests, and freedoms of individuals, which are guaranteed by the constitution and international agreements and which are also respected by Slovak law enforcement agencies and courts.[22]

The basic principles of criminal procedure are leading legal ideas to which this status is granted by law. The entire criminal process, the entire organization of criminal proceedings, and the division of functions in criminal proceedings, that is, all systemic and structural criminal relations, are built on them.[23]

The constitution for the establishment of the principles of criminal procedure has extraordinary importance in a democratic society, as it seeks to regulate criminal procedure, which, by its very nature, always affects the fundamental rights and freedoms of citizens. The basic constitutional principles are then further defined and specified by the relevant provisions of the Criminal Procedure Code. The following groups of principles are traditionally distinguished:

a) Principles common to all criminal proceedings (principle of due process, principle of proportionality, principle of ensuring the rights of defense, principle of audi alteram partem, principle of fair trial, principle of publicity, principle of cooperation with citizens' associations, principle of protection of the injured party's rights)
b) Principles of the initiation of proceedings (principle of officiality, principle of legality, principle of ne bis in idem, principle of opportunity, principle of indictment)
c) Principles of evidence (principle of the presumption of innocence, principle of search, principle of immediacy, principle of orality, principle of at liberty evaluation of evidence, principle of finding the facts of the case without reasonable doubt)[24]

In the various stages of criminal proceedings, the principles in question are applied differently, depending on their purpose.

Criminal proceedings are proceedings pursuant to the Criminal Procedure Code. In the Slovak republic, it has the character of a continental criminal process, which, in essence, means that it is divided into two basic parts. The first represents *pre-trial proceedings,* and the second represents *proceedings before the court*. In terms of the nature, order, and diversity of the task's performance by individual subjects of criminal proceeding, the criminal proceedings may but is not required to move through all six stages within these two basic portions.[25] The pre-trial portion of the proceedings has two stages: 1. the pre-prosecution procedure and 2. the preparatory proceedings. Within the judicial part of the proceedings, we distinguish four stages: 1. examination

22 Ivor, Polák and Záhora, 2021a, p. 51.
23 Ivor, Polák and Záhora, 2021a, pp. 53–54.
24 Jalč, 2021, p. 41.
25 Ivor, Polák and Záhora, 2021a, p. 18.

of the indictment and preliminary hearing of the indictment, 2. the main hearing, 3. the appeal procedure, and 4. the enforcement procedure.

The first stage the pre-*prosecution procedure* has a facultative character. Its essence lies in the receipt of criminal reports and complaints concerning the facts indicating the commission of a crime.[26] The second stage, *the preparatory proceedings*, is the obligatory stage. Its role is to provide the basis for deciding whether to bring a charge or a proposal for an agreement approval on guilt and punishment to the court that further deals with the case or whether to issue another decision on the merits.[27] The relevance of preparatory proceedings also lies in the fact that its proper execution is often decisive for the outcome of the entire criminal proceedings. The preparatory proceedings are carried out in the form of an investigation and an abbreviated investigation. The third stage, the examination of the indictment, is obligatory, and its essence lies in the fact that a single judge examines the content of the indictment, its justification, the content of the file, the completeness and legality of the preparatory proceedings, and the possibility of diversions and decides on further action. *The preliminary hearing of the indictment* is facultative, and its essence lies in the fact that the Senate examines the merits of the indictment, the legality of the evidence, and the possibilities of applying diversions and decides on the procedure to pursue further. Whether an examination or a preliminary hearing is applied depends on the category of the offense committed as well as the rate.[28] The fourth stage, *the main hearing*, is the crucial portion of the criminal proceedings, in which guilt and punishment are decided, as are other related issues, such as damages or the imposition of a protective measure. The main hearing is usually public and is held orally in the personal presence of the parties. At the main hearing, the principle of publicity, orality, and immediacy and the principle of audi alteram partem are fully reflected, which becomes evident during the evidence phase.[29] Stage five, the *appeal / appeal proceedings,* is only possible if the beneficiaries have taken the opportunity to lodge a proper appeal (correctly and in a timely manner). The essence of this stage lies in the examination of the previous proceedings and the issued decision: factual errors, legal errors, and procedural errors. The purpose is to remedy the incorrectness of the decision in the interests of the parties to the proceedings, which increases the guarantees of the legality and fairness of court decisions (as well as of law enforcement authorities). Decisions of higher courts (usually the Supreme Court) issued in appeal proceedings form an important part of the case law unifying and guiding the interpretation and application of legislation.[30] The sixth stage, the enforcement procedure, is possible if the final decision contains a statement imposing a sentence or protective measure.

Alternative punishment can be described as one of the possibilities for fulfilling the purpose of restorative justice. It is prerequisite for faster and more efficient and

26 Ivor, Polák and Záhora, 2021a, pp. 18–19.
27 Jalč, 2021, p. 187.
28 Ivor, Polák and Záhora, 2021a, p. 19.
29 Deset, 2021, p. 216.
30 Ivor, Polák and Záhora, 2021a, pp. 203–204.

cost-effective solutions in criminal cases and creates alternatives in procedural law. *Procedural law alternatives* are decisions, including special procedures, that precede these decisions. Their specificity lies in the following fact: if the legal conditions, such as those set out in the Criminal Procedure Code, are met, the criminal proceedings – that is, the prosecution of the accused – will be legally terminated even without a court ruling on guilt and punishment and even in the application of some of these procedural law alternatives including cases of criminal prosecutions conducted for particularly serious crimes. Decisions of this nature include conditional cessation of prosecution, conditional cessation of prosecution of the cooperating accused, and conciliation. All of these decisions can be applied only with the consent of the accused, while in theory, as well as in court practice, they are included among the so-called *diversions*. In the SR, diversions also include an agreement on guilt and punishment – proceedings as well as the subsequent court decision on this agreement in the form of a judgment – although some authors also consider a court decision by a criminal order to be a diversion. In both cases, however, unlike the diversions mentioned above, the decision – judgment or criminal order – can only be made by a court, and these decisions are always of the nature of a conviction declaring a person guilty and imposing a penalty.[31]

The system of penalties and the principles by which penalties are imposed are based on the idea that punishment should be proportionate to the seriousness of the offense for society and should be individualized and differentiated according to the nature of the offense being committed and the character of perpetrator as well as fair and lawful.[32] The principles of sentencing constitute aspects that relate to and constitute the imposition of penalties as certain limits in carrying out the work of courts and judges. From a practical perspective, they represent a concrete reflection of the protective function of criminal law in the legislative text. Here as well, the connection between theory and practice is extremely important, as principles, if we perceive them as rules of punishment, will be applicable in practice only if they become sufficiently abstract.[33] From the perspective of the application principles, it should then be the case that penalties are imposed precisely in light of the principles in question, specifically regarding the question of the legality and proportionality of such penalties.[34]

Punishment of offender is primarily based on the principle *of nulla poena sine lege*, that is, the principle of the legality of punishment, according to which only such type of punishment and only to the extent provided in the Penal Code can be imposed on the offender. Punishment should only punish the offender in such a way as to ensure the least possible impact on their family and those close to them, which is a manifestation of *the principle of personality of punishment*. In determining the type

31 Čopko, 2020, pp. 250–251.
32 Mencerová et al., 2015, p. 292.
33 Mihálik and Vincent, 2020, p. 306.
34 Čič, 1983, p. 19.

of punishment and its imposition, the court shall consider, in particular, the way in which the act was committed and its consequences, fault, motivation, aggravating circumstances, and mitigating circumstances as well as the perpetrator, their circumstances, and the possibility of their successful treatment. The law forces the court to consider the individual peculiarities of each individual crime, thus fulfilling *the principle of judicial individualization of punishment*, which determines the specific degree of the sentence. However, judicial individualization of punishment is preceded by *statutory individualization of punishment*, which determines the modification of the penalty rates of imprisonment specified in a separate part of the Penal Code for each crime. Effective January 1, 2021, the judicial individualization of the sentence was extended. When determining the type of sentence and its imposition, the court will also take into account whether the offender gained a property benefit from the crime; if the property or personal relations of the offender do not prevent it or it is not to the detriment of liquidated damages, in addition to another punishment, it shall – taking into account the amount of this property benefit – also impose punishment on their property, which will affect them, unless such punishment is imposed solely on them.

The principle of individualization of punishment (together with the principle of personality of punishment) is the most reflected in application practice and affects the type and scope of punishment imposed, namely judicial individualization of punishment. However, statutory individualization of punishment has a more general character. The purpose of judicial individualization can be seen not only in terms of setting the basis of proportionality of the sentence, but also, for example, in terms of whether alternative punishments can be also considered.[35] *The principle of proportionality of punishment to the committed crime* is relevant in application practice. In this context, proportionality means the impossibility of imposing a punishment that would be stricter than the severity of the crime. Judicial individualization of the sentence plays an important role in the requirement of the proportionality of the sentence, which enables the fulfillment of this requirement in specific cases. The individualization of punishment is a tool to achieve the adequacy of punishment.[36] The principle of justice of punishment is related to the principle of individualization and proportionality of punishment, and the justice of the punishment is determined by its purpose.

1.6. Enforcement of criminal sanctions

To fulfill the primary purpose of the Penal Code and Criminal Procedure Code, which is to protect social relations from crimes, issuing decisions in criminal proceedings is not sufficient; it is also necessary to enforce these decisions. This fact determines the relevance of the enforcement procedure, which usually follows the issuance of a court decision (possibly a body active in criminal proceedings). The *enforcement procedure* regulates the procedure of the court, bodies active in criminal proceedings,

35 Mihálik and Vincent, 2020, p. 307.
36 Judgment of the Supreme Court of the SR, sp. zn. 4To 7/2013.

and other public authorities by implementation of the issued decision.[37] The Criminal Procedure Code regulates procedural acts focused on enforcing criminal sanctions so that their purpose in criminal law is fulfilled.

First, there must be a court decision imposing the sanction, and second, that decision must be enforceable. An enforceable decision should be enforced immediately, reflecting the principle of urgent enforcement. This principle also allows legal exceptions. These exceptions cause either the suspension or the interruption of the sanction enforcement. Other principles of enforcement of sanctions include *the principle of enforcement of sanctions without interruption*. The enforcement of the sanction must correspond to the decision. The purpose of that principle is that only that type of sanction can be enforced and only to the extent specified in the decision. The execution of sanctions is carried out ex officio. The court that issued the decision and sent it be enforced shall be responsible for ensuring that its decision is correct and enforceable. *The enforcement of sanctions is entrusted to the court.* The authority that issued the decision is responsible for its enforcement or shall authorize another authority for the enforcement. This provision provides a general rule regarding the decision's enforcement in criminal proceedings. It applies to all decisions that require enforcement, regardless of whether a penalty is imposed and which authority issued the decision. Finally, the supervising and controlling of enforcing sanctions is also important.

In the area of custody and imprisonment, the Prison and Judicial Guard Corps (hereinafter referred to as the "Corps"), who are armed security corps, perform the tasks. The Corps consists of the General Directorate and institutions for the execution of custody, institutions for the execution of imprisonment, the institution for the execution of imprisonment for juveniles, and the hospital for the accused and convicted in Trenčín. The General Directorate and related Institutions are established and abolished by the Ministry of Justice of the SR. The Directorate-General manages and controls the institutions. The Corps reports to the Minister of Justice. The General director is head of the Corps, and the head of an institution is its respective director.

The basic principles of sentence enforcement are regulated by the Act on the Execution of Sentences of Imprisonment.[38] The enforcement of a sentence shall respect the human dignity of the convicted person and shall not use cruel, inhuman, or degrading treatment or punishment. The principle of equal treatment applies to convicts. The enforcement of the sentence shall support such attitudes and abilities that will assist the convicted person in reintegrating into society and respecting the rule of law. The punishment is carried out differently. The movement, social contact, and way of securing and exercising of the convict's rights may vary according to the different security levels of the prison. To increase the effectiveness of the execution of a sentence, internal differentiation is carried out, and specialized sections are created.

37 Minárik et al., 2010, p. 966.
38 Article 3 of Act on the Execution of Sentences of Imprisonment No. 475/2005.

The purpose of the sentence formulated in the Penal Code partly differs from the purpose of imprisonment enforcement, which is formulated in the Act on the Execution of Sentences of Imprisonment. Achieving the purpose of a custodial sentence is linked to the number of subjective and objective facts as well as to the specific conditions of the imprisonment enforcement. It is not only the treatment program itself and its tools individualized for each convict but an entire set of conditions of imprisonment enforcement that affect the nature, extent, and *possibilities of resocialization* of convicts in specific institutions for the execution of sentences. *An individual treatment program* is set for each convict. In the treatment program, it is possible to see standard elements with resocialization potential: inclusion in the work performance, method of rewarding, disciplinary responsibility, and system of leisure activities. Even the most effective systems and methods of serving a custodial sentence do not lead to the achievement of the purpose of serving the sentence if the convict themselves has a negative and damnatory attitude toward the possibilities of self-correction and re-education. For this reason, there is no demand for redress*, re-education of convicts,* or ensuring that they will actually lead a decent life; it is sufficient that conditions are objectively created for these purposes in the context of imprisonment.[39] Forms and methods of pedagogical and psychological activity, methods of social work, constitutional order, disciplinary authority, employment, education, and cultural-educational activities are used in the treatment of convicts.[40]

Regarding *reintegration*, it is necessary to emphasize the connection between penitentiary and post-penitentiary care. The current pilot project *"Chance to Return"* can be considered a milestone in the above intentions. The main goal of this national project is to reduce the risks of social exclusion for persons serving imprisonment and to increase their competencies when entering the labor market. This project creates spaces for the output departments of partner institutions for imprisonment enforcement to create a pilot-tested innovative system of comprehensive support for convicts for a smooth transition to civic life. The project links separate penitentiary and post-penitentiary care policies (post-penitentiary care thus begins during the enforcement of imprisonment), reducing the risks of re-offending and limiting the emergence of possible crisis situations in the immediate vicinity of persons returning from imprisonment. The evaluated results of the national project will be incorporated into generally binding legal regulations and internal governing acts of the beneficiary and partners. The meaningfulness of the funds spent on the national project is based on three basic functions of the enforcement purpose of imprisonment and their innovations, namely the protective function.

Within the current *problems of prisons* resonates the question of a constant increase in the number of accused and convicted persons in prisons. For this reason, the need for systemic changes in the prison system is emphasized in the area of alternative punishment rather than unconditional imprisonment as well as in the area of economy

39 Tittlová, 2021, pp. 99–102.
40 Article 16 of the Act on the Execution of Sentences of Imprisonment No. 475/2005.

and economics and in the area of post-penitentiary care. Changes regarding prisons as well as all of the other changes in public administration are essentially dependent on the economic conditions of a particular state as well as on the social and political priorities that are currently recognized.[41] The basic problem of ensuring adequate conditions of imprisonment has long been considered the increasing number of prisoners and the associated exceeding of accommodation capacities, unfavorable technical conditions and structure of prisons and facilities, and many other issues (such as insufficient regional coverage of institutions within Slovakia). The index of the Slovak prison population occupies very low ranks among other European countries.[42] The long-term unsustainable situation of Slovak prisons is also based on the conclusions of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

2. Relevant European Union documents

The key provision for the area of substantive criminal law is the provision of Article 83 of the Treaty on the Functioning of the EU, which states that the European Parliament and the Council may, in accordance with the ordinary legislative procedure, lay down, by means of directives, minimum rules concerning the definition of criminal offenses and sanctions in particularly serious crime with a cross-border dimension due to their nature or consequences or the special need to combat them on a common basis. It then identifies the areas of crime in which the EU has legislative powers: terrorism, trafficking of human beings and sexual abuse of women and children, drug and arms trafficking, money laundering, corruption, counterfeiting of means of payment, and computer and organized crime. Relevant in this area was *Council Framework Decision 2002/475/ JHA on combating terrorism*, the implementation of which introduced the criminal offense of terrorism into Slovak law. *Council Framework Decision 2002/629/ JHA on combating of human trafficking* was reflected in Criminal Code no. 300/2005 Coll., which was the result of extensive recodification work. It was later replaced by *Directive 2011/36/ EU of the European Parliament and of the Council on Preventing and Combating Trafficking of Human Beings and Protecting Victims of Trafficking*, which was transposed into Slovak law by *Directive 2011/92/ EU on combating sexual abuse and sexual exploitation of children and against child pornography*. These directives defined the definition of child, child pornography, and child prostitution in our legislation, introduced the concept of child pornography, extended the features of the crime of trafficking human beings, changed the crime of child trafficking to the crime of entrusting a child to another, introduced new sexual abuse of child (so-called grooming), and expanded the features of the crime of possession of child pornography. *Council Framework Decision 2008/913/ JHA on*

41 Fábry, 2012, p. 213.
42 Koncepcia väzenstva Slovenskej republiky na roky 2011–2020.

combating certain forms and expressions of racism and xenophobia by means of criminal law was also important; it was also transposed into the Slovak legal order and which introduced definitions of extremist groups, extremist material, and extremist crimes and introduced a new qualification feature, "extremist special motive," which has become a feature of qualified facts. Finally, new crimes affecting this issue were introduced.[43]

Judicial cooperation in criminal matters within the EU is cooperation that takes place exclusively among EU Member States, namely between judicial authorities, courts, and prosecutors' offices. Its basic aim is to ensure mutual recognition of the decisions taken by the individual Member States and their related enforcement. A key provision for the area of criminal procedural law is the provision in Article 82 of the Treaty on the Functioning of the EU, in particular, Paragraph 3, according to which the Union seeks to ensure a high level of security through the above-mentioned mutual recognition of criminal convictions (and other judicial decisions) or through approximation of criminal law (harmonization). These can be considered basic elements of judicial cooperation in criminal matters. One of the key documents in the field of judicial cooperation is *Framework Decision 2002/584/ JHA on the European arrest warrant and surrender procedures among EU Member States*, the implementation of which, in the form of Special Act no. 403/2004 Coll., took place in the Slovak Republic with no major complications. Based on the evaluation of its application, serious shortcomings were detected, the elimination of which resulted in the adoption of the new Act no. 154/2010 Coll. Equally relevant are Framework Decision 2009/829/ JHA on the application of the principle of mutual recognition to decisions on supervision measures as alternative links among EU Member States *(Framework Decision on the European supervision order) and Directive 2011/99/ EU on the European protection order,* which the Slovak Republic fully respected and transposed by special law no. 398/2015 Coll.[44]

The most up-to-date institution is the *European Public Prosecutor's Office*, which began its activities effective June 1, 2021. The legal basis for its existence is *Council Regulation no. 2017/1939* implementing enhanced cooperation for the establishment of the European Public Prosecutor's Office. Its basic task is to investigate and prosecute perpetrators of crimes affecting the EU's financial interests, as set out in EP and *Council Directive 2017/1371 on the fight against fraud to the EU's financial interests by means of criminal law*. Its competence also includes offenses concerning participation in a criminal organization within the meaning of *Council Framework Decision 2008/841/ JHA on combating organized crime*. In the Slovak Republic, in connection with the creation of this institution, Act no. 286/2018 Coll. on the selection of candidates for the post of European Prosecutor and European Delegated Prosecutor in the European Public Prosecutor's Office was accepted.[45]

43 Szabová, 2021a, pp. 236–251.
44 Szabová, 2021b, pp. 362–385.
45 Janko, 2021, pp. 123–125.

3. Conclusion and evaluation

Criminal policy as part of general policy focuses on crime as a social category; it is part of public policy, which focuses on crime and other anti-social phenomena and their solutions and control, as well as on prevention while also taking into account its political dimension. The current socio political situation forces us to consider the variability of criminal policy, the stability and effectiveness of criminal law, whether criminal policy responds flexibly to the need to change criminal law resulting from applied practice, and whether law enforcement authorities are able to respond flexibly to changes in the direction of criminal policy and thus changes in criminal law. Finally, the current socio political situation forces to consider the need to create a separate independent institute dealing with crime and criminological research.

Legitimate questions also arise in relation to the *subject of criminal policy regulation* (criminal justice, i.e., courts, prosecutor's office, police, and prisons)[46] because in relation to courts (so-called court map), the prosecutor's office (change of traditional internal organizational structure) as well as the police forces in terms of the conditions of the Slovak Republic, reform is being prepared, which has provoked discussions and a wave of non-acceptance in wider professional circles. The role of criminal policy is also to create recommendations for the reform of criminal law for legislation,[47] but it is absent in the current conditions in the Slovak Republic. The role of criminal policy is to identify the current state of social consensus on basic criminal policy principles. The logical part of this process is the formulation of the principles and guidelines of criminal policy.[48] The Slovak Republic is known for the strictness of its criminal codes, which is reflected, in particular, in the definition of anti-social behavior and its subsequent designation as crimes for which the Slovak legal system, compared with other legal systems in Europe, imposes one of the most severe penalties.

46 Strémy, Balogh and Turay, 2020, p. 2.
47 Zuobková, 2018, p. 314.
48 Zuobková, 2018, p. 312.

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| Chapter 8 |

Slovenia: National Regulations in the Shadow of a Common Past

Maja KOTNIK – Miha ŠEPEC

ABSTRACT

For many years, until the country's independence, Slovenian criminal law developed under the influence of communism. With the new modern Constitution of the Republic of Slovenia, it was necessary for the country to establish its own modern criminal law, which would no longer be tied to past communist patterns. Accordingly, both criminal procedural law and criminal substantive law have been revised. New Slovenian criminal law is based on the general principles, such as the principle of legitimacy and restricted repression in connection with the rule of law, the principle of humanity, the principle of individualization of criminal sanctions, the principle of legality, the principle of fairness of procedure, the principle of formality, the principle of material truth, the debate principal, the principle of free judgement of evidence, the principle of subjective or guilty responsibility, the principle in dubio pro reo, and finally, the assumption of innocence. In addition to these principles, Slovenian criminal law also rests on the general concept of criminal offense, which is formed by three key elements, namely the fulfillment of the nature of the offense, illegality, and guilt. All of the above represent the key pillars of Slovenian criminal law, making it fair, modern, and comparable to other criminal systems in European countries.

KEYWORDS

Slovenia, historical overview, criminal legislation, criminal law, practice of criminal justice

1. Introduction

Throughout history, criminal law may be understood as a gradual restriction of deviant actions or actions that legislator considers to be reprehensible. They are often considered as such by society, but this is not necessarily related, as a criminal offense has always been conduct that is criminalized by law. The essence of criminal law is to limit and prevent all forms of violence in social relations and in personal relations between individuals, although this has not always been the main motive for establishing positive criminal law in a particular period. Historically, leaders did not always use their repressive power to protect people's human rights and social values

Kotnik, M., Šepec, M. (2022) 'Slovenia: National Regulations in the Shadow of a Common Past' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 225–254. https://doi.org/10.54171/2022.evcs.cls_8

but, rather, abused it to consolidate their power, achieve their political goals, and persecute their political opponents.[1]

Criminal law is supposed to reflect the rule of law and its implementation in the most sensitive area of state repressive activity. However, the greatest danger lies in the subordination of legislation and its bodies by authorities who enjoy a certain social power. Through the historical review of the change of criminal law in the territory of the former Yugoslavia, it is possible to observe the development of criminal law with the change of the political regime and the realization of the social power of the authorities. This is well illustrated by the example of the principle of legality, the observance of which was very poor during socialism; however, with the development of European criminal law, this began to be consistently observed in Yugoslavia as well.[2]

With Slovenia's independence and, later, Slovenia's accession to the European Union (EU), Slovenian criminal law rose to the level of modern European criminal law and adopted European criminal law frameworks and standards.

2. A brief historical overview of the development of criminal law in Yugoslavia and, later, in Slovenia

The history of criminal law reflects the development of human civilization and culture. In this way, it is possible to connect the change and adaptation of criminal law through individual political periods in a certain area, while the criminal law legislation itself strongly reflects the tendencies of the current political system.[3]

2.1. Criminal law between World Wars I and II

With the formation of the Kingdom of Serbs, Croats and Slovenes (Kingdom of SCS) and then Yugoslavia, Yugoslavia inherited six different legal areas. In Serbia, the Serbian Criminal Code of 1860 was in force. In Croatia and Slavonia, the Austrian Criminal Code of Crimes, Offenses, and Misdemeanors of 1852 was in force, which also applied in Slovenia and Dalmatia but with amendments that applied for Austria. In Bosnia, the Austrian Penal Code has been in force since 1879 and was slightly adapted to Muslim religious and legal concepts. In Vojvodina, Medjimurje, and, initially, in Prekmurje, the Hungarian Penal Code of 1880 was in force, with an amendment in 1908. Montenegro had its own Criminal Law on Crimes and Offenses of 1906, modeled on the Serbian Criminal Code. After the formation of Yugoslavia, most of the listed regulations remained in force with individual amendments. The validity of the Military Penal Code was also extended to the entire country. In 1921, a special infamous law on the protection of public security and order in the country (or the law

1 Bavcon and Šelih, 1987, p. 43.
2 Bavcon, 2006, pp. 15–19.
3 Bavcon and Šelih, 1987, pp. 43–44.

on the protection of the state) was enacted, which was aimed primarily against the Communist Party of Yugoslavia.[4]

Due to several different criminal law acts that were in force at the same time in otherwise individual parts of the same country, there were needs and aspirations for a unified criminal law system that would apply to the entire country. In the period between the two world wars, preparations were underway for new Yugoslav criminal legislation, but the new penal code was not adopted until 1929, and it entered into force in 1930. It was drafted under the strong influence of the European legislative reform movement on modern penal codes, which include the principle of legality and other generally accepted European democratic principles of criminal law. However, such a democratically oriented criminal code did not meet the needs of former Yugoslavia.[5]

2.2. Criminal law during the national liberation front

The national liberation war and the people's revolution overthrew the government as well as the current legal order. However, the Yugoslav national liberation front had the peculiarity that it not only overthrew the old legal order but also established new bodies as well as new legal concepts and principles. This marked the beginning of the development of a new substantive criminal law, which initially stemmed primarily from the need to fight the occupiers and traitors, from the needs of revolutionary social transformation, and from the people's sense of justice.[6]

At that time, Slovenia was the leading country in written criminal law sources in Yugoslavia. On September 16, 1941, the Slovene National Liberation Committee issued a special "Decree on the Protection of the Slovene Nation and its Movement for Liberation and Unification"; this was considered the first substantive criminal regulation within the national liberation movement in Yugoslavia and represented an important legal source for post-war Yugoslav criminal law.[7] Otherwise, criminal law in other parts of Yugoslavia was created primarily through the case law of individual partisan detachments and national liberation committees with no special regulations. In 1942, regulations on the tasks and organization of national liberation committees delimited and defined the powers and tasks of military courts, which, accordingly, judged spies, traitors, hostile agents and saboteurs, and national liberation committees to combat

4 Ibid., p. 66.

5 Bavcon and Šelih, 1987, p. 67.

6 Ibid., p. 67.

7 In addition to the Decree on the Protection of the Slovene Nation and its Movement for Liberation and Unification, the Decree of the General Staff of the National Liberation Army and the Armed Forces of Slovenia on Military Criminal Justice of April 20, 1944, is one of the first Slovene and Yugoslav criminal law sources. The definition of criminal offense was established in these documents as acts that are dangerous for the Slovene nation and Yugoslavia, for the National Liberation Army, for the Liberation Front of the Slovene Nation, for the community in general, and, to the greatest extent, for individuals. In addition, the purpose of punishment was determined, namely, to prevent the perpetrator from re-committing criminal offenses, to intimidate the hesitant, and to have an educational effect on the perpetrators of criminal offenses. See more ibid., p. 67.

theft, robbery, and disorder in general. The principle of individual and culpable responsibility of perpetrators and the principle of humanity were included in these regulations.[8] More detailed procedural rules have emerged in the form of instructions for the work of the authorities, which have launched detailed investigations into individual cases and required sufficient evidence to impose a criminal sanction. However, it should be noted that these are not procedural rules in the form of procedural laws as we know today but political orientations in the form of instructions that follow the aspirations of the then ruling class. Furthermore, this was a time of war, which made it impossible to avoid disregarding these instructions. Regarding substantive criminal law, it is also necessary to highlight the Decree of the Supreme Staff on Military Courts of May 24, 1944, which, in addition to regulations on the organization of military courts and criminal procedure, also contained provisions on criminal offenses, penalties, and security measures. This regulation explicitly introduced the principles of guilt-based liability, the principle of the individualization of punishment and conditional sentence.[9]

2.3. Criminal law of the new Yugoslavia

At the end of the war, problems arose in the Yugoslav judiciary, especially regarding criminal law. In this area, only the decree on military courts was in force, which did not cover all socially dangerous acts that were committed by individuals. This situation of a lack of legal rules was regulated by the AVNOJ Decree (February 3, 1945), which, in 1946, became the Act on the Invalidity of Legal Regulations from the Time Before April 6, 1941, and from the Era of Enemy Occupation. This law allowed the application of individual rules of law of the old Yugoslavia, provided that they did not conflict with the Constitution of the Federal People's Republic of Yugoslavia (FRY) and the constitutions of people's republics, laws, and other applicable regulations and principles of the FRY constitutional order. In this sense, the law explicitly stipulates that such rules may only be applied, and state bodies may not base their decisions on them. In 1945, new laws had already been adopted that regulated various areas of criminal law, and in 1946, they were adjusted to the constitutional provisions of the new constitution of the FRY. However, the entire criminal area has still not been regulated. The idea of codifying the entire criminal law emerged and was carried out in 1947 in the form of a general part of the Criminal Code, which entered into force on February 12, 1948. It was based on the Soviet model and thus contained individual provisions that threatened fundamental rights and freedoms. These were, for example, the provisions on analogy and guilt and the provisions on liability for preparatory actions. Another problem was the lack of a special part of the Code including a list of

8 An example of a provision in the spirit of the principle of humanity is a provision according to which the wife and children of a convicted enemy of the people had to be left with enough property to confiscate their property during the confiscation of property.

9 Bavcon and Šelih, 1987, pp. 67–68.

crimes, all of which was reflected in a number of completely unfounded and unjust convictions (for example, the Dachau trials).[10]

Based on lessons learned from practice and experience with the Soviet Union, Yugoslavia began drafting its own penal code as well as a special section including a list of crimes and sanctions. It was important to adhere strictly to the principle of legality, which would prevent the arbitrariness of the authorities and protect the rights of the citizen, thus making it the main object of criminal protection. In the spirit of this, a special part introduced the rule that a citizen may be punished only for that criminal offense which, even before it was committed, was determined by law to be a criminal offense and for which a penalty was provided. In addition, the new law also regulated the issue of criminal liability, in particular the issue of the extent of guilt and the issue of liability for preparatory acts and participation.

The new Criminal Code was adopted by the People's Assembly of the FRY on March 2, 1951, and entered into force on July 1, 1951. An introductory law to the Criminal Code was also adopted, which regulated certain issues related to the transition from the old criminal law provisions to the new code. In addition to the regulation of substantive criminal law, the Code of Criminal Procedure was drafted in 1953 and included important principles of criminal law to protect the legality, freedom, rights, and dignity of man and society.[11]

The new criminal law regime raised the criminal law of Yugoslavia to the level of European criminal law as the appropriate level of development of the society at the time. In the coming years, the Criminal Code also had to be amended several times in accordance with the development of society and the political regime. Thus, the previously rather severe prescribed sentences have been reduced over time, and the general maximum sentence of strict imprisonment has been reduced from the previous 20 years to 15 years. The penalty of life imprisonment and the execution of the death penalty by hanging were also abolished, the possibility of applying a suspended sentence was expanded, a special sanction was imposed – a reprimand that could be imposed under special conditions in place of punishment – and the list of security measures was expanded. The field of criminal law for juvenile offenders was regulated in 1959.[12]

2.4. Transition from Yugoslav to Slovenian criminal law

Slovenia gained its independence after the disintegration from Yugoslavia in 1991. The same year, Slovenia also adopted its own Constitution.[13] Thus, it was also necessary to establish its own modern criminal law, which would no longer be tied to past communist patterns.

10 Ibid., pp. 68–69.
11 Ibid., pp. 68–69.
12 Ibid., pp. 69, 71.
13 Meško and Jere, 2012.

2.4.1. Criminal procedural law

In this context, the Slovenian Criminal Procedure Act (ZKP as in Slovene Zakon o kazenskem postopku) was adopted in 1994, but it was not revolutionarily different from the previous Yugoslav one, and it preserved all of the essential solutions of the old system. It was still characterized by the judge's focus on actively discovering the truth as a principle of seeking material truth, with the judge having the power to both propose and present evidence. Slightly more important changes to the first Slovenian ZKP were the mandatory instruction to the suspect upon deprivation of liberty, systemic regulation of covert investigative measures, and the introduction of deterrence mechanisms. With these changes, it is possible to observe a departure from the communist regime, also embedded in criminal law, in the direction of emphasizing the observance and protection of the rights of suspects in criminal proceedings. With the following amendments, Slovenia's criminal procedure has become closer to modern European regulations, as evidenced by the institutions of the pre-trial hearing and the plea bargaining procedure, with the court retaining a duty to discover the material truth in the case. In recent decades, the role of the investigating judge has increasingly taken over the guarantee function, when a defendant's rights and investigative functions are in conflict. An additional change in this regard is that the judicial activity of the investigating judge is increasingly being transferred back to the pre-trial proceedings, which means withdrawal from the adopted Yugoslav scheme.[14]

With time and development of criminal proceedings, systemic changes were undertaken in other bodies involved in criminal proceedings as well, with the role of the public prosecutor changing from a predominantly passive body to an active facilitator and the role of the police shifting, with their power reduced in the pre-trial proceedings and who are now subordinate to the public prosecutor's office.[15]

Regarding the structural changes in the criminal procedure, the trend of eliminating the investigation phase stands out, which, similar to Slovenia, is the case in all of Europe. In this context, the possibility of filing a direct indictment without an investigation has been considerably extended, allowing the prosecutor to move directly to the prosecution phase in many more pre-trial cases. This change in the nature of the investigating judge and the strengthening of their guarantee function also shows the loss of the importance of the investigation. In addition to the above, a major systemic change is the introduction of the pre-trial hearing, which is considered the first point of the procedure and in which the classic criminal law triangle of the main procedural subjects is established.[16]

The constant supplementation and amendment of criminal legislation without a comprehensive assessment has led to a great deal of criticism from legal experts, who believe that after many years of supplementing the law, it was time to prepare thorough research of the positive and negative results of Slovenian criminal law from a

14 Šugman, 2015, p. 123.
15 Gorkič, 2012.
16 Šugman, 2015.

professional as well as a practical perspective. According to some critics, the criminal procedure at the beginning of the 20th century contained too many obstacles, which made it slow and inefficient. Thus, criticisms arose that the law did not work at all and there was a tendency to rewrite the ZKP in full.[17]

2.4.2. Criminal substantive law

With independence, in addition to criminal proceedings, Slovenia also had to regulate criminal substantive law. Most crimes have remained the same with improvements to legal texts, as changing them would be unnecessary. Most of the criminal offenses covered by the Slovenian Criminal Code from 1977 and in the amendments to this Act were designed in a high-quality and modern manner, comparable to the criminal law regimes of the countries of Western Europe.[18] However, the new Criminal Code (KZ as in Slovene Kazenski zakonik) introduced many changes. It thus placed emphasis on man and his goods and introduced a reduction in the level of repression out of a desire to break the old communist patterns. In this context, the reduction of threatened penalties followed, and some criminal offenses were eliminated, especially those against the state, social property, and self-government. The new social situation and the new democratic parliamentary system in independent Slovenia also required the introduction of new crimes. A radical change in the content and scope of political and military crimes and the new economic market system set a new starting point for the introduction of economic crimes in KZ. Accordingly, it was necessary to take a new approach to the liability of legal persons for criminal offenses, with Slovenia following the example of recent European regulations and decided to regulate this topic in a special law.[19]

Regarding Slovenian substantive criminal law, it has been established over time that the KZ gives judges very broad powers, especially in deciding on sanctions, that is, in choosing, imposing, mitigating, and remitting sentences, which could be questionable from the fundamental principle of equality before the law. It was also necessary to introduce some classic European institutions of criminal law in the Slovenian Criminal Code that were previously not even mentioned in the Criminal Code. These include, for example, continuing crime, error of facts, and causation. However, the definition of the general concept of crime raised the greatest concerns in comparison with foreign European substantive criminal law regimes. The latter still contained an element of danger, which modern criminal law theory did not advocate, as well as the institution of acts of minor importance and the application of the principle of failed instigation.[20]

17 Fišer, 2000, p. 8.

18 It should be noted that as early as 1977, the Criminal Code of the Socialist Republic of Slovenia was quite different from other republican and provincial laws of the former Socialist Federal Republic of Yugoslavia, which made it easier to adapt to the new substantive criminal law framework by deviating from the old system. For more, see Deisinger, 1994.

19 Deisinger, 1994.

20 Fišer, 1998, pp. 30–31.

3. Criminal law in relation to the standards of the democratic rule of law and the impact of politics

The link between politics and criminal law is always a topical issue that adapts to the existing social regime. This connection can be seen in the amendments to criminal laws, which are sometimes highly politically motivated and pursue a tendency toward greater repression, as well as in the form of pressure on individual state bodies that directly or indirectly carry out repression. Criminal law is among the pillars of stability and legal security of any democratic state governed by the rule of law; thus, changes in criminal law must be carefully studied and supported by professional research, and ultimately, an accepted decision must be supported by sufficiently thorough explanations based on previous research and statutory procedure. It is certainly inappropriate and irresponsible to rush novelties and changes. Neither substantive nor procedural criminal law should be changed under the "halo effect" or political pressure. This is in sharp contrast to the democratic state governed by the rule of law, which Slovenes advocated at the time of independence. However, in the early years of Slovene independence and the building of its own legal system by the ruling party, there have been tendencies and attempts to take over the country's criminal law and repressive apparatus, which is unacceptable in a democratic state governed by the rule of law.[21]

On the other hand, in addition to following the principle of the rule of law, criminal law should respect human rights, which are essentially the result of the protection of the fundamental rights of the individual. In the past, these have often been adapted into political slogans to gain the affiliation of the public as well as to gain social power. The reflection of this power is shown in the case of the disintegration of the system of Eastern European real socialism, which was previously considered unbreakable. The fall of the totalitarian regime created the conditions for the implementation of the new human rights law. However, although individual revolutionaries were likely in favor of their actual implementation, it soon became apparent that the new rulers were as obstructive as they were for the revolutionaries' predecessors. At this point, it is necessary to emphasize the awareness that human rights are not designed to be used by revolutionaries as political slogans to gain support in the desire for regime change; their real assertion and protection should be guaranteed in positive law and in practice. They are a supra-ideological, supra-political, and supra-national legal category that has slowly emerged throughout history as a reflection of ideological, political, national, or other tolerance and intolerance on the one hand and the principle of the rule of law and the eternal tendency of those in power to apply it arbitrarily on the other.[22] However, even today in the time of modern democracy, such conflicts are not overcome in many regions, where the rule of law as a fundamental principle

21 Bavcon, 1999.
22 Bavcon, 1994.

of democratic order should be the undisputed awareness of authorities. Although the EU is strongly committed to this principle, constantly reminding Member States to respect it as a pillar of every modern constitutional democracy as well as human rights, the covert arbitrary decision-making of political elites and the disregard for the democratic states governed by the rule of law is still not overcome. In this context, the EU is constantly debating compliance with this topic in Poland and Hungary, and the Commission has recently expressed concern regarding compliance with this principle in Slovenia.[23]

The rule of law is an EU standard, although in recent times and situations in some European countries, this can may be debatable. The criminal law of a democratic state governed by the rule of law should follow ideas that have also been recognized at the international level.[24] Accordingly, it is important to be aware that no country is completely safe from crime; thus, the main goal of crime policy is to keep it within controllable limits rather than to eradicate it, as the former is likely not possible. Subsequently, more anti-crime measures should be in line with the fundamental principles of democratic states, subjected to the rule of law and subordinated to human rights; in no way should criminal law be based on ideological and political motives and, in this sense, be clearly instrumental and repressive.[25] Measures to combat crime that do not respect democratic values, the rule of law, and human rights are thus not acceptable under any circumstances or in any situation in which the country may find itself.[26]

Therefore, respect for human rights and fundamental freedoms is among the fundamental preconditions of a democratic state governed by the rule of law, but this has often been disregarded in the history of other established political regimes. In the context of the above, full respect for the principles of constitutionality and legality is particularly important in the field of criminal law, especially when these principles appear to be acting against the interests of the ruling authorities, and there is an additional danger of presenting their partial interests as national interest.[27] Criminal

23 See, for example, European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, further strengthening the Rule of Law within the Union State of play and possible next steps. See also Herszenhorn and Von der Burchard, 2021.

24 In 1996, on behalf of the leading members of the Council of Europe, the Committee of Ministers issued special Recommendation number R/96/8 on Europe in a time of change: crime policy and criminal law, which includes guidelines for countries on regulating the relationship between general and criminal policy and criminal law.

25 Bavcon, 2008.

26 Korošec, 1999.

27 The fact that the ruling elite presents its interest as a national one is evident from the case of the crime of terrorism, where, due to widespread social fear, people take for granted the most severe form of repression and inconsistent respect for human rights, which skilled politicians know how to use to consolidate their power and increase their social power. The support of society in disregarding human rights is dangerous, as individuals are usually unaware that the status of their rights is also at a crucial stage, which should be respected always and everywhere in a democratic society. For more, see Bavcon, 2006, p. 18.

law and science also have an important influence on this, as rules and warnings help limit the arbitrariness of the authorities, and all of this can only be ensured with the guaranteed independence of judges and the judiciary in general.[28]

The independence of the judiciary is a fundamental postulate of the rule of law, which, in the past, politics has attempted to affect by abolishing the permanent term of office of a judge, although this is an essential condition for a judge's independence. Individuals often do not understand this and are, therefore (and due to ignorance of judicial procedures), susceptible to political manipulation, which, through the media, blames courts for everything that goes wrong, thereby attacking and destroying the social institution that is most important for the rule of law. By doing so, they win over the people and increase the risk of subjugation of the judiciary, which can have far-reaching consequences that the lay population does not consider or understand. With a politically guided judiciary, not only is the principle of legality threatened, but all of the rights that belong to the individual are threatened as well. This is particularly dangerous in criminal law. The abuses of criminal law to prosecute and sanction political opponents, as we have witnessed throughout history, should be a sufficient lesson in the dangers to the independence and impartiality of the judge and of the judiciary as a third branch of government in general. Overall, it was on the experience of attempts at political incursions into the independence of the judiciary[29] that the human right to a fair trial was formed, which, in addition to the right to an independent and impartial judge, also includes the right to the presumption of innocence, the principle that, when in doubt, one should rule in favor of the accused *(in dubio pro reo*), as well as other rules and principles indispensable for fair criminal proceedings.[30]

Regardless of the completeness of the legal framework and legislation, it is impossible to prevent abuses and gross violations of human rights. This has historically always been the case, even in the most developed countries, which we consider to be models of democracy. We can reduce this mainly by limiting and balancing political power.[31] However, this does not mean that it is necessary to remove politics from the law, as criminal law is an instrument of society for the prevention and suppression of crime. Nonetheless, fundamental principles of criminal law and basic human right should always be respected.

The aforementioned principles and other core principles that are of exceptional importance for criminal law in its enforcement in practice are briefly presented in the next chapter.

28 Bavcon, 2006, pp. 18–19.

29 Such as the previously mentioned criminal prosecution of political opponents of the ruling party, attempts to establish a police state, and violations of the rights of individuals during war.

30 Bavcon, 2006, pp. 127–130.

31 Bavcon, 1992.

4. Analysis of the general principles of criminal law, the general concept of crime, and system of penalties and sanctions

The essence of understanding criminal law as a system in a particular country is understanding the fundamental principles that guide that criminal law. Both the principles of criminal procedure and the principles of substantive criminal law are important. For the latter, knowledge of the general concept of an act of crime is also crucial.

4.1. Principles of criminal law in Slovenia

The principles of criminal law are of exceptionally conceptual as well as great substantive importance. They reflect the postulates of a democratic state governed by the rule of law and, in this context, set the basic legal standards for criminal law. The following subsections present the key principles of Slovenian criminal law.

4.1.1. Principle of legitimacy and restricted repression in connection with the rule of law

The principle of legitimacy and limited repression is the overarching principle of criminal law in a democracy, as it requires the moral, ethical, and legal justification of any repressive encroachment on human rights and freedoms at the legislative level and in practice. This principle is essentially a question of the legitimacy of the political system, individual repressive bodies, procedure, and individual repressive measures. As such, it applies primarily to the legislature, which must assess whether each criminal prohibition and order constitutes a possible violation of human rights and freedoms and, in such a case, assess the urgency of the measure. It also applies to repressive state bodies that enforce legislative provisions. Accordingly, the state may use coercion only in those cases when it is necessary and only to the extent necessary to ensure the protection of man and other fundamental values, assuming that this cannot be ensured without coercion. Moreover, although this principle is not explicitly defined anywhere in the Constitution of the Republic of Slovenia (Constitution), it is evident from many provisions, especially those defining the Republic of Slovenia as a democratic state governed by the rule of law based on protection and respect for human rights as well as from provisions for the protection of constitutionality and legality and those on the independence of the judiciary.[32]

The issue of legitimacy and repression is always a topical issue adapted in time and space. The modern criminal justice system of the Republic of Slovenia had to abandon past totalitarian patterns of excessive repression, but the limit of repressive activities of individual state bodies has not been exceeded entirely. Modern repression manifests itself not only in the form of physical violence in the sense of the police and army suppressing riots but, in the postmodern sense, in the form of

32 Bavcon et al., 2003, pp. 136–138.

actual or potential economic coercion as well, which, in practice, manifests itself as bankruptcy, loss of property, flight capital, suspension or relocation of production or operations to another, more economically advantageous country, unemployment, relative or absolute poverty, trade blockade, attacks on the national currency, extortion of necessary loans, and other similar cases. However, regardless of the form of repression, in terms of the principle of legitimacy and limited coercion, the question arises as to where the line is between a sanction that benefits the community and one that is already a priori repressive as well as where the limits of permissible or appropriate repression are. The answer may be that repression is only appropriate in a form that is not only necessary to achieve the goal it pursues but also fair and, for most individuals in the community concerned, perfectly legitimate.[33]

In criminal proceedings, the use of repressive force against the perpetrator can only be justified by reacting quickly to alleged crimes; therefore, it can be argued that the effectiveness of criminal proceedings is one element of the legitimacy of repression and a necessary rule of law.[34] However, it must be ensured that the speed of proceedings does not prevail over efficiency, that is, that the efficiency of criminal proceedings and the principle of material truth come before the principle of economy in terms of accelerating criminal proceedings. This is important to maintain democratic criminal procedure.[35]

Limiting repression in all areas within the limits of what is permissible in criminal law means the progress of society for a better future as well as an important step toward recognizing the importance of setting boundaries for political oversight, preventing the "police state" and a return to old Yugoslav patterns of repression, thereby ensuring respect for the rule of law. The modern rule of law expresses the values of modern society and is organically linked to the concept of liberal democracy, all based on ensuring the secularity of law, capitalism, private property, and equal protection of individual personal freedoms and human rights. These concepts that have been introduced in the modern legal system must be protected from centuries of abuse in terms of the subordination of the legal order to political power or politicized religion.[36]

4.1.2. Principle of humanity and principle of individualization of criminal sanctions

In the field of criminal repression, it is important to emphasize the principle of humanity, which is associated primarily with the principle of the legitimacy of repression. In accordance with this principle, the entire legal and political system, and criminal law in particular, must be based on respect for and the effective protection of human rights. This stems from the value of human dignity, which negates any

33 Kanduč, 2016.
34 Deisinger, 1991.
35 Razdrih and Mihael, 2011, p. 36.
36 Cerar, 2008.

inhumanity. This principle is not explicitly stated in the Slovenian Constitution, but it is contained in many provisions, for example in Article 17, which excludes the death penalty, Article 18, which prohibits torture, Article 21, which guarantees respect for human personality and dignity in criminal proceedings as well as during deprivation of liberty and the execution of sentences, and in Article 34, which recognizes the right of every individual to personal dignity and security.[37]

In criminal procedural law, the principle of humanity is primarily related to the issue of treatment of people, especially defendants, in pre-trial and criminal proceedings or in all phases of law enforcement, while in substantive criminal law, the principle of humanity is primarily related to punishment. This is reflected in the prohibition of the death penalty in Slovenia and in the limitation of life imprisonment. It is also reflected in the view that a milder criminal sanction should always be used when imposing a sentence in criminal proceedings unless there are special reasons or circumstances for imposing a more severe sanction.[38] Accordingly, in criminal cases, defendants who are prosecuted for minor crimes and found guilty are, in practice, initially sentenced to probation.

In the context of the above, it can be concluded that the principle of humanity contributes to the fair conduct of law enforcement agencies and to fairness and efficiency in criminal proceedings in general. This aspect of the principle of humanity is also linked to the principle of individualization of criminal sanctions, which requires the adjustment of the imposed criminal sanction to the danger of a specific crime and the perpetrator's personality so that the purposes of criminal sanctions are achieved. This principle is not explicitly defined anywhere in criminal law, as in the case of the principle of humanity; however, in many provisions, it is shown as a guide of the legislator in establishing criminal law. This is evident, for example, from the provisions on sentencing in Article 49 KZ-1,[39] on mitigation of punishment in Article 50 KZ-1, on conditional sentence and reprimand in Articles 57, 58, and 68 KZ-1, and on security measures in Articles 69-73 KZ-1. Based on the above provisions, we can understand that the above mentioned provisions contain two guidelines for individualization: fairness and expediency, with fairness taking precedence. Thus, by individualizing criminal sanctions for each case and each perpetrator, criminal justice must impose a criminal sanction that strikes a balance between the principle of fairness and efficiency, while considering the protection of society and the re-socialization purpose of criminal sanctions.[40]

4.1.3. Principle of legality

The principle of legality is the basic and most important principle of criminal law, on which the entire criminal justice system is built. This is already stipulated in Article

37 Bavcon et al., 2013, p. 133.
38 Ibid., pp. 133–135.
39 Kazenski zakonik, Uradni list RS, št. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, and 186/21.
40 Bavcon et al., 2013, pp. 137–140.

28 of the Constitution of the Republic of Slovenia, which stipulates that no one may be punished for an act for which the law has not determined that it is criminal and has not prescribed punishment for it before the act was committed. Article 2 of KZ-1 stipulates the same. Accordingly, the provisions must be consistent, clear, specific, and made public in advance so that the individuals to whom these provisions apply are aware of them, and no one should be sanctioned for a crime for which, as such, the sentence was not specified by law. It is also important to emphasize that criminal offenses can only be determined by law and not by bylaws.[41]

In criminal law, the principle of legality has also become known under the Latin saying "*nullum crimen, nulla poena sine lege praevia,*" which means that there is no crime and no punishment without the law. Crimes must be clearly and precisely defined so that there is no doubt, and what is criminal and what is not is clearly delineated. It represents the basic and most important principle of the criminal law of modern states, which, with its guarantee function, provides protection against the arbitrariness of the ruling party or even the judiciary. As such, it is closely linked to the principle of legal certainty, which provides individuals with security against arbitrary and illegal interference by repressive authorities.[42]

According to *Feurbach,* the principle of legality could be divided into four individual principles, which together compose the principle of legality: the principle of written form (*nullum crimen sine lege scripta*), the principle of certainty (*nullum crimen sine lege certa*), the prohibition of retroactivity (*nullum crimen sine lege praevia*), and the prohibition of analogy (*nullum crimen sine lege stricta*). The principle of certainty and the principle of retroactivity apply to the legislature and limit it in the adoption of criminal law, and all four principles bind the judge in criminal trials and limit them in the application and interpretation of the law, especially how to interpret criminal law provisions. In this criminal law context, Šepec developed two concepts of interpretation of criminal law provisions. The first is the concept of maximum certainty, which is based on the claim that criminal law encroaches on fundamental human goods, so the provisions must be exact, clear, and precise and their interpretation linguistically accurate. The second is the concept of supremacy of teleological interpretation, in which, unlike the first, teleological interpretation predominates. What is important here is the meaning or *ratio legis* of the provision from the point of view of the legislator. In the case of several possible interpretations, according to this concept, it is necessary to choose the interpretation that best suits the intention of the legislator. Both concepts are present in Slovenia, with some theorists approaching one and others approaching the other, the key question being which concept of interpretation of criminal law provisions is better or more appropriate. Roughly speaking, the concept of maximum certainty is more appropriate for strict positivist systems of continental criminal law, while the concept of supremacy of teleological interpretation is more appropriate for Anglo-Saxon criminal law doctrine. In the case of continental criminal law regarding

41 Judgement of the Higher Court in Ljubljana, VSL Sodba VII Kp 27863/2013 of 4.10.2016.
42 Bavcon et al., 2003, pp. 138–141.

the interpretation of criminal law provisions, it is necessary to draw special attention to the dilemma of the interpretation of the provisions of the general and the special parts of the Criminal Code. The interpretation of the institutes of the general part of the Criminal Code can broaden or narrow the scope of criminal incrimination in the special part as well. As theoretical institutions of the general part (e.g., self-defense, duress, error, attempt) are usually very vaguely described in the law, it is up to the court practice in legal theory to develop the meaning of these institutes, so the concept of the supremacy of teleological interpretation could be used to interpret criminal law provisions in this part. Conversely, the consistency of linguistic interpretation is crucial in the provisions of the special part (containing definitions of crimes) due to the more strictly established *lex certa principle*, which makes it more appropriate to use the concept of maximum certainty in this part.[43]

4.1.4. Principle of a fair trial

The principle of a fair trial is the dominating principle of criminal procedural law derived from several rights of subjects in criminal proceedings. In practice, it is reflected primarily in the right to equality of arms and, in this sense, the right to counsel and the right to defense, full equality of the parties in criminal proceedings, and the court's obligation to examine all of the factual and legal aspects of the current case.[44] Fair procedure, which should be the standard of a democratic system, is ensured by the constitutional principle of legal guarantees in criminal proceedings from Article 29 of the Constitution and equal protection of rights or the requirement of equality of arms from Article 22 of the Constitution. In addition, the principle of fairness also includes the impartiality of the court, which is determined in Article 23 of the Constitution.[45]

The principle of a fair trial is defined in Article 6 of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights and is a key guideline in criminal proceedings in Slovenia. The main starting points for fair criminal proceedings are the objectivity of the court and full disclosure of information and decisive facts to both parties. This is also reflected in other principles of criminal law, such as the principle of immediacy and the principle of material truth, to which the principle of orality also contributes.[46]

In addition to the rights of the accused, the principle of a fair trial has another side, namely effective prosecution. The Public Prosecutor's Office makes an important contribution to this as a law enforcement agency, which helps ensure the rule of law

43 For more on the principle of legality see Šepec, 2019.

44 Conclusion of the Higher Court in Maribor, VSM Sklep II Kp 2474/2019 of 29. 5. 2019.

45 Conclusion of the Higher Court in Maribor, VSM Sklep II Kp 12533/2012 of 20.2.2019.

46 Comparing the principle of material truth and the principle of fair trial, we can see that recently the principle of a fair trial has prevailed over the principle of material truth because of awareness that the truth established in criminal proceedings can only be relative, as the crime is historically unique. The closer we get to the standard of certainty, the more legitimate the decision that was made. See more Vavken, 2019, p. 29.

through fair, impartial, and effective prosecution of perpetrators of criminal offenses.[47] Another aspect of a fair trial is the exclusion of evidence obtained illegally or by breach of constitutional rights of the accused. The basic exclusion rule stipulates that a court may base a court decision only on evidence obtained lawfully, as provided for in Article 18 of the Slovenian Criminal Procedure Act (ZKP).[48]

4.1.5. Principle of formality

The principle of formality in a broader sense means an ex officio procedure. The state, in principle, initiates and conducts criminal proceedings against the accused in the public interest through the competent authorities. The principle of formality is thus a criterion for dividing criminal offenses according to the eligible prosecutor into two groups, namely criminal offenses prosecuted ex officio and a smaller group of criminal offenses prosecuted on private action. The latter constitute an exception to the principle of formality in the basic sense of the principle, except that there is no such private action in special proceedings against minors. At the beginning of the criminal proceedings, in accordance with the principle of formality, the prosecutor is competent to initiate and carry out criminal prosecution at their own discretion, that is, ex officio, as in principle, they are not bound by the victim's consent or demand.[49]

In addition to the above, the principle of formality is also important in relation to the above-mentioned law of evidence. In accordance with one of the narrower aspects of the principle of formality, the investigating judge is obliged to collect ex officio the evidence and information that is relevant to the decision to file an indictment. Therefore, the official maxim in criminal proceedings obliges the judge to obtain and present all evidence on their own initiative, regardless of the parties' proposals.[50]

The principle officially originates from the inquisition procedures, but today, it is an important principle that helps discover the material truth in criminal proceedings to achieve a legitimate and lawful court decision.

4.1.6. Principle of material truth and the debate principle

The principle of material truth and the principle of investigation and debate are principles that are primarily related to the acquisition and presentation of evidence in all stages of criminal proceedings.

The principle of material truth is defined by Article 17 of the ZKP, which stipulates that courts and state bodies participating in criminal proceedings must completely establish the facts relevant to the issuance of a lawful decision. They must equally and carefully establish and test all of the facts opposed to the defendant as well as those

47 Opinion no. 9 (2014) of the Consultative Council of European Prosecutors for the Committee of Ministers of the Council of Europe on European rules and principles for prosecutors, Strasbourg, 17.12.2014.

48 Zakon o kazenskem postopku, Uradni list RS, št. 176/21.

49 Judgement of the Supreme Court of Slovenia, VSRS Sodba I Ips 25224/2012-104 of 12.5.2016.

50 Šorli, 2003.

in their favor. It is necessary to be aware that in criminal law, the concept of truth does not mean the same as truth in philosophical or ideological terms; it is a relative truth regarding a historical event that is the subject of consideration in criminal proceedings. This is established by means of evidence, such as DNA analysis, and the level of certainty of the established material truth is also increased by technological developments in the field of proof. The primary importance of establishing material truth is to make fair and lawful decisions, as the truth of the proven facts regarding the historical event is the basis for establishing the criminal responsibility of the accused and for the imposition of a criminal sanction. In addition to this main purpose, establishing material truth also serves to ensure the legitimacy of the legal resolution of disputes, which, in turn, empowers court decisions in public, namely that the public generally trust the judgments of the court insofar as people believe that the convicted person committed the crime, and consequently, such a judgment enjoys the approval and trust of the public.[51]

In the search for material truth, contradiction is also of great importance as a means of establishing the truth of information. The principle of debate is an expression of justice and a fair trial, and at the same time, it represents an opportunity for the defendant to acquaint themselves with the incriminating facts against them, the evidence and the opposing party's legal views, and the opportunity to assert their view of the truth.[52]

The forthcoming reforms of the Slovenian criminal procedure are moving in the direction of abolishing the judicial investigation, which is widely believed to be ineffective. In doing so, it would likely be appropriate to change the entire concept of criminal procedure, as the judicial investigation has its purpose, which can be replaced only by a comprehensive systemic change and not merely the abolition of this phase of the procedure. In the context of this change, it can, therefore, be expected that the parties will be given a greater role in providing evidence and proving their version of events in criminal proceedings, and the court will become slightly more passive, which also means abandoning the search for material truth. With the court and the prosecutor's office no longer obliged to search for and implement both the facts that burden the defendant and the facts that benefit them, greater differentiation of procedural functions is likely to lead to greater care for their work and, consequently, reduced care for general justice. It is also important to note that the greater the probative value of information from the beginning of criminal proceedings, the greater the focus of the police and the prosecution on this phase, and very few defendants will be able to afford effective defense at an early stage of criminal proceedings. This will result in easier access to the burdensome statement of the less educated, less well-off, and socially weaker by the police and the prosecution.[53]

51 Bavcon, 2015.
52 Radonjić, 2020.
53 Hren, 2021, p. 51.

4.1.7. Principle of immediacy and principle of free judgement of evidence

In the context of the law of evidence and the discovery of material truth, the principle of immediacy and the principle of free judgement of evidence are also important. These two principles are, to some extent, interconnected, complementary, and limit each other. In accordance with the principle of immediacy, a judge may oppose the decision only on the facts and evidence that they perceive with their senses at the trial. Thus, in criminal proceedings, this principle extends not only to the procedure until the pronouncement of the judgment but also to the preparation or writing of the reasons based on which the judge made the decision.[54]

In addition to the principle of immediacy, Slovenian law also enshrines the principle of free assessment of evidence, according to which the court's right to assess whether a fact is proven is not bound or limited by any special rules of evidence (Article 18 ZKP). Therefore, the assessment and selection of evidence is a matter of judicial discretion, with the subject of free discretion being each piece of evidence separately and in comparison with other evidence as well as all evidence together as a whole. Despite the principle of free assessment of evidence, judges are not absolutely free to assess evidence, as the findings and conclusions must be consistent with objective facts in reality and must also follow real and logical reasoning. The principles discussed in this paragraph ensures a rational and economical procedure.[55]

4.1.8. Assumption of innocence and the principle in dubio pro reo

The defendant is a weaker party in a criminal procedure against state authorities and is, therefore, entitled to a number of rights and guarantees in an effort to ensure that no one is found guilty unlawfully. The presumption of innocence is the basic guarantee of the accused in criminal proceedings, which protects them from the state apparatus[56] and is one of the most important guidelines in criminal proceedings. It is defined in the Constitution in Article 27, which stipulates that whoever is accused of criminal conduct is considered innocent until their guilt is established by a final court judgment. This principle is in effect from the beginning of a criminal prosecution and until proven otherwise. Article 3 of the ZKP stipulates the same. Therefore, it follows that the presumption of innocence disappears only with the finality of a court judgment that finds the defendant guilty.[57]

In addition to the above, an important aspect of the presumption of innocence is the rule that, in criminal proceedings, all decisive facts to the detriment of the accused must be established with certainty. When in doubt, facts must be considered unproven. From this aspect of the presumption of innocence also follows one of the most important criminal law principles, namely the *in dubio pro reo* principle,

54 Judgement of the Supreme Court in Slovenia, VSRS Sodba I Ips 6676/2010 of 19.10.2017.
55 Merc, 2000.
56 Šutanovac, 2015.
57 Šinkovec, 1995.

according to which the court must decide in favor of the accused in case of doubt. In doing so, the doubt must be serious or at a certain, albeit low, level of probability.[58]

Regarding the *in dubio pro reo* principle, however, there are also individual dilemmas and different points of view in legal doctrine, namely whether the rule in question can be applied only in relation to facts or also in terms of interpretation of the law. Particularly in the older legal literature, the majority opinion was that by applying the rule *in dubio mitius*, or in doubt, it is necessary to interpret a vague law in favor of the accused.[59]

4.1.9. Principle of subjective or guilty responsibility

The principle of subjective or culpable responsibility became a general principle in the late Roman period, around the beginning of our count. This means that causing a prohibited and harmful consequence does not in itself constitute a criminal offense and is, therefore, not sufficient to punish the perpetrator; the perpetrator may be punished only when it is proven that the accused is indeed the perpetrator of the crime for which they are prosecuted and only when found guilty. In this case, the perpetrator's guilt means that at the time of the commission of the criminal offense, the perpetrator acted with a psychological attitude toward the act due to which the act can also be blamed on them. Slovenian Criminal Code KZ-1 pursues and enforces the principle of subjective criminal responsibility as responsibility for guilt.[60] Thus, criminal responsibility can only be attributed to the perpetrator of the crime by linking their physical activity with their mental ability.[61]

4.2. General concept of a criminal offense

In addition to the general principles presented in the previous subchapters, a precise and clear theoretical breakdown of the general concept of a criminal offense is of key importance in criminal law theory and in practice.

The general notion of a criminal offense refers to the criteria that must be met such that conduct will be classified as a crime. These are criteria of general common features that are considered common to all crimes.[62]

As these criteria depend on society, the influence of the political system on the perception of the concept of a criminal offense cannot be neglected. With independence and the desire to join the EU, it was necessary to modernize the national legal framework and bring it closer to European standards. This was also necessary in the case of substantive criminal law. With the adoption of the new Slovenian Criminal Code (KZ-1), radical changes took place within the general concept of a criminal offense. In this context, there were changes in the basic assumptions of criminality,

58 Horvat, 2004.
59 Ibid.
60 Bavcon et al., 2013, pp. 135–136.
61 For more on the concept of criminal liability and guilt under Criminal Code KZ-1, see Ferlinc, 2004.
62 Bavcon et al., 2013, p. 148.

which constitute the structure of a criminal offense, and in the spirit of the principle of legality, the very definition of the criminal offense has changed. In accordance with Article 16 of KZ-1, a criminal offense is unlawful human conduct, which the law defines as such due to the urgent protection of legal values and, at the same time, determines its signs and punishment for the guilty perpetrator. Compared to the previous definition, this requires a more consistent justification of the notion of criminal offense in terms of the perpetrator's conduct and no longer in terms of the notion of danger, which was excluded from the definition of a criminal offense in the 1994 Criminal Code, as the reason for the assessment of illegality is the threat to criminally protected values.[63]

Therefore, according to KZ-1, a criminal offense is a voluntary act of a person, and this act or its consequence means opposition to the norms of criminal law in the absence of circumstances that would consider such an act in accordance with the law. Therefore, the individual guilt of the perpetrator of the criminal offense or the fact that the perpetrator can be attributed a subjective reflection of the act is important. In individual cases, where so provided by law, other special preconditions of criminality must be met, such as the objective condition of criminality. Modern Eurocontinental criminal law is based on the general definition of a criminal offense, which originates from the German tradition. Therefore, it is shaped by three key elements, namely the fulfillment of the nature of the offense ('Tatbestandsmäßigkeit'), illegality ('Rechtswidrigkeit'), and guilt ('Schuld'). It is a three-level general concept of a criminal offense, the main objectives of which are the clarity, predictability, and stability of criminal law as well as the simplification and acceleration of decision-making in practice. This three-stage analysis also enables the most systematic assessment of the criminality of the participants, as any instigation or aiding and abetting of an act is only possible if the main act in itself is at least illegal.[64]

4.2.1. Activity that fulfills the essence of a criminal offense

Fulfilling the first presumption of the general concept of a criminal offense means that the perpetrator's conduct or the consequence of the perpetrator's conduct must be contrary to the criminal law norm. In accordance with modern criminal law theory, conduct is any behavior of the perpetrator with an objectively predictable social effect (the social theory of behavior) or external expression of the perpetrator's personality (the personality theory of behavior), which is reflected in the perpetrator's actions and omissions, threats and injuries, and attempted and completed crimes. It should be noted, however, that fulfilling only this first presumption of the general notion of a criminal offense is in itself only an indication that an individual has committed a criminal offense for which may be found guilty and even punished if other presumptions are fulfilled.[65]

63 Dežman, 2009.
64 Bavcon et al., 2013, pp. 149–157.
65 Ibid., pp. 152–153.

4.2.2. Illegality

Illegality means that the perpetrator's conduct is contrary to the law or that it violates it. In the context of the general concept of a criminal offense, this is particularly important in assessing the reasons as to whether the perpetrator's voluntary conduct, despite its compliance with the nature of the criminal offense, may nevertheless be in accordance with the law, that is, not unlawful. If the essence of the criminal offense is fulfilled, the illegality is presumed. However, illegality will be excluded if criminal law justifies the conduct. The most typical example of this is self-defense.[66]

4.2.3. Guilt

Insofar as the individual perpetrator's conduct is in accordance with the nature of the incrimination of the crime, and illegality is not excluded, the third premise of the general concept of criminal offense is always the perpetrator's guilt, which may occur in the form of intent or negligence. Unlike wrongdoing, guilt is not presumed; it must always be proven. An important element of the concept of guilt was established with the hypothesis of criminality at the level of the essence of incrimination, within the first element of the general concept of crime. In this sense, we refer to the dual position of intent, as the perpetrator's intent must be considered and judged as soon as the essence of the crime is established and again as a form of guilt. Guilt can also be excluded by legal norms, and the conduct of the accused can be excused. This is primarily a matter of the statutory institutes of the general part of criminal law as well (for example, various forms of unavoidable error, justifiable extreme force, and, in some cases, acting on the orders of a superior).[67]

According to the elaborated general principles that guide Slovenian criminal law in theory and practice, and according to the defined general concept of a criminal offense, it makes sense to briefly discuss the system of punishment and sanctions in Slovenia.

4.3. Brief overview of the punishment and sanction system in Slovenia

Slovenia has faced certain problems in the past regarding the system of punishment and sanctions. At the same time, problems at the general level have manifested themselves in the purpose of punishment, which is also reflected in the lack of regulation. The question of the purpose of punishment is the basic norm on which the entire penal system should be based, followed by the imposition of sanctions as well as their enforcement. Punishment in the Slovenian system follows several theories regarding the purpose of punishment, but these purposes are not clearly defined, nor is there a clear relationship established among them on an abstract level. Until a few years ago, the purpose of punishment could be defined as proportional expression of justice that acts restrictively, and within its borders, the criterion of expediency takes

66 Ibid., pp. 153–154.
67 Ibid., pp. 154–155.

precedence, which, in Slovenian criminal law, is strongly linked to the rehabilitative function of punishment.[68]

Today, at the global level, it is possible to discuss abandoning the rehabilitation paradigm, which, in light of the universally emphasized individualism, tends toward stricter punishment. This global trend of tougher penalties is also followed by the Slovenian criminal system, which has not completely abandoned the rehabilitation function of punishment; thus, in this sense, it can be compared with some Scandinavian models. As part of this, the punishment of perpetrators with alternative sanctions has been increasing in recent years. Alternative sanctions are a form of punishment that is presented as an alternative to imprisonment with the fundamental aim of replacing short-term imprisonment and reducing imprisonment in general, but only if the judge considers that such a sanction will have a sufficient deterrent effect on the perpetrator and that they will not commit another crime again.[69]

The system of punishment in the Slovenian criminal legislation consistently implements the principle of legality, within which it is possible to impose only the criminal sanction that was prescribed for an individual criminal offense before it was committed. The system of criminal sanctions in the Slovenian legal system is based on a pluralistic starting point, with the Criminal Code classifying criminal sanctions into three groups. The first includes the penalties, the second group consists of warning sanctions, which include a suspended sentence, a suspended sentence with medical supervision, and a court reprimand, and the third group covers security measures. In the Slovenian legal system, penalties can be further divided into main penalties that are imposed independently (for example, imprisonment), ancillary penalties that can be imposed in addition to the main penalty (for example, prohibition of driving a motor vehicle), and penalties which may be imposed as a principal or side penalty (for example, a monetary fine). Regardless of the punishment imposed on the perpetrator, it must meet certain requirements. It must be personal, as it must affect only the perpetrator and not their environment, ignoring the fact that in principle, at least indirectly, the punishment also affects the perpetrator's immediate environment, such as their family. In addition, the sentence must be humane, so according to its basic content, it must not cause suffering to the convict. The sentence imposed must also be proportionate to the degree and form of the perpetrator's guilt as well as to the degree of the crime while satisfying a sense of justice. Proportionality must be understood in relation to each individual crime and perpetrator. In principle, the sentence must also be reversible in the sense that, once the sentence has been unjustifiably imposed, its effect and consequences can be remedied, which is somewhat more difficult or even impossible to achieve in practice. Due to the latter requirement, there can be no death penalty in the Slovenian legal system, as it is irreparable. The requirement of remediability of penalties is important in practice primarily

68 Mihelj, 2012.
69 Mihelj and Drobnjak, 2019.

due to miscarriages of justice, wherein the effect of penalties can be remedied at least to some extent.[70]

5. Slovenian criminal law in relation to the legal framework of the European Union

Slovenia gained independence from Yugoslavia in 1991, and the former Yugoslav federation was finally abolished in 2003, with the rest of its Serbo-Montenegrin portion no longer bearing that name. Immediately after independence, Slovenia began to adjust its legislation to become as close as possible to European trends, and in 2003, when Slovenians decided to join the EU by an overwhelming majority in a referendum, it took a step forward toward a progressive European federation and officially joined on May 1, 2004. Slovenia, as an equal member of the EU, gained, among other things, a commitment to respect the EU legal framework and the duty to adapt national legislation to European requirements. Thus, many changes were introduced into Slovenian legal acts. Among others, the criminal law, which is continues to evolve following modern European trends, had to be adjusted to a certain extent. Respected Slovenian legal expert Ljubo Bavcon pointed out that in certain situations, European requirements do not always follow the goals and values that criminal law should protect and, instead, excessively encroach on human rights. These include demands to increase repression, increase police powers, toughen intimidating penalties, and restrict rights.[71] In this context, he gave the example of the European demand for incrimination of the promise made and acceptance of bribery in itself, without the alleged acceptable harmful consequences. He noted that such a case was an encroachment on the so-called subfield of the crime of corruption, an encroachment that Western criminal law science strongly criticized as illegitimate, as long as it referred to the tort (*Unternehmensdelikt*) from the criminal codes of Western European countries.[72]

5.1. Slovenian criminal law in respect to EU law

Due to Slovenia's accession to the EU, the Slovenian National Assembly, as a legislative body, amended the Constitution of the Republic of Slovenia with Article 3.a, by which Slovenia, as a member state, transferred the exercise of a portion of its sovereignty to the EU. Within the framework of criminal law, these implications of Article 3.a of the Slovenian Constitution relate primarily to the repressive authority and jurisdiction of the state. The status of criminal law in the EU acquis has changed significantly since the Maastricht Treaty (Treaty on European Union or the TEU, which placed criminal law in the third pillar of the three-pillar structure) and, in particular, since the Amsterdam Treaty. Since then, there has been a tendency to transfer the formulation

70 Bavcon et al., 2013, pp. 371–384.
71 Ribičič, 2003, pp. 44–45.
72 Bavcon, Zakonjšek and Razdrih, 2013, p. 35.

of criminal policy and criminal law to supranational bodies of the EU, which would further unify the criminal law of the EU Member States. The decision to expand the EU's criminal jurisdiction has been strongly influenced by terrorist attacks as a political crime, with experts noting that, notwithstanding the fear, the horror of the crime, and the urgent need to protect in the context of such offenses, the repressive authorities must not forget human rights, the fundamental principle of the rule of law, and legitimacy in criminal law, whether acting at a national or supranational level.[73]

The EU is working intensely to ensure security in its territory, with the protection of the freedom and privacy of the population sometimes being overlooked, although it has recently taken a step forward in this direction as well. From the outset, it has been extremely difficult to reach a consensus among Member States in the field of criminal law, as the repression of national authority, which no Member State wants to lose, is most pronounced in this area. The EU's main concern in the field of criminal justice has always been the protection of the Union's financial interests in relation to organized crime issues as a common interest of all EU Member States. However, following the terrorist attacks, political priorities changed significantly due to the sense of danger, and Member States were quicker to agree on measures that they could not have taken before the terrorist attacks. Thus, the tendency to act quickly, efficiently, and repressively emerged as a trend that the Member States should follow in drafting or amending their legislation. In the trend of spreading European criminal law standardization under the impression that it is necessary to prevent the most serious crimes, Slovenia, as a member state, has adopted the European Arrest Warrant and the European Investigation Order and adjusted the legislation to enable the implementation of these EU institutions.[74]

Slovenia's accession to the EU required certain changes in criminal legislation that were regarding criminal procedure as well as substantive criminal law.[75] The ZKP has been revised many times since its adoption in 1994, and many revisions were made to comply with EU legislation. Therefore, as a member state of the EU, Slovenia accepted the Act on the European Arrest Warrant and Surrender Procedure in 2004. Slovenia has also simplified extradition according to membership in the EU, where the phase in front of a judicial panel was left out (now referred to as the surrender procedure). In 2006, Slovenia adopted the Witness Protection Act, and in the same year, the country was under the Council Framework Decision on the standing of victims in criminal proceedings, obligated to provide for adequate instruments for the protection of prisoners who take part in witness protection programs. Changes have been implemented in Schengen-related issues as well, expressed as external border protection, discreet surveillance, and specific checks. It can be said that the Slovenian legislature has closely followed EU legislation in every change in purpose, spirit, and wording.[76]

73 Bavcon, 2005.
74 Šugman, 2005.
75 See also Zgaga, 2014.
76 Zgaga and Ambrož, 2007.

Most changes in Slovenian substantive criminal law, especially in the field of international crimes and some changes of the general part of KZ-1, are regarded as a step toward the European criminal law area. One of the most intriguing modern topics of substantive criminal law in Europe is medical penal law. Slovenian criminal law expert Damjan Korošec wrote that in Slovenia, traditionally, the legitimacy of the existence of medical penal law as a special branch of substantive criminal law is seen in the fact that the nature of medical science and activity is different from all other known sciences and activities to such a degree that it calls for special treatment within criminal law. It is widely believed that the immanent human nature of medicine as such was special grounds for justification or even a more basic obstacle for the subsumption of medical activity under incriminating norms (hindering the so called "Tatbestandsmäßigkeit," as Germans call it), initially "naturally" neutralizing incriminations against life and body and bodily injuries of different degrees. The only legitimate role of medical penal law would be the task of delivering special institutes of the general part that guarantee proper milder substantive legal treatment of medical personnel, such as a physician as a perpetrator of criminal conduct during their medical work. In Slovenia, the technical correctness of the medical activity (procedure) together with the will of the medical personnel to heal or to prevent illness or degradation of health was developed as the central self-sufficient special ground of justification. This was referred to as "medical activity." Changes were also made in the special part of KZ-1. There were changes in the definitions of sexual crimes and of crimes against humanity and international law. Because of its entry into the EU, Slovenia also changed the definition of crimes against intellectual property, industrial property, and some minor changes of definitions of crimes in the field of corruption and insider trading.[77]

Slovenian criminal law is constantly changing while attempting to maintain the stability of the Criminal Code, which is necessary primarily for the protection of the rule of law. In this context, changes are being adopted in the direction of abolishing the judicial investigation, although the Slovenian legislature has been advocating this for years. Changes in criminal procedure are also reflected in the tracking of technological developments, most notably in increasing digitalization, which facilitates and accelerates criminal proceedings. Changes are also reflected in substantive criminal law, where Slovenia adopted the Yes means Yes theory in the field of sexual offenses in 2021. Changes can also be expected in other areas of criminal law, such as whistleblowing, in the near future.[78]

5.2. Slovenia's criminal law and practice in the trend of Europe

The Slovenian court system is built on three instances: regional or district courts, higher courts, and the Supreme Court. Slovenian courts, similar to many others around the EU, reach their decision in a case by applying legal norms to the facts of an individual case; thus, they are not obligated to follow the precedent of previous

77 Korošec, 2007.
78 Hren, 2021, p. 51.

cases. The main problem in the Slovenian criminal court system in relation to the operation of courts consists in excessive delays in the adjudication of cases, primarily due to crowded court dockets. This problem was also brought to the attention of the European Court of Human Rights in 2005 in the case of *Lukenda v. Slovenia*.[79]

In Slovenian criminal courts, liberal progress can be observed in connection to sentencing patterns. Recently, there has been an overall increase in the use of alternative sanctions other than custody or prison, such as suspended sentences and fines, especially when the offender has not previously committed a crime. For example, there was a 9.8 percent rise in the use of mentioned alternative sanctions compared with 2009.[80]

The Slovenian legislature is aware that the sanction has a reintegration and resocialization function in addition to its penal one. To reach a conviction, judges judge according to the committed crime, the record of past convictions, and the perpetrator's personal characteristics when assessing mitigating and aggravating circumstances and then decide which sanction would be most appropriate for an individual perpetrator to prevent re-offending. Short imprisonment of a duration of several months, which, in the case of a criminal sanction of imprisonment, is, in principle, imposed for less serious criminal offenses in court practice, sometimes has a worse resocialization and preventive effect than if such a sanction is executed through community service or if the perpetrator is punished with a fine. The incarceration rate has also followed the trends of other EU member states. Between 2008 and 2020, the incarceration rate in Slovenia reached the lowest point in 2011 but then peaked in 2014.[81] Slovenia has increased its prison population, for which it is now possible to make a comparison with the rest of the Europe. Moreover, since 2011, there has been a trend of an increase in the prison population in Slovenia, while in the rest of Europe, this population is decreasing. Despite this, Slovenia still has one of the lowest prison population rates in Europe, primarily because the average length of imprisonment in Slovenia is lower than in the rest of Europe.[82]

6. Conclusion

It is reasonable to conclude that criminal law is an independent branch of law, though it is largely related to politics, more precisely to the political system in force. This is clearly seen in the case of Slovenia, where criminal law established on socialist Yugoslav foundations has been applied for many years. With independence, Slovenia established its own criminal law, in which it was still possible to detect socialist patterns. By updating criminal legislation over the years and following European trends,

79 Meško and Jere, 2012.
80 Ibid.
81 Clark, 2021. For additional information and statistics about prison brief data see World Prison Brief, no date.
82 Aebi et al., 2016.

Slovenian criminal law has shifted closer to modern European criminal law. This was also accelerated due to the Slovenia's accession to the EU, which forced it, as a Member State, to situate national legislation in the European legal framework and adopt EU legal rules, including in the field of criminal law, while maintaining the rule of law and legal security, stability of its legislation, and transparency. With the changes in criminal law, Slovenian criminal law, in accordance with modern European criminal law, revised the general concept of a crime based on the German theoretical model.

Slovenian criminal law is based on the principles of continental criminal law, which serve as a guide for substantive and procedural criminal law in the application of legal provisions, in which they are also reflected. In addition to the rule of law, as one of the most important principles highlighted by the EU, the basic umbrella principles of criminal law are the principle of legitimacy and limited repression; the principle of humanity; the principle of legality; the principle of individualization of criminal sanctions; the principle of fairness of proceedings; the principle of formality, directness, and free assessment of evidence; the principle of material truth; the principle of debate; the presumption of innocence; the *in dubio pro reo* principle; and the principle of subjective or culpable liability.

Finally, it is important to note that Slovenian criminal law follows European trends, which, in practice, can be seen in the increased use of alternative criminal sanctions for perpetrators. These are fines and suspended sentences, which are mostly used in Slovenian case law for lesser crimes and when the perpetrator has not previously committed a crime. However, Slovenia faces various problems. The most pronounced are reflected in various inappropriate attempts by politicians and the ruling elite to break into criminal law. In practice, the problems are mostly observable in the duration of open criminal cases or excessive delays in trials. Regardless, Slovenia is among the countries with the lowest prison population rate in Europe in general. This is primarily due to the lower average length of imprisonment than is typical for Europe, and Slovenia can also boast that the majority of its population still considers it a safe country.

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| Chapter 9 |

Hungary: National Regulations in the Shadow of a Common Past

Csongor HERKE

ABSTRACT

Hungarian criminal legislation underwent substantial changes in the process of replacing the former socialist law enforcement principles with the rule of law. It is against this background that the new Criminal Code (Act C of 2012), Criminal Procedure Code (Act XC of 2017), and Penal Code (Act CCXL of 2013) were drafted. Accordingly, this study analyzes the provisions of the new Criminal Code, Criminal Procedure Code, and Penal Code in detail independently and in their context. After analyzing the general part of the Criminal Code, the study analyzes certain groups of crimes and the statistics associated with them. After addressing the criminal law questions, the main characteristics of Hungarian criminal procedure law are analyzed. Of these, it is worth highlighting the issue of the principles of criminal procedure law, the stages of the Hungarian criminal procedure, the possibilities of diversion in Hungarian criminal proceedings, and the characteristics of judgment. After the rules of the Criminal Procedure Code, the study describes the purpose and principles of penitentiary law and the Hungarian prison system in detail. The work concludes with a presentation of the main provisions of international criminal cooperation. In Hungary, the main sources of basic criminal science during the regime change in the 1990s were derived from the 1970s. Therefore, the sources of the criminal sciences require major revision. Nonetheless, legislation needs to change constantly to keep up with the challenges of a changing society.

KEYWORDS

Hungary, criminal justice, criminal law, criminal procedure, prison law

1. Criminal sources in Hungary after the regime change

In Hungary, the main sources of basic criminal science at the time of the 1990s regime change were derived from the 1970s: Act IV of 1978 on the Criminal Code[1], Act I of 1973 on Criminal Procedure[2], and Decree-Law No. 11 of 1979 on the Enforcement of

1 Old Criminal Code.
2 Old Criminal Procedure Code.

Herke, Cs. (2022) 'Hungary: National Regulations in the Shadow of a Common Past' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 255–295. https://doi.org/10.54171/2022.evcs.cls_9

Sentences and Measures.[3] Three important lessons can be drawn from these three sources of law: not only did the sources of all three basic sciences need major revision (as they date from the 1970s), but interestingly, the Criminal Procedure Code, which enforces the rules of substantive criminal law, predates the Criminal Code, and the rules on the execution of sentences, which entail substantial restrictions on fundamental rights, are not even regulated by law.

Prior to the regime change in 1990, the above legislation underwent substantial changes to replace the former socialist law enforcement principles with the rule of law. Accordingly, before being replaced by the new legislation, the old Criminal Code was amended in a total of 1,078 places, the old Criminal Procedure Code in 701 places, and the old Prison Law in 455 places (with several parts revised in some portions). This partly made the transition possible, but the large number of amendments anticipated the need for new legislation.

This was first done, somewhat thoughtlessly, by recasting criminal procedural law. This codification can be considered to have been ill-considered in two ways: on the one hand, the rules of criminal procedure must always be adapted to the substantive rules in force; that is, it was known at the time of the drafting of the next Criminal Procedure Code[4] that a new Criminal Code would require recodification of the procedural law. On the other hand, the text of the Criminal Procedural Code itself was unprepared. This is reflected in the fact that, in an unprecedented manner, when it entered into force on July 1, 2003, the text adopted by Parliament and published in the gazette of Hungary had already been amended in 877 places. In the meantime, the most important legal provisions and amendments of this Criminal Procedure Code had been incorporated into the text of the old Criminal Code, which was in force until that point; therefore, there was no justification for the drafting and enactment of this Act before the codification of the new Criminal Code.

2. The main sources of the Hungarian criminal justice system

It is against this background that the new Criminal Code (still in force) was drafted. Act C of 2012[5] explains that the old Criminal Code had been amended more than 90 times over the past three decades and had been affected by more than 10 Constitutional Court decisions. These changes had amended, introduced, or repealed more than 1,600 provisions by the time the new Criminal Code was enacted. However, it was not only this almost opaque and often contradictory dumping of amendments that led to the creation of the new Criminal Code but also the fact that since the regime change, different governments have been revising the criminal law provisions (often

3 Old Prison Law. This chapter does not intend to deal with the criminal sciences in detail; it only reviews the sources of criminal law. For those interested in the state of the criminal sciences at the time of the regime change, see Jakab, Takács and Tatham, 2007, pp. 191–252.

4 Act XIX of 1998.

5 Criminal Code, hereinafter referred to as CC.

contradicting each other) in line with different criminal policies, and the amendments have significantly altered the original system of the law (the sentencing system, the chapter on economic offenses,[6] and even the chapter on offenses against the person have been transformed). The requirements arising from scientific progress and the harmonization of the law in the context of accession to the European Union have also been taken into account, as have the challenges posed by the rise of organized crime, as the Explanatory Memorandum states.

However, the CC did not represent a complete dogmatic break with the old Criminal Code, and accordingly, many basic institutions were not only retained but often literally adopted.

As in continental countries, the CC regulates the conditions for criminal liability, the penalties, and all punishable offenses in a single law. The only exception to this is Act CIV of 2001 on Criminal Measures against Legal Persons.[7]

A further change compared to the old Criminal Code was that while the previous Act also contained provisions of a penal enforcement nature (e.g., the subsequent determination of one more severe or one more favorable degrees of enforcement of imprisonment, the list of reasons for excluding the enforcement of the sentence, etc.), the new CC does not contain such provisions. Likewise, procedural issues have been removed (e.g., the rules of procedure for the criminal liability of diplomatic and other persons enjoying immunity under international law are contained in the Criminal Procedure Code, while procedures with an international dimension are dealt with in a separate law).

The CC retains the dual structure of the old Criminal Code: the general part deals with the scope, criminal liability (the subjects), and sanctions, while the special part lists the basic, qualified, and privileged cases of each offense as well as their punishable offenses. In addition, the Final Part of the CC contains provisions interpreting, enacting, repealing, etc.

As previously mentioned, the general part of the CC has not been conceptually revised, although there have been significant changes to the system of sanctions. Unfortunately, this law did not fully meet the need for a broad introduction of alternative sanctions, and the increase in sanctions in practice was rather a self-imposed extension of the previous forms.[8]

After the accept of the CC, there was also a demand for the creation of a corresponding code of criminal procedure and prison law as soon as possible. In the case of the Code of Criminal Procedure, the first codification attempt stalled, and after several years of preparatory work, a new Codification Committee was convened. Thus, the Prison Law preceded the new Code of Procedure. According to the

6 Elek, 2008, pp. 219–233.

7 Interestingly, under socialism, until 1961, the system was different, with the general part in a separate law, the individual offenses in separate laws, and even the framework provisions being supplemented by additional legislation.

8 According to some authors, the law of misdemeanors (petty offenses) is also part of criminal law, but I do not agree with this view.

Explanatory Memorandum, the aim in drafting Act CCXL of 2013 on the Enforcement of Penal Sanctions, Measures, Certain Coercive Measures, and that of the Procedure for the Execution of Offenses[9] was to create a law harmonizing the legal provisions introduced by the CC and creating a unified system with the CC, which would place the enforcement of sentences on new footing in line with the new sanctions and other amendments. In addition to the Code, the Explanatory Memorandum states that international documents had to be taken into account when drafting the Prison Law.

As it has been almost three and a half decades since the previous law on the execution of sentences was drafted, and it did not even contain the rules of the execution of sentences in a legal form, the drafting of a new law was almost more inevitable than the CC. However, it was not only the Prison Law itself that was not at the level of a law; certain institutions restricting fundamental rights in the context of the penitentiary system were often regulated by ministerial decrees (see, for example, certain provisions on the healthcare of prisoners or the fundamental rights of pupils in reformatories).

Finally, the third was the recodification of the provisions on criminal procedure. The Act XC of 2017 on criminal proceedings[10] has significantly altered criminal procedure in both its structure and its content. The Act XIX of 1998 on criminal proceedings followed the earlier (socialist) criminal procedure laws (in contrast with the basic concept), the traditional investigation (intermediate procedure) governed the criminal procedure within a judicial procedure system. However, effective laws allow for a great deal more leeway for criminal procedures based on agreement; confession by the defendant (acceptance of the facts) enables a number of simplifications. Through this, the progression of the criminal procedure (possible outcome) is significantly more complicated and diversified as in the earlier linear procedure.

The main reason for the drafting of the Criminal Procedural Code was also the need to create procedural law that was in line with the rules of the CC. However, the Explanatory Memorandum also highlights other aspects. Among the most important of these is the timeliness of the proceedings, and to this end, the Act contains numerous provisions to simplify and accelerate criminal proceedings. Most of these have been proven in practice, in particular the acceleration of the judicial process. In addition, the legislature has emphasized the more consistent enforcement of the requirement of the separation of functions, the creation of the possibility of cooperation in the enforcement of charges, and the greater enforcement of victims' rights as codification aspects.

In addition to the three main areas of criminal law (criminal law, criminal procedure, and penitentiary law), numerous other sources of criminal law exist.

9 The Prison Law, hereinafter referred to as PL.
10 Criminal Procedure Code, hereinafter referred to as CPC.

The international treaties and recommendations and the Fundamental Law[11] of Hungary have a vital influence. These set out the primary framework of criminal law (criminal procedure and enforcement) not only by specifying the primary human rights to be respected in criminal procedure (and enforcement) but also (especially in the international recommendations) by laying down some detailed requirements.[12]

In addition to these main rules, which provide guidance in principle, a number of criminal laws should be mentioned. The most important of these are the organizational laws, as the legal status of the main actors in criminal proceedings in Hungary is regulated by law. These include Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Act CLXIII of 2011 on the Public Prosecutor's Office, Act XXXIV of 1994 on the Police, and Act LXXVIII of 2011 on the Activities of Attorneys 2017. It can be seen that the codification wave of the 2010s (with the exception of the police) has also reached the main subjects of criminal proceedings.

In addition to organizational laws, there are also laws on other subjects related to criminal proceedings. Some are regulated at the statutory level (e.g., Act XXIX of 2016 on the activities of forensic experts), while others are regulated at a lower level (e.g., IRM Regulation 14/2008 [VI. 27] on the reimbursement of witnesses).

3. Authorities acting in criminal proceedings

The circle of the criminal procedure's subjects consists of authorities and natural or legal persons, respectively, as well as organizations without legal entity that in some quality partake in the procedure. The circle of subjects can principally be divided into two main groups:

Subject of the investigation		
Authorities	**Participants**	
	Main person	Subsidiary person
1. investigating authority 2. prosecutor 3. court 4. other organisations	1. defendant (person reasonably suspected of having committed a criminal offense) 2. defence counsel 3. victim (private prosecutor/substitute private prosecutor, private party) 4. representative of victim	1. relatives (e.g. of the defendant) 2. contributories in taking evidence (witness, expert) 3. interested parties: during criminal procedure and based on the decision and person that has become a participant in the procedure (e.g. party aggrieved by the investigation) 4. initiator of procedure (the denouncer)

11 It entered into force on April 25, 2011.
12 Bárd, 2008.

3.1. The investigating authority

During the preparatory procedure and the cleaning up, the investigating authority proceeds independently during the examining phase under governance of the prosecutor's office[13]. The head of the investigating authority is responsible for compliance with the instructions given by the prosecutor's office.

During investigation, we can differentiate general investigating authorities and special investigating authorities:

1. The general investigating authority is the police. The police proceed in all cases unless stipulated otherwise by legislative provisions.
2. Special investigating authorities can only proceed in case of particular crimes determined in the law. These extraordinary investigating authorities are the following:
   a) National Tax and Customs Office (e.g., tax fraud, violation of accounting order, bankruptcy fraud), which can also proceed as secondary investigating authority (i.e., for crimes committed within its competence, such as the forgery of official documents, the use of fake private documents, and money laundering)
   b) the captain of a vessel (aircraft) on a commercial vessel with Hungarian nationality insignia abroad or on a civilian aircraft can proceed in the case of a crime under Hungarian jurisdiction
   c) military commander: if the investigation is not carried out by the prosecutor's office, the commanding officer can be the investigating authority[14] by way of the investigating body or the representing investigating officer

A separate law determines which of the investigating authorities can proceed (e.g., local [urban or district] police stations, district [provincial or metropolitan] police headquarters, and National Police Headquarters) in a given case.

During the preparatory procedure and investigation, in addition to the investigating authority, the prosecutor, and the investigating judge, the following bodies can proceed a) during preparatory procedure: bodies authorized to apply covert instruments[15]; b) within the management of criminal assets, the body responsible for the handling of corpus delicti and criminal assets[16]; c) before indictment and upon request of the prosecutor's office (investigating authority), the body of the investigating authority responsible for the recovery of assets carries out the procedure for the reconnaissance and insurance of objects seized.[17]

13 Section 31 Subsection 2 of CPC.
14 Section 701 Subsection 1 of CPC.
15 Section 36 Subsection 1 of CPC.
16 Section 36 Subsection 2 of CPC.
17 Sections 353–354 of CPC.

3.2. The prosecutor's office

The prosecutor does not only carry out classic public prosecutor's tasks in the criminal procedure but also it carries out preparatory procedures and investigates; it supervises, directs, and instructs; it carries out prosecution representation tasks.

In addition, the prosecutor has important responsibilities in the execution of sentences.

Ad. a) In certain cases, the prosecutor carries out the preparatory procedure. The prosecutor also investigates the following: the prosecutor can take over investigation in any case[18]; in certain cases, only the prosecutor can investigate (crimes that fall under the scope of the investigative competence of the prosecutor's office, such as certain crimes committed by or affecting certain judicial employees, cases in connection with immunity, and certain crimes of corruption[19]).

Ad. b) In certain investigative phases, the prosecutor's supervision-direction-instruction scope of activities are governed differently in the CPC: during cleaning up, the prosecutor oversees legitimacy[20]; during examination, the prosecutor now not only supervises but directs as well[21]; apart from the above-mentioned, the prosecutor also has the right to instruct if they carries out the investigation themselves.

Ad. c) The prosecutor's office may modify the charge before making the final decision at the latest[22] according to the following: the prosecutor's office can amend the charge if it suspects that the accused is guilty in other crime or the classification in the indictment needs to be modified (at that point, the trial may be adjourned at the motion of the prosecutor or the defense); the prosecutor's office can expand the charge if it suspects that the accused is guilty in other crime in addition to the one they are charged with (at that point, the trial must be adjourned at the motion of the defense for at least eight days unless the procedure with respect to the expanded crime is compensated).

The prosecutor may drop the charge (before adoption of the final decision at the latest;[23] if the object of the charge is not a crime; the crime wasn't committed by the accused; the crime is not indicted by the public prosecutor.

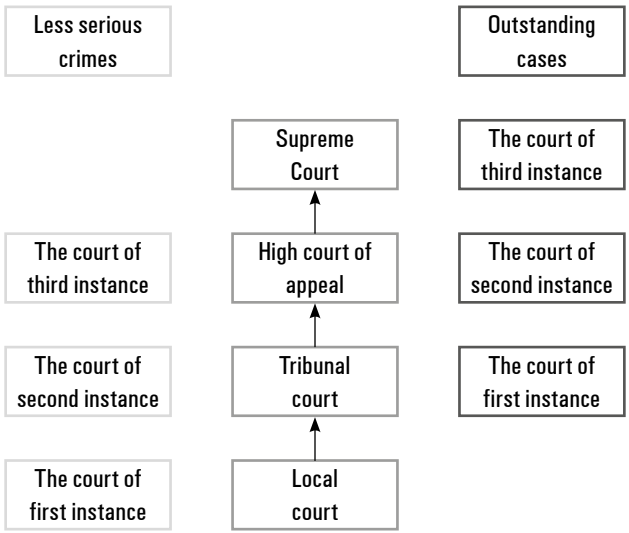
3.3. The court

According to Section 11 of CPC, the main task of the court is to provide justice (i.e., ruling in criminal cases and decisions on criminal liability). At the same time, the court also carries out other tasks determined in the CPC in connection with criminal proceedings (e.g., as investigating judge), and the court has a special role to play in enforcing the sentence.

18 Section 26 Subsection 5 of CPC, Section 349 of CPC.
19 Section 30 of CPC.
20 Section 25 Subsection 2 of CPC.
21 Section 25 Subsection 2 of CPC.
22 Section 538 of CPC.
23 Section 539 of CPC.

In the course of the pre-trial, the court with the same competence and jurisdiction shall proceed as that which later makes a decision on the merits of the case. The court entitled to proceed is defined in three aspects: a) legal authority: the Hungarian courts can proceed in cases falling under Hungarian authority, the rules of which are determined by Section 3 of the CC; b) competence: subsequently to legal authority (that is, if a Hungarian court may proceed in the case), what organizationally structured court should proceed must be clarified (the local court, tribunal court, high court of appeal, or Supreme Court); c) jurisdiction (territorial competence): finally, if the question of competence has been clarified, the final question is which of the courts with the same organizational structure (that is, more than 100 local courts, exactly 20 tribunal courts, and five high courts of appeal) should proceed.

The competence of the proceeding courts is illustrated in the following diagram:



The local court disposes of the general competence of first instance[24]. As the diagram shows, the tribunal court proceeds in the first instance in outstanding cases. The definition of the court of first instance appoints the court proceeding in the second and, contingently, the third instances, and there is no departure from that (prohibition against secession).

The court adjudicates in the first instance on the merits as a single judge or in council, while in a legal remedy procedure is always adjudicated in council[25]:

24 Section 19 of CPC.
25 Section 13 of CPC.

In the first instance	In the second and third instance
• single judge (generally) • three professional judges (if the single judge remitted the case to the council of the court) • special council (economic and business case, criminal procedure against juvenile offenders, militarv criminal orocedure)	• small council (3 professional judges) • large council (5 professional judges)

During investigation (before indictment) the investigating judge decides on questions that were referred to the jurisdiction of the court. This is the local court judge that is appointed by the head of the tribunal court[26]. In the case of military criminal procedures, this is the military judge of the tribunal court[27].

The investigating judge's decision can have two forms[28]:

1. Session for priority questions:
   a) ordainment of coercive measures bound to judicial consent concerning personal freedom (except if a milder measure than the earlier one is motioned)
   b) prolonging detention (based on new circumstances or following six months)
   c) ordainment of the monitoring one's of mental state
   d) ordainment of continuation of procedure due to a breach of cooperation (except if the person breaching cooperation resides in an unknown place or if the prosecutor does not motion for a session)

2. Passes the decision based on the documents in all other questions referred to its jurisdiction:
   a) excluding the defense counsel
   b) special protection of witness
   c) obliging the person that denies testimony to disclose the identity of the person providing information
   d) issue and recall of European and international arrest warrants
   e) judging motions of revision
   f) changing a fine into incarceration
   g) ordainment of the continuation of a terminated procedure (except if a session is to be held)
   h) tasks regarding the application of covert instruments that are bound to judicial permissions
   i) in other cases specified by law

26 Section 463 of CPC.
27 Section 713 of CPC.
28 Sections 464–467 of CPC.

4. Main features of Hungarian criminal law

4.1. Basic principles of criminal law

In the context of the principles of criminal law, Mészáros first mentions that criminal law is permeated[29] not only by fundamental principles but also by the so-called fundamental principles of law. Such fundamental legal principles are the rule of law (legal certainty and justice[30]) and the principle of humanity (the sanction imposed on the offender must not violate human dignity).

The specific principles of criminal law are as follows: a) the principle of legality (legality); b) the principle of responsibility for action (principle of individual responsibility for action); c) the principle of liability based on fault (principle of liability based on individual fault) d) the ultima ratio nature of criminal law; e) the principle of proportionality; f) the prohibition of double assessment (ne bis in idem); g) the principle of in dubio mitius.[31]

The principle of legality is enshrined in Section 1 of the CC. Accordingly, the criminal liability of the accused may only be established for an act that was punishable by law at the time that it was committed (nullum crimen sine lege). An exception to this general rule is made for acts punishable under generally recognized rules of international law. In essence, the same is stated in Article XXVIII Subsection 4 of the Fundamental Law, according to which no one shall be held guilty or punished for an act that, at the time it was committed, was not a criminal offense under Hungarian law or the law of another State (within the scope of an international treaty or an act of the European Union). At the same time, Article XXVIII Subsection 5 of the Fundamental Law also allows for criminal liability for an act that, at the time that it was committed, was a criminal offense under the generally recognized rules of international law even if it did not constitute a criminal offense under the Hungarian CC in force at the time that the offense was committed.

No penalty may be imposed or measure taken for the commission of a criminal offense that was not provided for by law at the time that it was committed (nulla poena sine lege). Here as well, there is an exception because according to Section 2 of the CC, although, as a general rule, an offense must be judged in accordance with the criminal law in force at the time of its commission, if the new criminal law in force at the time of the judgement of the offense provides that the offense is no longer a criminal offense or is to be judged more leniently, the new criminal law must be applied. In the latter case, a sanction may be imposed that was not provided for in the law at the time

29 Mészáros, 2005, p. 6.

30 Others argue that the rule of law itself and equality of rights are part of the rule of law; see A büntetőjog alapelvei.

31 This principle (like the ne bis in idem principle) is considered by many to be more of a criminal procedural requirement embodied in the principle of in dubio pro reo (the obligation to rule in favor of the accused in case of doubt); see Fenyvesi, Herke and Tremmel, 2004, p. 81.

of the offense but was provided for in the law at the time of the conviction, and this means a lighter sentence for the accused.

The principle of responsibility for the act, the principle of liability based on guilt, and the principle of proportionality are reflected in Chapter IX of the CC on the imposition of penalties. Section 79 of the CC states that the purpose of punishment is to prevent either the offender or another person from committing a crime to protect society. Accordingly, within the limits set by the CC and bearing in mind its purpose, the penalty must be imposed in such a way that it is commensurate with the material gravity of the offense, the degree of culpability, the offender's danger to society, and other mitigating and aggravating circumstances[32].

The ultima ratio nature of criminal law appeared in Hungarian law[33] soon after the regime change. Its foundations were laid by the Constitutional Court in its decisions 1214/B/1990, 23/1990 (X. 31) and 30/1992 (V. 26). Although these decisions pre-date the entry into force of the current Fundamental Law and have thus lapsed, this does not impact the legal effects of these decisions.[34]

According to the Constitutional Court's Decision No. 1214/B/1990, the extent of the restriction of rights by means of punishment must also comply with the principles of proportionality, necessity, and ultima ratio. Decision No 23/1990 (X. 31) of the Constitutional Court, which ruled that the death penalty was unconstitutional, also touches on the principle of ultima ratio, stating that "the social function of criminal law is to be the sanctioning pillar of the legal system as a whole." The role and function of criminal sanctions is "to maintain the integrity of legal and moral norms when other legal sanctions no longer help."

The principle of ultima ratio is discussed in detail in the Constitutional Court's Decision No. 30/1992 (V. 26). According to this decision, criminal law is the ultima ratio in the system of legal liability or, as Ferenc Nagy puts it, "the last resort in the last place."[35] The role and function of criminal sanctions, that is, of punishment, is to maintain the integrity of legal and moral norms when sanctions in other branches of law no longer help. An act can, therefore, be considered a criminal offense if the effects and consequences of the conduct on the individual and society are so serious that other forms of liability, such as the liability systems of criminal or civil law, are insufficient against the perpetrators of such conduct.

Ultima ratio can thus be interpreted on at least three levels: legislation is only necessary when no other instrument is adequate; if legal regulation is necessary, then criminal law can only be considered if no other legal system can resolve the issue; and if criminal law is absolutely necessary, more severe sanctions should be used only if less severe sanctions are not sufficient. In accordance with this line of thought,

32 Section 80 Subsection 1 of the CC.

33 Amberg, 2013, pp. 11–22.

34 "T Decisions of the Alkotmánybíróság delivered prior to the Fundamental Law entering into force shall be abolished. This provision shall be without prejudice to the legal effects of such decisions." See Closing and miscellaneous provisions of the Fundamental Law, Nr. 5.

35 Nagy, 2008, p. 59.

Karsai concluded that (because, with the abolition of the death penalty, imprisonment is the most severe punishment in Hungary) imprisonment itself functions[36] as an ultima ratio.

As previously explained, the ultima ratio principle is closely linked to the principle of proportionality. As Békés puts it, criminal law is the instrument of last resort, to be used only when necessary and then only within[37] the framework of proportionality. Wiener argues that necessity must be examined first, followed by whether it is really the instrument[38] of last resort. The Constitutional Court explained in its decision No 1214/B/1990 that the special part of the CC establishes the penalty limits according to the gravity of each offense and thus meets the proportionality requirements. The general rules on penalties in the general part of the CC and the normative rules on sentencing are an integral part of the CC's penal system. Together, the system of penalties adapted to the nature and gravity of each offense and the normative rules on sentencing serve the function of legal punishment under the rule of law: proportionate and deserved retribution through sanctions. Proportionate and deserved retribution can serve preventive punishment objectives. The increase in responsibility, which must be proportionate, necessary, and based on constitutional grounds, must not be cruel, inhuman, or degrading while taking the legal system of punishment as a benchmark.

The other principles of criminal law are regulated by the Criminal Procedural Code. In connection with the principle of ne bis in idem, Section 4 Subsection 3 of the CPC stipulates that criminal proceedings may not be initiated and criminal proceedings that have been initiated will be terminated if the offender's offense has already been finally adjudicated, except in the case of extraordinary legal remedies and certain special proceedings. According to Subsection 4, this provision also applies if the offender commits several offenses in one act, but the court does not find the accused guilty of all of the offenses (according to the qualification of the charge) that can be established according to the facts of the indictment. In fact, the prohibition of multiple prosecution under Section 4 Subsection 7 of the CPC and Article XXVIII Subsection 6 of the Fundamental Law applies within a much broader scope, as defined by international treaties or European Union acts.[39] According to Section 4 Subsection 7 of the CPC, criminal proceedings may not be instituted, and criminal proceedings shall be terminated if the offender's act has been finally adjudicated upon in a Member State of the European Union or a decision has been made on the merits of the act in a Member State that (under the law of the Member State that made the decision) prevents the institution of further criminal proceedings in respect of the same act or the continuation of criminal proceedings ex officio or on the basis of ordinary legal remedies. However, according to Subsection 8, this provision shall not apply if a final

36 Karsai, 2012, p. 260.
37 Békés, 2002, p. 51.
38 Bárd et al., 2002, p. 29.
39 Herke, 2021b, p. 161.

judgment given by a court of a Member State cannot be taken into account or the act was committed entirely in the territory of Hungary. In the latter case, the principle of ne bis in idem shall also apply if, in the event of conviction, the sentence imposed by the Member State has been executed, is being executed, or cannot be executed[40] under the law of the Member State that has given final judgment.

A fact not proven beyond reasonable doubt cannot be assessed against the accused, according to Section 7 Subsection 4 of the CPC. In relation to the principle of in dubio pro reo (in dubio mitius), we must make three restrictions: a) applies only to questions of fact (assessment of evidence), not to questions of law (i.e., the court is not obliged to apply the lighter standard in case of doubt); b) applies only to final decisions (not to other decisions, such as those ordering detention,[41] when the court decides); c) only after all legal means of proof have been exhausted (for example, if there is doubt between two statements, the court must first try to eliminate it by other means, such as confrontation).

Thus, subject to the above restrictions, if the evidence is scarce or contradictory, the court must determine the facts in a way that is more favorable to the accused.

4.2. Criminal liability: Obstacles to criminal liability

According to Section 4 of the CC, "criminal offense" refers to any conduct that is committed intentionally or (if negligence also carries a punishment) with negligence and that is considered potentially harmful to society and that is punishable under the CC.

There are three main elements to this concept: a) Intent: a criminal offense is committed with intent if the person conceives a plan to achieve a certain result or acquiesces to the consequences of their conduct[42]; negligence: a criminal offense is committed where the perpetrator can anticipate the possible consequences of their conduct but carelessly relies on the non-occurrence of those consequences or fails to foresee such possible consequences through conduct characterized by carelessness and neglectfulness[43]; harm to society: any activity or passive negligence that prejudices or presents a risk to the person or rights of others or the fundamental constitutional, economic, or social structure of Hungary provided for in the Fundamental Law[44].

There are two forms of statutory criminal offense in Hungary: felony and misdemeanor. The third, mildest form is the misdemeanor, which is not a criminal offense and is provided for by a separate law.[45] A felony is a crime committed intentionally

40 For details, see Herke, 2018, pp. 413–417.
41 Bagossy, 2016, pp. 15–20.
42 Section 7 of the CC.
43 Section 8 of the CC.
44 Section 4 Subsection 2 of the CC.
45 See Act II of 2012 on misdemeanors, the misdemeanor procedure, and the misdemeanor registration system. Because the terms "misdemeanor" and "misdemeanour" are very similar, several authors use the term "petty offense" for the latter.

that is punishable under this Act by imprisonment of two or more years. Every other criminal offense is a misdemeanor[46].

The offense has three stages. Compared to the completed offense, the closer stage is the attempt, and the more distant stage is the preparation. An attempt is a criminal offense if the person who commits the intentional offense starts but does not complete it. An attempt is punishable as a completed offense[47]. While an attempt is punishable in the same way as a completed offense, the offense of preparation is punishable only if the CC specifically provides for this in the case of the offense in question. An act of preparation is deemed to be committed if the accused, with a view to committing the offense, provides the necessary or facilitating conditions, invites, offers, undertakes or agrees to commit the offense jointly[48].

The CC divides the obstacles to criminal liability into three main categories: a) grounds for total or partial exemption from criminal responsibility; b) grounds for exemption from criminal responsibility; c) other obstacles of criminal prosecution.

Ad. a) According to Section 15 of CC, the perpetrator may be totally or partially exempt from criminal responsibility or an act may be fully or partly exempt from criminalization on the following grounds: being below the age of criminal responsibility, insanity, coercion and threat, mistake, justifiable defense, means of last resort, statutory authorization, and other grounds defined by law.

In the criminal law according to Section 12 of the CC, "perpetrator" means the parties to a crime (the principal, the covert offender, and the cofactor) as well as the accomplices (the abettor and the aider). In terms of becoming the defendant, age at the time of committing the crime has great significance:

1. childhood: childhood is an excluding factor for punishment; that is, a defendant under 14 when committing a crime in the majority of cases, and under[49] 12 in certain cases, cannot be punished and can, at most, be a witness in the criminal procedure;
2. juvenile: criminal procedures against juveniles can be carried out against the person that can make the above-mentioned distinction and is over 14/12 years of age but under 18[50], if the defendant was under 14 when committing the crime, or if the defendant has the capacity to understand the nature and consequences of their acts[51];

46 Section 5 of the CC.
47 Section 10 Subsections 1–2 of the CC.
48 Section 11 Subsection 1 of the CC.
49 Section 16 of the CC: homicide, voluntary manslaughter, battery if it is life-threatening or results in death, assault on a public official, assault on a person entrusted with public functions, assault on a person aiding a public official or a person entrusted with public functions, acts of terrorism, aggravated cases of robbery and plundering, and if the defendant lacks the capacity to understand the nature and consequences of their acts.
50 Section 678 of CPC.
51 The provisions of the Criminal Code concerning juveniles are different from the general ones and the aim and content of these special provisions is the upbringing and resocialization of juveniles.

3. adult: a defendant who, when committing the crime, was over the age of 18 (or if there are more criminal procedures pending and one of those was committed as a juvenile, but the defendant was 18 when committing at least one of the crimes).

Ad. b) According to Section 25 of the CC, the grounds for exemption from criminal responsibility are the death of the perpetrator, the statutory limitation, clemency, upon voluntary restitution, and under other grounds defined by law.

Among the grounds for decriminalization, active remorse should be highlighted because of its specificity. Active remorse is essentially grounds for decriminalization resulting from a successful mediation process. Mediation is a procedure designed to promote the agreement of the suspect and the victim, the reparation of the consequences of the crime, and the prospective law-abiding conduct of the suspect motioned by the suspect or the victim or applicable with their voluntary consent[52]. The conditions of the mediation procedure are contained partly in the CPC and partly in the CC:

Positive conditions (§ 412. CPC, § 29. Ss. 1-2 of Criminal Code)	**Negative conditions** (§ 712. CPC, § 29. Ss. 3 of Criminal Code)
1. In case of any of the six types of crime: • against against life, limb and health (Chapter XV. of Criminal Code), • against personal freedom (Chapter 18 of Criminal Code), • against human dignity and fundamental rights (Chapter XXI. of Criminal Code), • crime against traffic regulations (Chapter XXII. of Criminal Code), • against property (Chapter XXXVI. of Criminal Code), • against intellectual property rights (Chapter XXXVII. of Criminal Code) 2. The crime punishable with imprisonment not exceeding five years. 3. Motioned by/with the consent of the suspect and the victim. 4. The suspect has made a confession to the crime before the indictment. 5. Reparation of the consequences of the crime is expected (with regard to the nature of the crime, method of perpetration and the identity of the suspect) and the conduct of the judicial procedure is omissible / the mediation procedure is not contrary to the principles of the imposition of the punishment.	1. the defendant is repeat offender or habitual recidivist; 2. perpetration in criminal organization; 3. the crime caused death; 4. intentional perpetration during probation/ conditional sentence/ conditional prosecutorial suspension 5. participation in mediation procedure within two years 6. crime committed to the detriment military body in military criminal procedure

For the purpose of the conduct of the mediation procedure, the prosecutor's office may suspend the procedure on one occasion for six months, which shall be communicated

52 Section 412 of CPC.

to the probation officers' service with powers and competence for the conduct of the mediation procedure.

There are three possible outcomes of the mediation process:

1. Compensate the victim for the damage caused or otherwise make reparation for the harmful consequences of the offense; for a misdemeanor or a felony punishable by a maximum of three years, the prosecutor terminates the proceedings; for an offense punishable by more than three years but not more than five years, the prosecutor will prosecute, but there may be unlimited reduction of the sentence.
2. If the accused has begun to comply with the agreement reached as a result of the mediation procedure, but their criminal liability has not been terminated because the obligation contained in the agreement cannot be fulfilled during the period of suspension, the prosecutor's office may extend the period of suspension for a maximum of 18 months and will examine what measures may be taken at the end of the period at the latest.
3. If the mediation procedure has been completed during the period of suspension, and there is no reason to terminate or otherwise suspend the procedure (no agreement, unsuccessful mediation), the prosecution will order the continuation of the procedure.

Ad. c) The other obstacles of criminal prosecution are the lack of private motion or official complaint. A private motion is any statement by the victim that they wish to punish the perpetrator of the offense against them.

These obstacles are not, in fact, substantive obstacles but procedural ones; there is a historical reason why they are regulated in the CC, and unfortunately, this dogmatic error has not been remedied in the course of the recent codifications.

4.3. The system of sanctions under the Criminal Code

The system of sanctions is the set of laws that govern the various criminal penalties as well as their application and enforcement. The Hungarian system of sanctions has three characteristic features: a) This is a dual system of sanctions: sanctions can be penalties or measures. Both types of sanction are aimed at prevention, but punishment can only be used when a criminal offense is committed, while measures can also be used for non-criminal offenses (e.g., compulsory treatment of a person with a pathological mental disorder). b) Penalties themselves can be of two halves: a penalty and a secondary penalty. The CC only recognizes one subsidiary punishment, so this division has lost its former significance (in the old Criminal Code, there were still seven subsidiary punishments, most of which are in the new CC punishments, and a smaller part of which have become measures in the current CC or are not regulated by it). c) Finally, a specific feature of the system of sanctions is that the CC includes both custodial and non-custodial sanctions among both penalties and measures.

The system of sanctions under the Prison Law is illustrated in the table below:

Penalties		**Measures**
Penalties	*Additional penalty*	
• Imprisonment (§§ 34-45. of CC), • Custodial arrest (§ 46. of CC), • community service work (§§ 47-49. of CC), • fine (§§ 50-51. of CC), • prohibition to exercise professional activity (§§ 52-54. of CC), • driving ban (§§ 55-56. of CC), • prohibition from residing in a particular area (§ 57. of CC), • ban from visiting sport events (§ 58. of CC), • expulsion (§§ 59-60. of CC).	• deprivation of civil rights (§§ 1-62. of CC)	• warning (§ 64. of CC), • conditional sentence, (§§ 65-66. of CC), • work performed in amends (§§ 67-63. of CC), • probation with supervision (§§ 69-71. of CC), • confiscation (§§ 72-73. of CC), • confiscation of property (§§ 74-76. of CC), • irreversibly rendering electronic information inaccessible (§ 77. of CC), • involuntary treatment in a mental institution (§ 73. of CC), • measures: under the Act on criminal measures applicable to a legal entity (§ 3 of the Act CIV. of 2001: termination of the legal person, restriction of the activity of the legal person or fine).

Imprisonment is imposed for a fixed duration or for a life term[53]. In the event that a sentence of life imprisonment is imposed, the court shall specify in its peremptory decision the earliest date of eligibility for parole or shall preclude any eligibility for parole[54].[55]

The current Hungarian law is characterized by a relatively severe system of penalties, but it also recognizes alternative sanctions. Alternative sanctions always follow the fate, from a legal point of view, of the first type of penalty. According to Section 33 Subsection 4 of the Criminal Code, if the minimum penalty for an offense is less than one year's imprisonment, imprisonment may be replaced by detention, community service, a fine, a ban on engaging in an occupation, a ban on driving, a ban on being expelled, a ban on attending sporting events or expulsion, or several of these penalties.

Penalties may be imposed concurrently. There are two limits: a) If the offense is punishable by imprisonment, community service, a fine, prohibition from occupation, prohibition from driving, banishment, prohibition from attending sports events or expulsion, one or more than one of these penalties may be imposed instead of or in addition to this penalty. b) Imprisonment may not be accompanied by detention or community service, expulsion may not be accompanied by community service or a fine, and life imprisonment may not be accompanied by a fine.

Among these measures, reprimand, probation, and reparation can be used independently in place of penalty. Probation supervision may be used in addition to a

53 Section 34 of CC.
54 Section 42 of the CC.
55 In relation to life imprisonment without parole, see Lévay, 2016, pp. 167–187.

penalty or measure. However, probation supervision cannot be ordered in addition to expulsion. Forfeiture, confiscation of property, and permanent inaccessibility of electronic data may be used independently and in addition to a penalty or measure.

4.4. Trends related to the special part of the Criminal Code

According to the information[56] published by the Prosecutor General's Office in 2021 (hereafter: the Information), the overall crime rate in Hungary over the past 20 years has developed as follows:

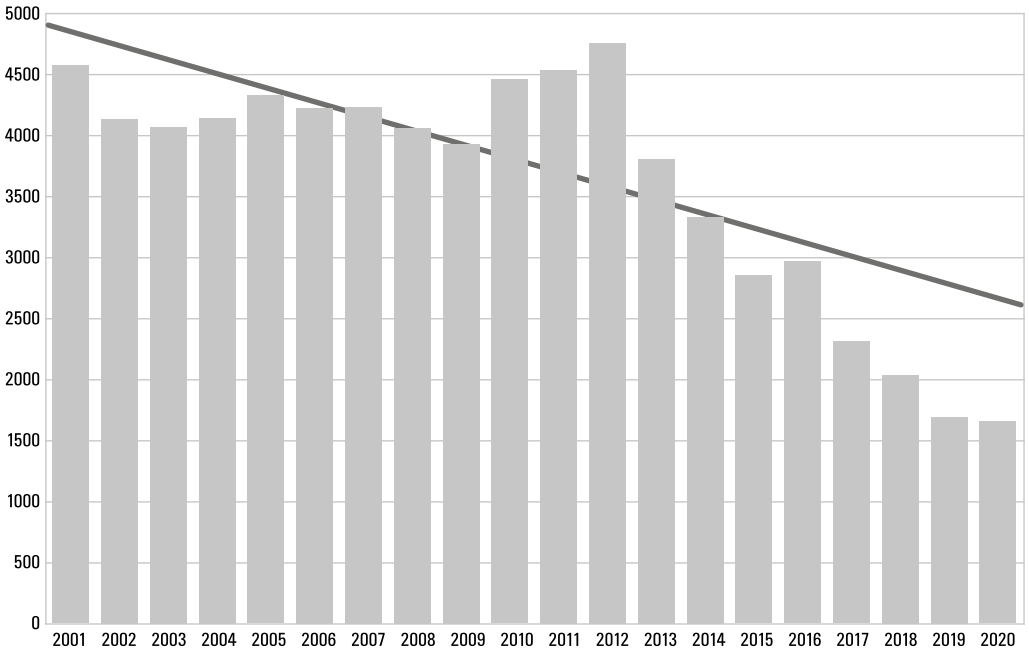
Year	Registered crimes				Registered offenders		
	number	change in number (2001 = 100%)	Number per 100 thousand inhabitants	unknown perpetrator	number	change in number (2001 = 100%)	Number per 100 thousand inhabitants
2001	465 694	100,0	4565,5	223 911	128 399	100,0	1258,8
2002	420 782	90,4	4135,5	200 784	129 454	100,8	1272,3
2003	413 343	88,8	4075,4	179 250	124 924	97,3	1231,7
2004	418 883	89,9	4140,5	181 245	137 195	106,9	1356,1
2005	436 522	93,7	4323,0	179 328	140 211	109,2	1388,6
2006	425 941	91,5	4227,0	174 120	129 991	101,2	1290,0
2007	426 914	91,7	4241,1	187 668	121 561	94,7	1207,6
2008	408 409	87,7	4065,6	178 285	122 695	95,6	1221,4
2009	394 034	84,6	3928,2	182 602	120 141	93,6	1197,1
2010	447 186	96,0	4465,5	221 194	129 945	101,2	1297,6
2011	451 371	96,9	4520,2	245 080	120 529	93,9	1207,0
2012	472 236	101,4	4742,4	274 143	108 306	84,4	1087,7
2013	377 829	81,1	3813,1	177 877	109 876	85,6	1108,9
2014	329 575	70,8	3336,7	139 020	108 466	84,5	1098,1
2015	280 113	60,1	2842,2	109 178	101 494	79,0	1029,8
2016	290 779	62,4	2957,9	91 073	100 933	78,6	1026,7
2017	226 452	48,6	2311,3	77 034	92 896	72,3	948,2
2018	199 830	42,9	2043,6	63 190	87 733	68,3	897,2
2019	165 648	35,6	1695,0	56 718	73 765	57,4	754,8
2020	162 416	34,9	1662,5	48 918	77 552	60,4	793,8

56 Nagy, 2020, p. 10.

The main conclusions that can be drawn[57] from the above data, according to the Prospectus, are outlined below.

The number of registered offenses has been steadily decreasing[58] since the introduction of the CC.[59] Accordingly, the number of offenses per 100,000 inhabitants has also decreased significantly (as the population has not changed significantly): the number of offenses per 100,000 inhabitants in 2020 is the lowest since 2001 (1662.5), while in the base year (2001), it was 4565.5. This may be partly due[60] to changes in the rules of the CC and partly to the increase in the threshold for offenses.

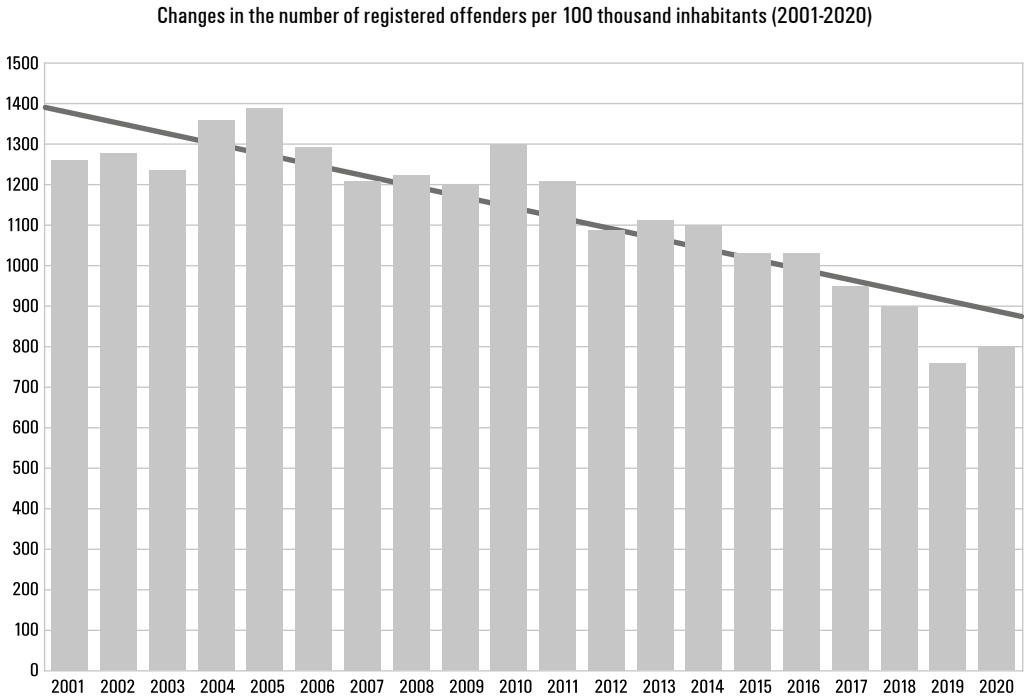
Changes in the number of registered crimes per 100 thousand inhabitants (2001-2020)



A similar trend can be observed in the number of registered offenders. The trend, which has essentially been steadily decreasing, is broken only in one year or another due to a small number of cases with more offenders. The number and proportion of offenses committed by unknown perpetrators is an important indicator. This rate has ranged from 40–60% of registered offenses over the last two decades (above 50% in

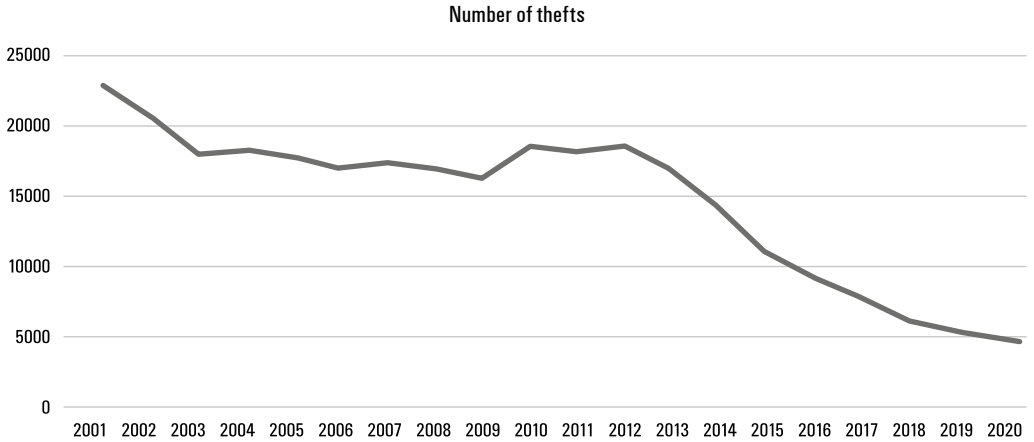
57 Nagy, 2020, pp. 6–8.
58 The exception to this was 2016, but the reason for this was that there were two cases with tens of thousands of offenses, which distorted the statistics; ibid., p. 6.
59 In the context of a decrease in the number of registered offenses, see Kerezsi, 2020.
60 Nagy, 2020, p. 11.

2011 and 2012). These rates have been gradually decreasing, reaching below 40% from 2015 and around 30% in[61] recent years.

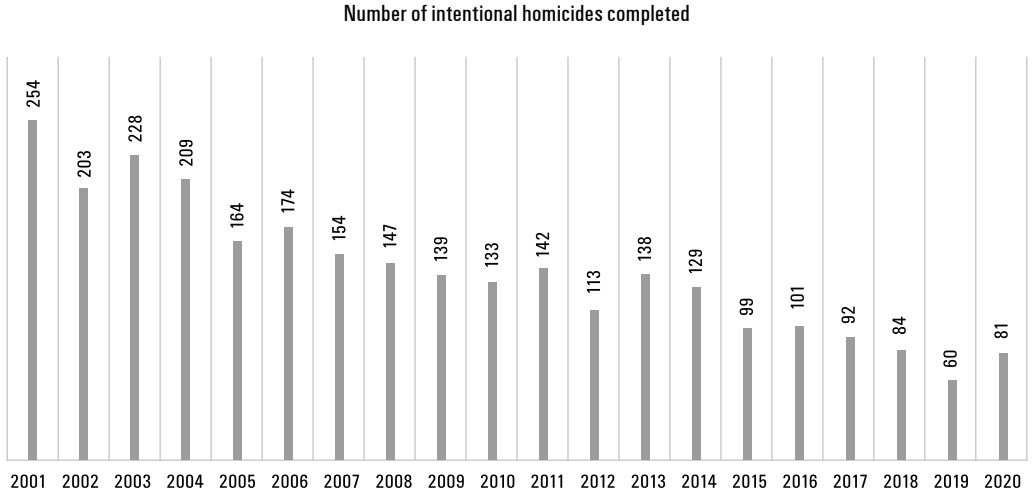


The predominance of crimes against property in relation to the total number of registered crimes is striking, according to the data in the publication. These offenses usually account for around 50–60% of the total crime figures and are, therefore, of crucial importance for the evolution of total crime. In 2020, 45.6% of all registered offenses were crimes against property. Theft and fraud continue to account for the largest share of crimes against property, which has remained unchanged for decades. At the same time, the number of thefts has fallen significantly compared to previous years: compared to 228,769 in the base year (2001), only 48,627 thefts were recorded in 2020, 21.2% of the 2001 figure.[62]

61 Ibid., p. 12.
62 Ibid., p. 13.

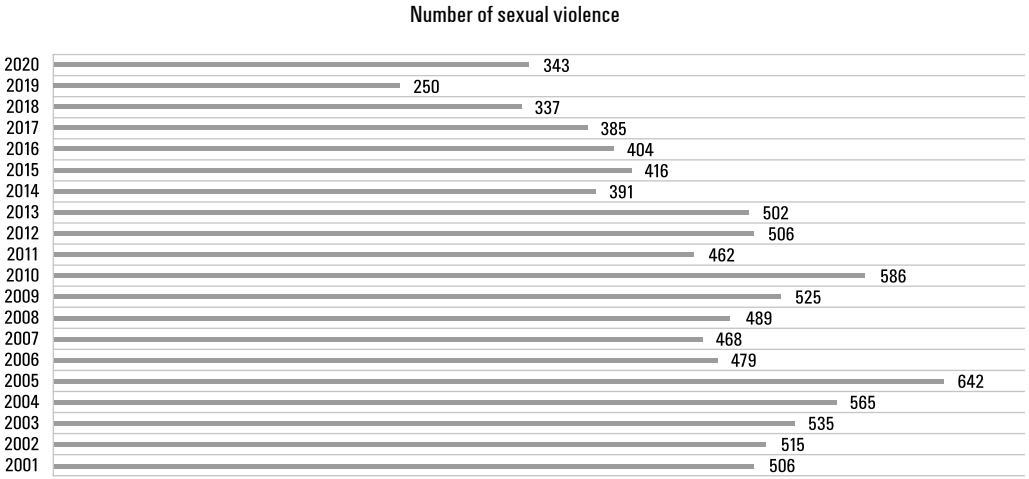


The available data on violent crime show that while the number of violent crimes against property (similar to crimes against property) has steadily decreased, the number of crimes against life, limb, and health has increased slightly (6.2%) compared to 2019. The same is true for the number of intentionally completed homicides (2019: 60; 2020: 81); nonetheless, the number of intentionally completed homicides is still much lower compared to previous years (254 in the base year 2001 and around 130–150 between 2007 and 2014, but since then, with the exception of 2016, it has always remained below 100).[63]



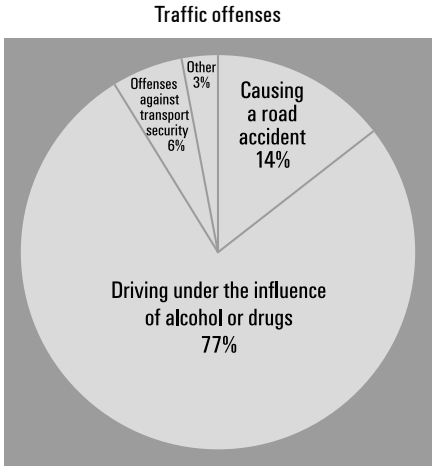
63 Ibid., p. 17.

The figures for crimes against sexual freedom and crimes against sexual morality have been constantly changing. The main reason for this is attributed to the jumps in child pornography figures. In the case of child pornography, the regularity of the offense has been constantly changing (e.g., 94% of offenses in 2013 and 80% in 2017 were recorded as a single offense); that is, if the offender committed the offense through several pornographic recordings, this was sometimes treated as a single offense and sometimes as multiple offenses. The issue was resolved by the Curia Criminal Case Law No. 2/2018, which established that one offense is committed with several pornographic recordings. The number of sexual assaults[64] has decreased by a third in the two decades under review; however, an increase can be observed in 2020 compared to the figures recorded in 2019 (2019: 250; 2020: 343).[65]

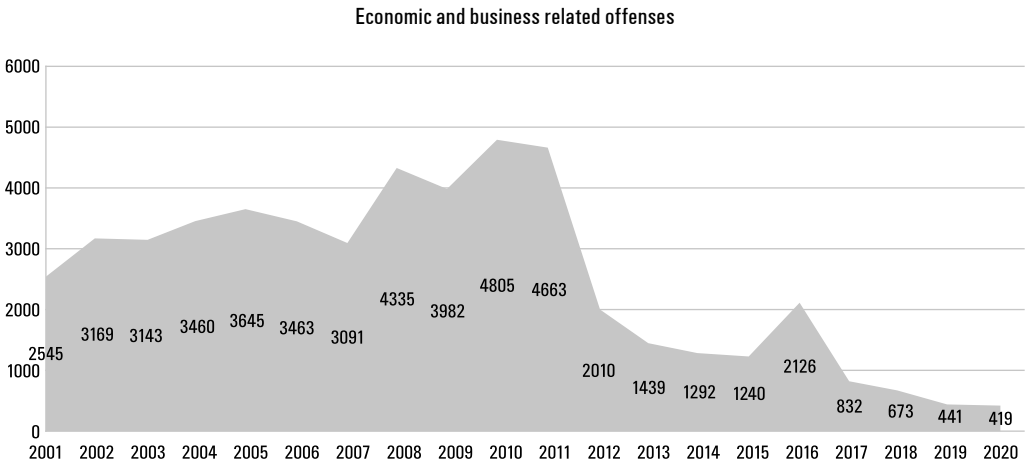


Compared to the previous year, there was a slight increase in the number of traffic offenses recorded in 2020. The number of drunk or intoxicated driving offenses, which had been on a steady upward trend in previous years, decreased in 2019 and was almost the same in 2020 as in the previous year (2019: 14,564; 2020: 14,556). Despite the significant decrease, this number is still 14.5% higher than the average of the last 20 years and continues to account for the largest share of traffic offenses:[66]

64 In the old Prison Law, it was two offenses (forcible sexual intercourse, indecent assault). For the data for this period, the data of the two previous offenses have been added together.
65 Ibid., p. 21.
66 Ibid., p. 19.

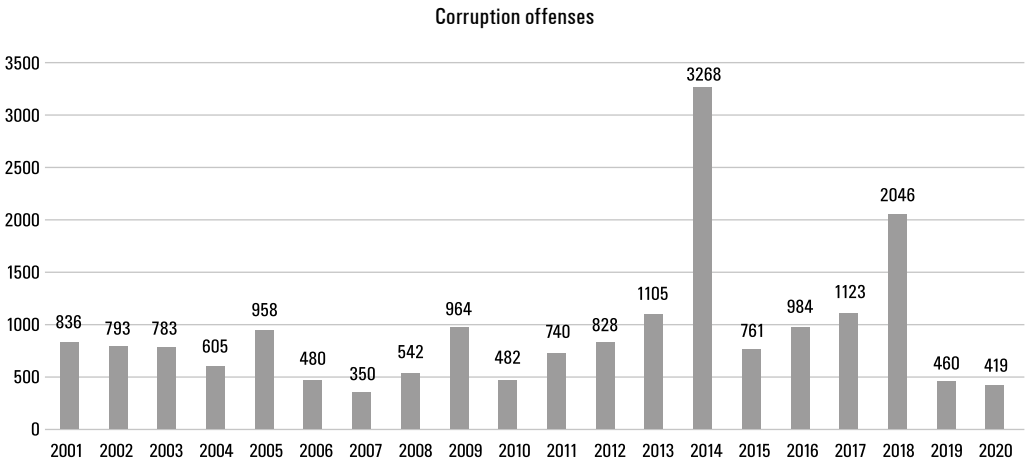


The number of economic and business-related offenses shows a significant decrease compared to the base year 2001. This is particularly the case for bankruptcy offenses, which have fallen from between 1,000 and 2,000 in 2001–2006 to between 200 and 300 in recent years, with only 107 bankruptcy offenses recorded in the last year. The drastic reduction in the number of offenses against the economic order may be due to the use of electronic tax registers, as the possibility of committing[67] these offenses was much greater with the older paper-based accounts.



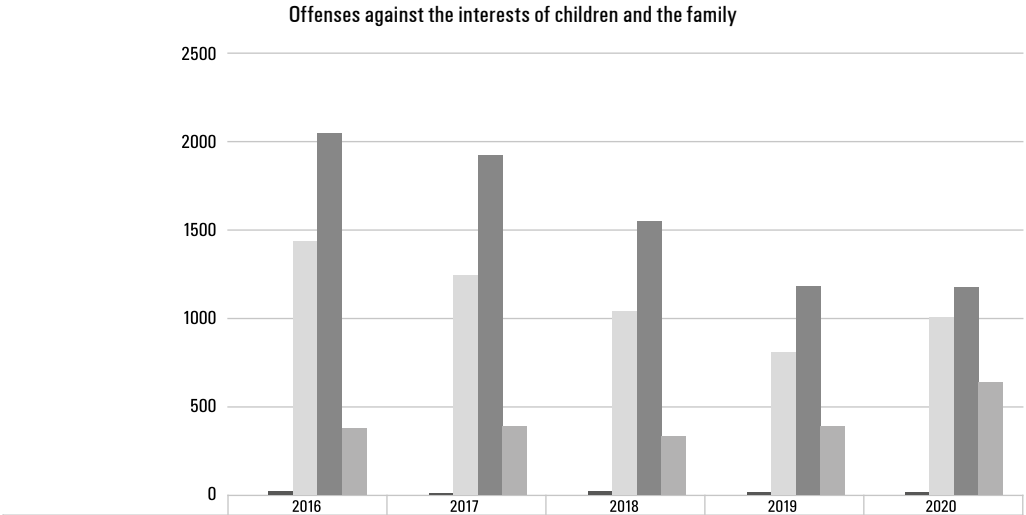
67 Ibid., p. 22.

The data on corruption offenses show the opposite trend to those on offenses against sound management[68]. After stable figures in the 2000s (with a further major decrease between 2006 and 2008), the number of corruption offenses increased severalfold in the 2010s. The spike in 2014 may be explained by several cases of bribery (the number of bribery[69] cases in 2014 was 1,573 and is usually below 100), but this shows that the rise of corruption crimes is significant.



The number of offenses against the interests of children and crimes against the family has been decreasing steadily over the last few years,[70] only increasing slightly in 2020 (2016: 3,918; 2017: 3,590; 2018: 2,967; 2019: 2,417; 2020: 2,863). However, observing two aspects shows that the situation is not so simple. On the one hand, the 20-year data shows that for this group of offenses, there is essentially only a decrease of around 12% compared to 3,246 in 2001, with this number rising to over 5,000 by the early 2010s and then beginning to slowly decline.[71] On the other hand, while failure to comply with a maintenance obligation has fallen by about half in the last five years (2016: 2,058; 2020: 1,186) and endangerment of a minor by about two-thirds (2016: 1,439; 2020: 1,005), relationship violence has increased by one and a half times (2016: 391; 2020: 650), and the latter offense was committed in 2014 only a quarter as frequently as in the year 2020 (158). However, this is possibly only due to the high latency rate for relationship violence, the reduction of which (and hence the increase in the number of reported crimes) is also due[72] to the proliferation of victim support centers over the last few years.

68 Ligeti, 2003.
69 Nagy, 2020, p. 23.
70 Barabás, 2017, pp. 171–181.
71 Nagy, 2020, p. 20.
72 Ibid., p. 20.



	2016	2017	2018	2019	2020
Violation of family status	0	1	0	0	1
Changing of the custody of a minor	29	18	25	21	20
Abuse of a minor	1489	1248	1050	818	1005
Nonsupport	2058	1906	1559	1184	1186
Domestic violence	391	396	339	392	650

5. The main characteristics of Hungarian criminal procedure law

5.1. Principles of criminal procedure law

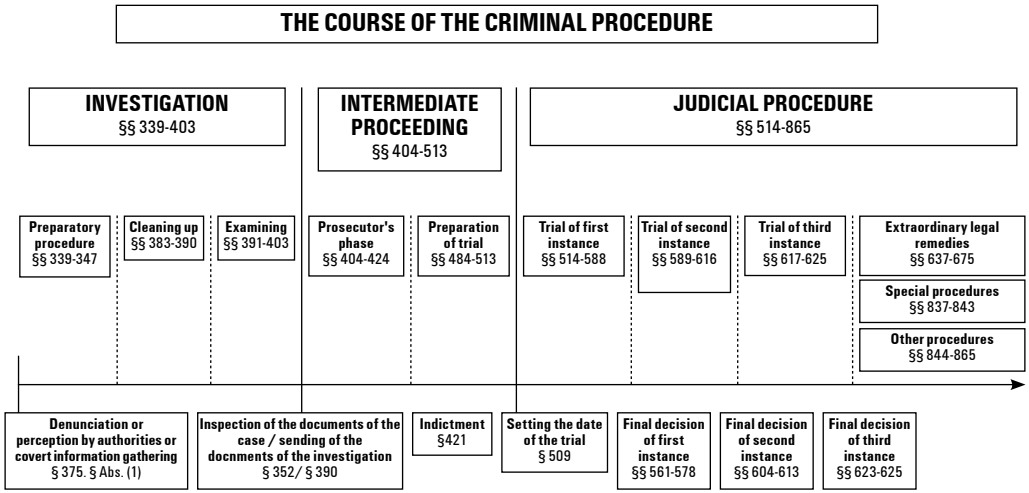
In Chapter I of the CPC, the basic principles regulated under General Provisions serve as a norm for legislation. For example, the rules for exclusion had to be created so that they fit with the principle of function sharing (contradictorium). In other cases, these can be applied in practice (e.g., principle of in dubio pro reo).

The basic principles regulated in the CPC can be divided into two main groups:

Basic principles prevailing in the entire criminal procedure	Basic principles prevailing only in the judicial phase
• presumption of innocence in a narrower sense (§1. of CPC) • protection of basic rights (§2. of CPC) • principle of defence (§ 3. of CPC) • foundation and obstacles of criminal procedure (§ 4. of CPC) • division of procedural duties (§ 5. of CPC) • prohibition of self-incrimination (§ 7. Subsection 3 of CPC) • principle of substantive evaluation of criminal liability (§ 7. Subsection 5 of CPC) • language of the criminal procedure and the riaht to use lanruage (6 8. of CPC)	• foundation of adjudication and commitment to indictment (§ 6. of CPC) • principle of appeal (§ 6. of CPC) • burden of proof (§ 7. Subsections 1-2 of CPC) • principle of in dubio pro reo (§ 7. Subsection 4 of CPC) • free evaluation of evidence (§ 167. of CPC) • publicity of the trial (§ 436. of CPC)

5.2. The stages of the criminal procedure

The progression of the criminal procedure can be structured as follows:



The role of investigation remains important at each procedural stage (although the legislative aim over the last two decades has been the opposite). Investigations are characterized by over-proofing: the investigating authority or the prosecution tries to gather almost all of the evidence during the investigation, which can last for months or even years, and the court essentially repeats this proof, which makes the trial very formal.

One of the decisive effects of the innovations of the current CPC was the acceleration of the procedure. This has still not had a significant impact on investigations, but it has had an impact on the judicial branch. Thanks to the provision that if the prosecution offers a specific sentence at the pre-trial meeting, which if accepted by the accused, the case can finally be concluded (because the court is bound upward to this prosecution motion; that is, it cannot apply a more severe sanction), a significant number of cases are concluded before they go to trial. This is compounded by the numerous legal measures that lead to the termination of proceedings (e.g., mediation, conditional suspension, cooperation of the suspect, dismissal with a reprimand, plea bargain, criminal trial) before or at the beginning of the trial phase or during the pre-trial phase. Accordingly, the trial phase has been used in increasingly fewer cases, primarily when the accused does not plead guilty.

5.3. Possibilities of diversion in Hungarian criminal proceedings

As previously mentioned, there are several ways to avoid trial in Hungarian criminal proceedings. Among these, the following are highlighted: a) mediation procedure; b) conditional prosecutorial suspension; c) cooperation of the suspect; d) plea bargaining.

Ad. a) The mediation procedure has already been dealt with in detail in the criminal substantive law section in relation to active remorse as ground for decriminalization.

Ad. b) The prosecutor's office may suspend the procedure with respect to the future conduct of the suspect to terminate the procedure at a later time under the following conditions:

Specific reasons for the conditional prosecutorial suspension (§ 416. Subsection 2 of CPC, § 690. Subsection 1 of CPC)	**Reasons excluding conditional prosecutorial suspension (§ 416. Subsection 3 of CPC)**
• threat of imprisonment of at most 3 years (in exceptional circumstances: 5 years), threat of imprisonment of at most 8 years in case of a juvenile • favourable change of conduct of the suspect is expected with regard to character of the crime, the method of perpetration and identity of the suspect	• repeat offender • criminal organization • the crime caused death • intentional perpetration during probation/ conditional sentence/conditional prosecutorial suspension

The length of the conditional prosecutorial suspension shall be determined in years (and months); it can be between one year and the threat of the length of imprisonment for the crime (in case of a juvenile, at most three years).

If the law regulates the conduct of the defendant as grounds for the reason for ceasing the punishability, the procedure shall be suspended for one year.

The prosecutor's office may prescribe rules or obligations of conduct concurrently with the conditional prosecutorial suspension, and for the purpose of the clarification of circumstances, the prosecutor's office may order the obtainment of the opinion of the probation officer[73], which is obligatory if the defendant is a juvenile[74].

The following table shows the aim and content of the rules of conduct:

The aim of the rules of conduct	**The content of the rules of conduct**
To clarify whether • the suspect is able to comply with the planned rule (obligation) of conduct • the suspect consents to the planned psychiatric treatment (treatment of alcohol addiction) • the victim consents to the reparation if the possibility of reparation sustains	The suspect shall • compensate for damages (substantial value, etc.) (if the amount can be stated, the suspect shall generally be obligated to compensate) • provide for the reparation in favour of the victim in another way • effect financial compensation for a determined purpose or do community service (if the defendant is at least 16 years of age when the decision is made) • participate in psychiatric (alcohol addiction) treatment (with preliminary consent)

73 Section 418 of CPC.
74 Section 690 of CPC.

The prosecutor's office may state several or other rules of conduct (may prescribe other obligations), and concurrently with the conditional prosecutorial suspension, the prosecutor's office may order the probation with supervision of the suspect.

The defendant shall not be punishable for a crime substantiating the conditional prosecutorial suspension if they complied with the prescribed conduct or the period of the conditional prosecutorial suspension has passed effectively (in which case the prosecutor's office terminates the procedure); otherwise (or if the defendant lodged a complaint against the conditional prosecutorial suspension), the prosecution's office shall order the continuation of the procedure.

Ad. c) If the person who may be reasonably suspected to have committed a criminal act cooperates by contributing to the detection of the case (or other criminal case) or to the presentation of evidence to such an extent that the interests of national security or criminal prosecution related to cooperation takes priority over the interest of establishing the criminal liability of the person reasonably suspected to have committed a crime, depending on the stage of the proceedings, the prosecutor's office shall 1. reject the denunciation[75] or 2. terminate the procedure[76].

Cooperation shall be excluded if the object of incrimination is a crime which intentionally causes the death of another person, causes permanent disability, or intentionally causes serious health impairment.

In the case of cooperation, the state shall compensate for damages (compensation for immaterial injuries) that the defendant is liable to effect pursuant to civil law (if it is not indemnified in any other way).

Ad. d) There are two main forms of plea bargaining in the Hungarian CPC: d/1) the arrangement; d/2) confession of the accused in addition to the sanction indicated by the prosecutor.

Ad. d/1) Before the indictment, the prosecutor's office and the defendant may conclude an arrangement in relation to the crime committed by the defendant on the admission of culpability and its consequences[77]. There is no obstacle to reaching an arrangement if the suspect has previously admitted to committing the crime. The private prosecutor may not conclude an arrangement with the accused[78]. The conclusion of the arrangement may be initiated by the defendant, the defense counsel, and the prosecutor's office alike (the prosecutor's office may do so even during the interrogation of the defendant). The participation of the defense counsel in the procedure directed at the conclusion of the arrangement is mandatory.

In the interest of the conclusion of an arrangement, the prosecutor's office, the defendant, and the defense counsel (or, with the consent of the defendant, only the prosecutor's office and the defense counsel) may conciliate concerning the admission of culpability and the substantial elements of the arrangement (except for the findings

75 Section 382 of CPC.
76 Section 399 of CPC.
77 Section 407 of CPC.
78 Section 786 of CPC.

of fact and the classification of the crime according to the CC). If the prosecutor's office and the defendant have agreed in the purport of the arrangement, the prosecutor's office shall warn the defendant of the consequences of the planned arrangement during the interrogation of the defendant as a suspect, and the arrangement shall be included in the protocol of the interrogation of the suspect. The protocol shall be signed jointly by the prosecutor, the defendant, and the defense counsel.

At the preparatory session, the court decides on the approval or denial of the arrangement:

The conditions of the approval of the arrangement	The cases of denial of the approval of the arrangement
1. the conclusion of the arrangement was in conformity with the rules 2. the arrangement includes the legal requirements 3. the accused has understood the nature of the arrangement and the consequences of its approval 4. there is no reasonable doubt concerning the legal responsibility of the accused and the voluntariness of his confession 5. the statement of the admission of culpability by the accused is unequivocal and substantiated by the documents	1. the indictment or the prosecutor's motions depart from the arrangement 2. the accused did not admit his culpability in compliance with the arrangement at the preparatory session or did not renounce his right to trial 3. the conditions of the approval of the arrangement are not in place 4. the accused did not fulfil his accepted obligations 5. a classification departing from the indictment seems ascertainable

Ad. d/2) If there are no obstacles to a preparatory session, following the commencement of the preparatory session, at the request of the court, the prosecutor: 1) shall present the essence of the charge (this may be omitted at the motion or consent of the accused); 2) shall designate the means of evidence underlying the charge; 3) may motion for the degree (length) of the penalty or measure in case the accused confesses of committing the crime at the preparatory session.

Next, the court interrogates the accused. After the warnings, the court poses the question to the accused as to whether they plead guilty to the crime as an object of the charge.

If the accused admits their culpability and renounces their right to a trial in the scope of the confession, the court shall decide via an order whether it accepts the statement of the admission of culpability by the accused on the basis of this fact, the documents of the procedure, and the interrogation of the accused. In such cases, the questioning of the accused may be limited to the examination of the conditions for the acceptance of the statement. No appeal can be submitted against the order of acceptance[79].

There are two possibilities following the acceptance of the statement of confession:

1. the court does not find an obstacle to the settlement of the case at the preparatory session, in which case it shall interrogate the accused in the circumstances of the imposition of penalty; the prosecutor and defense counsel may

79 Section 504 of CPC.

then plead, and the court may issue the judgment (in such a case, the court may not impose a more unfavorable sanction than proposed[80])
2. if the case cannot be settled at the preparatory session, the accused and the defense counsel may motion for the conduct of an evidentiary procedure not concerning the reasonability of the findings of fact in the indictment and the issue of culpability and for other procedural actions as well as the exclusion of evidence with the designation of the cause and the purpose, which the prosecutor may comment on (and present a similar motion)

In the latter case (if the case cannot be settled at the preparatory session), the court may hold the trial without delay[81].

5.4. Characteristics of judgment

During the judicial procedure, the following decisions may be made:

Final decisions			***Non-conclusive orders***	***Judicial measures not requiring decisions form***
Sentences		**Orders**		
Verdict of acquittal	*Guilty sentence*		Decisions that do not include provisions on the merits of the case	
The court acquits the accused from the charge, if the culpability of the accused cannot be established and does not terminate the procedure.	The court finds the accused guilty, if it established that the accused committed a crime and is punishable	• ruling terminating the procedure • penalty order		

In 2018, the Curia carried out an investigation into the practice of imposing sentences, which was summarized[82] in its Summary Report (hereinafter: the Report). The findings of the Report were summarized in three points.

1. Sentencing disparities: Sentencing practice remained almost unchanged on average between 2003 and 2017, but there are statistically significant differences among courts. This was particularly noticeable regarding theft; for example, the differences were smaller for aggravated assault.
2. Several explanations for the possible reasons for the regional differences were given in the Report. One is the "crime rate" hypothesis: where crime rates are lower (e.g., Transdanubia), crimes pose less of a threat to personal safety, property security, and public tranquility, and therefore, sentencing practices are more lenient. On the other hand, where crime rates are higher (e.g., northeast Hungary), the sentencing practices are stricter. However, local sentencing practices are also important (e.g., in Veszprém, even with

80 Section 565 Subsection 2 of CPC.
81 For details on the rules of criminal procedure, see Herke, 2021a.
82 Cf. Kúria, 2019.

a low crime rate, sentencing is still quite strict). For career reasons, district judges in a given court may adapt to the practice of forensic judges, as their qualifications and thus their promotion in the organizational hierarchy are crucially dependent on them. Tribunals tend to have a small number of second-tier panels, so that sentencing practice is shaped by a relatively small number of people per county, whose personal perceptions of sentencing can thus have a decisive influence on sentencing in the county as a whole.

3. Ways of promoting uniform sentencing practices: the Report proposes a computer application that would allow the key features of a case to be entered into a computer system to determine the range of sentences in which sentences in similar cases vary at the national level (even taking into account mitigating and aggravating circumstances as corrective factors).

6. Prison law in Hungary

6.1. Purpose and principles of penitentiary law

Pursuant to Section 1 of PL, the task of the enforcement of sentences is to enforce the objectives of punishment through the execution of the penalty or measure, with the objective that the aspects of individualization must be ensured in the execution to serve the achievement of individual prevention objectives.

In relation to the principles of the execution of sentences, Hungarian legal literature generally focuses on the principles of the execution of imprisonment (which are also contained in Section 83 of the PL). These authors generally distinguish[83] among the following principles: a) the principle of normalization: to create living conditions similar to free conditions; b) the principle of openness: the mental and physical isolation of prisoners must be reduced; c) the principle of responsibility and self-respect: the prisoner is not the object of the enforcement of the sentence but the subject of it; d) the principle of gradualness and progressive implementation: as the prisoner approaches release, they must be guaranteed living conditions that are close to those of a free life; e) the principle of the individualization of enforcement: the procedures used must be adapted to the personality, individual abilities, and needs of the sentenced person.

According to Vókó, however, there are principles that apply to the enforcement of sentences as a whole and principles[84] that apply only to the enforcement of individual sanctions. Thus, the principles of the enforcement of sentences are not only the principles of the enforcement of imprisonment. Indeed, there are also general principles of law that permeate the entirety of the enforcement of sentences. Accordingly, the principles of the penitentiary system cannot be listed in a taxonomy, but Vókó

83 Eisemann, Gyurnik and Ragó, 2018, pp. 10–11.
84 Vókó, 2014, p. 113.

considers the following to be such principles: the principle of legality; the principle of equality; the rule of law; the humanity requirement; right to a defense; principle of publicity; the principle of mother tongue use; the principle of social participation; protecting your privacy; protection of personal data; the inviolability of the private home; the prohibition of the abuse of rights; the requirement of humane treatment; the requirement of timeliness; the requirement of the application of the legal disadvantage defined in the court's decision; the principle of unity of disadvantage and treatment or education; the prohibition of torture; restrictions and prohibitions on medical scientific experimentation; the principle of normalization; the principle of the necessary degree of separation from society; the principle of necessary and sufficient security; the principle of harm reduction; the requirement of openness; the integration (responsibility) principle; the principle of loan-assumption of rights and obligations[85]; the principle of individualization in the penitentiary system; the principle of least intrusion; respect for human dignity and the need to be treated accordingly; the principle of promoting participation in education; the differentiation principle.

6.2. The Hungarian prison system

According to Section 97 of the PL, imprisonment is carried out in the degree of imprisonment determined by the court (in a jail, correctional institution, or penitentiary) and in the penitentiary institution designated by the penitentiary organization (on the basis of the law or the national commander's measure), preferably in the prison nearest to the convict's address. Imprisonment in a penitentiary is a more severe form of execution than that in a correctional institution, and that in a correctional institution is a more severe form of execution than that in a jail.

During the execution of a custodial sentence, depending on the risk analysis of the prisoner, their behavior and participation in reintegration activities, the order of execution within each level of imprisonment, and the benefits to be granted to the prisoner may vary according to the regime rules associated with each level. A sentenced person may be subject to general, more lenient, and more restrictive regime rules for each level of enforcement. The security classification of a sentenced person should not in itself be an obstacle to their being subject to the more favorable regime rules for each level.

The order of enforcement differs for each level of enforcement in the application of the lighter enforcement rules in the case of placement in a temporary unit or in a secure cell or unit. The penitentiary organization may set up a special section for prisoners with special treatment needs (e.g., drug prevention section, low security risk section, religious section), where the enforcement regime is primarily adapted to these special needs.

85 According to Kabódi, the penitentiary apparatus, as a superior organization with undisguised power, has an accountable duty to promote the human right of the convicted person; Kabódi, 1991, p. 34.

The rules for each implementation stage are listed in the table below:

	Penitentiary	**Correctional institution**	**Jail**
leave	may exceptionally be allowed, the duration of which counts towards the term of imprisonment (not for life imprisonment)	may exceptionally be authorised, the duration of which shall be included in the period of imprisonment	may be authorised, the duration of which shall be included in the period of imprisonment
his life	defined in detail, under permanent management and control	defined, managed and controlled	• set out in part • use their free time outside the reintegration programmes as they see fit
movement within the prison	• with authorisation and under supervision • under supervision • under supervision, only in the designated area	• with authorisation and under supervision • under supervision, with control in the designated area of the penitentiary institute • freely participate in supervised organised programmes	• with supervision • check • free
keeping the lock closed	• must be kept closed at night • during the day, periodic opening hours in line with regime rules may be allowed	• be closed at night, unless running water or toilets for toileting are provided per department • full or temporary opening hours during the day	• be closed at night, unless running water or toilets for toileting are provided per department • must be kept open during the day
participation in group cultural and sports programmes, other activities	be authorised in accordance with regime rules		
what you can keep with you	• limited (not limited to: library and textbooks, school supplies, licensed artifacts, family photos) • can be extended according to the regime rules		
frequency and duration of contact	expandable according to regime rules a lower limit must be provided		

6.3. Education, reintegration, and resocialization

According to Section 164 of the PL, in the framework for reintegration activity, efforts must be made to recognize the social danger of the convicted person's crime and to mitigate its consequences to the greatest extend possible. The sentenced person should be offered apprenticeship training, vocational training, or, if the prison institute so permits, professional training, taking into account the prison's characteristics, and (if the prison governor so permits) may be encouraged to start or continue higher education.

It should be possible for the prisoner to receive primary education in the prison. If the prison does not provide primary education, the prisoner shall, at their request, be transferred to a prison suitable for providing primary education, if possible.

To the greatest extent possible for the penitentiary institution, the prisoner's self-education should be supported, taking into account the penitentiary's characteristics, and the prisoner should be provided with the conditions for regular work. For a period and at regular intervals to be decided by the prison governor, the prison shall provide the prisoner with technical equipment for listening to foreign-language texts to learn a language or take a language examination.

To ensure effective reintegration, the prisoner's family and other relationships should be maintained and developed.

To facilitate the reintegration of prisoners, the prison service makes use of the Prison Chaplaincy Service.

To make good use of free time, opportunities should be provided for education, sport, and religious practice.

As part of the preparation for release, prisoners are already assisted in their reintegration into society and the creation of the necessary social conditions for this during the period of imprisonment[86]. Preparation for release is carried out by the prison probation officer (with the assistance of the reintegration officer) based on an individual care plan or, in the cases specified by law, a reintegration program.

A prisoner who has been sentenced to a term of imprisonment for the first time and for whom the term of imprisonment for the misdemeanor does not exceed one year shall, upon request, be included in a social bonding program[87]. The purpose of the social attachment program is to strengthen the inclusive environment and, if necessary, to help re-establish family ties to facilitate reintegration into the former workplace; if this is not possible, to find a new job; or, failing this, to create public employment to explore the possibility of further social contacts and to help create housing.

If the purpose of the sentence can also be achieved in this way, a prisoner who undertakes doing so and who is in custody for reintegration before the expected date of release may be placed in reintegration custody if they have been sentenced to imprisonment for a reckless offense (in which case the period of detention for

86 Section 185 of PL.
87 Section 187 of the PL.

reintegration is one year) or if they have been sentenced to imprisonment for an intentional offense but not for a violent offense against the person, is serving a first sentence of imprisonment, or is a non-recidivist repeat offender serving a sentence of imprisonment of no more than five years (in which case the period of reintegration detention is ten months).

In the event of a detention order for reintegration, the prisoner may leave the accommodation and the fenced area designated by the prison judge only for the purposes specified in the ordering decision, in particular to meet the normal needs of daily life, to work, or to attend education, training, or medical treatment at the time and for the destination specified therein. Therefore, reintegration detention is a similar legal measure to house arrest and can only be provided through the use of electronic means of remote monitoring.

Finally, aftercare must be mentioned[88]. The aim of aftercare is to help people released from prison reintegrate into society. The maximum duration of aftercare is one year. Aftercare is provided at the request of the sentenced person. The prisoner released from custody may request assistance and support, in particular for employment, resettlement, accommodation, the continuation of studies and medical treatment. Aftercare is carried out by the probation officer in cooperation with local authorities, employers, NGOs, religious communities, and other voluntary organizations involved in charitable activities to promote the integration of the prisoner into society.

7. Cooperation with the Member States of the European Union

Act CLXXX of 2012 on criminal cooperation with the Member States of the European Union (hereinafter referred to as the EU Act) regulates numerous legal instruments.

One such instrument is the European Arrest Warrant, which is a significant and increasingly utilized legal instrument[89] The seizure and surrender of objects[90] and the interrogation of the suspect are also legal instruments relating to criminal cooperation with the Member States of the European Union.

A separate chapter of the EU Treaty regulates the legal instruments relating to procedural legal aid: a) mutual legal assistance for the execution of a European Investigation Order (including provisional measures, provision of information on accounts and account data held by a financial institution, temporary transfer of a detained person to the Member State issuing a European Investigation Order, temporary transfer of a detained person to the Member State executing a European Investigation Order, interrogation by means of telecommunications, and the use of disguised

88 Section 191 of the PL.
89 Horváth, 2007; Herke, Blagojević and Mohay, 2011.
90 Farkas, 2009.

means); b) procedural assistance with Member States that do not apply the European Investigation Order (provision of information on accounts and account data held by a financial institution, temporary transfer of a detained person to the Member State executing the request for procedural assistance, interrogation by telecommunication, controlled delivery, use of undercover investigators, use of disguised means subject to judicial authorization); c) setting up a joint investigation team; d) direct information; e) service of an official document; f) return of the object; g) legal aid for the enforcement of a decision on supervision measures; h) means of evidence, procedural assistance for the execution of a confiscation order and for the preservation of confiscated property[91]; i) forwarding and receiving denunciations; j) the validity of a national judgment; k) enforcement assistance (imprisonment, measures involving deprivation of liberty, rules of conduct and alternative sanctions during probation, fines or other financial penalties, the confiscation and forfeiture of property); l) transit; m) European protection order.

The regulation of these legal instruments is based on EU sources of law, and it is not possible discuss them in detail in this study.

8. Summary

In Hungary, the main sources of criminal law at the time of the 1990s regime change were derived from the 1970s. Therefore, the sources of the criminal sciences needed major revision. Against this background, the new Criminal Code[92], Criminal Procedure Code[93], and Prison Law[94] were drafted.

The new CC did not represent a complete dogmatic break with the old Criminal Code, and accordingly, many basic institutions were not only retained but often literally adopted; however, the penal system, the chapter on economic offenses, and even the chapter on offenses against the person have been transformed. A further change compared to the old Criminal Code was that while the previous Act also contained provisions of a penal enforcement nature, the new CC does not contain such provisions. Likewise, procedural issues have been removed from the CC. The CC retains the dual structure of the old Criminal Code: the general part deals with the scope, criminal liability (the subjects), and sanctions, while the special part lists the basic, qualified, and privileged cases of each offense and the punishable offenses.

After the acceptance of the CC, there was also a demand for the creation of a corresponding code of criminal procedure and penal law as soon as possible. The Prison Law preceded the new Code of Procedure. The aim of Prison Law was to create a law

91 Törő, 2014.
92 Act C of 2012.
93 Act XC of 2017.
94 Act CCXL of 2013.

harmonizing the legal provisions introduced by the CC and creating a unified system with the CC, which would place the enforcement of sentences on new footing in line with the new sanctions and other amendments.

Finally, after the CC and the Prison Law, the third legislation was the recodification of the provisions on criminal procedure. The CPC has significantly altered criminal procedure in its structure and content. The former Criminal Procedure Act followed the earlier (socialist) criminal procedure laws (in contrast with basic concept); the traditional investigation (intermediate procedure) governed the criminal procedure within a judicial procedure system. However, effective laws allow for a great deal more leeway for criminal procedures based on agreement; in particular, confession by the defendant (acceptance of the facts) enables a number of simplifications. Through this, the progression of the criminal procedure (possible outcome) is much more complicated and diversified than in the earlier linear procedure.

In addition to the three main areas of criminal law (criminal law, criminal procedure, and penitentiary law), there are numerous other sources of criminal law (the Fundamental Law of Hungary, the organizational laws, laws on other subjects of criminal proceedings, etc.). The codification wave of the 2010s (with the exception of the police) has also reached the main subjects of criminal proceedings.

The study reviewed the main rules for authorities acting in criminal proceedings (investigating authority, the prosecutor's office, and the court). The principles of criminal law (the fundamental legal principles: the rule of law [legal certainty and justice], the principle of humanity, and the specific principles of criminal law: legality, the principle of responsibility for action, the principle of liability based on fault, the ultima ratio nature of criminal law, the principle of proportionality, the ne bis in idem principle, and the principle of in dubio mitius) were then analyzed in detail. This was followed by a chapter on criminal liability and its obstacles. The main elements of the concept of criminal offense (intent, negligence, and harm to society), the two forms of crime in Hungary (felony and misdemeanor), and the stages of criminal offenses (the completed offense, the attempt, and the preparation) were analyzed. In Hungary, the CC divides the obstacles to criminal liability into three main categories: grounds for total or partial exemption from criminal responsibility, grounds for exemption from criminal responsibility, and other obstacles to criminal prosecution.

In terms of becoming a defendant, age at the time of committing the crime has great significance. Childhood is an excluding factor for punishment, that is, if the defendant is under 14 (or, in certain cases, under 12) when committing a crime. Criminal procedures against juveniles can be carried out against a person who is over 14/12 years of age but under 18 when committing a crime. All defendants who were over the age of 18 when committing the crime are considered adults.

Among the grounds for decriminalization, active remorse should be highlighted because of its specificity. Active remorse is essentially grounds for decriminalization

resulting from a successful mediation process. The study analyzed in detail the conditions and the possible outcomes of the mediation process.

The Hungarian system of sanctions has three characteristic features: a) the dual system of sanctions: sanctions can be penalties or measures; b) penalties can also be of two kinds (penalty, secondary penalty); c) the CC includes both custodial and non-custodial sanctions (among both penalties and measures).

The current Hungarian law is characterized by a relatively severe system of penalties, but it also recognizes alternative sanctions, and the penalties may be imposed concurrently as well.

After analyzing the general part of the CC, the study analyzed certain groups of crimes (crimes against property, violent crimes, crimes against sexual freedom and sexual morality, traffic offenses, administrative offenses, economic and business-related offenses, corruption offenses, offenses against the interests of the children, and crimes against the family) and the statistics associated with them. The main conclusion that can be drawn from the data is that the number of registered offenses has been steadily decreasing since the introduction of the CC; accordingly, the number of offenses per 100,000 inhabitants has also decreased significantly (as the population has not changed significantly). The predominance of crimes against property in relation to the total number of registered crimes is striking (around 50–60% of total crime).

After the criminal law questions, the main characteristics of Hungarian criminal procedure law were analyzed. Among these, it is worth highlighting the issue of the principles of criminal procedure law, the stages of the Hungarian criminal procedure, the possibilities of diversion in Hungarian criminal proceedings (mediation procedure, conditional prosecutorial suspension, the cooperation of the suspect, and plea bargaining), and the characteristics of judgment.

The role of investigation remains important at each procedural stage (although the legislative aim over the last two decades has been the opposite). Investigations are characterized by over-proofing; that is, the investigating authority or the prosecution tries to gather almost all of the evidence during the investigation, which can last for months or even years, and the court essentially repeats this proof, which makes the trial very formal. One of the decisive effects of the innovations of the current CPC was the acceleration of this procedure.

The task of the enforcement of sentences is to enforce the objectives of punishment through the execution of the penalty or measure, with the objective that the aspects of individualization must be ensured in the execution to serve the achievement of individual prevention objectives. Following the discussion of the purpose and principles of penitentiary law, the study described the Hungarian prison system in detail. The imprisonment is carried out in the degree of imprisonment determined by the court (in a jail, correctional institution, or penitentiary). Imprisonment in a penitentiary is a more severe form of execution than that in a correctional institution, and that in a correctional institution is a more severe form of execution than that in a jail. The rules for each implementation stage are outlined in a table in the

study. The study then briefly reviewed the main rules of education, reintegration, and resocialization.

The work concludes with a presentation of the main provisions of international criminal cooperation.

Overall, it can be said that Hungary's criminal legislation underwent substantial changes to replace the former socialist criminal justice principles with the rule of law. Nonetheless, legislation must change constantly to keep up with the challenges of an everchanging society.

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| PART III |

| Chapter 10 |

International Criminal Law and International Crimes

Róbert BARTKÓ — Ferenc SÁNTHA

ABSTRACT

This paper outlines the underlying concepts, statutory elements, and characteristics of the so-called core international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression) and terrorist crimes. The core international crimes, the act of terrorism, and criminal offenses regarding terrorism are subject to international criminal law. Libraries could be filled with literature on the concept of international criminal law; however, it suffices to refer to the fact that international criminal law is a relatively young area of law that emerged at the boundaries of public international and domestic law. International criminal law cannot be considered a separate branch of law but rather a body of law created by the functional interaction of several branches or areas of law (international, criminal, and constitutional law). This study employs the comparative perspective to address the statutory definitions of the noted crimes and examines the legal way to implement the international requirements by the relevant national laws.

KEYWORDS

international core crimes, terrorism, international criminal law, criminal offenses related to terrorism, European criminal law

1. Introduction

This paper outlines the underlying concepts, statutory elements, and characteristics of the so-called core international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression) and terrorist crimes. Core international crimes and criminal offenses regarding terrorism are subject to international criminal law. Libraries could be filled with literature on the concept of international criminal law.[1] However, it is sufficient here to refer to the fact that international criminal law is a

1 Notably, international criminal law has at least six different meanings: (1) the territorial scope of the municipal criminal law, (2) internationally prescribed municipal criminal law, (3) internationally authorized municipal criminal law, (4) municipal criminal law common to civilized nations, (5) international co-operation in the administration of municipal criminal justice, and (6) the material sense of the word. See in Schwarzenberger, 1965, pp. 3–37.

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relatively young area of law that emerged at the boundaries of public international law and domestic law.[2] International criminal law cannot be considered a separate branch of law but rather a body of law created by the functional interaction of several branches or areas of law (international, criminal, and constitutional law).[3] This study employs the so-called unitary theory that is often used in foreign and Hungarian legal literature and is considered a working concept. According to the theory, the concept of international criminal law comprises two law groups:

(1) *International criminal law in the traditional sense* (so-called transnational criminal law), with provisions that are part of domestic law and contain elements like the institutions of international cooperation in criminal matters, rules of jurisdiction, and recognition of foreign judgments. These rules facilitate the enforcement of a State's claim of criminal law, and the perpetrator will only be prosecuted in a subsequent procedure.

(2) *Penal international law,* with provisions that are part of international law, directly enforced without the application of domestic law. This area of law includes the legal materials of crimes under international law whose perpetration imposes direct criminal liability on the individual, the system of liability for such crimes, the Statutes and other legal norms of the international criminal tribunals, and the tribunals' caselaw. Other characteristics in this field are the erosion of the principle of sovereignty, the demand for establishing a supranational criminal court, and the prevalence of the principle of universality. These rules ensure the effective prosecution of perpetrators of the most serious crimes.[4]

In this paper, 'international criminal law' is used in the latter, narrow sense, and the analysis is limited to the substantive features of the core international crimes and terrorist crimes. Given that there is no accepted definition of international crimes, the first part of this work is devoted to the concept of international crimes. The next four parts discuss the elements and characteristics of the four core international crimes, which are genocide, crimes against humanity, war crimes, and aggression. The final section, without attempting to be comprehensive, gives an overview the international legal instruments elaborated to prevent and punish terrorist acts and the most important elements of criminal offenses related to terrorism.

Given that international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), are essential to the development and enforcement of substantive norms of international criminal law,[5] the paper takes careful consideration of the provisions of the Statutes of these courts, relevant caselaw of ad hoc tribunals (ICTY, ICTR) and, regarding the crimes related to terrorism, the relevant international legal instruments.

2 Stahn, 2019, p. 8.
3 M. Nyitrai, 2006, p. 15.
4 This working concept of international criminal law is based on the following studies: Nagy, 2004, pp. 105–106; M. Nyitrai, 2006, pp. 16–20; Hollán, 2000, pp. 226–237.
5 Zahar and Sluiter, 2008, p. 4.

Finally, in accordance with the declared purpose of the project, this paper also outlines the common elements and differences in the related domestic legislation of eight Central and Eastern-European countries, Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia.

2. International crimes

International crimes can be divided into different categories. The legal literature has several useful classifications. This paper distinguishes between transnational crimes and crimes under international law (the so-called core international crimes).

a) *Transnational crimes*[6] are serious illegal acts with international impacts that, given the potential circumstances in which they are committed, harm or endanger the interests of more than one State or even the international community as a whole. The criminalization of these crimes is based on an international treaty and requires contracting states to implement legislation for criminal prosecution of these conducts in their domestic legal system. Given that the relevant legislation should be incorporated into domestic law (transnational crimes are also covered by national laws), the liability for such crimes is indirectly based on international law. The primary purpose of the international treaty is to facilitate the prevention and punishment of an act at national levels by applying the institutions of international cooperation in criminal matters. Thus, the principles of 'ordinary jurisdiction' and universality have a role to play.

b) *Crimes under international law* harm or endanger the most fundamental values and interests of the community of nations or, in the most serious cases, the peace and security of mankind. The characterization of these illegal conducts as criminal does not depend on national law but has its direct basis in international law.[7] Such serious crimes are part of and based on international customary law and constitute a violation of a *jus cogens* legal norm.[8] The general principles of international substantive criminal law have been developed by the legal literature in connection with crimes under international law (e.g. the principle of legality, the irrelevance of official capacity, the non-applicability of *statutory limitations, and* the system of grounds for excluding criminal liability).[9] Given that the punishment and prevention of such crimes are in the interest of the international community, the principle of universality must be applied. Further,

6 The United Nations identified several categories of transnational crime: drug trafficking, trafficking in persons, organ trafficking, trafficking in cultural property, counterfeiting, money laundering, terrorist activities, theft of intellectual property, illicit traffic in arms, aircraft hijacking, sea piracy, hijacking on land, insurance fraud, environmental crime, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public officials, and other offences committed by organized criminal groups. See Wilson, 2020, p. 415.

7 Swart, 2004, p. 203.

8 The customary law nature of the crime does not exclude the possibility that it may be regulated by an international treaty (e.g., the crime of genocide). See Werle, 2005, p. 191.

9 See Sántha, 2010, p. 180. Note that crimes under international law are often committed with the complicity or support of a state actor.

if the crime in question constitutes a threat to international peace and security, the UN Security Council has the power to apply the rules set out in Chapter VII of the UN Charter (measures not involving the use of armed force and military operations by air, sea, or land).[10] Finally, as legal history shows, crimes under international law are criminal offenses over which international tribunals have been given jurisdiction.

In the present state of international criminal law, crimes under international law or core international crimes include genocide, crimes against humanity, war crimes, and the crime of aggression. However, the scope of crimes under international law is not closed and may be further expanded in the future by the transformation of a transnational crime into a crime under international law. Some authors extend this list to include torture and international terrorism.[11] Though whether terrorism can be considered a crime under international law remains questionable,[12]we address terrorist crimes in this paper for two reasons: First, the most serious forms of terrorism (e.g. the September 11 attacks), represent a threat to important universal values and endanger international peace and security; moreover, like crimes under international law, they 'shock the consciousness of humanity.' Second, the most serious form of terrorist crimes can fulfill the prerequisites of core international crimes, such as crimes against humanity and war crimes.[13]

3. Genocide

3.1. Short history

Genocide, called 'the crime of crimes'[14] in the legal literature and court practice, is as old as the development of human society. The human race has demonstrated a propensity toward grave acts of violence.[15] History indicates that genocide is an accompanying phenomenon of war and serves as an effective tool to eradicate whole nations or ethnic groups. The crime has a long history, but the term appeared only in the 20th century.[16]Moreover, the term and the first normative definition were only established in the 40s of the last century.[17]

10 Swart, 2004, p. 207.

11 For 'some extreme forms of terrorism (serious acts of State-sponsored or -tolerated international terrorism),' see Cassese, 2003, p. 24.

12 See Ambos and Timmermann, 2004, pp. 24–27.

13 Werle, 2005, p. 27.

14 *Kambanda* (Trial Chamber ICTR-97-23). 16.

15 Jung and King, 2006, p. 3.

16 *Raphael Lempkin* defined 'genocide' first in 1944 to mean 'the coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.' See Lempkin, 2005, p. 79.

17 The Charter of the International Military Tribunal at Nurenberg (IMT) did not classify the crime of genocide as a separate crime. Concerning the extermination of Jews and other ethnic or religious groups, the IMT referred to it as the crime of persecution and, therefore, a crime against humanity.

The first relevant international legal instrument was the Convention on the Prevention and Punishment of Genocide (hereinafter, Genocide Convention). The definition of genocide is provided by Article II of the Convention:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."[18]

Consequently, the prohibition of genocide was originally based on an international convention, but it is widely known that the law set out in the Convention reflects customary international law, and the norm prohibiting genocide constitutes *ius cogens*.[19]

3.2. The elements of the crime of genocide

The Genocide Convention defines genocide as committing a prohibited act with the intent to destroy a protected group. There are two elements of the crime: the *chapeau* defines the mens rea or mental element ('with intent in whole or in part to destroy a national, ethnical, racial, or religious group) and the actus reus or material element (the list of the prohibited acts). The mens rea of genocide—the special intent or *dolus specialis*—should be distinguished from the mental element of the underlying offenses (e.g. killing or causing serious bodily harm). The most important criterion to distinguish genocide from crimes against humanity is the required special intent that at the same time is the most problematic regarding evidence.

3.2.1. The objective elements of the crime

a) The *'object of the commission'* of genocide is one of the protected groups listed in the definition of the crime. The list of the groups—national, ethnical, racial, and religious—is exhaustive and shall not be expanded.

A national group is defined by the ICTR in *Akayesu* as 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with

18 See Convention on the Prevention and Punishment of the Crime of Genocide.

19 The definition of genocide in the Convention has been reproduced verbatim in Article 4(2) of the ICTY Statute, Article 2(2) of the ICTR Statute, and Article 6 of the Rome Statute for the International Criminal Court (ICC). The first trials for genocide began in Rwanda in the Rwandan national courts in December 1996 and the *Akayesu*-case decided by the International Criminal Tribunal for Rwanda (ICTR) in 1998 was the first in which an international criminal tribunal interpreted the definition of genocide. At the International Criminal Tribunal for the former Yugoslavia (ICTY), *Radislav Krstic* was the first person to be convicted of genocide in August 2001. See Schabas, 2003, p. 46.

reciprocity of rights and duties.'[20] An ethnic(al) group in the practice of the ICTR is 'a group whose members share a common language *or* culture.'[21] The concept of a racial group is at present somewhat problematic because there is no such thing as race from a biological standpoint,[22] and racial discrimination is prohibited by several international conventions and national constitutions.

Nonetheless, the Rwanda Tribunal adopted the definition that a 'racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.'[23] A religious group as a protected group has not occurred in the practice of the ad hoc tribunals. It can be defined as a group whose members share the same religion or set of spiritual beliefs and faith and traditions of worship. According to the ICTR, the group must be stable and permanent,[24] and a crime was committed if the perpetrator believed that the victim belonged to a protected group.[25]

b) The *conducts (acts) of the crime*—the so-called 'underlying offenses'—are phrased clearly, and usually make a profound interpretation dispensable.

- *Killing members of the group*: Based on historical experiences, killing is the most effective way of physical genocide, which must be interpreted as 'murder' (i.e. an intentional crime that is committed with the intent to cause the death of the victim).
- *Causing serious bodily or mental harm to members of the group*: 'Serious bodily harm' means an injury or illness caused by the perpetrator that takes more than eight days to heal. Serious mental harm is more than minor or temporary impairment of mental faculties.[26]
- *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*: According to the international criminal court practice, the third act of genocide is the method of group annihilation, where the perpetrator does not immediately kill the members of the group but seeks their physical destruction.[27]

20 We criticise this concept because the members of a certain national group (nation) are bound together by the feeling of appurtenance to the national group (nation), the common language, the common culture and, usually, the common area and economic life, not necessarily and primarily by their citizenship.

21 *Akayesu* (Trial Chamber ICTR-96-4). 513.

22 Bassiouni, 2003, p. 25.

23 *Akayesu* (Trial Chamber ICTR-96-4). 514.

24 It means that members usually belong to the group by birth and can usually not change their status as a member. *Akayesu* (Trial Chamber ICTR-96-4). 511.

25 *Bagilishema* (Trial Chamber ICTR-96-4). 65.

26 *Semanza* (Trial Chamber ICTR-97-20). 321. Examples of act causing serious bodily or mental harm include torture, inhumane or degrading treatment, sexual violence like rape, violent interrogations, threats of deaths, and harm that damages health or causes disfigurement or serious injury to members of the targeted group. See Bou, 2013, pp. 649–650.

27 Possible conduct of the so-called 'slow death measures' includes withholding necessities such as food, clothing, shelter and medicine and de facto enslavement through forced labour. See Werle, 2005, p. 201.

- *Imposing measures intended to prevent births within the group*: This act is one form of biological genocide which is construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and prohibition of marriages.
- *Forcibly transferring children of the group to another group*: The legally protected value of this form of genocide is the cultural self-identity of the protected group. When transferred to another group, children cannot grow up as part of their group, or they become estranged from their cultural identity.[28]

3.2.2. The subjective elements of genocide

The subjective side of genocide has two components. First, the underlying offenses (e.g. killing) are intentional acts; the perpetrator must be aware of the objective elements of the underlying offenses. Furthermore, they must know the other factual elements of the crime of genocide, e.g. the status of the victim(s).

The other, crucial part of the subjective side of genocide is the additional subjective requirement: the Convention (and the statutes of international tribunals) requires that the accused acted with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.[29] This intent has been referred to by the international criminal court practice as special intent or specific intent[30] (*dolus specialis*) or genocidal intent. The concept of special intent is unknown in the doctrine of Roman-continental legal systems, which usually distinguishes only two types of criminal intent: direct intent (*dolus directus*) and eventual intent (*dolus eventualis*). *Purpose*, however, is a subjective statutory element of certain crimes, which accordingly constitutes an additional subjective requirement. The statutory definition of genocide in the Criminal Codes of relevant countries usually explicitly states the purpose of the perpetrator ('any person who, with an aim to destroy …'). Consequently, genocide is a purposeful crime and can only be committed with direct intent by a principal offender (perpetrator).[31]

The most problematic issue in court practice is to ascertain the content of the knowledge of low-level perpetrators ('foot soldiers'). However, the purpose to destroy

28 Werle, 2005, p. 203 for international conventions defining a child as a person under the age of 18 years.

29 See also Ambos, 2009, p. 834.

30 Special or 'specific intent' is used in the common law to distinguish offences of 'general' intent, which are crimes for which no particular level of intent is set out in the text of infraction. A specific intent offence requires performance of the actus reus but in association with an intent or purpose that goes beyond the mere performance of the act. See Schabas, 2000, p. 218.

31 See Sántha, 2014, pp. 215–232. The situation is different in the case of the accessories (instigators and abettors) given that it is not necessary to commit the crime with the statutory purpose by the accessory. The accessory only has to be aware of the principal offender's purpose.

can be established from the circumstances in the external world, as outlined in *Akayesu*.[32]

4. Crimes against humanity

4.1. Short history

The term crimes against humanity is a relatively new category in international criminal law, though reference was often made in the past to the 'fundamental requirement of humanity' as a value that ideally guides the conduct of states. Crimes against humanity comprise the elimination of fundamental human values and an extremely serious violation of human dignity. Given that the concept of genocide is defined in a widely accepted UN Convention, crimes against humanity have not yet been codified in a treaty of international law. Its statutory definition has appeared in a series of international instruments, sometimes with different meanings, but the prohibition of crimes against humanity can be considered a part of customary international law.

The Charters of the Nuremberg Tribunal and the Tokyo Tribunal addressed crimes against humanity, defined as the commission of serious inhuman criminal offenses, such as murder, extermination, enslavement, and deportation, against civilians during or before the war. The Allied Control Council Law later explicitly mentioned rape as an individual act of crime, and the war nexus requirement was not a necessary part of the definition of crimes; therefore, the crime can also be committed in peacetime.

After World War II, there were trials and convictions by national courts for crimes against humanity [Eichmann (1961); Barbie (1987); Touvier (1994)], and the crime has been included in the Statutes of the ICTY and the ICTR and the Statute of the ICC. Notably, there are some differences in the elements of the crime between the Statute of the ICC and the statutes of the international tribunals. The following analysis is based on the Statute of the ICC and the international case law.

4.2. Statutory elements of the crime

The normative text of the ICC Statute defines crimes against humanity as the commission of specific criminal offenses—the so-called individual acts (e.g. killing and

32 i) The general context of the perpetration of other culpable acts systematically directed against that same group, whether … committed by the same offender or by others; ii) the scale of atrocities committed; iii) the general nature of the atrocities committed in a region or a country; iv) the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups; v) the general political doctrine [that] gave rise to the acts; [and] vi) the repetition of destructive and discriminatory acts; vii) the perpetration of acts [that] violate or [that] the perpetrators themselves consider to violate the very foundation of the group—acts [that] are not in themselves covered by the list … but […] are committed as part of the same pattern of conduct.

extermination)—that become crimes against humanity when they are committed in the course of a widespread or systematic attack against a civilian population.[33]

a) The criminal act must be part of an *attack* against a civilian population. An attack is typically a course of conduct involving the commission of acts of violence and not just a random act of violence. It can exceptionally be conducted without violence, like imposing a system of apartheid.[34] It is challenging to imagine the commission of the crime by a single isolated act; therefore, the ICC Statute states that the attack is understood to mean the multiple commission of individual acts.[35]The definition should be interpreted broadly, as an attack is not limited to the conduct of hostilities but may also encompass situations of mistreatment of persons taking no active part in the hostilities, such as someone in detention.[36]

b) The primary object of the attack is any civilian population. The Commentary to the Geneva Conventions of 1949, applied by the court practice, defines the civilian population as all persons who are civilians as opposed to members of the armed forces and other legitimate combatants. The civilian population refers to a broad range of people, but this does not mean that the entire population of the geographical entity must be subject to the attack.[37] The crimes can be committed against both civilians of the enemies and the state's own population.

c) The attack must be either *widespread or systematic*, thereby excluding isolated and random violent acts.[38] '*Widespread*' may usually include a massive, frequent, and large-scale action directed against a multiplicity of victims.[39] However, a widespread attack can comprise a single act, if a large number of civilians fall victim to it.[40]

The term '*systematic*' signifies the organized nature of acts of violence and the improbability of their random occurrence.[41]The systematic nature of the attack also refers to the existence of the so-called *'policy element,'* namely a previously agreed policy or plan behind the attack. It is not required that the policy be adopted by the government; policies adopted by any organization or group can be sufficient.[42] However, as to whether the policy element is required, there are different approaches in the case law of the international tribunals and legal literature. Categorically, crimes against humanity are usually linked to a state or an entity entitled to exercise

33 See the Article 7(1) of the Statute: 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...)'.
34 *Akayesu* (Trial Chamber ICTR-96-4). 581.
35 See the Article 7(2a): 'Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.'
36 *Kunarac* (Trial Chamber IT-96-23&23/1). 416.
37 *Kunarac* (Appeals Chamber IT-96-23&23/1). 90.
38 *Tadic* (Trial Chamber IT-94-1-T). 648.
39 *Akayesu* (Trial Chamber ICTR-96-4). 581.
40 Werle, 2005, p. 225.
41 *Kunarac* (Trial Chamber IT-96-23&23/1). 429.
42 *Kayishema* (Trial Chamber ICTR-95-1). 125–126.

de facto sovereign power in the affected territory,[43] and the ICC Statute also requires the existence of the policy element ('pursuant to or in furtherance of a State or organizational policy').

d) The individual criminal act (e.g. murder) must be *part of the attack,* which refers to the link between the act and the attack. Thus, the act is objectively part of the attack and the perpetrator must be aware of it; however, it is not required for the perpetrator to know all the details of the attack.

e) *The subjective elements*. Crimes against humanity are also intentional crimes; the individual acts must be intentional, and intent must cover the objective elements of the offense. The perpetrator must know the broader criminal context in which his acts occur, must know that there is a widespread or systematic attack on a civilian population, and that their acts comprise part of the attack. The motive of the perpetrator is irrelevant and does not require that the perpetrator be identified with the ideology, policy, or plan in whose name mass crimes were perpetrated.[44]

4.3. Individual acts of crimes against humanity

a) *Killing* is intentionally causing the death of a human being, which can be committed by act or omission.

b) *Extermination* is the killing of persons on a massive scale: a particular population is targeted and its members killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.[45]

c) *Enslavement* means the exercise of any or all of the powers attached to the right of ownership over a person. According to court practice, it is usually insufficient just to show that a person was held in captivity; there must be other factors or indicia of enslavement.[46]

d) *Deportation or forcible transfer of population* is defined by the ICC Statute as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[47]

e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.* This act is the deprivation of the liberty of an individual arbitrarily; that is, without due process of the law. In that respect, the

43 M. Nyitrai, 2006, p. 192.

44 *Blaskic* (Trial Chamber IT-95-14). 257.

45 *Krstic* (Trial Chamber IT-98-33) 503. According to the Article 7(2b), '"Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.'

46 These factors include forced or compulsory labour or service; the control of the victim's movement; measures taken to prevent escape; cruel treatment; forced prostitution or sexual act; and human trafficking. See *Kunarac* (Trial Chamber IT-96-23&23/1). 542.

47 See Article 7(2d). Note that deportation can be a legal act if it is necessary to protect civilians or for compelling military reasons, but civilians must be returned to their home. See Werle, 2005, p. 241.

court must consider whether there was a legal basis for the imprisonment (e.g. the suspicion of a crime) and whether the procedural safeguards were respected during the detention.[48]

f) *Torture* in the caselaw of the Tribunals: (i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) the act or omission must be intentional; (iii) the act or omission must aim at obtaining information or a confession, at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or third person.[49]

g) *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.*

h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender* (as defined in paragraph 3), *or other grounds* that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court. The elements of the crime are: (i) the act or omission with the intent (motive) to discriminate on racial, religious, or political grounds, and (ii) the act or omission denies or infringes upon a fundamental right laid down in international customary or treaty law.[50]

i) *Enforced disappearance of persons* means 'the arrest, detention, or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period [...];'[51]

j) *The crime of apartheid*. The legislation is based on the 1973 UN Convention on the Suppression and Punishment of the Crime of Apartheid, which defines the crime as certain inhuman acts committed to establish and maintain domination by one racial group of persons over any other racial group of persons and systematically oppressing them (purposeful crime). By comparison, the ICC Statute requires that inhumane acts must be committed 'in the context of an institutionalized regime of systematic oppression and domination.'[52] Consequently, under the Statute, only apartheid at the level of government policy can be considered as a crime against humanity.

48 *Kordic and Cerkez* (Trial Chamber IT-95-14/2). 292–303.

49 *Kunarac* (Appeals Chamber IT-96-23&23/1). 142. Note that the relevant case-law differs as to whether torture requires that the perpetrator is a public official or that torture was committed in the presence of an official. Examples of torture: beatings; prolonged denial of sleep, food, hygiene, or medical assistance; threats to torture, rape, or killing of relatives; and rape and other forms of sexual violence. However, torture shall not include pain or suffering arising only from lawful sanctions.

50 *Naletilic and Martinovic* (Trial Chamber IT-95-17/1) 634. Examples of persecution: collection of civilians to camps; using detained persons as hostages or human shields; destruction or plunder of houses, educational or religious institutions with the requisite discriminatory intent. See in *Kvocka* (Trial Chamber IT-98-30/1). 185–186.

51 See Article 7(2i) of the ICC Statute.

52 See Article 7(2h) of the ICC Statute.

k) *Other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or to mental or physical health*. Such acts are any inhumane acts committed in the course of a widespread or systematic attack against a civilian population that is not included in the previous list of the underlying offenses of crimes against humanity.

5. War crimes

5.1. Introductory remarks

The legal regulation of war crimes[53] has a longer history than, for example, the normative formulation of genocide or crimes against humanity; however, the scope of such offenses remains controversial and the related system of legal sources is rather divergent. Characteristics of war crimes can be summarized as follows:

- The definition of 'war crime' is a generic term that covers different types of illegal acts, as defined by international customary law and international treaties.
- The common feature of such offenses is a serious violation of a rule of international humanitarian law (*ius in bello)* that confers direct criminal responsibility to a natural person under international law.
- War crimes can only be committed during armed conflict.
- Lists of war crimes can be found in international law treaties and international customary law. The first part of the related body of law is the so-called *Hague Law* [Hague Conventions adopted in 1899 and 1907, especially the Convention (IV) respecting the Laws and Customs of War on Land] that focuses on the prohibition of warring parties to use certain means and methods of warfare.

The second part is the so-called *Geneva Law,* the four Geneva Conventions of 1949, and the two Additional Protocols of 1977, the purpose of which is to protect persons not or no longer taking part in hostilities. Importantly, per the First Additional Protocol, *grave breaches* defined in the Conventions and the Protocol *shall be regarded as war crimes*.[54]

- Four Geneva Conventions: (I) for the amelioration of the condition of the wounded and sick in armed forces in the field; (II) for the amelioration of the condition of wounded, sick, and shipwrecked members of armed forces at sea;

53 Certain behavior in armed conflict was already forbidden by the belligerent parties in ancient times (e.g., killing prisoners of war, women, and children), but the codification of the relevant rules at the international level only started in the 19th century. In 1856, Declaration Respecting Maritime Law (Paris) restricted wartime practices, followed by the first Geneva Convention in 1864, considered the basis of international humanitarian law, which covered the treatment of sick and wounded soldiers. The peace treaties after World War I ordered the prosecution of the perpetrators of the 'violations of the laws and customs of war'; a small number of German suspects were, finally, convicted to prison. After World War II, the Nuremberg Charter rendered violations of the laws and customs of war punishable as war crimes and provided a non-exhaustive list of potential criminal acts. See e.g. Werle, 2005, pp. 2–8.

54 See Article 85 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

III) relative to the treatment of prisoners of war; (IV) relative to the protection of civilian persons in times of war.
- Two Additional Protocols: (I) relating to the protection of victims of international armed conflicts; (II) relating to the protection of victims of non-international armed conflicts.
- It is also important that the so-called Common Article 3 of the Conventions also contains minimum rules for non-international armed conflicts.

Finally, *the scope of war crimes includes several other criminal acts,* in addition to the grave breaches covered by Geneva Law.[55]

5.2. Common elements of war crimes

a) *The existence of an armed conflict*. In the most general sense, an armed conflict exists whenever there is a resort to armed force or protracted armed violence between different actors (states and non-state actors).[56]

Armed conflicts are traditionally divided into two categories: (1) international armed conflict between two or more states; and (2) non-international armed conflict (civil wars), which occurs in the territory of a state between the armed force of the state and dissident armed forces or other organized armed groups which, under responsible command, exercise control over a part of the state's territory to help them conduct sustained and concerted military operations and implement the II. Additional Protocol.[57] However, it is useful to distinguish a third type called (3) mixed armed conflict, characterized by international and non-international elements; for example when a state intervenes in a civil war on the territory of another state.[58]

b) *The nexus between the armed conflict and the committed crime*. According to the case law of the ICTY, the crime must be closely related to the armed conflict, whether the crimes were committed in the course of fighting or during the takeover of a locality. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict occurs at a given moment.[59] However, 'the close relationship means [...] the existence of an armed conflict must play a substantial part in the perpetrator's ability to commit it, his decision to commit it, [how] it was committed, or the purpose for which it was committed.'[60]

55 Sources of war crimes law include but not limited to the Hague Convention IV regarding the Laws and Customs of War on Land (1907); the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases and Bacteriological Methods of Warfare (1925); the so-called London Agreement (1945), which contains the Charter of the Nuremberg Tribunal; the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954);and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons that May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects (1980).
56 Ambos, 2004, p. 264.
57 *Akayesu* (Trial Chamber ICTR-96-4). 622–623.
58 Hoffmann, 2009, pp. 25–42.
59 *Blaskic* (Trial Chamber IT-95-14) 69.
60 *Kunarac* et al. (Appeals Chamber IT-96-23 & IT-96-23/1-A) 58.

c) The *object of the commission and the victim of the crime* in the most general sense is a protected object and person, as defined by the Hague Law and the Geneva Law. *Protected persons,* as per the Geneva Conventions, are those who do not take a direct part in hostilities.[61] Primarily, they include

- Members of armed forces who have laid down their arms and those rendered 'hors de combat' by relevant causes (e.g., wounded and sick members of armed forces in the field and at sea, shipwrecked persons, prisoners of war, and detention).
- Civilian persons taking no active part in the hostilities.
- Members of humanitarian organizations and peacekeeping missions operating per the UN Charter and medical and religious personnel.
- *Protected objects* (protected properties) include civilian installations (which are not military targets); objects indispensable for the survival of the civilian population; cultural properties; religious, educational, artistic, scientific, or charitable buildings; historical monuments; and hospitals.

d) *The perpetrator of war crimes.* War crimes, based on historical experience, are typically committed by combatants (soldiers) against members of the civilian population or enemy soldiers. However, the perpetrators can be civilians (e.g., if an enemy air force pilot is killed) or non-combatants involved in hostilities (e.g., partisans, guerrillas, and mercenaries). Thus, the scope of perpetrators should be defined such that *a war crime can be committed by persons taking part in hostilities (combatants, non-combatants, or even civilians*), provided that the crime is committed *against protected persons*.

e) *The subjective elements*. Given that war crimes are intentional, the crime committed by the perpetrator (e.g., murder, torture, or launching an unlawful attack) must be intentional and their intent must cover the objective elements of the offense. Therefore, they must be aware of the existence of an armed conflict at the time of the commission, that the victim is a protected person, or the object is a protected object.

5.3. Categories of war crimes

The ICC has jurisdiction over 'war crimes,' which can be generic. Thus, to ensure harmony with the principle of *nullum crimen sine lege,* the Statute defines precisely which war crimes in international law are war crimes for the Statute. The taxative list contains 53 criminal offenses.[62]

The Statute narrows its jurisdiction over war crimes given that Article 8(1) provides that 'the Court shall have jurisdiction in respect of war crimes, in particular,

61 Exceptions include war crimes committed using means of warfare prohibited by international humanitarian law, which can be committed against anyone, including combatants.

62 The Statute (Article 8) distinguishes four categories of war crimes: (i) grave breaches under the four 1949 Geneva Conventions; (ii) criminal offenses covers other serious law and custom violations applicable in international armed conflicts; (iii) serious violations of Common Article 3 of the Geneva Conventions (which applies to non-international armed conflicts); (iv) other serious violations of the laws and customs applicable in non-international armed conflicts.

when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' The types of war crimes,[63] in simple terms, can be summarized as follows:

a) *Criminal offense committed against protected persons and objects as defined by the Geneva Law*:

- Willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering, or serious injury to body or health. Based on the latter criminal conduct, rape, sexual slavery, forced pregnancy, enforced sterilization and other serious forms of sexual violence are also punishable.
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; depriving a prisoner of war or other protected person of the rights of fair and regular trial.
- Unlawful deportation, transfer, or confinement of civilians (or other protected persons), hostage-taking of civilians.
- Extensive destruction and appropriation of property, not justified by military necessity and conducted unlawfully and wantonly.

b) *Using prohibited methods of warfare*, where criminal offenses are not exclusively committed against a protected person:

- Intentionally directing attacks against civilian populations or installations (that are not military targets), attacks against personnel or vehicles involved in a humanitarian assistance or peacekeeping mission, attacking or bombarding towns or villages that are undefended and not a military objective;
- Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes; historic monuments; and hospitals; and pillaging a town or other places.
- Killing or wounding a combatant who laid down his arms without conditions, declaring that no quarter will be given.
- Compelling the nationals of the hostile party to take part in the operations of war directed against their country.
- Deportation or transfer of the population of the occupied territory;
- Using civilians and other protected persons as human shields.

c) *Using prohibited weapons and means of warfare*, where the criminal offenses are also not exclusively committed against a protected person:

- Employing toxin and toxic weapons, biological weapons, asphyxiating or poison gas, and similar substances.
- Employing bullets that expand or flatten easily in the human body (e.g. using 'dum-dum bullets').
- Employing weapons, projectiles, and materials and methods of warfare that cause superfluous injury, unnecessary suffering, or are inherently indiscriminate

63 The typology was partly based on Cassese's classification, see Cassese, 2003, pp. 88–92.

(e.g., using prohibited mines or weapons causing injuries by shrapnel invisible to x-rays).

d) *Misusing of symbol or insignia protected by international law*:
- Improper use of the Red Cross, the Red Crystal, the Red Crescent, and other similar identifying symbols protected by international law.
- Improper use of a flag, flag of truce, enemy's military insignia and uniform, or distinctive emblems of United Nations and the Geneva Conventions.

e) *Using of child soldiers*:
- conscripting or enlisting children under 15 years into the national armed forces or using them to participate actively in hostilities.

6. The crime of aggression

6.1. Short history

The criminalization of the crime of aggression is directly concerned with the sovereignty of the states; therefore, the statutory definition of the crime and the conditions of the criminal proceedings to be conducted are the most controversial issues of international (criminal) law. The concept of aggression is inseparable from the *ius ad bellum* definition; thus, it is useful to briefly examine the right to resort to war.

Until the end of World War I, resorting to the use of armed force was regarded not as an illegal act but as an acceptable way of settling disputes. Thus, each state was entitled to wage war according to its interests.[64] In 1919, the Covenant of the League of Nations sought to limit the right to resort to war but did not prohibit all forms of war: it distinguished between legitimate (legal) and illegitimate (illegal) wars.[65] An important step toward a comprehensive ban on war was the so-called Kellogg-Briand Pact (1928), where the States Parties renounced war as an instrument of international policy.[66] However, the use of force remained permissible as part of collective measures by the League of Nations, and the parties clarified that the treaty did not limit

64 Werle, 2005, p. 386.

65 War of aggression ('external aggression'), which is directed to the territorial integrity and political independence of any of the Members of the League; *or* a war is waged without judicial settlement; or the report of the Council of the League and a war is waged within three months of the decisions of above forums; *or* a war against Members of the League, which has accepted the decision of the Council is considered an *illegal war.* However, a war waged in compliance with relevant provisions is a *legal war* and a permissible act. See Bibó, 1990.

66 Article I. 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.' See Halmosy, 1983, pp. 282–283.

their right to self-defense.[67] Despite many ratifications (63 States in 1939), the lack of a sanction for violation of the provisions of the convention made it inappropriate to prevent the next great war.

Following World War II, the crime of aggression—more precisely, *'crimes against peace,'* was first recognized as a punishable international crime in the Charter of the International Tribunal at Nuremberg (1945), which set up the Nuremberg Tribunal:

> "Article 6: The following acts, or any of them, are crimes [...] within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

At the Nuremberg trial, all 22 defendants were charged with crimes against peace, and 12 were convicted of this crime.[68] Therefore, the Nuremberg Charter is the first significant step toward the criminalization of the crime of aggression.

After World War II, the concept of the crime of aggression already existed, but the question of the extent to which the definition meets the requirement of precise legal definition required by the principle of *nullum crimen sine lege* remained. By the adoption of the United Nations Charter in 1945, the general prohibition of war—more precisely the prohibition of the use of force—was declared: as per the Charter, 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'[69] The question of whether a state has used force and, thus, aggression has been committed is a matter for the Security Council to decide.[70]

6.2 The definition of the crime of aggression

Despite the general international prohibition of aggression, several wars of aggression were waged after 1945, which were not followed up with effective sanctions. Therefore, the solution was to adopt a legal instrument (preferably an international convention) containing the statutory definition of the crime of aggression and establish a permanent international criminal court with jurisdiction to prosecute perpetrators of

67 Werle, 2005, pp. 388–389.

68 See Werle, 2005, p. 391. The Charter of the International Tribunal for the Far East (1946) also regulated the crimes against peace and 25 Japanese major war criminals were convicted of this crime at the Tokyo trial.

69 See Article 2(4) of the UN Charter. The Charter allows for the use of force only for individual or collective self-defense or upon authorization by the Security Council.

70 See Article 39 of the UN Charter: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or *act of aggression*, and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security'.

this crime. Instead of an international convention, in 1974, the UN General Assembly attempted to define the concept of aggression:

According to Article 1 of the UN General Assembly Resolution 3314 (XXIX), *aggression* is 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations (...).' Article III gives a non-exhaustive list of the forms of aggression (*the possible acts of aggression*) as follows:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.
b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
c) The blockade of the ports or coasts of a State by the armed forces of another State.
d) An attack by the armed forces of a State on the land, sea, or air forces or marine and air fleets of another State.
e) The use of armed forces of one State within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.
f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.
g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which conduct acts of armed force against another State of such gravity as to amount to the acts listed above or its substantial involvement therein.[71]

Unfortunately, this resolution did not become the basis for an international convention but served as a basis for further work on the definition of aggression, first in the framework of the International Law Commission and later in the framework of the Preparatory Committee responsible for drafting the Statute of the International Criminal Court (ICC).

71 Article 2 notes that the *first use of armed force* by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified given other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity. Further, the noted acts are not exhaustive, and the Security Council may determine that other acts constitute aggression under the provisions of the Charter (Article 4).

6.3. The crime of aggression in the Statute of the ICC

After long preparatory work, the Statute of the International Criminal Court was adopted on 17 July 1998 in Rome and enforced on 1 July 2002. Article 5 (1) (d) of the Statute determines that the ICC has jurisdiction over the crime of aggression; however, the statutory definition of the crime was not included in the Statute.[72] The Kampala Review Conference in 2010 adopted the amendments ('Kampala Amendments') on the crime of aggression.[73]

a) The new Article 8 bis (1) defines *the crime of aggression*:

> 'the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of an aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'

The crime of aggression is an offense that can be committed by a natural person, and the conduct of the crime (the planning, preparation, initiation, or execution of an act of aggression) is inspired by the Nuremberg Charter.

b) An important statutory element of the offense is the *specific offender*. The crime of aggression is a so-called *leadership crime* that can only be committed by 'a person in a position effectively to exercise control over or to direct the political or military action of a State.'[74]

c) The new provision of the Statute[75] defines the concept of *the act of aggression*, which may be committed by a State, as follows: 'the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.'

The provision then lists, in a non-exhaustive manner, the same acts as the UN General Assembly Resolution 3314 (XXIX), which qualify as acts of aggression (see above).[76] Even so, Resolution RC/Res.6 did not enter into force in 2010 because it

72 The explanation was provided by the former Article 5(2), which states that 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted (...), defining the crime and setting out the conditions under which the Court shall exercise jurisdiction [regarding] this crime'.

73 Resolution RC/Res.6.

74 Aggression is a crime that can only be committed by the highest political or military leaders, given that the planning, preparation, and execution of armed aggression against another state is conducted at the highest levels of political and military leadership. Arguably, it excludes non-governmental actors such as organized armed groups involved in armed conflicts and private economic actors. See Politi, 2012, pp. 285–286.

75 Article 8 bis (2).

76 Article 8 bis (1) appears to narrow the definition of the act of aggression to acts involving the use of armed force that manifestly violate the UN Charter. Consequently, humanitarian interventions or armed interventions that are not or not manifestly contrary to the provisions of the Charter do not constitute an act of aggression. The explicit exception of humanitarian interventions in the text of the Statute, as proposed by the USA, was ultimately dropped. See Trahan, 2011, p. 78.

required 30 States Parties to ratify the amendments, followed by a vote to activate the crime by at least a two-thirds majority of States Parties after January 1, 2017. Finally, the amendments were enforced on July 17, 2018; it was the first time since the Nuremberg trials that an international tribunal was empowered to prosecute this crime.

There is room for optimism: after decades of debate, the ICC Statute defines the crime of aggression and the act of aggression, and rules on the exercise of jurisdiction of the Court have been adopted. However, such provisions will only be applicable in a very limited scope given a special jurisdictional regime[77] that cannot be triggered like other crimes of the Statute.

7. Implementation of core international crimes into the national laws included in the project

7.1. General remarks

Several possible forms of implementation of core international crimes into domestic law can be distinguished. The simplest method is direct application, as the national legislature argues that rules of core international crimes, as a part of international customary law, can be directly applied domestically without implementing legislation.[78] The second method is modified corporation[79]where the domestic legislator incorporates core international crimes by integrating its substance into the national criminal law systems. Two legislative forms of modified corporation include: (1) adding the statutory definitions of international core crimes to existing criminal codes and (2) adopting a separate act or code on international crimes.[80]

All states examined by the project chose to implement the core international crimes into the special part of their criminal code by defining the statutory definitions of the crimes and applying the basic principles and legal institutions of domestic criminal law to such crimes. Another common solution was to include a separate

77 Without a Security Council referral, the ICC will have jurisdiction only when a State Party commits the crime of aggression against another State Party. The Court's jurisdiction is further narrowed to only those States Parties that have ratified the aggression amendment (presently 43 of the 123 States Parties). States Parties that ratify the aggression amendment can at any time opt out of the aggression jurisdictional regime. See Whiting, 2017.

78 Werle refers to this method as *complete incorporation*, which can also be achieved by *reference* (e.g., reference to the provisions of the ICC or to international customary law in a domestic Act) or *copying* (adopting the offenses verbatim into domestic law). Werle, 2005, pp. 76–77. According to Gellér, regarding war crimes, no further legislative action is necessary if the Geneva Conventions and Additional Protocols are part of the national law. See Gellér, 2009, p. 81. Quotes by Varga, 2012, p. 197.

79 Werle, 2005, p. 77.

80 See, for example, the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) in Germany.

title or chapter(s) in the special part of the criminal code[81] for core international crimes.[82]

7.2. Implementation of genocide

As noted, the Genocide Convention contains the statutory definition of the crime[83]. Given that all examined states have ratified the Convention, it is not surprising that the implementation was achieved by adopting this definition verbatim into their criminal code.

However, notably, in some countries, the scope of protected groups is broader than the Convention. For example, in Slovenia, the legislator included any group if the underlying offenses are committed against the group for political, racial, national, ethnic, cultural, and religious motivations. For example, the Slovak legislator considers the situation where the perpetrator commits the crime in wartime or during an armed conflict or he causes death to several persons as a qualified case.[84] Such broader definitions do not violate international law because national legislators can define their own criminal jurisdiction more broadly.

7.3. Implementation of crimes against humanity

Like genocide, crimes against humanity are included in the criminal codes of all examined states. The definition of the crime under the ICC Statute has already received wide acceptance and is increasingly considered a codification of customary international law. In some states, the statutory definition of the crime mirrors the definition of crimes against humanity in Article 7 of the ICC Statute. This is the situation in Romania, Croatia, and Serbia.

The Slovak legislator used the method of complete incorporation by referring to the provision of the ICC Statute.[85] In other states, there are minor differences in the wording of individual acts[86] or the characteristics of the

81 *Croatia*: Title IX – Crimes against humanity and human dignity; *the Czech Republic*: Chapter XIII – Criminal offencss against humanity, peace and war crimes; *Hungary*: Chapter XIII – Crimes against humanity and Chapter XIV – War crimes; *Poland*: Chapter XVI – Crimes against peace, humanity, and war crimes; *Romania*: Title XII – Crime of genocide, crimes against humanity, and war crimes; *Serbia*: Chapter 34 – Criminal offenses against humanity and other right guaranteed by international law; *Slovakia*: Chapter XII – Criminal offenses against peace and humanity, criminal offences of terrorism, extremism and war crimes; *Slovenia*: Chapter 14 – Crimes against humanity.

82 Varga, 2012, p. 200.

83 Article II.

84 See Article 418(2) of the Slovakian Criminal Code.

85 'Any person who commits an act against civilian population that is deemed to be a crime against humanity under Article 7 of the Rome Statute of the International Criminal Court (...).' See Article 425.

86 For example 'inflicting on the civilian population conditions of life calculated to bring about its physical destruction in whole or in part' instead of 'extermination' in Hungarian Criminal Code.

attack,[87] and the crime of apartheid, as a form of crime against humanity, is treated as a separate crime.[88]

7.4. Implementation of war crimes

Given that the scope of war crimes remains controversial, and the list of these crimes provided by the ICC Statute is rather long and challenging to translate into an ordinary criminal code,[89] the implementation of war crimes is a considerable challenge for the domestic legislator. Given the limits of this paper, the emphasis is only on the following:

The starting point for all examined states during the implementation was the ICC Statute, but the scope of crimes is significantly narrower than in the Statute, and the intention of the legislators to simplify and merge the crimes of the Statute is perceived. However, this intention yielded certain occasions in formulations that eventually left out important crimes.[90]

The analysis of the implementation of such crimes shows that the methods used in war crimes legislation can be the making of literal incorporation of war crimes established in the ICC Statute (e.g. Slovenia) and the categorization of the crimes (other states). The forms of categorization of war crimes include

1. (a) The protection of persons covered by the Geneva Law (war crimes against a person); (b) the protection of property covered by the Geneva Law (war crimes against property); (c) the prohibition of certain methods and means of warfare based on mainly the Hague Law; and (d) the protection of humanitarian missions (Hungary, Serbia, Romania, and Poland).[91]

87 The Slovenian legislator uses the term 'larger systematic attack' instead of the 'widespread or systematic attack,' and 'extensive and systematic attack' can be found in the Criminal Code of the Czech Republic.

88 See Article 144 of the Hungarian Criminal Code ('Apartheid') and Article 402 of the Criminal Code of the Czech Republic ('Apartheid and Discrimination against a Group of People').

89 Varga, 2012, p. 196.

90 Varga, 2012, p. 196.

91 In Hungarian criminal law, the first group includes Assault on Protected Persons, Assault against a War Emissary, Illegal Recruitment, Unlawful Enlistment, the second Assault on Protected Property, War-time looting, the third Command to Liquidate Survivors, Human Shield, Breach of Armistice, Use of Weapons Prohibited by International Convention, Crimes with Internationally Protected Signs and Marks, and the fourth Assault Against a Humanitarian Organization. The Hungarian legislation is a successful adoption of war crimes but, as Varga notes, not perfect. For example, Assault on Protected Persons does not cover the prohibition of starvation of the civilian population and prohibition of inhumane and degrading treatment and punishment. See Varga, 2012, p. 204.The Serbian legislator has implemented war crimes similar to the Hungarian system, though, in the third group, the Unlawful Manufacture, Sale, and Possession of Prohibited Weapons is a separate crime and criminalizes the organizing and the incitement to genocide and war crimes. Chapter II of the Romanian Criminal Code ('War Crimes'), which contains only five crimes, is logical, with a simple structure: War crimes against persons; War crimes against property and other rights; War crimes against humanitarian operations and insignia; Use of forbidden methods in combat operations; Use of forbidden means in combat operations. The Polish Criminal Code does not contain the titles of the criminal

2. (a) War crimes that comprise grave breaches of the Geneva Conventions; (b) other war crimes with mixed character.[92]
3. Selection from the list of ICC-war crimes and incomplete implementation.[93]

The analysis shows that most of the domestic legislations do not distinguish between crimes committed in international or non-international armed conflicts, and the criminal codes of the states provide for the criminal liability of a superior for acts of a subordinate amounting to war crimes.

7.5. Implementation of the crime of aggression

Five states—Croatia, the Czech Republic, Poland, Slovakia, and Slovenia—have ratified the 'Kampala Amendments'[94] and have implemented the crime into their domestic criminal law.[95]The definition of the crime of aggression in the ICC Statute has been reproduced verbatim in the criminal code of Croatia and Slovenia. In the Czech Republic, the legislator has codified the crime with a reference to the provisions of international law.[96] The Polish Criminal Code contains a narrow definition[97] without the statutory elements of the crime ('anyone who initiates or wages a war of aggression') and without providing the notion of 'war of aggression' in the Code.[98]

offenses; thus, the Polish system of war crimes is rather complicated. However, the noted classification is detectable because there are war crimes against protected persons (Article 123–124); attacks on non-military or specially protected objects (Article 122) and crimes against cultural property (Article 125); acts violating the prohibition on the use, production, and distribution of certain weapons and means of warfare (Article 120–121); improper use of the Red Cross and signs protected by international law (Article 126).

92 See, for example, the Croatian Criminal Code, which enlists only five war crimes. The second group comprises the following acts: Infringement of Inviolability of Parlementaires, Abuse of International Emblems, Unjustifiable Delay in the Repatriation of Prisoners of War, and Recruitment of Mercenaries.

93 The Criminal Code of the Czech Republic contains only War Cruelty (Article 412), Persecution of Population (Article 413), and Assault against a Negotiator under Flag of Truce (Article 417) among war crimes against person. The adoption of war crimes committed by improper use of symbols or signs protected by international law (Article 415–416) and by using forbidden methods and means of warfare (Article 411) can be acceptable, but there is only one war crimes against property: Plunder in Combat Area (Article 414). The same criticism applies to the Slovak implementation of war crimes.

94 Information as of February 3, 2022. See Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression.

95 Note that, despite the ratification, the Slovak Criminal Code contains only a crime titled 'Endangering Peace' (Article 417), committed by a person who endangers peaceful coexistence among nations by any warmongering, propagating war, or otherwise supporting war propaganda.

96 'Any person in a position effectively to exercise control over or to direct the political or military action of a State who, in contravention of the provisions of international law, (...)' See Article 405a of the Criminal Code.

97 See Article 117(1) of the Criminal Code.

98 The Serbian legislator uses the same implementation method (see Article 386), but this solution is problematic because it does not comply with the principle of legality.

Hungary and Romania have not yet ratified the 'Kampala Amendments,' which is, presumably, why their criminal code does not include the crime of aggression. Although there is no legal obligation to implement the crime into domestic law originating from the ICC Statute, it appears to be justified to codify the crime in the criminal code by using the exact wording of the Statute.

8. Terrorism and criminal offenses related to terrorism

8.1. Historical aspects and the basic international legal background

The criminal legal dimension[99] of counter-terrorism action is based on the fact that terrorism must be regarded as a criminal offense. Its international nature needs the harmonization of the rules of each State. Therefore, the fight against terrorism needs the legal support of international law. However, this approach does not yet consider terrorism to be a so-called international core crime, even if it is closely monitored because of its nature and social implications. Given the basic nature of the criminal legal steps, this dimension addresses the phenomenon within the competence or cooperation of the states, or it responds to acts already committed and tries to strengthen their prevention through sanctions.

If we address the international dimension of the fight against terrorism, we must think in two different ways: The level of the broadest international law defined by the fundamental multilateral conventions and the level of the European Union. Notably, the European integration and its legislation also affect the criminal legal framework of the European Member States. The European Union may have a significant effect on the substantive criminal law of the Member States.

At the level of international law, the first significant stage in the history of terrorism was the so-called *"Belgian Assassination Clause."* The background to this document was the assassination attempt against Emperor Napoleon III by Célestin and Jules Jacquin in 1855. The assassins placed a bomb on the Emperor's train traveling to Tournay. After the attempt, the terrorists fled to Belgium.[100] Although France made several requests for extradition, the Brussels Court of Appeal rejected those requests because the assassination by the Jacquin Brothers was a political offense under a Belgian law passed in 1833. However, under severe political and diplomatic pressure, Article 6 of the Act was amended on 22 May 1856. After this amendment, called the Belgian Assassination Clause, assassinations of the emperor and his family members could not be considered a political offense.[101] However, terrorism has not yet been defined at the international level with the creation of the Clause.

99 In this regard, see United Nations Office on Drugs and Crime, 2009; Tóth, 2017, pp. 43–53; Bartkó, 2010, pp. 57–71; Bartkó, 2011, pp. 155–171.
100 Lammash, 1887, pp. 309–312.
101 Whyngaert, 1980, p. 15.

Between 1927 and 1935, the International Criminal Law Association dealt with international terrorism and its nature and conception and tried to define the phenomenon. The Association also drafted a convention. However, it was not accepted by the member states. The definition of terrorism at the international level was, again, based on an assassination. In 1934, in Marseille, a terrorist attack was committed against Alexander I (King of former Yugoslavia) and French Foreign Minister Barthou. Although the 1937 Convention, drafted by the League of Nations after this attack, was never enforced, it was the first one to seek to summarize the conceptual legal elements of terrorism. The definition includes, for instance, anti-state intent and the incitement of terror among the population.[102]

After World War II, the UN convention system[103] typically responded to newer forms of terrorism, expanding the range of conduct intended to be punished. Furthermore, the international community typically reacted to the sui generis forms of terrorist acts, which expanded the scope of the criminal law answers.

Meanwhile, it is important to emphasize that the individual conventions focused only on the terrorist actions themselves until the beginning of the 21st Century. The need to broaden the criminal steps arose after the terrorist attacks committed on September 11, 2001, against the USA. A claim arose in international politics to '[bring] the criminal lability forward'[104] in this field. Criminal action against terrorism has evolved in legal thinking. The fight against terrorism has become all-encompassing, changing the criminal law responses. The line between war and law enforcement has begun to disappear.[105] The number of legal rules has increased, making it possible to remove persons suspected of terrorism more effectively from society. Substantive criminal law responded to the newer and newer security policy challenges of the world, which aimed to punish acts related to terrorism at an early stage.[106]

102 Braun, 1999, pp. 148–149.

103 For instance, Convention on International Civil Aviation (Chicago, on December 7, 1944); Convention on Offenses and Certain Other Acts committed on Board Aircraft (Tokio, on September 14, 1963); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague, on December 16, 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, on September23, 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (New York, on December 14, 1973); Convention against the Taking of Hostages (New York, on December 17, 1979); Convention on the Physical Protection of Nuclear Material (New York, on March 3, 1980); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, on 10 March 1988); Convention for the Suppression of Terrorist Bombings (New York, on January 19, 1998); Convention for Suppression of Financing Terrorism (New York, on February 25, 2000); Convention for Suppression of Acts of Nuclear Terrorism (New York, on April 13, 2005). We do not aim to address the system of convention defined by the Council of Europe because the Strasbourg Convention (January 27, 1977) and the Warsaw Convention (May16, 2005) contain reference elements of crime concerning the legal concept of terrorist offenses. Therefore, the conceptual system created by the Council of Europe is the same one as the system of the UN conventions.

104 Nagy, 2007, p. 66.

105 Albrecht, 2005, p. 4.

106 Sieber, 2016, p. 15.

Beyond the act of terrorism as a basic statutory definition, to bring 'the criminal lability forward,' the offenses related to terrorist activities have also appeared. The criminalization of these offenses was based on the legal policy consideration, which punished perpetrators suspected of conduct linked to terrorism (e.g. training of terrorists, public provocation to commit a terrorist offense, or traveling for the purpose of terrorism).[107] At the international and European levels, the criminal legal steps have clearly widened over the past decade.

However, the international literature remains divided on whether international terrorism can be considered a crime under international law (international core crime). For our part, we share the view of a group of international lawyers who do not regard the scope of international core crimes as a closed system. This approach defines two groups of international crimes:[108] crimes against the peace and security of humanity and other international crimes. The former can be defined as a set of crimes that threaten the interests and values of the international community, where the criminal liability of an individual is based on international law. Although international law does not yet categorically include international terrorism in this set, there is a shift in this direction.[109] The problem after the 2001 terrorist attacks was precisely that the U.S. wanted to retaliate for its security breaches on an international legal basis. If international terrorism is considered an international crime, criminal law guarantees must be put in place in the fight against it, which is not an easy task using administrative and military tools. The move was illustrated by UN Security Council Resolutions 1368 (2001) and 1373 (2001), which have apostrophized international terrorism as a phenomenon that threatens international peace and security. It is also illustrated by the system of obligations based on the UN resolutions: (1) states are required to take all reasonable steps to prevent acts of terrorism; (2) states are obliged to criminalize the act of terrorism and any other related activities; (3) states shall cooperate with each other and international organizations in the fight against terrorism; and (4) states shall refrain from supporting terrorism in any form.[110]

8.2. The legal framework of the European Union

After the terrorist attacks committed in the USA in 2001, a new legal framework was created by the European Union, based on a framework decision system. The main documents were the Council Framework Decision 2002/475/JHA on combating terrorism and its amending Council Framework Decision 2005/671/JHA. This legal

107 The need to broaden criminal steps in the fight against terrorism was already laid down in the Resolution 2178 (2014) of UN Security Council, where the Council expressed its concern over the growing threat posed by foreign terrorist fighters and required all member states of the UN to ensure that offenses related to this phenomenon are punishable under the national law.

108 Swart, 2004, p. 201.

109 For instance, some countries (whose substantive criminal rules will be analyzed in the Chapter 3) regulate the terrorism among the international core crimes.

110 Becker, 2006, p. 130.

background determined the European fundamental criminal legal steps in the fight against terrorism until 2017. In that year, a new directive[111] was adopted by the European Parliament and the Council, which partly replaced and partly amended the framework decisions (hereinafter, "The Directive"). The Directive promotes common actions by all the Member States of the European Union against new forms of terrorism. The definite aim of the Directive is to broaden the range of criminal offenses in connection with the noted change in thinking but accords with the process of strengthening public and defense instruments in the Member States' response to terrorism.[112]

The Directive is an important legal part of the Union's comprehensive counter-terrorism policy, complemented by other elements, such as the work of EUROPOL and EUROJUST, the various action plans and strategies at the political level, and the control of the Union's external borders.[113] The EU counter-terrorism strategy focuses on four pillars: prevention, protection, pursuit, and response. The first pillar combats radicalization and recruitment of terrorists by identifying methods, propaganda, and any other instruments used by terrorists. The protection pillar focuses on protecting citizens and infrastructures and reducing vulnerability to attacks. The third pillar pursues terrorists across borders. Preparing, managing, and minimizing the consequences of a terrorist attack is the fourth part of the EU's strategy.[114]

The Directive did not change the concept of the act of terrorism, as defined in the previous framework decisions, but broadened the range of conducts punishable under it. Several elements of the crime can be considered as 'offenses related to terrorist activities,' which shows that the EU's criminal policy is part of the international 'flow,' such as public provocation to commit a terrorist offense[115]; recruitment for terrorism[116]; providing and receiving terrorism training[117]; traveling for the purpose of terrorism and organizing or otherwise facilitating traveling for such an act[118]. The obligation on implementing these regulations into the national law is a challenging task for the legislators of the Member States and law enforcement authorities who must apply these new rules.

111 Directive (EU) 2017/541 of the European Parliament and the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ 31.3.2017 L88/6).
112 See Simicskó, 2016, pp. 100–113; Farkas, 2017, pp. 5–20.
113 Murphy, 2014, pp. 168–169.
114 Regarding the details of the strategy see The European Union Counter-Terrorism Strategy – November 30, 2005 (14469/4/05/REV 4). The new Counter-Terrorism Agenda was announced in the EU's Security Union Strategy (Commission Communication on the EU Security Strategy, 24.7.2020. – COM (2020) 605 final.
115 Article 5 of the Directive.
116 Article 6 of the Directive.
117 Articles 7–8 of the Directive.
118 Article 9–10 of the Directive.

The Directive provided an exhaustive list of serious offenses that must be classified by Member States as terrorist offenses in their national law.[119] The common characteristic of these offenses is that they have common aims—so-called "terrorist aims," including the following: seriously intimidating a population; unduly compelling a government or an international organization to perform or abstain from performing any act; and finally, seriously destabilizing or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organization. Thus, the Directive created a complex statutory definition that furnishes content on resource actions and goal actions. Notably, the first category can generally be considered public crimes, and if committed with terrorist intent (as noted above), they can be qualified as an act of terrorism.

Furthermore, the list of activities that must be also punished by the Member States, even if a terrorist offense was not committed, was extended.[120] The Directive prescribed that Member States must take the necessary measures to ensure offenses related to terrorist activities and a terrorist group are punished and must extend the criminal liability to the aiding, abetting, inciting, and attempting of the crimes mentioned.

The Directive determined a deadline to incorporate such rules into the national laws: September 8, 2018.[121] By the end of 2020, most Member States, as per the provi-

119 These acts, which may seriously damage a country or an international organization can be the following (Article 3 paragraph 1 of the Directive): '(a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage-taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental self, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public and goods transport; (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life; (h) interfering or disrupting the supply of water, power or any other fundamental natural resource, the effect of which it to endanger of human life; (i) case related to illegal system interference; (j) or threatening to commit any of acts listed in points (a) to (i)'.

120 These criminal offenses are offenses related to a terrorist group and offenses related to terrorist activities.

121 It shall be underlined that there are a lot of legal measures of the EU which clearly show the EU's aim in the fight against terrorism, for example: Regulation (EU) 2021/1149 of the European Parliament and of the Council on establishing the Internal Security Fund – 7 July 2021 (OJ. L 251/94); Regulation (EU) 2021/784 of the European Parliament and of the Council on addressing the dissemination of terrorist content online – 29 April 2021 (OJ. L172/79); Directive (EU) 2018/1673 of the European Parliament and of the Council on combating money laundering by criminal law – 23 October 2018 (OJ. L284/22); Regulation (EU) 2018/1672 of the European Parliament and of the Council on controls on cash entering or leaving the Union and repealing Regulation (EC) No. 1889/2005 – 23 October 2018 (OJ. L284/6); Directive (EU) 2016/681 of the European Parliament and of the Council on the use of passenger name record (PNR) data for prevention, detection, investigation and prosecution of terrorist offences and serious crime – 27 April 2016 (OJ. L119/132).

sions of the Directive, adopted new legislative measures and amended the statutory definition of terrorism in their national law. According to the Commission's report, 23 Member States adopted new legislation, 'while two Member States[122] notified pre-existing legislation in transposition of the Directive.'[123]

In the next chapter, we analyze how the Member States fulfilled this obligation. Our comparative legal view concerns only the countries of interest to this study and the criminal legal steps with special reference to the different forms of regulations. We will not address the liability of the legal persons and the different sanctioning systems of the Member States, with criminal procedural questions like jurisdiction, prosecution, investigative tools, and financing terrorism. Accordingly, the latter topic (financing terrorism) is so diverse that it shall be the basis of another independent research.

8.3. Implementation in the national laws included in the project

8.3.1. The act of terrorism

The Hungarian Criminal Code (hereinafter, Hungarian CC)[124] regulates the statutory definition of the act of terrorism as a complex crime. As noted, a complex crime includes resource actions and goal actions. As for the statutory definition of terrorism, such resource actions are public crimes that can be considered either violent crimes against a person or crimes of public endangerment that involve the use of firearms.[125] These crimes are exhaustively listed by the Hungarian CC[126]. According to this regulation, the terrorist aims may be the following: (a) coerce a government agency, another state, or an intentional body into doing, not doing, or countenancing something; (b) intimidate the general public; (c) conspire to change or disrupt the constitutional, economic, and social order of another state, or disrupt the operation of an international organization.

In contrast to the Hungarian legal solution, the Polish Criminal Code (hereinafter, Polish CC) does not list the so-called resource actions. It does not provide an exhaustive list of crimes whose commission with terrorist intent constitutes an act of terrorism. The Polish CC[127] defines the goal actions following the Directive. Furthermore, the terrorist intent appears in the special part of the Polish CC in other crime definitions to meet the requirements declared by the Directive concerning the offenses related to terrorist activities and a terrorist group. According to the provision, the terrorist aims

122 France and Italy.
123 See Report from the Commission to the European Parliament and the Council based on Article 29(2) of Directive 2017/541 (COM/2021/ 701 final), Point 3.1.
124 Section 314 paragraph (1)–(2) and (4).
125 For example: homicide, violation of personal freedom, kidnapping, criminal misuse of explosives or explosive devices, etc.
126 Section 314 paragraph (1) lists the goal actions or "the terrorist aims," as per the Directive.
127 Article 115 paragraph 20.

are the following: (a) seriously terrorizing many people;[128] (b) compelling a public authority of the Republic of Poland, another state, or an international organization to perform or to omit to perform certain actions; and (c) causing a serious disruption of the political system of the Republic of Poland, of another state or an international organization. These aims are relevant when the public crime committed by the perpetrator with terrorist intent can be punished by a penalty of deprivation of liberty with an upper limit of at least five years. With this legal solution, the Polish legislator aimed to broaden the statutory definition of terrorism.[129]

Like the Hungarian criminal law, the Slovak and Czech Criminal Code (hereinafter, Slovak CC and Czech CC) regard the act of terrorism as a complex crime. The difference between the legal solutions can be found in the regulation of the resource action. As long as the Hungarian CC[130] gives an exhaustive list of the concrete public crimes, the Czech[131] and Slovak CC[132] only describe criminal conducts that can link to a concrete crime in the special part of the Codes.[133] Arguably, the Hungarian solution is better than the ones noted above because it is easier to amend if necessary. As for the Czech and Slovak CCs, the terrorist aims are regulated similarly to the Directive.[134]

The legal construction mentioned above is followed by the Slovenian and Croatian substantive criminal law as well. The Slovenian Criminal Code (hereinafter, Slovenian CC) regulates the statutory definition of terrorism and the other offenses related to terrorist activities in Articles 108 to 111; for the Croatian Criminal Code (hereinafter, Croatian CC), this relates to Articles 97 to 102. Article 108 of the Slovenian CC and Article 97 of the Croatian CC address the concrete statutory definition of terrorism. The form of the regulation is similar to the Czech and Slovak criminal substantive legal solutions because the Codes also declare only the goal actions.[135] However, they

128 Thus, the Polish legislator broadened this aim relative to the Directive because it is about many people. For further analysis see: Michalska-Warias, 2011, p. 160.

129 Gacka, 2017, p. 33.

130 Section 314 paragraph (4).

131 See the Article 419 of the Slovak Criminal Code.

132 See the Article 311 paragraph (1) of the Czech Criminal Code.

133 Hence, for instance, the Hungarian CC regulates (Section 314 paragraph [1]) homicide and battery as concrete public crimes, while the other Codes describe them as performing "an attack threatening human life or health with the intention to cause death or grievous body harm".

134 Intention to impair the constitutional system or defence capabilities of the state; disrupt or destroy the base political, economic, or social structure of the state or an international organization; seriously terrify the population or illegally make the government or other public authority or an international organization to act, omit or tolerate something.

135 These actions are very similar to the Directive's system: (a) in Slovenia –'intention of destroying or severely jeopardising the constitutional, social, or political foundations of Republic Slovenia or other country or international organization; intention of arousing fear among the population, or forcing the Government of the Republic of Slovenia or other country or international organization to perform or stop performing a certain activity; or to perform or threaten to perform one or more" of the acts regulated by the Article 108 paragraph (1); (b) in Croatia – 'aim of seriously intimidating a population; or compelling a government or an international organization to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental constitutional, political, economic or social structures of a state or an international organization".

do not give an exhaustive list of public crimes considered as resource actions; they list exhaustively elements of crimes[136] committed with terrorist intent and can be regarded as acts of terrorism.

However, Serbia is not a member state of the EU and its criminal code regards the act of terrorism also as a complex crime; the regulation is remarkably similar to the Directive. As per Article 391 of the Serbian Criminal Code (hereinafter, Serbian CC), if a perpetrator commits one of the elements of a crime with terrorist intent,[137] it can be qualified as terrorism. The list[138] is similar to the Czech, Slovak, and Slovenian legal solutions.

According to the Directive, Member States shall take the necessary measures to define as a crime the threat to commit any acts listed in Article 3. point 1 and ensure that aiding, abetting, inciting, and attempting an offense referred to in the Article will be punishable under their substantive criminal law. Notably, the Member States and Serbia followed the provisions in their national laws. Most countries within the scope of this study ensured the punishability of attempt, incitement, and aiding and abetting under the general part and partly under the special part of their criminal code,[139] and every Member State was obligated to ensure the punishability of threats as well.[140]

8.3.2. Offenses relating to terrorism and a terrorist group

According to the provisions of the Directive, the Member States shall take the necessary legal steps to ensure that the offenses relating to a terrorist group[141] and terrorist activities[142] will be punishable based on national law. In order to adhere to the space

136 For instance, an assault on life or body or human rights and freedoms; considerable destruction of state or public buildings or representations of foreign states, the transport system, infrastructure, a public place or private property; or taking hostages; or hijacking an aircraft, ship, means of foreign transport or means of public transport; and release of dangerous substances.

137 The intent can be the following: 'seriously threaten the citizens or force Serbia, a foreign country, or international organization to do or not to do something; seriously threaten or violate the fundamental constitutional, political, economic and social structures of Serbia, a foreign country, or international organization".

138 Article 391 paragraph (1) between points 1–8.

139 Articles 30 and 34–35 of the Serbian CC; Articles 34 and 37–38 of the Croatian CC; Articles 34 and 37–39 of the Slovenian CC; Articles 13–16 and 18 of the Polish CC; Section 20–21, Section 24, Section 311 paragraph (4), and Section 312 paragraph (2) of the Czech CC; Section 14 and Section 21 of the Slovak CC; Articles 10–11, 14, and 315 of the Hungarian CC.

140 Article 391 paragraph (2) of the Serbian CC; Article 97 paragraph (2) of the Croatian CC; Article 108 paragraph (1) of the Slovenian CC; Article 115 paragraph (20) of the Polish CC; Section 311 paragraph (2) of the Czech CC; Section 419 paragraph (1) of the Slovak CC; Article 316 of the Hungarian CC.

141 Directing a terrorist group or participating in the activities of a terrorist group.

142 The criminal offences are as follows: public provocation to commit a terrorist offence; recruitment for terrorism; providing and receiving training for terrorism; travelling for the purpose of terrorism; organizing and, otherwise, facilitating travelling for the purpose of terrorism.

limits of our paper, we will summarize in Tables 1 and 2 how the countries analyzed in our paper aim to ensure the punishability of these offenses. The Hungarian solution is noted in the footnote.[143]

Table 1. *How Serbia, Croatia, and Slovenia aim to ensure the punishability of offenses*

Criminal Offense	Serbia	Croatia	Slovenia
Directing a terrorist group	Article 393a of the CC	Article 102 paragraph (1) of the CC	Article 108 paragraph (8) of the CC
Participating in the activities of a terrorist group	Article 393a of the CC	Article 102 paragraph (2) of the CC	Article 108 paragraph (7) of the CC
Public provocation to commit a terrorist offense	Article 391a of the CC	Article 99 of the CC	Article 110 paragraph (1)–(2) of the CC
Recruitment for terrorism	Article 391b paragraph (1) of the CC	Article 100 of the CC	Article 111 paragraph (1) of the CC
Providing and receiving training for terrorism	Article 391b paragraph (2) of the CC – but only regarding providing	Article 101 of the CC – but only regarding providing	Article 111 paragraph (2)–(3) of the CC
Traveling for the purpose of terrorism and other related crimes	It can link, for instance, to a preparation of a concrete crime	It can link, for instance, to the preparation of a concrete crime mentioned above	Article 108a of the CC

Table 2. *How Czech Republic, Slovakia, and Poland aim to ensure the punishability of offenses*

Criminal Offense	Czech Republic	Slovakia	Poland
Directing a terrorist group	Section 311 paragraph (3) a. point of the CC	Section 297 of the CC	Article 258 paragraph (4) of the CC
Participating in the activities of a terrorist group	Section 311 paragraph (2) of the CC	Section 419 paragraph (2) a. point of the CC, or Section 297 of the CC, or Section 129 paragraph (6)–(7) of the CC	Article 258 paragraph (2) of the CC, or Article 165 paragraph (2) of the Code

143 The relevant criminal legal rules are the following: Article 314 paragraph (2) b point; Article 315 paragraph (1)–(2), Article 316/A paragraph (1)–(2); Article 319 paragraph (1); Article 331 paragraph (2).

Criminal Offense	Czech Republic	Slovakia	Poland
Public provocation to commit a terrorist offense	Section 20, Section 311 paragraph (4) of the CC, or Section 311 paragraph (2) – regarding a concrete terrorist offense	Section 419 paragraph (2) c. point of the CC	Article 255a paragraph (1)–(2) of the CC
Recruitment for terrorism	Section 20, Section 311 paragraph (4) of the CC, or Section 311 paragraph (2) – regarding a concrete terrorist offense	Section 419 paragraph (2) d. point of the CC	At most, regarding a concrete terrorist offense, the perpetrator may be punished as an abettor or accomplice
Providing and receiving training for terrorism	Section 20, Section 311 paragraph (4), or Section 311 paragraph (2) of the CC – regarding a concrete terrorist offense	Section 419 paragraph (2) b. point of the CC – only regarding providing	Article 255a paragraph (2) of the CC, or Article 165a paragraph (1) of the CC
Traveling for the purpose of terrorism and related crimes	Section 20, Section 311 paragraph (4), or Section 311 paragraph (2) of the CC – regarding a concrete terrorist offense	Section 419 paragraph (2) e. point of the CC – regarding a concrete terrorist offense	Article 259a of the CC

9. Final remarks

From the comparative analysis, it can be stated that the national laws parsed in our paper meet the international and European requirements. The differences between the substantive criminal legal norms are not perceptible in their content but rather in their legal technical approach. They stem from the criminal traditions of the state. Notably, the national legal systems analyzed are prepared for the international fight against terrorism and can provide citizens with effective legal protection against the perpetrators of terrorist offenses.

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Chapter 11

Coercive Measures in Criminal Proceedings

Erika RÓTH

ABSTRACT

This chapter introduces the basic problems of coercive measures applicable in criminal proceedings. The fundamental rights of the suspect or accused can be restricted in several forms to ensure the effective completion of an investigation and, if necessary, the court procedure. Coercive measures restricting personal liberty are the most serious limitations and should be of interest to international organizations protecting fundamental/human rights and empirical studies. Although we examine the relevant provisions of the national codes of criminal procedures of the Central European countries,[1] we will use this background material to refer to them only as examples. Considering the scope and complexity of the provisions, it would not be possible to outline the main rules concerning coercive measures in different states.

KEYWORDS

coercive measures, criminal procedure, custody, fundamental rights, pre-trial detention

1. Introduction

Rules of modern criminal procedural codes must meet this *double requirement*: to ensure the effectiveness of criminal justice and protect and respect the human rights of participants, among other fundamental rights of the suspect or accused.

This chapter addresses the basic questions of coercive measures in criminal procedure. The measures are appropriate to ensure effective completion of proceedings, though significantly restricting fundamental rights.

At the onset, note that it is impossible to examine all the measures in detail; therefore, we concentrate on the following questions:

- What does a coercive measure mean?
- Which international requirements concern coercive measures?
- What kinds of coercive measures are regulated in codes of criminal procedure?

1 We used only national codes of criminal procedure available in English.

Róth, E. (2022) 'Coercive Measures in Criminal Proceedings' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 335–360. https://doi.org/10.54171/2022.evcs.cls_11

- What are the common content of national regulations, and which are the most important problems of the application of coercive measures?

Given the aim to provide a picture of different parts of criminal justice regarding legislations of Central European countries, we intended to follow national rules in force as far as possible. As it is well known and very often mentioned by scholars on criminal procedural problems, the rules of criminal procedure are modified frequently.[2] Thus, we must emphasize that we do not undertake a comparative analysis of coercive measures, as it is beyond the scope of this study, In the absence of reliable, up-to-date information, we cannot introduce the relevant regulation of all Central European countries concerning all sub-topics. We aim to use the regulation of such countries only as examples when analyzing the specific issues of coercive measures.

A common feature of the regulation of criminal procedure is that national rules must meet *international standards*. International standards stem primarily from international treaties, resolutions, and recommendations from framework decisions and directives of the European Parliament, the Council, the case law of the European Court of Human Rights (ECtHR), and the Court of the European Union. As the custody and the pre-trial detention (hereinafter, PTD) are executed in police detention centers and penitentiary institutions, other control bodies may formulate expectations[3].

Coercive measures, especially related to law enforcement practice, are frequently and heavily criticized by scholars and civil organizations. In particular, problems of overuse of custody or PTD emerge regularly in empirical and 'theoretical' research.[4]

Although we try to discuss common and special problems of all coercive measures, it is obvious that PTD and its alternatives are the focus of the activity of international organizations and academia, while other coercive measures are only mentioned in papers. In some Codes of Criminal Procedure (hereinafter, CCP), even the place of coercive measures affecting property rights is quite different (e.g., they can be found among the rules concerning the collection of evidence and not under the title of coercive measures) (Croatian CCP Chapter VIII Evidence collecting actions).

2 The other problem is that not every Code of Criminal Procedure is available in foreign languages (especially in English), and, if available, there is no guarantee that the English version is an updated one. In some countries, only the basic rules can be found in the Code on Criminal Procedure, while detailed regulations, especially rules concerning their execution, are part of other acts or decrees. In some countries, modification of the Code of Criminal Procedure is in progress or is expected in the near future.

3 E.g., the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

4 See, for example, Open Society Foundation, 2014; Heard and Fair, 2019; A Measure of Last Resort? The practice of PTD decision making in the EU.

This chapter follows this trend and discusses problems of *custody, PTD,* and *its alternatives* in detail, paying less attention to other coercive measures.

2. Definition of coercive measures

Coercive measures are among the most problematic tools in criminal procedure. Although they are necessary, and all procedural systems allow their use, if unavoidable, to ensure the successful completion of criminal procedures, they restrict the fundamental rights of the suspect or accused and, frequently, some rights of other persons. Coercive measures interfere with personal liberty, private property, privacy, family life, home, or correspondence. The content of such rights and freedoms are declared by *international conventions* and *constitutions* of states and detailed conditions of their limitations are regulated in national *acts on criminal procedure*.

The first question we must answer is 'what are coercive measures?' It is not easy to give a precise definition that is applicable to all kinds of measures. Therefore, instead of a definition containing all elements in one sentence, we aim at collecting specific features of coercive measures used in criminal proceedings.

Generally speaking, coercive measures are used to force people to do something they are unwilling (do not want) to do. In criminal procedure, coercive measures may be ordered by the court or judge, the public prosecutor, and investigating authorities to compel participants of the criminal proceeding to perform their obligations or refrain from doing something. Such measures restrict the fundamental, constitutional rights of the defendant and others. The basic requirement for restricting fundamental rights in a criminal proceeding is the *lawfulness* of the application of such a measure, where lawfulness means the fundamental rights of any participant in the criminal proceeding (not only the fundamental rights of the suspect or accused) may be restricted only in a proceeding under the act on criminal procedure 'for a reason, in a manner, and to an extent determined in the act, provided that the purpose to be achieved may not be guaranteed by any other procedural act or measure involving any lesser restriction.'[5]

Coercive measures can be divided according to different aspects, two of which are restricted rights and the aim of ordering or using coercive measures. Restricted rights include personal liberty, free movement, freedom to choose residence, right to respect privacy, home, and correspondence, and right to property. Notably, these rights and freedoms are guaranteed by the constitutions (international treaties) at the national (international) level. The most typical classification differentiates coercive measures restricting personal liberty and coercive measures concerning other rights

5 See Hungarian CCP Section 2 (3). Similar rules can be found in CCP of other states (e.g., Czech CCP Section 2 [4]; Slovakian CCP Section 2 [2]).

of the affected person.[6] Though names of coercive measures may vary by country and the most typical ones include the following:[7]

- Remand/custody/arrest[8]
- PTD/custody[9]
- House arrest
- Precautionary measures
- Prohibition of leaving a temporary residence
- Prohibition of leaving a dwelling
- (Criminal) supervision/judicial control
- prohibition of approaching, meeting, or communicating with a certain person and visiting certain locations
- Restraining order
- Bail/pecuniary guarantee[10]
- Preliminary compulsory psychiatric treatment

Other rights are restricted by the following coercive measures:

- Search/house search/search of dwellings, other premises, land, movable property, bank safe[11]
- Personal search/body search[12]
- Seizure/temporary seizure of objects[13]
- Sequestration
- Rendering electronic data is temporarily inaccessible.

The aim of ordering coercive measures restricting personal liberty may be

- Ensuring the presence of the suspect/accused
- Preventing the obstruction or frustration of the taking of evidence
- Ensuring the efficiency (the timely completion) of the procedure
- Eliminating the possibility of reoffending
- Protecting the public order.

6 The Serbian CCP uses a slightly different solution: we can find a group of measures aims of which must ensure the presence of the defendant and unobstructed conduct of criminal proceedings. This chapter includes not only detention, bail, prohibition of leaving temporary residence and other classical coercive measure restricting right to liberty but also summonses (Serbian CCP Chapter VIII. Measures to secure the presence of the defendant and for unobstructed conduct of criminal proceeding).

7 Other measures are similar to coercive measures and undoubtedly contain coercive elements (e.g., order to bring in to secure the presence of the defendant or other persons).

8 In general, we will use *custody* as name of this coercive measure.

9 The term *pre-trial detention* will be used.

10 The term *bail* will be used.

11 The term *search* will be used.

12 The term *body search* will be used.

13 The term *seizure* will be used.

The aim of ordering coercive measures affecting assets and other rights in criminal proceedings may be

- Finding and securing evidence,
- Ensuring the efficiency of the procedure,
- Securing the subsequent confiscation or forfeiture.

3. International framework

Some international conventions and several *resolutions, recommendations, framework decisions,* and *directives* were adopted under the auspices of the United Nations, the Council of Europe, and the European Union[14] regarding coercive measures, directly or indirectly. The following documents are only the 'tip of the iceberg':

- International Covenant on Civil and Political Rights[15]
- European Convention on Human Rights[16] (hereinafter, ECHR)
- Council Framework Decision 2009/829/JHA of October 23, 2009, on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
- Resolution (65) 11 (Adopted by the Ministers' Deputies on April 9, 1965) on remand in custody
- Recommendation No. R (80) 11 of the Committee of Ministers to member states concerning custody pending trial
- Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place, and the provision of safeguards against abuse[17]

A few other documents can be mentioned in connection with coercive measures affecting assets; however, we refer only to two of them here:

- Council Framework Decision 2003/577/JHA of July 22, 2003 on the execution in the European Union of orders freezing property or evidence
- Directive 2014/42/EU of the European Parliament and of the Council of April 3, 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

14 The following part of this chapter will use the generally accepted abbreviations of international organizations: UN (United Nations), CE (Council of Europe), EU (European Union).

15 Adopted on 16 December 1966 by General Assembly resolution 2200A (XXI).

16 Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted in Rome, on 4. XI. 1950

17 This Recommendation replaced the Resolution (65) 11 on remand in custody and Recommendation No. R (80) 11 of the Committee of Ministers to Member States concerning custody pending trial.

The EU directives, adopted as parts of the procedural rights package, contain articles that affect PTD and other coercive measures restricting the right to liberty. Article 2 of the International Covenant on Civil and Political Rights notes that 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...' The following rights recognized by the Covenant are in connection with coercive measures: right to liberty and security[18]; right to liberty of movement and freedom to choose their residence[19]; right to respect for individual's privacy, family, home, or correspondence[20].

The examined Central European countries are members of the CE and EU.[21] Undoubtedly, the legal instruments adopted by these two organizations and the practice of the European Court of Human Rights (hereinafter, ECtHR) and European Court of Justice (hereinafter, ECJ) had the greatest impact on the states' legislation and jurisprudence regarding coercive measures. Decisions of the ECtHR and the requirement to implement EU directives have influenced domestic laws considerably.

As we will see, a significant proportion of international instruments and decisions of control bodies concern the issue of coercive measures restricting the right to liberty: remand in custody, PTD, and its alternatives. Article 5 of the ECHR is the most important part of the Convention from our point of view. Paragraph 1 of this Article, states that 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.' The ECHR does not define what the criteria of lawfulness are, as the national law shall lay down the legal basis of arrest and detention. Point c) of Article 5 (1) is of outstanding importance in defining cases when deprivation of liberty in criminal proceedings is acceptable. It concerns

> 'The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'

Paragraph 2 requires, that 'everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.' This obligation of the authorities, which is the right of the suspected or accused person is important when we examine the Directive on the right to information in criminal proceedings.[22] Article 6 paragraph 2 of the Directive says that 'Member

18 Article 9 point 1.
19 Article 12 point 1.
20 Article 17 point 1.
21 Serbia is the only exception.
22 Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings.

States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.' Article 4 paragraph 1 prescribes the obligation that 'Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights.' According to paragraph 5, 'Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand.'[23] Article 5 (3) of the ECHR requires, that

> 'Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

This provision guarantees that the suspect can be kept in custody only for a short period without a judicial decision. As far as the case law of the ECtHR is concerned, Article 5 of the ECHR is one of the articles most frequently alleged to have been violated. For example, the ECtHR found a violation of this article because PTD was not used as a measure of last resort.[24] Beyond that, 'the lengthy periods of remand detention, insufficient and irrelevant reasons given for extending periods of detention, and its use as a disguised form of punishment are the most pressing issues in the practice of PTDs.'[25] As a consequence of the Court's judgments, several Member States 'have undertaken successful reforms to tackle systemic issues identified by the Court in respect of the detention on remand.'[26]

The last *Recommendation* of the Committee of Ministers[27] adopted in 2006 provides a complex set of requirements in the field of remand in custody. Remand in custody means PTD, which must always be exceptional and justified. The Recommendation

23 In the Annex I of the Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, there is an Indicative model Letter of Rights (in Annex II, an Indicative model Letter of Rights for persons arrested on the basis of a European Arrest Warrant). It must contain information on the right of the arrested or detained person to access essential documents, inform someone about his detention, and be informed about the maximum period of detention and challenging the lawfulness of the arrest. CCP of some states contains detailed regulation on the information provided for the arrested or detained person. The content of such provisions is similar to the model Letter of Rights (e.g., Croatia and Hungary).

24 The requirement that PTD should be used as a last resort is emphasized in the resolution and recommendation of the Committee of Ministers of the Council of Europe.

25 See European Union and Council of Europe, no date, p. 3. This document notes that 'Disproportional use of detention gives rise to other human rights violations ...'.

26 Council of Europe, Committee of Ministers, 2016.

27 Council of Europe, Committee of Ministers, 2006. As noted, this Recommendation replaced Resolution (65) 11 on remand in custody and Recommendation No. R (80) 11 of the Committee of Ministers to member states concerning custody pending trial. (hereinafter, Recommendation).

intends to set strict limits on the use of remand in custody and encourages the use of alternative measures wherever possible.[28]

As some alternatives to PTD mean the limitation of the right to liberty of movement and freedom to choose residence, it is important to mention Article 2 of Protocol No. 4 to the ECHR, which guarantees such rights to everyone lawfully within the territory of a State.

Other rights declared in the ECHR that can be restricted by coercive measures are as follows: the right to respect private and family life, home, and correspondence (ECHR Article 8); the right to the peaceful enjoyment of possessions[29]; and the right to liberty of movement and freedom of choice of residence[30].

Regarding the activity of the EU in this field, we must emphasize that the need for EU legislation emerged more than 10 years ago. Certain problems must be solved at the EU level because 'deficiencies in Member State's PTD regimes threaten to undermine mutual trust and, thus, the effective functioning of mutual recognition instruments, such as the European arrest warrant.'[31] The issue is whether the EU has the competence to set common standards for detention. Some authors believe that

> 'Legislation on pre-trial detention, to the extent it facilitates mutual recognition, falls within the ambit of Art 82(2) b) TFEU, since it is intimately linked to the rights of individuals in criminal procedures, and could therefore be considered. Setting maximum time-limits could strengthen mutual trust/ mutual recognition and reinforce the current framework on fundamental rights'[32], increase the effectiveness of mutual recognition instruments and demonstrate commitment to upholding the EU's fundamental values.'[33]

However, other scholars are quite skeptical and consider this issue debatable.[34] At the EU level, questions related to PTD primarily concern the proper operation of the Framework Decision of European Arrest Warrant (hereinafter, FD EAW)[35] and the Framework Decision on European Supervision Order (hereinafter, FD ESO).[36]

28 Preamble of the Recommendation.
29 Protocol (1st) to the ECHR Article 1.
30 Protocol No. 4 to the ECHR Article 2.
31 Baker et al., 2020, p. 221.
32 Sellier and Weyembergh, 2018, p. 102.
33 Baker et al., 2020, p. 223. Treaty on the Functioning of the European Union (hereinafter, TFEU).
34 See Martufi and Peristeridou, 2020, p. 1478.
35 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, 2002, pp. 1–20.
36 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009, pp. 20–40.

Although many problems of using PTD have an EU dimension, it is not a field where harmonization of legislation of the Member States could easily be reached.[37] In 2011, a Green Paper was elaborated by the Commission as part of the procedural rights package. Why was it important? There are several reasons for this in the Green Paper, but we would like to underline only one, which justifies the necessity of formulating common minimum standards:

> 'Without mutual confidence in the area of detention, European Union mutual recognition instruments that have a bearing on detention will not work properly, because a Member State might be reluctant to recognise and enforce the decision taken by another Member State's authorities.'[38]

The issues that should be regulated in a directive are listed in the study written by Baker et al. Following the authors, we would like to emphasize that 'the new directive should not be restricted to cross-border cases but should apply to PTD in general.'[39] *The Framework Decision on European Supervision Order* is an important tool for reducing the number of PTDs.

> 'The measures provided for in this Framework Decision should aim at enhancing the protection of the general public through enabling a person resident in one Member State, but subject to criminal proceedings in a second Member State, to be supervised by the authorities in the State in which he or she is resident whilst awaiting trial.'[40]

Supervision measures are defined in the FD ESO. They are 'obligations and instructions imposed on a natural person, in accordance with the national law and procedures of the issuing State.'[41] in Article 8 paragraph 1 of the FD ESO lists the supervision measures, which mean obligations for the person concerned. In this list, several measures are regulated in national codes on the criminal procedure as obligations connected to criminal supervision in some countries and separate coercive measures (e.g., house arrest and prohibition of leaving residence) in other countries. The Member States may decide to accept other measures listed in Article 8 paragraph 2 of the FD ESO.

37 'Rules governing [PTD] regimes … touch a very sensitive nerve of Member States sovereignty, as evidenced by the rejection of the establishment of a time-limit system in 2011.' Sellier and Weyembergh, 2018, p. 102.
38 European Commission, 2011, p. 4.
39 Baker et al., 2020, p. 226.
40 Preamble (3) of the FD ESO.
41 Article 4 (b) of the FD ESO.

4. Basic principles concerning the application of coercive measures

The principle of *necessity* appears in national codes. It means that the rights and liberties of a defendant may be restricted only to the extent necessary for realizing the aim of the proceedings.[42]

> 'When ordering or enforcing a coercive measure, efforts shall be made to ensure that the application of the coercive measure leads to restricting the fundamental rights of the person concerned only to the extent and for the time strictly necessary'.[43]

The principle of *proportionality* requires, that 'a more restrictive coercive measure may be ordered if the objective of the coercive measure may not be achieved by applying a less restrictive coercive measure or any other procedural act'.[44] That is, a more severe measure is not applicable if a less serious measure can achieve the same purpose.[45] A coercive measure 'shall also be repealed ex officio when the reasons for ordering it cease to exist or be replaced with a more lenient measure when the conditions thereto arise'.[46]

Lawfulness, as noted in subsection 2, means that a fundamental right may be restricted only in a proceeding prescribed by law, for a reason, in a manner, and to an extent determined by law.[47] This principle has a specific meaning regarding deprivation of liberty: a suspect or accused can only be detained in cases stipulated by law. 'Nobody may be taken into custody except for reasons set out by law, for the period set out by law, and on the basis of a court decision.'[48]

Examining the lawfulness of deprivation of liberty is extremely important, as it is applied before the final decision of the court and, thus, affects a person protected by the principle of the presumption of innocence.[49]

42 Czech CCP Section 2(4); Serbian CCP Article 10.

43 Hungarian CCP Article 271 (1). Necessity is an important requirement in codes of criminal procedure of other states. See Romanian CCP Article 202(1), (3); Slovakian CCP Section 2(2).

44 Hungarian CCP Article (2). Similar rules apply to ordering of coercive measures restricting right to liberty; for example, in Poland (Polish CCP Article 189 '... the authority conducting proceedings shall take care not to apply a harsher measure if the same purpose can be achieved by a more lenient measure.') and Romania [Romanian CCP Article 202(3)].

45 Croatian CCP Section 95(1).

46 Serbian CCP Section 189; Croatian CCP Section 95(2).

47 See about it Croatian CCP Article 1(2); Section 2(3) of Hungarian CCP; Romanian CCP Article 9(2); CCP of Serbia Article 10; Slovak CCP Section 2(2) regarding custodial or freedom-restrictive measures; etc.

48 Karabec et al., 2017, p. 81.

49 'Detention is an institute that is an obvious exception to the principle of the presumption of innocence because in the same way as in the case of an unconditional sentence of imprisonment, detention affects a person who has not yet been finally convicted.' Pelc, 2020, p. 51.

5. Coercive measures restricting the right to liberty

Before we address certain coercive measures restricting the right to liberty in detail, we must mention a special rule that allows for the application of coercion for anyone beyond the authorities acting in a criminal proceeding. Thus, a special form of *apprehension* may be *applied by anyone*. The personal liberty of a person caught committing a criminal offense (or immediately after) may be restricted by anyone if it is necessary to ascertain the identity of such person, prevent his escape, secure evidence, or prevent further crimes (Reasons for such apprehension may differ per country). However, the person applying apprehension is obliged to immediately hand the apprehended person over to the police authorities, or, if doing so is not possible, to inform the police without undue delay[50].

5.1. Deprivation of liberty by the police – custody

Custody is the 'temporary deprivation of a defendant or a person reasonably suspected of having committed a criminal offence of his personal freedom'[51]. This is an *exceptional*, but frequently used, measure in all examined countries. It is exceptional because it is usually the only coercive measure restricting the right to liberty that can be ordered and executed without a court or judge's decision. Police custody may be ordered if the police have sufficient reason to presume that a person has committed a crime (in some countries, a crime punishable by imprisonment or by a certain period of imprisonment) and that there are grounds for ordering other (more serious) coercive measures (e.g., PTD). Custody may be applied when the establishment of the identity of the arrested person is necessary, especially if the defendant is caught in the act. The term 'temporary' means that custody shall not exceed a short time limit prescribed by law, usually 24, 48, or 72 hours or the combination of these periods (e.g. the arrested person must be handed over to the court in 48 hours and the court has 24 hours to decide on ordering the PTD).[52] In *Croatia*,

> 'the deprivation of liberty from the moment of the arrest until the bringing before the judge of investigation may not exceed 48 hours or, in the case of criminal offences punishable by imprisonment for a term of up to one year, 36 hours.'[53]

50 E.g., Croatian CCP Section 106(1); Czech CCP Section 76(2); Hungarian CCP Section 273; Polish CCP Article 243; Slovak CCP Section 85(2).

51 Hungarian CCP Section 274(1).

52 In Czech Republic, an arrested person must be interrogated within 48 hours of their arrest and 'committed to a court or released. A judge must conduct the hearing of the arrested person within 24 hours of the committal and decide on custody or release.' Karabec et al., 2017, p. 81.

53 Ivičević Karas, Bonačić and Burić, 2020, p. 29. Regulation of the time limit of custody in Croatian CCP is very complex. The reason of the arrest and the authority who ordered it influence the maximum term.

In Hungary, 'custody may last until a decision is adopted on a coercive measure affecting personal freedom subject to judicial permission, but shall not exceed seventy-two hours'[54]. According to the *Romanian* CCP, custody (taking in custody) may be ordered for a maximum of 24 hours by the investigation body or prosecutor.[55]

Custody may be ordered by the public prosecutor or the investigating authority (in some states, with the previous consent of the public prosecutor; e.g. in the Czech Republic[56] and Slovakia).[57] In general, custody is ordered in most cases by the police during the investigation. Given that the public prosecutor controls the lawfulness of the investigation or oversees this phase of the criminal proceeding, they must be notified (at least), or their prior consent must be obtained.

The police must bring the arrested person before a court or judge without delay. In the *Czech Republic,* when a suspect is arrested without a judicial warrant,[58] the police must inform them of the reason for the arrest, interrogate them, and decide on the release or bring the arrested person before court within 48 hours. The judge must decide within 24 hours whether to set the person free or to take them into custody.[59]

In *Poland,* the arrested person shall be released if they are not handed over to the court within 48 hours of their arrest or if a copy of the decision on this provisional detention is not served on them or such decision is not delivered to them at the court session within 24 hours of them being handed over to the court[60]. In *Slovakia,* the court or judge 'shall have to hear the accused and to decide on his detention within 48 hours and in case of serious crime within 72 hours or to release him'[61]. In *Hungary,* the police, the prosecutor or judge may order the arrest of suspects for 72 hours if there is a well-founded suspicion that an offense punishable by imprisonment was committed. A motion by the public prosecutor should be submitted to the court and the court must decide on (pre-trial) detention within 72 hours. 'An investigatory judge may order pre-trial detention where there is a risk a detainee may flee, commit a

54 Hungarian CCP Section 274(3).

55 Romanian CCP Article 209(1).

56 Such a previous consent of the public prosecutor is not necessary when the person was caught committing a criminal offence or apprehended on the run. [Czech CCP Section 76(1)].

57 A 'person suspected of committing a criminal offence may, if there is reason for the custody … be apprehended and detained by a police officer' with prior authorization of prosecutor, except in urgent cases [Slovak CCP Section 85(1)]. The police officer must notify the public prosecutor to draw up a report and deliver it to the prosecutor, and the detainee must be brought before the court within 48 hours (in criminal offences of terrorism, within 96 hours from his detention or arrest) [Slovak CCP Section 85(3), (4) and 86(1)].

58 *'Police may make arrests without a warrant when they believe a prosecutable offense has been committed, when they regard arrest as necessary to prevent further offenses or the destruction of evidence, to protect a suspect, or when a person refuses to obey police orders to move.'* Bureau of Democracy, Human Rights and Labor, 2021a.

59 Bureau of Democracy, Human Rights and Labor, 2021a; Karabec et al., 2011. pp. 39–40; Czech CCP Section 76(4) and 77(2).

60 Polish CCP Article 248 paragraph 1, 2.

61 Slovak CCP Section 73(1), (4), (5).

new offense, or hinder an investigation. Cases involving PTD take priority over other expedited hearings.' [62]

From the examples, the usual time limit of custody is 72 hours (a combination of 48 + 24 hours in some CCPs), within which the court must decide on further limitations of personal liberty. If a person is arrested on a warrant issued by the court, the arrested person must be brought before the court within the period prescribed by the law.

5.2. Pre-trial detention

> PTD is 'a measure of restraint by which a person accused of committing a crime is kept in custody, ordered by a judicial authority at pre-trial or trial stage of proceedings to ensure his/her appearance before a court, prevent his/her further criminal activity, and/or prevent unlawful interference with the investigation of the case.'[63]

Given that PTD is (or at least should be) a measure of an exceptional nature or last resort,[64] it can be ordered only under the conditions specified in the act and only if the same purpose cannot be achieved by another measure.[65] Thus, PTD 'is to be applied only when all other measures are judged to be insufficient.'[66]

One of the important questions in the interpretation of PTD is *how long* we can talk about 'pre-trial' criminal proceedings and where it ends. For example, '[PTD] in the context of the Green Paper issued by the European Commission covers the period until the sentence is final.'[67] 'Likewise in most EU Member States, the notion "pre-trial detention" in the Green Paper is used in a "broad" sense and includes all prisoners who have not been finally judged.'[68] There is a different interpretation in the case law of the ECtHR:

> 'In determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance.'[69]

62 Bureau of Democracy, Human Rights and Labor, 2021b.
63 European Union and Council of Europe, no date.
64 This notion is from a well elaborated research report, which we will use in this chapter. See A Measure of Last Resort? The practice of PTD decision making in the EU.
65 Regarding the character of the accused and 'the nature and seriousness of the offence, the purpose of custody cannot be reached by other means at the time of making the decision on custody.' (Czech CCP Section 67) This exeptional character is also emphasized, for example, in the CCP of Croatia Article 95(1), in the Hungarian CCP Section 277(4), and in the Polish CCP Article 257 paragraph 1, in the Serb CCP Article 210.
66 European Commission, 2011, (Hereinafter, Green Paper) p. 9.
67 Green Paper, p. 9.
68 Green Paper, p. 9, footnote 19.
69 European Court of Human Rights, 2022. p. 37.

So, 'the period to be considered ends when the first instance court issues a decision (of acquittal or conviction). The period of detention following conviction by the trial court – for example during the appeal proceedings – is not taken into account.'[70] In contrast to the practice of the ECtHR, the examined Central European countries consider this coercive measure to be *pre-trial* detention until the court decision becomes final.

5.3. Proceeding of ordering pre-trial detention

According to international requirements, PTD (and some other coercive measures) can be ordered only by the court. Court means *investigating judge* (e.g. in Croatia and Hungary) or its equivalent (e.g. judge for the preliminary procedure in Slovakia or Judge for Rights and Liberties in Romania) in the investigating stage of the procedure and the *trial court* after the submission of the indictment. Commonly, in pre-trial proceedings, the court or judge and the public prosecutor are authorized to decide on releasing an accused from PTD.[71]

The motion for ordering detention is filed to the court by the public prosecutor. 'The judge is obliged to interview this person and decide within 24 hours of the delivery of the public prosecutor's petition either to release the detainee or take them into custody.'[72] In most countries, the presence of the public prosecutor is mandatory at a court session if their motion is aimed at ordering a coercive measure affecting the right to liberty (e.g. PTD, among others) and criminal supervision order[73]. However, according to the Czech CCP, 'the participation of the public prosecutor in the [PTD] procedure is not obligatory …' although 'the public prosecutor is the person who proposes the detention of a certain person.'[74]

5.4. Reasons of detention

The basic requirement for the application of any coercive measure concerning the right to personal liberty is the existence of *well-founded* or *reasonable suspicion* that a person has committed an offense. 'What may be regarded as "reasonable" will however depend upon all the circumstances …'[75] The meaning of reasonable suspicion is well elaborated by the case law of the ECtHR: 'A "reasonable suspicion" that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.'[76] Although the existence of reasonable suspicion is essential

70 Macovei, 2002, p. 34.
71 Hungarian CCP Section 279(7); Polish CCP Article 253 paragraph 2; Slovak CCP Section 76(2e).
72 Karabec et al., 2017, p. 82; Czech CCP Section 77(2). The procedure of ordering PTD is similar in other countries. See for example Hungarian CCP Section 278 and 463–479, the Polish CCP Article 250, the Slovak CCP Section 72, the Serb CCP Article 212–213.
73 E.g., Hungarian CCP Section 474(1); Romanian CCP Article 225(6).
74 Pelc, 2020, p. 52.
75 Fox, Campbell, and Hartley v. the United Kingdom, 12244/ 86, 12245/86 and 12383/86, 30 August 1990, 32. cited by McBride, 2009, p. 39.
76 European Court of Human Rights, 2022, pp. 21–22.

for ordering and prolonging the PTD, after a certain period, it is no longer sufficient.[77] Another generally accepted condition is that the criminal offense is *punishable by imprisonment*.

If these general conditions exist, at least one so-called special reason is necessary for ordering PTD.

> 'The Convention case-law sets five distinct grounds for pre-trial detention of persons arrested under Article 5 § 1(c) of the Convention, namely, 1) risk of absconding; 2) risk of obstructing the investigation; 3) risk of committing further offence; 4) risk of causing public disturbance if released, and 5) the need to protect the detainee...'[78]

Some of these special reasons are in the CCP of examined countries. PTD of the suspect or accused may be ordered only if specific facts of the case justify that

a) They will escape or hide to avoid criminal prosecution or punishment, particularly if their identity cannot be immediately determined, if they have no permanent residence, or if they are liable to receive a severe sentence (*risk of absconding*).
b) They will influence so far unquestioned witnesses or co-defendants, or, otherwise, obstruct the clarification of facts important for prosecution (*risk of collusion*).
c) They will commit the offense for which they are prosecuted again, complete the attempted offense, or commit an offense they have planned or threatened to commit (*risk of reoffending*).[79]

The above are positive requirements of PTD (custody), but the Czech CCP, for example, contains an exclusionary rule.[80]

77 'The persistence of a reasonable suspicion is a condition sine qua non for the validity of the continued detention. [However], when the national judicial authorities first examine, "promptly" after the arrest, whether to place the arrestee in [PTD], that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention.' European Court of Human Rights, 2022, p. 38.

78 European Union and Council of Europe, no date, p. 34.

79 Karabec et al., 2017, p. 82; Czech CCP Section 67. Similar reasons of ordering PTD can be found in the Hungarian CCP Section 276(2) and 277(4); the Romanian CCP Article 223(1) and the Slovakian CCP Section 71 (1). In some countries, there are additional special reasons of ordering PTD; for example, when long-term imprisonment is prescribed for an offence [Polish CCP Article 258 paragraph 2; Serbian CCP Article 211(4)]. In Croatia, PTD can be ordered during the investigation if the criminal offence punishable by long-term imprisonment and the circumstances of the commission are especially grave and if the duly summoned defendant evades appearance at the trial [CCP of Croatia Article 123(1)]. In Romania the seriousness of the offence may also be a reason for ordering PTD. See the Romanian CCP Article 223(2).

80 With several exceptions in the Czech CCP Section 68(3) and (4).

> 'The accused person, who is prosecuted for an intentional criminal offence punishable according to law by incarceration for two years at maximum or for a negligent offence punishable according to law by incarceration for three years at maximum, cannot be taken into custody'[81].

There are examples where ordering a PTD is compulsory, though it is rare. It is debatable whether this obligation of the court meets the requirements of the Council of Europe. For example, in Croatia, the ordering or prolongation of PTD is mandatory when, in its judgment, the court of first instance imposes imprisonment of five years or more.[82]

For whatever reason the CCP of the given country allows the ordering of PTD, the *reasoning of the decision* must provide a detailed explanation of the circumstances that confirm the reason for detention. This reasoning is very crucial. It must contain concrete justification tailored to the case, special circumstances that confirm the necessity of ordering the detention,[83] and that no other measure was appropriate to reach the given procedural aim.[84]

> 'The absence or lack of reasoning in detention orders is one of the elements taken into account by the Court when assessing the lawfulness of detention under Article 5 § 1 ... a decision which is extremely laconic and makes no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness.'[85]

5.5. The length of pre-trial detention

Usually, the PTD may last as long as necessary, but codes on criminal proceedings define the period after which the court has to *examine ex officio* whether this coercive measure must be extended; that is, *automatic judicial review* at reasonable intervals that takes place without the application of a detained person. The court is obliged to decide regularly whether the suspect or accused should remain in detention or should be released. The period of judicial review differs depending on the rules of the national law and the phase of the proceeding; in some countries, different causes of detention may justify different periods.

In *Hungary,* before filing the indictment 'The period of [PTD] may be extended repeatedly by the court by up to three months each time for one year after ordering the [PTD], and up to two months each time afterward'.

81 Czech CCP Section 68 paragraph (2).

82 Ivičević Karas, Bonačić and Burić, 2020, p. 31; CCP of Croatia Article 123(2).

83 As the European Court of Human Rights noted in its several decisions *'the danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors [that] may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify [PTD].'* W. v. Switzerland, 14379/88, 26 January 1993 point 33. McBride, 2009, p. 63.

84 See, for example, Czech CCP Section 73c.

85 European Court of Human Rights, 2022, p. 14.

In *Slovakia* 'The basic period of custody in the pre-trial proceedings is seven months,' which may be extended up to seven months[86]. In *Romania,* the term of PTD may not exceed 30 days, but the extension of this period is allowed by the act and may be ordered several times, though each not exceeding 30 days. 'The total duration of the defendant's pre-trial arrest during the criminal investigation cannot exceed a reasonable term and can be no longer than 180 days'.[87]

In the framework of this chapter, it is not possible to examine all provisions concerning the time limits of detention and periods when the necessity should be supervised by the court in all countries of interest. The main rule is (as a guarantee for the defendant) that authorities must keep the duration of detention as short as possible and act expeditiously if the defendant is in detention. Detention shall be revoked as soon as the reasons for which it was ordered cease to exist.

5.6. (Absolute) time limit of detention

The time limit (maximum period) of PTD depends on the seriousness of the offense (length of imprisonment) and may be different in the pre-trial stage of the proceeding (during the investigation) and the court procedure. In the *Czech Republic*

> 'The total length of custody during criminal proceedings may not exceed either one, two, three or four years, depending on the nature of the offence. One third of the term of custody is allocated to pre-trial proceedings and two thirds to trial proceedings. Once this period expires, the accused must be released immediately.'[88]

In *Hungary,* PTD may last up to one, two, three, four, or five years per the period of imprisonment by the punishable offense[89]. In the exceptional cases defined by the CCP, the maximum period of PTD is extended by a further year; for instance, where the original maximum period would have been five years, the maximum period of PTD is six years in certain exceptional cases[90]. In *Romania*, there are two maximum periods of PTD: during the investigation (see above) and during the trial in the first instance. In the latter phase of criminal proceedings,

> 'The total duration of a defendant's pre-trial arrest may not exceed a reasonable period of time and cannot exceed half of the special maximum limit

86 Slovak CCP Section 76(2).
87 Romanian CCP Article 226(2) and 236 (2)–(4).
88 Karabec et al., 2017, p. 83. 'The total time of custody in criminal proceedings cannot exceed a) one year, if the criminal proceedings concern a misdemeanour, b) two years, if the criminal proceedings concern a felony, c) three years, if the criminal proceedings concern an especially serious felony, d) four years, if the criminal proceedings concern an especially serious felony, for which may be imposed an exceptional sentence of imprisonment according to the Criminal Code' [Czech CCP Section 72a paragraph (1)].
89 Hungarian CCP Section 298(1).
90 Hungarian CCP Section 298(4).

> provided by law for the offense with which the court was seized. In all cases, the duration of pre-trial arrest in first instance may not exceed five years'[91].

In *Serbia*

> 'A defendant may be kept in detention for a maximum of three months from the date of being deprived of liberty. ... A panel of the immediately higher court ... may, acting on a reasoned motion of the public prosecutor, for important reasons extend detention by a maximum of another three months. ... If no indictment is filed by the expiry of the time limits ... the defendant shall be released'[92].

'From the filing of the indictment to the court until the commitment of the defendant to serve a custodial criminal sanction, detention may be ordered, extended, or repealed by a ruling of the panel'[93]. Detention in the court proceeding 'may last until the commitment of the defendant to serve a custodial criminal sanction, but no longer than the expiry of the duration of the criminal sanction pronounced in the first-instance judgment'.[94]

In *Slovakia,* the maximum 'overall' term of PTD differs between 12 months and 60 months depending on the seriousness of the offense[95]. The maximum duration does not always mean the PTD cannot last longer. Exceptions can be allowed by national CCPs.

5.7. Right to compensation

It is important to note that 'everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation'[96]. Persons wrongfully or unjustifiably deprived of their liberty or convicted of a criminal offense are also entitled to compensation of damages by the state under national laws. The Croatian CCP emphasizes also the right to full rehabilitation.[97]

Compensation means 'remedy for disadvantages suffered due to the fact and period of the restriction, or deprivation, of personal freedom'[98]. 'Compensation might cover loss of income, loss of opportunities, and moral damage.'[99] States established a compensation system for unjustified detention in national CCPs, but the content

91 Romanian CCP Article 239(1).
92 Serbian CCP Article 215.
93 Serbian CCP Article 216.
94 Serbian CCP Article 216.
95 The regulation is complex. See Slovak CCP Section 76(6), (7) and Section 76a.
96 ECHR Article 5 paragraph 5.
97 Croatian CCP Article 14, Hungarian CCP Section 844; Romanian CCP Article 9(5); Serbian CCP Article 18.
98 Hungarian CCP Section 844.
99 Council of Europe, Committee of Ministers, 2006, point 34.

varies per state. 'The most striking differences occur in terms of grounds for application, amounts awarded, time-limits for application and eligibility criteria.'[100]

However, a person deprived of their liberty is not entitled to compensation even when the conditions specified by law are met and if their behavior was the basis for ordering a coercive measure (e.g., their actions led to the deprivation of their liberties or they hid or escaped).[101]

5.8. Alternatives to detention

As noted, ordering detention is allowed as a last resort when the purpose of the detention could not be achieved by any other measure. The number of alternatives and their effectiveness influence the application (or overuse) of PTD.

5.8.1. Bail

Bail is *a sum determined by a court*. Usually, it aims to ensure the presence of a defendant at the procedural acts. However, in *Hungary*, for example, bail ensures 'compliance with the rules of behavior relating to a restraining order or the criminal supervision'[102]. 'The amount of bail may not be lower than five hundred thousand forints'[103].

In the *Czech* Republic, bail serves as an alternative to detention 'except in cases of serious crimes or to prevent witness tampering.'[104] The minimum amount of bail (pecuniary guarantee) is 10 000 CZK, and the concrete sum depends on

> 'the character and property relations of the accused person or the person depositing the pecuniary guarantee in his stead to the nature and seriousness of the criminal offence for which [...] the accused person [is] prosecuted and [...] seriousness of the reasons for custody'[105].

If the authority accepts the pecuniary guarantee, 'it may also decide to impose a restriction [comprising the] prohibition of travelling abroad'[106].

In *Poland,* the suspect or accused and other people may deposit *bail* 'in the form of cash, securities, pledge, or mortgage'[107].

The bail is connected to judicial control in *Romania* and may be ordered not only by the court or judge but also by the prosecutor during the investigation. The minimum value of bail, RON 1000, is also defined by the CCP Article 217(2). In *Serbia,* bail

100 Sellier and Weyembergh, 2018, pp. 123–124.
101 See, for example, Hungarian CCP Section 846(1), Serb CCP Article. 584.
102 Hungarian CCP Section 282.
103 Hungarian CCP Section 286(2).
104 Bureau of Democracy, Human Rights, and Labor, 2021a; See Section 73a paragraph (1) of the Czech CCP.
105 Czech CCP Section 73a paragraph (2).
106 Czech CCP Section 73a (3).
107 Polish CCP Article 266(1).

> 'consists of depositing cash money, securities, valuables or other moveable assets of substantial value which are easy to sell and safeguard, or the placement of a mortgage in the amount of the guarantee on immovable assets of the person posting the guarantee, or a personal obligation of one or more persons ...'[108].

The defendant himself can make a promise before the court that he shall not go into hiding or leave his place of residence without the permission of the court[109].

5.8.2. Judicial control/criminal supervision and other similar measures

Judicial control (in Romania) or *criminal supervision* (in Hungary) indicate a similar limitation of the right to liberty of movement and freedom to choose a residence. The defendant shall comply with different obligations prescribed by the court or judge or, in the case of judicial control, the prosecutor. The list of *rules of behavior and obligation* is similar to those prescribed in the FD ESO. The scope of obligations connected to judicial control in Romania is wide, while rules of behavior in the Hungarian CCP comprise three items (not to leave a specified area, home, or other premises without permission, not to visit certain public places, and to report to a police organ at specific intervals); however, the list is not exhaustive. 'The court may also impose additional rules of behaviour to ensure that the goal of the criminal supervision is achieved'[110].

Similarly, in the *Czech Republic*, the measure of 'supervision of the accused [is] by a probation officer instead of placement in custody. It could be combined with [the] obligation to stay at the designated residence or portion thereof over a [period] determined by the court.'[111]

In *Croatia, precautionary measures* can be ordered by the court and the State Attorney instead of PTD if the same purpose may be achieved by such measures. Precautionary measures mean similar obligations for the defendant, as were noted regarding judicial control in Romania and criminal supervision in Hungary (e.g. prohibition to leave a residence, prohibition to visit a certain place or territory, and temporary seizure of passport or other documents to cross the state border).[112]

In *Poland, police supervision* as a precautionary measure means that the 'person under supervision shall be obliged to comply with the conditions set forth in the decision of the court or public prosecutor'[113]. The list of obligations is very similar to those mentioned above.[114] *House arrest* is an alternative measure to PTD in *Romania*; in other countries, it usually comprises (criminal) supervision[115]. In *Serbia,* different

108 Serbian CCP Article 203.
109 Serbian CCP Article 202.
110 Hungarian CCP Section 281(2), (3) and Romanian CCP Article 215(1), (2).
111 Karabec et al., 2017, p. 84.
112 Croatian CCP Article 98(1), (2).
113 Polish CCP Article 275 (2).
114 Polish CCP Article 275 (2).
115 Romanian CCP Article 218 (2).

prohibitions may be ordered (e.g. prohibition of meeting with certain persons, visiting certain places, and leaving dwelling without permission)[116].

5.8.3. Guarantee

Guarantee is an interesting measure that serves as an alternative to PTD. In the *Czech Republic,* it may be 'given by a citizens' interest association or by a trustworthy person concerning the future behaviour of the accused and an assurance that they will not evade prosecution.'[117] Guarantee is also an alternative to detention in *Slovakia*, where the association of citizens or a trustworthy person may propose to replace custody of the accused with their guarantee[118]. In *Poland*, social guarantee

> 'may be given by an employer hiring the accused, the principals of the school or university of which the accused is a student, by a collective in which the accused works or studies, or by a community organisation of which they are a member, on the motion of such persons. Such a guaranty shall ensure that the accused would appear whenever summoned and would not obstruct the course of the proceedings'[119].

5.8.4. Pledge or written promise

Another alternative to PTD in the *Czech Republic* is a 'written promise by the accused to lead an orderly life, not evade prosecution, meet the obligations and observe the restrictions imposed on them'[120] In *Poland,* a pledge is a form of bail[121].

5.8.5. Other rules of measures alternative to pre-trial detention

If any of the measures restricting personal liberty is ordered, in some countries (e.g. the Czech Republic, Hungary, and Serbia), the authorities may decide to use electronic monitoring to control compliance with the imposed obligations or restrictions.[122]

A common feature of measures alternative to PTD is that, if required, the authorities may order two or more alternative measures if it seems necessary and more effective and that a harsher measure may be ordered against the defendant if they violate the rules of more lenient measures.

While detention usually has strict time limits, alternative measures may last longer, but the court shall examine regularly (e.g., every three or four months) whether the measure is justified.

116 Serbian CCP Article 197, 199, 202, 208.
117 Karabec et al., 2017, p. 84.
118 Slovak CCP Section 5(2).
119 Polish CCP Article 271(1).
120 Karabec et al., 2017, p. 84.
121 Polish CCP Article 266(1).
122 Karabec et al., 2017, p. 84.

6. Coercive measures restricting other rights

This subsection outlines the main features and basic rules of coercive measures affecting assets. While the catalog of coercive measures restricting the right to liberty is quite similar in almost all Central European countries, such coercive measures regarding other rights show a significant difference. Let's examine some examples of these measures.

Seizure is a frequently applied coercive measure concerning property rights in all examined countries. Usually, it may be ordered by all authorities acting in a criminal proceeding: police, public prosecutor, and court, including the investigating judge or judge who decides on questions prescribed by law before the trial stage. In some countries, the police need the prior approval of the public prosecutor to order this measure (e.g. the Czech Republic); in other countries, it is allowed to decide independently, though with some restrictions (e.g. Hungary).

In cases when the matter cannot be delayed, the seizure might be conducted without the prior consent of the public prosecutor or judge, but it is usually necessary to obtain posterior approval later. Seizure concerns objects that must be seized under the Criminal Code or that may serve as evidence in criminal proceedings to secure their safekeeping (Hungary, Serbia). Special rules concern electronic data that are increasingly used in criminal proceedings.[123] *Financial assets* might be the other special object of seizures.[124]

A *search* of a house, a dwelling, other premises, a vehicle, or a person may be performed if it is probable that the search shall result in finding the defendant, traces of the criminal offense, or objects of importance for the proceedings. Given technical developments, special rules concern the search of electronic devices and electronic data search. In some countries, search may be ordered only by the court (with some rare exceptions); in other countries, investigating authorities and public prosecutors decide on it, and the cases when the permission of the court is required are exceptions to the general rules. It is also a common rule that a search should be conducted during the daytime and only exceptionally at night between 22:00 and 06:00 hours.

Stricter rules of search and seizure apply to special premises (e.g., the office of an attorney may have documents that contain facts subject to the obligation of confidentiality) and to undelivered postal consignments (e.g. the Czech Republic and Hungary).

As the *personal search* is a sensitive measure, it shall always be performed by a person of the same sex[125]; however, in some countries, there are exceptions[126]. Voluntarily surrendering the searched item is given priority, and the search as a coercive

123 E.g. Slovak CCP Section 90 Paragraph (1), Hungarian CCP Sections 315–316.
124 Slovak CCP Section 95.
125 Czech CCP Section 83b (3).
126 E.g. situations of extreme urgency in Hungary. Hungarian CCP Section 307(5).

measure may be performed only when the person concerned does not hand over the searched object to the authorities.

7. Legal remedy

A legal remedy must always be provided against decisions on ordering or extending coercive measures to restrict the right to liberty and other fundamental rights. Arbitrary arrest and detention are prohibited by the constitution and the code of criminal procedure. Any person has the right to challenge the lawfulness of their arrest or detention before the court.

A defendant and the defense counsel may appeal against decisions on coercive measures (e.g., pre-trial detention order). In some cases, the person concerned has the right to ask for a remedy if their right was affected by the given measure.

8. Conclusion

We can underline that strict and precise rules that leave no room for misunderstanding and misconception are crucial in the field of coercive measures. We have seen that the provisions of CCPs of Central European countries differ by country, though there are many common features. The amendments in recent years were rendered necessary by the implementation of international standards. Further harmonization is needed in some areas of coercive measures, especially at the EU level, to enhance the mutual trust between the Member States.

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Chapter 12

The Impact of Economic Policy on Economic Crime

Sándor MADAI

ABSTRACT

This study presents the parallelism of the characteristics of the economic crimes of the Central and Eastern-European countries participating in the project. That is, it notes aspects of criminal law that clearly show that such countries in the past decade employed (and still employ) similar regulatory principles, owing to reasons such as geographical proximity and others. This study provides an overview of the regulatory directions of the countries after World War II, which, from the Soviet sphere of interest, were common. We then review the main steps in the field of action against economic crimes, which can be perceived as stemming from democratization. Notably, most of the examined countries are European Union members, and more countries want to join. Therefore, among the countries, the integration process indeed reveals a similar legal and political background. Considering the limitations of the study, it was not possible to examine the changes in the regulations of each country in detail. Thus, we only tried to draw attention to the similarities of common processes and characteristics.

KEYWORDS

Central and Eastern Europe, Eastern Europe, economic crimes, criminal law, European Union

1. Conceptual issues

Economic crime, as a concept, can be interpreted in different ways. Even within a given country, different disciplines classify behaviors differently. Regarding substantive criminal law, the offenses in the (so-called) 'economic crimes' chapter of the state's criminal code are classified here. If the country has special criminal law specifically on this subject, the norms in that law can be considered economic offenses. According to one classification, the following levels can be distinguished:

- According to the concept in public opinion, each conduct in the course of which economic operators obtain some financial advantage that is considered to be unlawful is included;

Madai, S. (2022) 'The Impact of Economic Policy on Economic Crime' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 361–370. https://doi.org/10.54171/2022.evcs.cls_12

- Economic crime in the criminological sense is narrower than this; we can mean crimes committed in connection with the management, suitable for violating or endangering the course of lawful management;
- At the conceptual level of management-related crime, beyond the economic crimes regulated in the criminal code, some of the acts against property that take place in connection with the management, and specific acts against the integrity of the office, public life, and public order are included;
- In the narrowest sense, it covers only economic crimes regulated in the relevant chapter of the criminal code.[1]

2. Common historical background

After World War II, Europe saw unprecedented fundamental socio-economic-political changes. However, the changes did not affect only Europe but were of global significance, leading to bipolar world order. Notably, in this world order, the central and eastern parts of Europe came into the sphere of interest of the Soviet Union. This process had an obvious impact on political-socio-economic transformation and the accompanying transformation of the legal system. The former can be said to be traditional. German legal influences were less prevalent during the era of Soviet influence, as the identity of the legal basis, or at least its similarity, could not be dispensed with the same ideological base of the 'Eastern bloc.'[2] Of course, it would be a mistake to believe that ideological and legal 'harmonization' was unique to the Soviet sphere of interest: a similar process was felt in the case of the U.S.-led interest group. The question, of course, is how continuous this process was for the states, whether in the East or the West. Further, it could be the subject of separate investigations, perhaps even beyond the jurisprudence framework. The post-World War II social transformations, thus, brought with them a legal transformation, especially since several issues that could not be postponed had to be clarified through the law.

The primary basic expectation was the question of bringing the perpetrators of war and anti-people crimes to justice and laying the legal foundations for this process. Creating legislation to protect the new social order received special attention, understandably. In this context, and perhaps in the first instance, we must refer to the adoption of the rules on the economic order that are essential for the new political ideas to prevail, as the country had to be rebuilt from its ruins. The revision of the laws on the previous economy was (also) essential. Hence, as in the case of reconstruction

1 Tóth, 2006, pp. 404–406.

2 Of course, completeness also means that in Hungary, for example, pre-war legal institutions. at least as far as substantive criminal law is concerned, still prevailed at the level of the normative text. For example, the general part of the Csemegi Code (Act V of 1878) was still in force until Act II of 1950 and its special part until Act V of 1961 ('Socialist Criminal Code').

and the 'laying of the foundations of socialism,'[3] clarifying the relations of production and property was essential to determine who owns the means of production and, in general, to determine the forms of ownership.

Based on historical experience, the legislator principle considered important is declared and defended. The legislature has defined some specific forms of this protection and did not forget to provide criminal protection for the highly esteemed economic-philosophical declaration. In the exemplary Soviet Union, the Legislative Decree of 7 August 1932 on the Preservation of the Property of State-Owned Enterprises, Kolkhozes (Collective Farms), and the Consolidation of Social Property provided special criminal protection on crimes against social property. Legislative activity on criminal law subsequently intensified: the Legislative Decree of 4 June 1947 on criminal liability for the looting of state and social property indicated that the Soviet legislature still followed in the footsteps of the 1932 Act.[4] After World War II, countries in the Soviet sphere of interest followed a similar path. In Hungary, the Criminal Code was amended in 1948, and the first independent norm concerning collective property was adopted in 1949. In Albania, a law on enhanced protection of social property was enacted in 1949, which included criminal protection. In Czechoslovakia, a criminal code enacted in 1950 punished conduct that attacked national property and the property of popular cooperatives. In Romania, also in 1950, a special law was adopted to protect social property, which further extended the scope of criminal law protection, as all property that promotes the achievement of a community goal was given priority. In Bulgaria in 1951, the German Democratic Republic in 1952, and Poland in 1953, special legislation was enacted to increase the protection of social property.[5]

Moreover, of course, similar steps have been taken in other areas of economic policy aimed at criminal law protection. The differing legislative approaches in each state yielded somewhat different results but have not questioned socialist commitment. In an ever-easing international environment, the regulation of the states concerned hinges on the fact that criminal liability for economic crimes is an important (and the only most serious and ultimately applicable) part of the legal liability system for economic governance. Legal consequences, such as economic sanctions, and forms of personal liability can be effectively applied against behaviors that violate the discipline of management. Therefore, in the field of economic life, criminal liability must be considered only regarding those acts with a detrimental effect that are particularly dangerous to society, for which economic sanctions or other forms of liability are no longer sufficient. The primary aim was to link criminal liability only to conduct whose detrimental effects extend beyond the circumstances, scope, and significance of the given economic entity and are detrimental to the national

3 The original preamble of Act XX of 1949 on the Constitution of the Hungarian People's Republic.

4 Notably, the Act ordered to punish the crimes against state property more severely than the delicts committed against the property of the kolkhozes or the property of the cooperatives.

5 Gyarmathy, 1954, pp. 18–22.

economy's interests, inducing disadvantages. For example, for a long time, foreign exchange management regulations have been in force in criminal law, but customs offenses have also received special attention.

The process of political transformation that induced a period of regime change in Central and Eastern Europe in the 1989–1990 period was felt in the late 1980s. In this period, together with the political-social transformation, the democratization process also induced a change in the attitude toward the economy. The policy, based on the former centralized socialist economic philosophy, shifted to the mechanism of the market economy, which brought with it economic crimes designed for socialist conditions that no longer served to protect the economy but hindered the process of transformation. This situation is explained by the fact that the pre-existing rules were ordered to punish partly behaviors considered natural in a market economy. Thus, if the legislature had left the previous legislation unchanged, it would have hindered the development of a market economy. Of course, 'classic' economic crimes like tax fraud persisted and likely adapted to the requirements of the age. Meanwhile, the new economic environment required new crimes not typical of the previous social order (e.g., stock market and securities-related crimes).[6] However, it would be a mistake to believe the transition went smoothly, as the democratization in each state was different and adapted to the social conditions of that state.

With the dissolution of the Soviet Union, the political and economic guidance that served as the basis for the previous unified approach also disappeared. Regarding the latter, privatization of the former state-owned means of production also occurred at different rates and with different solutions. Hence, the criminal treatment of the emergent abuses also differed per country. Meanwhile, there remained (perhaps even more so) an approach that had characterized the criminal law of some Central and Eastern-European countries as early as the 1970s and 1980s: a new norm of criminal law was created for certain behaviors of the economic sphere only if they could not be addressed by other legal means.

3. The new common direction: Joining the European Union

In most Central and Eastern-European countries, the need to join the European Union rose during the social transition.[7] As a first step on the road to membership, the country concerned must meet the accession criteria. The European Council set the criteria at its summit in Copenhagen in June 1993 (hereinafter, 'Copenhagen criteria'). The Copenhagen criteria set out several democratic, economic, and political conditions for countries wishing to join the Union; the most important being the existence of a functioning

6 Molnár, 2009, pp. 9–11.

7 In 2004, Cyprus, the Czech Republic, Estonia, Poland, Latvia, Lithuania, Hungary, Malta, Slovakia and Slovenia; in 2007, Bulgaria and Romania; and, in 2013, Croatia joined the European Union.

market economy and the ability of a country to cope with competitive pressure within the EU and market forces.[8] The Copenhagen criteria do not impose a criminal law requirement on candidate countries. However, some expectations may include it if a country cannot achieve the goals by other means. Thus, a functioning market economy as a condition also does not impose a criminal law requirement; however, the protection of a market economy cannot be imagined without certain necessary criminal law provisions, as criminal law protection through the regulation of economic crimes also serves the functioning of a market economy. Finding the balance of the extent to which criminal law regulation is justified is already left to the state. However, the situation will change if the state joins the European Union. At that time, of course, the regulations binding on the Member States are also binding on the new member state.

4. The impact of the European Union on economic crime

For centuries, the substantial embodiment of state sovereignty, its seemingly inexhaustible bastion, was the need for criminal power and the exclusive opportunity to enforce it. However, this theory seems to be waning, as the entity created by the will of the member states demands increased room for maneuver in all areas of legislation. Criminal law is no exception,[9] although it should be noted that sometimes the member states want to resign this segment of sovereignty only after intensive, long, and persistent pressure.[10]

Even so, the European Union seems to be constantly challenged, requiring it to work together to meet goals in a united manner and show the strength of the community, unlike previous isolated efforts.[11] The solutions used in the previous framework of the member states, possibly through international conventions, no longer necessarily produce the desired result and do not solve new problems. World changes have called for the development of a new form of cooperation and the need to rethink old solutions that lead to integration in criminal law. Indeed, how is integrative cooperation is different from previous cooperation? Clearly, both are mainly aimed at meeting the challenges posed by international crime, but criminal justice integration will, hopefully, be a different form of cooperation that may be better suited to increasing law enforcement effectiveness.[12] However, such challenges already call for reactions that tear apart the traditional formulas for responses.

In our view, the trend can be seen in two directions: the threat to the interests of the Union[13] and the issues of individual member states. The latter is ignored by the

8 See EU enlargement policy.
9 Fromm, 2006, pp. 104–108; Vervaele, 2006, pp. 87–93; Kuhl and Killmann, 2006, pp. 100–103.
10 Valki, 1997, pp. 85–91; Jakab, 2006, pp. 3–14; Valki, 1999, pp. 1000–1007.
11 For an overview of the possibilities for judicial cooperation in criminal matters, see Farkas, 2001; Karsai, 2004; Udvarhelyi, 2021.
12 For previous efforts, see Farkas, 2004.
13 An example is fraudulent competition for budgetary resources.

Union, as the problems do not directly affect the EU but cause severe problems at the member-state level. Without joint action, solving these issues would be challenging, even impossible.[14] However, we must not believe that greater cooperation can only take place within the framework of the Union: an example is cooperation under the auspices of the Council of Europe. However, what is striking is that the legislation within the Union regarding quality and intensity represents a new chapter in cooperation.[15]

This change affects many areas of the Union. However, given the sovereignty conflict, it is strongly felt in criminal law, perhaps more strongly than in any other area.[16] The traditional approach to specific infringements is no longer sufficiently dissuasive; thus, how classical means, such as administrative sanctions, have been used is being transformed. However, the 'classical' means are being replaced by criminal sanctions in many cases. Hence, a kind of new silent reception can be observed: the range of instruments previously classified as criminal law permeates the sanctions belonging to other fields of law; thus, they show signs of criminal law. Therefore, it is not a question of trying to settle a conflict through criminal law but of preserving the field of non-criminal sanctions as a forum for problem-solving while interweaving them with elements of criminal law to be as effective as possible. This process must induce a change and expand the concept of criminal law in the traditional sense. Accordingly, a new approach emerges, which also means that the concept will necessarily expand or, perhaps, has already expanded. It seems clear that this process is at the crossroads of political and scientific debates, but we seem to be on the path to developing European criminal law. Although we often only taste the concept, it seems likely that, eventually, we will have to befriend it and welcome a new criminal law.[17]

An eclectic example of the process of Europeanization of criminal law is the approach to competition law at the Union level.[18] Considering these legal instruments, the legislator has provided the acting bodies with an arsenal of tools for their effectiveness that almost rivals the tools provided in the criminal procedure standards of the Member States. Hence, many questions can be raised, either concerning the guarantee system otherwise provided in criminal procedure law or from other aspects.[19] However, this momentum vividly characterizes the trends. We do not even have to go abroad for the example of the convergence of the two fields of law. The Hungarian legislature grants some powers to the competition authority, and the Criminal Code reflects the fact that the two fields of law have entered into a closer union than perceived.[20] This process forces both criminal lawyers and legislators accustomed to

14 It could be, for example, cross-border trafficking in human beings.
15 Hecker, 2007, pp. 84–89.
16 Szalayné Sándor, 2004, pp. 27–35.
17 The concept of European criminal law is understood in the narrowest sense as the criminal law norms of the European Union. Farkas, 2001, p. 12.
18 Beyond competition law, there is a strong emphasis on other areas, such as criminal consumer law. Madai, 2007; Madai, 2014.
19 Klip, 2009, pp. 151–287.
20 See, for example, paragraph 420 of the Hungarian Criminal Code (Agreement restricting competition in public procurement and concession proceedings).

traditional dogmatics to rethink the boundaries of criminal law. In this context, the statement that concepts previously developed by criminal lawyers in each member state are based on their approach or even compelled by the legislator may take on a new meaning. This change can often make it essential to fill these concepts with different content. A specific and undoubted position to consider in this context may also be that differences in criminal law between the member states may affect competition law, which has a distortive effect on competition.[21] This situation is another relationship between the two areas of law.

As noted, the European Union influences the legislation of the member states in various areas, which can only be achieved if the interests of the Union justify it. Thus, the power to legislate in criminal matters remains in the hands of the member states on matters where there is no common EU direction. This option provides the states with a relatively wide margin of maneuver in cases where they want to enforce their internal legislative ideas in light of the socio-economic situation, which requires criminal law regulation.

Today, we must consider the following EU rules on substantive criminal law regarding economic crime:

- Directive 2013/40/EU of the European Parliament and the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA[22] (the Cybercrime Directive);
- Directive 2014/42/EU of the European Parliament and the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union;
- Directive 2014/57/EU of the European Parliament and the Council of 16 April 2014 on criminal sanctions for market abuse (the Market Abuse Directive);
- Directive 2014/62/EU of the European Parliament and the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA;
- Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law;
- Directive (EU) 2018/843 of the European Parliament and the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing;
- Directive (EU) 2018/1673 of the European Parliament and the Council of 23 October 2018 on combating money laundering by criminal law;
- Regulation (EU) 2018/1805 of the European Parliament and the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders;

21 Albrecht, 2000; Ligeti, 1998.
22 Justice and Home Affairs (JHA) Council.

- Directive (EU) 2019/713 of the European Parliament and the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413 / JHA.

It is important to emphasize that the above key EU elements focus on economic crime in the broadest sense, but the Directive on the protection of the European Union's financial interests has a special place, which, given its role, is the subject of a separate inquiry. However, regulation is classified as an economic crime, as it penalizes behaviors that negatively affect the Union's revenues and expenses. Thus, within the framework of the dogmatic interpretation of the member states, it primarily sanctions tax fraud-type behavior.

Furthermore, for example, confiscation rules do not explicitly penalize certain specific behaviors but focus on the recovery of property resulting from (but not limited to) organized crime offenses given their economic weight. Therefore, effective common rules on this issue make it possible for law enforcement authorities to take effective action in this area in cross-border cases. Meanwhile, we must note that the legislature of the member states has the option (beyond EU rules) to formulate criminal offenses in its criminal code. They may serve to comply with European Union law and, in the event of an internal claim by a member state, cover behavior that occurs in that Member State but is not covered by EU law. Such solutions may also bring the criminal law rules of the Member States, otherwise partly different in content, closer together. However, the presentation of the related policy obstacles and the challenges from dogmatic differences would be significantly beyond the scope of this study.

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Chapter 13

The Protection of the Financial Interests of the European Union—European Union Requirements and their Implementation by the Central and Eastern-European Countries

Judit JACSÓ – Bence UDVARHELYI

ABSTRACT

This chapter analyzes the efforts of the European Union to protect its financial interests. The first part of the paper sets out the brief historical development of the criminal law protection of the financial interests of the European Union with particular emphasis on the strengthened and reinforced legal framework provided by the Treaty of Lisbon. The second part focuses on the newly adopted Directive of the European Union on the fight against fraud to the Union's financial interests by means of criminal law. The third part of the study addresses the implementation of the PIF Directive in Central and Eastern-European countries.

KEYWORDS

Treaty of Lisbon, protection of the financial interests, PIF Directive, European Public Prosecutor's Office, tax evasion, tax fraud, money laundering

1. The financial interests of the European Union as a supranational legal interest

The European Union (EU) has its *own budget independent from the Member States* of approximately *150 billion euros* per year. This huge amount attracts the attention of criminals, who seek to obtain money from the EU budget using illicit means. The budget of the EU has, therefore, become the target of a wide variety of highly diverse criminal behavior, forcing the Union to ensure the protection of its financial interests.

Fraud and other irregularities (e.g., corruption, money laundering, misappropriation of funds) affecting the financial interests of the EU cause *significant loss* for the

Jacsó, J., Udvarhelyi, B. (2022) 'The Protection of the Financial Interests of the European Union—European Union Requirements and their Implementation by the Central and Eastern-European Countries' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 371–401. https://doi.org/10.54171/2022.evcs.cls_13

EU, inducing the reduction of the resources that can be redistributed. These crimes endanger the effective implementation of different EU policies. The magnitude of the problem is well illustrated by the fact that, by some estimations, the overall damage caused by such criminal conduct can reach *10% to 20% of the EU budget*.[1] Therefore, the EU suffers significant damage. Further, given that a part of the budget of the EU is indirectly financed by the *taxpayers* of the Member States, the offenses harm them as well.[2] However, the establishment of the supranational framework for the fight against criminal offenses affecting the financial interests of the European can be justified using economic and *political reasons*. In the long term, the rising crime rate against the financial interests can negatively affect the *credibility, confidence, and political acceptance of the EU*. Therefore, these criminal offenses may seriously *slow down the process of European integration*.[3]

The financial interests of the EU can be regarded as a *supranational legal interest*. Thus, this legal interest goes beyond the interests of the Member States and is directly linked to the EU as a supranational entity.[4] The specialty of the supranational legal interests is that they *cannot be protected solely by the national criminal law of the Member States*, given that its scope often does not extend to the protection of the financial and other interests of other states or international organizations.[5] Furthermore, another problem is caused by the fact that the *national criminal law provisions of the Member States are different*. Given such differences, the same act can be regarded as a criminal offense in one Member State and as an administrative offense in another Member State; moreover, it is not punishable in a third Member State.[6] Consequently, perpetrators can choose the criminal offense in the Member State where the chance of criminal conviction is less likely and the penalty is the most lenient.[7] These factors force the EU to seek the *establishment of a unified, supranational framework* in connection with the protection of its financial interests. Thus, to achieve this objective, the Union can naturally use several non-criminal instruments, in particular administrative and civil law measures. However, the seriousness of the criminal offenses affecting the financial interests requires the application of *criminal sanctions*.[8]

Therefore, to ensure the *effective, proportionate, and dissuasive protection* of the Union's financial interests, one of the main objectives of the EU is to create a *unified or at least harmonized regulation of the criminal offenses affecting its financial interests*.

1 See for example Fromm, 2004, p. 13; Williams, 2013, pp. 229–234.
2 Holé, 2004, p. 309.
3 See Jacsó, 2012, p. 66; Murawska, 2008, pp. 53–54.
4 Karsai, 2002, pp. 19–20; Ligeti, 2005, p. 22.
5 Kaiafa-Gbandi, 2012, p. 321.
6 Hecker, 2007, p. 562.
7 Ligeti, 2005, p. 22.
8 Juszczak and Sason, 2017, p. 82; Madai, 2010, p. 90.

2. The criminal law protection of the financial interests of the European Union

2.1. Historical development before the Treaty of Lisbon

Although the EU promptly recognized the need for unified action for the protection of its financial interests, the first criminal law measures were adapted after a long development.

The *Founding Treaties of the European Communities* originally did not contain any criminal law provisions in connection with the protection of financial interests because the competences of the European Communities did not cover the field of criminal law in the first few decades of the history of the European integration, given that criminal law was considered as one of the *main symbols and the last rampart of the national sovereignty*.[9] Given the lack of criminal competence of the European Communities, criminal sanctioning of the unlawful acts against its financial interests *remained within the competence of the Member States,* and the Community legislator used primarily *administrative means* to protect these supranational interests until the 1990s.[10]

The judgment of the European Court of Justice in the so-called *Greek Maize case* in 1989 can be considered the first important milestone in the history of the protection of financial interests since it formulated the so-called *assimilation principle*. According to the ruling, the Member States are required, by virtue of Article 5 of the EEC-Treaty,[11] to *penalize any persons who infringe Community law in the same way* they penalize *those who infringe national law.* The choice of penalties remains within the discretion of the Member States; however, they must ensure that infringements of Community law are penalized under *procedural and substantive conditions, analogous* to those applicable to *infringements of national law of a similar nature and importance,* which make the penalty *effective, proportionate, and dissuasive*. Moreover, the national authorities must proceed, regarding infringements of Community law, with the *same diligence* they bring to bear in implementing corresponding national laws.[12]

The *principle of assimilation* elaborated by the European Court of Justice was incorporated by the *Maastricht Treaty,* signed in 1992, which established the so-called

9 See, for example Albrecht, 2000, p. 27; Farkas, 2001, p. 23; Hildebrandt, 2007, pp. 66–67; Jung, 1998, pp. 210–211.

10 Farkas, 2005, p. 11.

11 Article 5 of the EEC-Treaty – currently Article 4(3) TEU – regulates the so-called principle of sincere cooperation. Pursuant to this principle, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks that flow from the Treaties; the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union; and the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardise the attainment of the Union's objectives.

12 Judgment of the Court of 21 September 1989 in Case 68/88 *Commission of the European Communities v Hellenic Republic*, ECR 2965, paragraphs. 22–25.

three-pillar structure of the EU. According to the provisions of the Treaty, the Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their financial interests. Furthermore, the Member States shall coordinate their action to protect the financial interests of the Community against fraud and shall organize, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.[13] As a result of the Treaty of Maastricht, the fight against fraud became *part of the primary law of the EU*.

However, within the framework of the *third pillar of the EU,*[14] the Treaty of Maastricht declared that the Member States regard the *fight against fraud on an international scale* as matters of common interest to achieve the objectives of the Union and without prejudice to the powers of the European Community.[15] As per the provisions of the Treaty, the Council was empowered to adopt special *third pillar legal instruments* (joint positions, joint actions, conventions, and later framework decisions) in this field.[16] It opened the way for the EU legislator to adopt *criminal law measures* (within the framework of the third pillar cooperation, in specific sources of law) regarding the protection of financial interests for the first time in the history of integration. Based on the authorization of the Treaty, the Member States of the EU signed a Convention on the protection of the European Communities' financial interests on June 26, 1995.[17] The so-called *PIF Convention*, which laid down the cornerstones of the coherent and united EU action against criminal offenses affecting financial interests, set out the *definition of fraud affecting the European Communities' financial interests* and required Member States to *criminalize the described conduct* and impose *effective, proportionate, and dissuasive sanctions*.[18] *Three Additional Protocols* were subsequently added to the PIF Convention, which prescribed the sanctioning of other criminal offenses affecting the financial interests of the EU (corruption and money laundering) and regulated the responsibility of legal persons.[19] The PIF Convention and its Additional Protocols

13 Article 209a of the EEC-Treaty.
14 Cooperation in the fields of Justice and Home Affairs.
15 Point 5 of Article K.1 of the EU-Treaty.
16 Article 3(2) of the EU-Treaty.
17 Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [OJ C 316, 27.11.1995, pp. 48–57] (hereinafter, PIF Convention).
18 Notably, parallel with the PIF Convention, the European Union also adopted a Regulation that contains the administrative means of the protection of the financial interests. See Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests [OJ L 312, 23.12.1995, pp. 1–4].
19 Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests [OJ C 313, 23.10.1996, pp. 1–11]; Council Act of 29 November 1996 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 [OJ C 151, 20.5.1997, pp. 1–14]; Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [OJ C 221, 19.7.1997, pp. 11–22].

were undoubtedly important steps in the fight against illegal offenses detrimental to the Union's financial interests given that they were the first documents that explicitly provided for criminal sanctions for crimes affecting the EU budget. However, given *prolonged ratification* and the *incomplete or inadequate transposition* of the PIF instruments by Member States,[20] they could not contribute sufficiently to the harmonization of criminal justice systems of the Member States and, thus, could provide little for more effective protection of the financial interests of the EU. [21]

2.2. The protection of the financial interests of the EU in the Treaty of Lisbon

The *Treaty of Lisbon*, enforced in 2009, was an important milestone in the development of European criminal integration and the history of the protection of the financial interests of the EU. The Treaty of Lisbon *abolished the pillar system*, given which the former third pillar disappeared, and the judicial cooperation in criminal matters of the EU became an *independent, homogeneous, supranational policy.*[22]

The Treaty of Lisbon empowered the EU with *broad legislative competences in the field of criminal law and the protection of financial interests* and enabled the adoption of the *traditional secondary sources of law* (regulations and directives). It was a significant step forward, given that—contrary to the previous third pillar legal acts, like the PIF Convention— the Union now has effective tools to *monitor the implementation* of regulations and directives and to *sanction Member States* that fail to comply to implement or infringe the adopted EU legal acts.[23] The criminal law competences of the EU under the Treaty of Lisbon that can be used for the protection of financial interests can be divided into four categories:[24]

a) The *legal harmonization competence* of *Article 83(1) TFEU* enables the EU to establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of *particularly serious crime with a cross-border dimension.* For the use of the Union's legal harmonization competence, two cumulative criteria are required to be met: the *particular seriousness* and the *cross-border dimension* of the crime, defined by three alternative requirements—the nature of the crime, the impact of the offense, or the special need to combat the area of crime on a common basis.[25] The 10 so-called *'eurocrimes'* are listed in the Treaty: terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime,

20 See Report from the Commission: Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols [COM(2004) 709, 25.10.2004.]; Second Report from the Commission: Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols [COM(2008) 77, 14.2.2008.].

21 See Jacsó, 2012, p. 68.

22 Satzger, 2014, p. 98.

23 See Articles 258–260 TFEU.

24 See in details Udvarhelyi, 2019, pp. 117–133, 143–161.

25 See in details Asp, 2012, pp. 86–87; Dorra, 2013, pp. 195–200; Simon, 2012, pp. 247–248.

and organized crime. However, the Treaty does not contain an exhaustive enumeration because, based on developments in crime, *additional areas of crime* that fulfill the general requirements can be added to the list.[26]

b) *Article 83(2) TFEU* provides the Union a means to ensure the effective implementation of other Union policies through criminal law measures. Based on this *ancillary legal harmonization competence*, the EU can adopt criminal law measures if they are *essential to ensure the effective implementation of a Union policy.* For the application of this competence, two requirements must be fulfilled. First, there is a *need for previous harmonization measures* in the policy area the Union legislator intends to criminalize, which means that the criminal harmonization presupposes that other harmonized (non-criminal) rules exist in the area concerned.[27] Second, the criminal sanctions must be *essential for the effective implementation of the aforementioned harmonized Union policy,* which demands the Union legislator to prove that the current enforcement regime cannot achieve effective implementation of the policy concerned, criminal law is more efficient than the existing less restrictive measures to achieve the pursued objective, and the disadvantages caused by criminal law are not disproportionate regarding the objective of ensuring the effective implementation of a Union policy.[28]

c) *Article 325 TFEU* focuses directly on the protection of the financial interests of the EU. It obliges the Union and the Member States to *counter fraud and any other illegal activities* affecting the financial interests through *deterrent and effective measures,* and it allows the EU legislator to adopt all *necessary measures* in the fields of the prevention of and fight against fraud affecting the financial interests of the Union to afford *effective and equivalent protection* in the Member States and all the Union's institutions, bodies, offices, and agencies. This provision enables the adoption of *directly applicable, supranational criminal law measures* in this field.[29]

d) *Article 86 TFEU* provides the legal basis for the establishment of the *European Public Prosecutor's Office.* The Office is intended to be an *independent supranational prosecution authority* that is responsible for investigating, prosecuting, and bringing to justice the perpetrators of, and accomplices in, offenses against the Union's financial interests. It also exercises the functions of the prosecutor in competent courts of the Member States regarding such offenses. Therefore, the scope of competence of the European Public Prosecutor's Office is limited to *criminal offenses against the financial interests of the EU*; however, the European Council is entitled to extend the powers of the Prosecutor's Office to other *serious crimes having a cross-border dimension*.

26 See Dorra, 2013, pp. 214–215; Jacsó, 2017, pp. 66–67; Safferling, 2011, p. 414.
27 Asp, 2012, p. 133.
28 Öberg, 2011, pp. 290–293.
29 See for example Hecker, 2012, p. 493; Safferling, 2011, p. 409; Satzger, 2016, pp. 119–120.

After the Treaty of Lisbon, based on the aforementioned criminal law competences, *intensive criminal legislation* began in the field of the criminal law protection of the financial interests of the EU, as a result of which two important legal acts were adopted: the *Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive)*[30] and the *Regulation on the establishment of the European Public Prosecutor's Office (EPPO Regulation)*.[31] The PIF Directive contains the substantive criminal law provisions in connection with the fight against fraud, while the EPPO Regulation provides for the procedural side of the protection of the financial interests of the EU. In this study, we focus on the provisions of the PIF Directive and its national implementation.

3. Directive on the fight against fraud to the Union's financial interests via criminal law

The PIF Directive aims to establish *minimum rules* concerning the *definition of criminal offenses and sanctions* regarding *combating fraud and other illegal activities affecting the Union's financial interests* to *strengthen protection* against criminal offenses that affect those financial interests, as per the acquis of the Union in this field.[32] Thus, to achieve this objective, the Directive *defines the criminal offenses of fraud affecting the Union's financial interests*[33] and *other criminal offenses affecting financial interests* (active and passive corruption, money laundering, and misappropriation). In connection with the definition, the PIF Directive differentiates between the *expenditure and the revenue side of the budget*.

1. Regarding *non-procurement-related expenditure*, Member States must criminalize any intentional act or omission relating to
   a) the use or presentation of false, incorrect, or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union or on its behalf;
   b) non-disclosure of information in violation of a specific obligation, with the same effect;
   c) the misapplication of such funds or assets for purposes other than those for which they were originally granted.

30 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, pp. 29–41].

31 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31.10.2017, pp. 1–71].

32 Article 1 of the PIF Directive.

33 Under Article 2(1)(a) of the PIF Directive, the definition of the Union's financial interests' is all revenues, expenditure, and assets covered by, acquired through, or due to the Union budget; alternatively, it is the budgets of the Union institutions, bodies, offices, and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

2. Regarding *procurement-related expenditure,* at least when committed to making an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, Member States must criminalize any intentional act or omission relating to:
   a) the use or presentation of false, incorrect, or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union or on its behalf;
   b) non-disclosure of information in violation of a specific obligation, with the same effect;
   c) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests;
3. Regarding *revenue other than revenue arising from VAT own resources,* Member States must criminalize any intentional act or omission relating to
   a) the use or presentation of false, incorrect, or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;
   b) non-disclosure of information in violation of a specific obligation, with the same effect;
   c) misapplication of a legally obtained benefit, with the same effect.
4. Regarding *revenue arising from VAT own resources,* Member States must criminalize any intentional act or omission committed in cross-border fraudulent schemes on
   a) the use or presentation of false, incorrect, or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
   b) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect;
   c) the presentation of correct VAT-related statements to fraudulently disguise the non-payment or wrongful creation of rights to VAT refunds.[34]

It can be regarded as a significant development in the fight against VAT fraud within the EU that the scope of the *PIF Directive,* under certain conditions, covers *VAT fraud*. The EU legislator recognized that the most serious forms of VAT fraud—in particular, carousel fraud and VAT fraud through missing traders—create serious threats to the common VAT system[35] and, thus, to the Union budget and the protection of the financial interests of the EU.[36] The European Commission has taken a firm standpoint

34 Article 3 of the PIF Directive.
35 See Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [OJ L 347, 11.12.2006, pp. 1–118].
36 Preamble (4) of PIF Directive.

on this issue during the legislative process of the PIF Directive. Referring to the case law of the Court of Justice of the European Union, the concept of EU fraud *expressis verbis* covered the VAT in the proposal of the PIF Directive.[37] Finally, given a political compromise, regarding revenue arising from VAT own resources, the PIF Directive shall apply only in cases of *serious offenses against the common VAT system*. Offenses against the common VAT system shall be considered to be serious where intentional acts or omissions are connected with the territory of two or more Member States of the Union and involve a total cost of at least EUR 10.000.000.[38]

The PIF Directive contains the definition of fraud and three other fraud-related criminal offenses that could affect the Union's financial interests: *money laundering*, *active and passive corruption,* and *misappropriation*. The definition of *money laundering* is determined by the PIF Directive regarding the Anti-Money Laundering Directive of the European Union.[39] According to the Anti-Money Laundering Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:

a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity to conceal or disguise the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;
b) the concealment or disguise of the true nature, source, location, disposition, movement, rights regarding, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such activity;
c) the acquisition, possession, or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;
d) participation in, association to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of any of the aforementioned actions.

According to the PIF Directive, Member States must only criminalize money laundering if the property derives from the criminal offenses covered by the Directive (i.e., the *predicate offenses of money laundering* must be EU fraud, corruption, and

37 See Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law [COM(2012) 363 final, Brussels, 11.7.2012.], the cited court judgement: Judgment of the Court (Grand Chamber) of 15 November 2011 in Case C-539/09 *European Commission v Federal Republic of Germany,* ECR I-11235.
38 Article 2(2) of the PIF Directive.
39 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [OJ L 141, 5.6.2015, pp. 73–117].

misappropriation).[40] According to the PIF Directive, *passive corruption* is the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind for himself or a third party or accepts a promise of such an advantage to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way that damages or is likely to damage the Union's financial interests. *Active corruption* is the action of a person who promises, offers, or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way that damages or is likely to damage the Union's financial interests. Finally, *misappropriation* is the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way that damages the Union's financial interests.[41]

The PIF Directive obliges the Member States to *criminalize the described conducts* and punish them with *effective, proportionate, and dissuasive criminal sanctions*. In the most serious cases, the Directive also prescribes the *minimum amount of the maximum penalty* the Member States are required to prescribe. Thus, the criminal offenses must be punishable by a maximum penalty of at least *four years of imprisonment* when they involve considerable damage or advantage, which is more than EUR 100,000. However, the Member States may provide for *sanctions other than criminal sanctions*, where the criminal offense involves damage or advantage of less than EUR 10,000. If the criminal offense is committed within a criminal organization, this shall be considered an aggravating circumstance.[42]

Furthermore, the Directive regulates the *liability of legal persons*. Legal persons can be held liable

a) if the aforementioned criminal offense is committed for their benefit by any person, acting either individually or as part of an organ of the legal person, having a leading position within the legal person;
b) where the lack of supervision or control by a person having a leading position has made possible the commission, by a person under its authority, of the criminal offense concerned for the benefit of that legal person.

Legal persons must be subject to *effective, proportionate, and dissuasive sanctions*, which shall include: criminal or non-criminal fines; exclusion from entitlement to public benefits or aid; temporary or permanent exclusion from public tender procedures; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; judicial winding-up; temporary or permanent closure of establishments used for committing the criminal offense.[43]

40 Article 4(1) of the PIF Directive.
41 Article 4(2)–(3) of the PIF Directive.
42 Articles 7–8 of the PIF Directive.
43 Article 6 and 9 of the PIF Directive.

4. Fight against fraud affecting the Union's financial interests in the Central and Eastern-European countries

This chapter analyzes the protection of the financial interests of the EU by the Central and Eastern-European Member States, during which we try to present whether the Member States have managed to implement the provisions of the PIF Directive into their national criminal law system. In the analysis of the Member States, we focus on the Hungarian legislation, but briefly consider the provisions of the other Central and Eastern-European countries.

4.1. The Hungarian regulation

Hungary was required to *ensure the criminal protection of the financial interests of the EU* even *before the accession of the country to the EU*. The PIF Convention and its Additional Protocols were among the EU documents implemented by all the pre-accession States. A crucial reason was the fact that several pre-accession funds were available for the candidate countries through which the Community budget could potentially be damaged.[44] Although Hungary formally ratified the PIF Convention only in 2009,[45] to ensure compliance with the Convention, Act CXXI of 2001, which was enforced on April 1, 2002, inserted the criminal offense of *violation of the financial interest of the European Communities* into the previous Hungarian Criminal Code.[46] Therefore, the Hungarian legislator, unlike many other EU Member States, did not try to comply with its legal harmonization obligation by amending the existing criminal offenses but through the creation of a new, separate criminal offense. Thus, the national and EU budget was protected by different criminal law provisions in Hungary until 2012. As per the prior Criminal Code, the protection of the national budget was covered by *tax fraud,*[47] *employment-related tax fraud,*[48] *excise violation,*[49] *illegal importation,*[50] and *unlawful acquisition of economic advantage,*[51] while the crime of *violation of the financial interest of the European Communities* safeguarded the financial interests of the EU.[52] However, this distinction generated several challenges in practice.[53]

44 See: Madai, 2010, p. 97.
45 Act CLIX of 2009 on the promulgation of the Convention on the protection of the European Communities' financial interests drawn up based on Article K.3. of the Treaty establishing the European Community, and of the Additional Protocols thereto and of the declaration based on Article 35(2) of the Treaty on the European Union.
46 Act IV of 1978 on the Criminal Code (hereinafter referred to as: previous HCC).
47 Section 310 of the previous HCC.
48 Section 310/A of the previous HCC.
49 Section 311 of the previous HCC.
50 Section 312 of the previous HCC.
51 Section 288 of the previous HCC.
52 Section 314 of the previous HCC
53 See in detail, Halász, 2006, pp. 632–633; Láris, 2011, pp. 29–30; Madai, 2010, pp. 99–102; Miskolczi, 2007, pp. 33–35; Udvarhelyi, 2014, pp. 177–179.

Therefore, *Act LXIII of 2011,* enforced on January 1, 2012, integrated fraud-related crimes into one criminal offense called *budget fraud*.[54] The currently effective fourth Criminal Code,[55] which came into force on July 1, 2013, did not bring any substantial changes to budget fraud. The Criminal Code regulates the *criminal offenses against public finances* in Chapter XXXIX and contains *four criminal offenses*: *fraud relating to social security, social and other welfare benefits,*[56] *budget fraud,*[57] *omission of oversight or supervisory responsibilities in connection with budget fraud,*[58] and *conspiracy to commit excise violation.*[59] With the *new regulation of the financial criminal law* of 2011, the legislator intended to achieve the following objectives:

a) the provision of a *more effective and coordinated defense* of the budget
b) the elimination of loopholes and the possibilities of abuse
c) the abolition of the interpretational problems in connection with the criminal offense of *violation of the financial interest of the European Communities*
d) the elimination of the delimitation problems
e) the *unified protection of the revenue and the expenditure side of the budget* and of the *national and the EU budget*.

Thus, to achieve the objectives, the *focus of the protection of budget fraud becomes the budget* itself. This regulatory concept fully accords with the expectations of the EU, formulated in the PIF Convention and the PIF Directive.[60] According to the legal definition of the CC,

> "budget shall mean the sub-systems of the central budget, including the budgets of social security funds and extra-budgetary funds, budgets and/or funds managed by or on behalf of international organizations, and budgets and/or funds managed by or on behalf of the European Union. In respect of crimes committed in connection with funds paid or payable from a budget, [the] budget shall also mean (in addition to the above) budgets and/or funds managed by or on behalf of a foreign State."[61]

The revenue and expenditure sides of the EU budget are covered by budget fraud based on the legal definition. Regarding the expenditure side, the Hungarian regulation protects the budget managed by the EU or Member States and the budget of *any other foreign states*. The criminal offenses of budget fraud can be divided into three different types of conduct: we can distinguish between *budget fraud in the narrower sense,*

54 Section 310 of the previous HCC.
55 Act C of 2012 on the Criminal Code (hereinafter referred to as: previous HCC).
56 Section 395 of the HCC.
57 Section 396 of the HCC.
58 Section 397 of the HCC.
59 Section 398 of the HCC.
60 Udvarhelyi, 2014, pp. 170–188; Jacsó, 2017, pp. 53–57.
61 Section 396(9)(a) of the HCC.

budget fraud committed on excise goods, and the *violation of the settlement, accounting, or notification obligations regarding funds paid or payable from the budget (administrative budget fraud)*. *Budget fraud in the narrower sense* can be committed by anybody who

f) induces a person to hold or continue to hold a false belief, suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent;
g) unlawfully claims any advantage made available in connection with budget payment obligations;
h) uses funds paid or payable from the budget for purposes other than those authorized;

thereby, causing financial loss to one or more budgets.[62] According to the Hungarian Criminal Code, budget fraud is a *material delict*, punishable if it causes *financial loss to one or more budgets*. This provision also complies with the PIF Directive, which punishes EU fraud only if it affects the *misappropriation or wrongful retention of funds or assets* from the Union budget or budgets managed by the Union or on its behalf; or the *illegal diminution of the* resources of the Union budget or budgets managed by the Union, or on its behalf. The definition of *financial loss* can be found among the explanatory provisions of the CC, under which financial loss shall mean *damage to one's property,*[63] including *lost income*.[64] In connection with budget fraud, the Criminal Code contains a specific provision that supplements the aforementioned definition. According to this provision, financial loss also includes

> "any loss of revenue stemming from non-compliance with any budget payment obligation, as well as the claiming of funds from a budget unlawfully or the use of funds paid or payable from a budget for purposes other than those authorized."[65]

Analyzing the punishable conduct of the PIF Directive reveals that the Hungarian regulation is mostly in compliance with them. Similar to the PIF Directive, budget fraud can only be committed *intentionally*; negligent conducts are not punishable. The *punishment* that could be imposed on the perpetrators of budget fraud *depends on the amount of the financial loss.*[66] The legislator defined it as aggravating circumstance if the budget fraud is committed in *criminal association with accomplices* or on a *commercial scale*.

Notably, the Hungarian legislator provided a possibility for the *reduction of the penalty without limitation*. According to this provision, the penalty may be reduced without limitation if the *perpetrator provides compensation for the financial loss caused by*

62 Section 396(1) of the HCC.
63 Therefore, the depreciation of property caused by crime [Point 16 of Section 459(1) of the HCC].
64 Point 17 of Section 459(1) of the HCC.
65 Section 396(9)(b) of the HCC.
66 The individual categories are prescribed in the Closing Provisions of the HCC.

the budget fraud referred to in Sections 396(1)–(6) *before the indictment*. The reduction is applicable *regardless of the amount of financial loss caused*.

It is an important social interest that the subsidies and payments from the budget must be used transparently. Therefore, the Hungarian legislator also criminalizes the *violation of the settlement, accounting, or notification obligations relating to funds paid or payable from the budget*. This criminal offense can only be committed in connection with the *expenditure side of the budget* (i.e., in connection with *funds from the budget*). The offense is committed by any person who *does not comply or inadequately complies with the settlement, accounting, or notification obligations relating to funds paid or payable from the budget*; *makes a false statement* to this extent; or *uses a false, counterfeit, or forged document or instrument*. Contrary to budget fraud in the narrower sense, this criminal offense is *immaterial*; it does not contain any results, meaning that the financial loss is not necessary for the realization of the offense. Hence, the Criminal Code provides enhanced protection of the expenditures of the budget relative to the provisions of the PIF Directive.

The Hungarian Criminal Code also regulates the *specific liability of the director of an economic operator* or a *member or employee with authority to exercise control or supervision*. According to the provision of the Hungarian Criminal Code, the director and the member or the employee of an economic operator can be held liable if he *fails to discharge the obligation of exercising control or supervision*, thereby making it possible for the member or employee of the economic operator to commit the budget fraud within the framework of their respective functions.[67]

4.2. The protection of the financial interests of the EU in other Member States

Analyzing the regulation of the other Central and Eastern-European countries reveals different solutions for the protection of the financial interests of the EU. First, there are states, where the related crimes are found in the national Criminal Codes but the domestic budget and the EU budget are protected with separate criminal offenses. This is the situation in the Czech Republic, Slovakia, and Slovenia.

The Criminal Code of the *Czech Republic* distinguishes between three tax-related criminal offenses regarding the protection of domestic financial interests *(evasion of taxes, fees, and similar compulsory payments;*[68] *evasion of tax, social security insurance fee, and similar compulsory payment;*[69] and *breach of information duty in tax proceedings*[70]), while the budget of the EU is protected by another criminal offense (i.e., *harming financial interests of European Communities*).[71] This criminal offense can be committed by a person who produces, uses, or presents false, incorrect, or incomplete documentation or states in such documentation false or grossly distorted data regarding income or expenses of the summary budget of European Communities or budgets administered

67 Section 397 of the HCC.
68 Section 240 of the Czech Criminal Code.
69 Section 241 of the Czech Criminal Code.
70 Section 243 of the Czech Criminal Code.
71 Section 243 of the Czech Criminal Code.

by European Communities or on their behalf or conceals such documentation or data and, thus, facilitating incorrect use or withholding of financial resources from any such budget or diminishing of funds of any such budget. It is also punishable if the perpetrator diminishes or uses financial resources (without authorization) comprising the income or expenses of the summary budget of the European Communities or budgets administered by European Communities or on their behalf. The punishment is more severe if the criminal offense causes larger damage; if the offender commits the act as a member of an organized group, as a person who has a special obligation to protect the interests of European Communities, or causes substantial or extensive damage.

The regulation of the *Slovakian Criminal Code* is quite similar. It contains three criminal offenses in connection with the protection of the financial interests of the Slovakian state: *tax and insurance evasion,*[72] *failure to pay tax and insurance,*[73] and *failure to pay tax*.[74] The financial interests of the EU are protected by the criminal offense of *damaging financial interests of the European Communities,*[75] which punishes the use or presentation of a false, incorrect, or incomplete statement or document, or the failure to provide mandatory data, or the use of funds from the general budget of the European Communities or the budget managed by or on behalf of the European Communities for purposes other than those for which they were originally intended, thus allowing embezzlement or illegal withholding of funds from the aforesaid budget. It is an aggravating circumstance if the crime causes larger, substantial large-scale damage, if the commission of the offense was by reason of specific motivations, and if the offender acts in a more serious manner or as a member of a dangerous grouping. The Slovakian Criminal Code punishes intentional and negligent conduct. Further, the Slovakian Criminal Code contains a special liability of the head of businesses, according to which it is also punishable if a person by breaching or failing to comply with an obligation resulting from his employment, occupation, position, or function in the management or supervision over his subordinates enables the commission of the criminal offense.

In the *Slovenian legal system*, the domestic budget is protected via the criminal offense of tax evasion,[76] while the financial interests of the EU are defended by the criminal offense of *fraud to the detriment of European Communities*.[77] According to this crime, a person can be held liable if the person avoids expenses by using or submitting false, incorrect, or incomplete statements or documents, or does not reveal data and, thus, misappropriates or unlawfully withholds or uses inappropriately funds of the general budget of European Communities or the budgets managed by European Communities or managed on their behalf. It is also punishable if the perpetrator

72 Section 276 of the Slovakian Criminal Code.
73 Section 276 of the Slovakian Criminal Code.
74 Section 277 of the Slovakian Criminal Code.
75 Sections 261–263 of the Slovakian Criminal Code.
76 Section 249 of the Slovenian Criminal Code.
77 Section 229 of the Slovenian Criminal Code.

acquires funds using offenses and from the budgets. The punishment can be higher if the criminal offense results in a large property benefit acquired or a large loss of property. The liability of the head of businesses is also regulated in the Slovenian system, under which the managers of companies or other persons authorized to take decisions or assume control in enterprises can be held liable if they render possible or do not prevent the criminal offenses of noted perpetrators that are subordinated and act on behalf of the company.

Second, there are states where the national criminal law protects the domestic and the EU budget in the same criminal offense. This is the situation in *Croatia*, where the *Croatian Criminal Code* protects the revenue and the expenditure side of its budget with two different criminal offenses, but the scope of both covers the protection of the financial interests of the EU. The revenue side of the budget is covered by the criminal offense of *Tax and Customs Duty Evasion*.[78] It can be committed by anybody who provides false or incomplete information on income, items, or other facts of relevance for determining the amount of tax or customs duty payable, or whoever, regarding mandatory declaration, fails, with the same aim, to declare his or her income, items or other facts of relevance to the determination of tax or customs duty payable. The criminal offense is punishable if it results in a reduction of the tax or customs duty payable by an amount exceeding 20 thousand kunas or to its non-determination in the said amount. The aim of the perpetrator must be the evasion of paying full or in part the perpetrator or another person's tax or customs duty. It is also punishable if the perpetrator uses a tax relief or customs privilege in an amount exceeding 20 thousand kunas in breach of the conditions under which he or she obtained it. The Croatian Criminal Code *expressis verbis* declares that these provisions shall also be applied to the perpetrator who reduces EU funds by committing the acts described therein. The expenditure side of the budget is protected by the criminal offense of *Subsidy Fraud*.[79] Based on this crime, anybody must be held liable who provides a state subsidy provider with false or incomplete information concerning the facts on which the decision on the granting of a state subsidy depends or fails to inform a state subsidy provider of changes important for deciding on the granting of a state subsidy. The perpetrator must act with the aim that he or she or another person receive a state subsidy. The criminal offense also holds liable perpetrators who use the granted state subsidy funds in a manner contrary to their intended use. Similar to the other criminal offense, the Croatian legislator here also declares that state subsidies shall be equated with subsidies and aid granted from EU funds.

Third, there are countries, where criminal offenses aimed at the protection of the EU's financial interests are not regulated by the Criminal Code but by another legal act. In *Romania*, Law no. 78/2000 on the prevention, detection, and sanctioning of corruption contains a series of acts against the financial interests of the EU. Section 4/1 of the law (Offences against the Financial Interests of the EU) punishes

78 Section 256 of the Croatian Criminal Code.
79 Section 256 of the Croatian Criminal Code.

the using or presenting in bad faith false, inaccurate, or incomplete documents or statements, which results in the illegal obtaining of funds from or the illegal diminishing of the resources of the general budget of the European Communities or from the budgets administrated by them or on their behalf. The deliberate omission to provide the information required according to the law to obtain funds from the general budget of the European Communities or the budgets administrated by them or on their behalf is also sanctioned. Furthermore, the law criminalizes changing the destination of the funds obtained from the general budget of the European Communities or the budgets administrated by them or on their behalf. The law also contains provisions for the liability of the directors, administrators, or persons with decisional or control tasks within an economic agent who can be held punishable if they willingly do not observe an official duty by not performing or deficiently performing it and if it had, as result the perpetration, of one of the aforementioned offenses by a person subordinate to him or her and who acted on behalf of that specific economic agent.[80]

Finally, in *Serbia*, the Criminal Code only protects the domestic budget through the criminal offenses of *tax avoidance*[81] and *avoidance of withholding tax*.[82] The scope of the Serbian criminal law does not cover the protection of the financial interests of the EU, since the country is currently not an EU member.

5. The fight against money laundering in the Member States

Given that the scope of the PIF Directive covers EU fraud and other criminal offenses affecting its financial interests. Among the three crimes regulated by the PIF Directive, we only intend to analyze the criminal offense of money laundering.

5.1. The regulation of money laundering in the European Union

As noted in the prior chapters, the *fight against money laundering* has significant importance in the *protection of the financial interests of the EU* given that this criminal offense can hurt the financial interests of the EU. Therefore, the PIF Directive also regulates money laundering as among *"other criminal offences affecting financial interests."*[83] However, the EU has already adopted several other legal acts against money laundering since the EU legislator recognized that money laundering could jeopardize the functioning of the internal market because the lack of EU action against money laundering could induce Member States to adopt measures that can be inconsistent with the completion of the single market in their quest to protect their financial systems.[84] The definition of *money laundering* is determined by the PIF Directive regarding

80 Sections 18/1-18/5 of the Romanian Law no. 78/2000. See in detail, Mirisan, 2019, pp. 179–184.
81 Section 225 of the Serbian Criminal Code.
82 Section 226 of the Serbian Criminal Code.
83 Article 4 of the PIF Directive.
84 See Jacsó, 2004, pp. 143–144; Jacsó, 2005, p. 99; Udvarhelyi, 2013a, p. 458.

the *Anti-Money Laundering Directive (4th AMLD)* of the European Union.[85] However, anti-money-laundering regulating measures are considered in several international documents[86] and other legal acts of the European Union.

The Anti-Money Laundering measures of the European Union can be divided into *two main categories*. First, *five Anti Money Laundering Directives*[87] regulate the *preventive instruments against money laundering*, as their primary objective is to prevent the financial sector from being used for laundering by requiring customer due diligence and reporting obligations.[88] Second, a *Criminal Law Directive*[89] (*6th AMLD*) contains *repressive measures for combating money laundering* and lays down *minimum standards for criminal offenses and sanctions*.[90] Furthermore, as noted, the *PIF Directive* also contains regulations in connection with money laundering. It is necessary to analyze the provisions of the 6th AMLD relating to the offense of money laundering.

The Preamble of the Directive emphasizes that money laundering and the related financing of terrorism and organized crime are significant problems at the EU level because they damage the integrity, stability, and reputation of the financial sector and threaten the internal market and internal security of the Union. Thus, to tackle the problems and complement and reinforce the application of the preventive

85 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [OJ L 141, 5.6.2015, pp. 73–117].

86 Most important in the field of the soft law regulation is the 40 Recommendations of the Financial Action Task Force (FATF). FATF as an inter-governmental body sets international standards to prevent money laundering and terrorist financing. See https://www.fatf-gafi.org/.

87 Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [OJ L 166, 28.6.1991, pp. 77–82]; Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering – Commission Declaration [OJ L 344, 28.12.2001, pp. 76–82]; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [OJ L 309, 25.11.2005, pp. 15–36]; Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [OJ L 141, 5.6.2015, pp. 73–117]; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [OJ L 156, 19.6.2018, pp. 43–74].

88 For details, see Bausch and Voller, 2014, pp. 6–9; Bülte, 2010, pp. 94–99; Gál, 2004, pp. 42–45; Jacsó, 2004, pp. 142–157; Jacsó, 2005, pp. 98–122; Jacsó, 2009, pp. 221–228; Jacsó and Udvarhelyi, 2017a, pp. 8–24; Langlois, 2013, pp. 96–98; Met-Domestici, 2016, pp. 170–179; Udvarhelyi, 2013, pp. 456–464, 467–469.

89 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [OJ L 284, 12.11.2018, pp. 22–30].

90 Article 1(1) of the 6th AMLD.

Anti-Money Laundering Directives, this Directive aims to combat money laundering using criminal law, enabling more efficient and swifter cross-border cooperation between competent authorities.[91]

The Directive first sets out the *definition* and the *predicate offenses of money laundering*. In connection with the latter, it must be mentioned that the *list of predicate offenses has significantly been expanded* relative to the previous and current preventive directives.[92] The *6th AMLD* lists more than 20 *criminal offenses* that are considered criminal activity and, thus, can be *predicate offenses* of money laundering.[93]

The Directive defines these offenses, where relevant, by *reference to the related legal act of the EU*. Regarding other criminal offenses, Member States should decide how to delimit the range of offenses.[94] As a *general rule*, however, the Directive also provides that any offense should be regarded as a predicate offense of money laundering that is punishable, as per national law, by deprivation of liberty or a detention order for a maximum of more than one year or, regarding Member States that have a minimum threshold for offenses in their legal systems, any offense punishable by deprivation of liberty or a detention order for a minimum of more than six months.[95] Notably, the provisions of this Directive do not apply to money laundering regarding property derived from criminal offenses affecting the Union's financial interests, which is subject to specific rules by the PIF Directive.[96]

The *definition of money laundering* is regulated similarly to the previous preventive directives. Accordingly, Member States must take the necessary measures to ensure that the following conducts, when committed intentionally, are punishable as a criminal offense:

a) The conversion or transfer of property,[97] knowing that such property is derived from criminal activity, to conceal or disguise the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action.

91 Preamble (1) of the 6th AMLD. See Jacsó, 2017, pp. 128–129; Jacsó and Udvarhelyi, 2017b, p. 40.
92 See Jacsó, 2017, p. 130; Jacsó and Udvarhelyi, 2017b, pp. 43–44.
93 1. Participation in an organized criminal group and racketeering; 2. Terrorism; 3. Trafficking in human beings and migrant smuggling; 4. Sexual exploitation; 5. Illicit trafficking in narcotic drugs and psychotropic substances; 6. Illicit arms trafficking; 7. Illicit trafficking in stolen goods and other goods; 8. Corruption; 9. Fraud; 10. Counterfeiting of currency; 11. Counterfeiting and piracy of products; 12. Environmental crime; 13. Murder, grievous bodily injury; 14. Kidnapping, illegal restraint and hostage-taking; 15. Robbery or theft; 16. Smuggling; 17. Tax crimes relating to direct and indirect taxes, as laid down in national law; 18. Extortion; 19. Forgery; 20. Piracy; 21. Insider trading and market manipulation; 22. Cybercrime. See: Article 2(1) of the 6th AMLD.
94 Preamble (5) of the 6th AMLD.
95 Article 2(1) of the 6th AMLD.
96 Article 1(2) of the 6th AMLD.
97 According to Article 2(2) of the 6th AMLD property means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets.

b) The concealment or disguise of the true nature, source, location, disposition, movement, and rights regarding, or ownership of, property, knowing that such property is derived from criminal activity.
c) The acquisition, possession, or use of property, knowing at the time of receipt, that such property was derived from criminal activity.[98]

As noted, the Directive criminalizes the aforementioned conducts when committed *intentionally* and with the *knowledge that the property was derived from criminal activity*. When determining whether the property is derived from criminal activity and whether the person knew that, the specific circumstances of the case should be considered, such as the fact that the value of the property is disproportionate to the lawful income of the accused person, and the criminal activity and acquisition of property occurred within the same time frame. Intention and knowledge can be inferred from *objective, factual circumstances*.[99] Beyond the criminalization of intentional money laundering, the Directive also allows the Member States to punish the aforementioned conducts as criminal offenses, where the offender *suspected or ought to have known* that the property was derived from criminal activity.[100]

The Directive also stipulates that money laundering can also be punishable if the property derived from a predicate offense that occurred on the *territory of another Member State or of a third country,* where that conduct would constitute a criminal activity had it occurred domestically. However, except for some predicate offenses listed in the Directive, Member States can prescribe the requirement of *double incrimination*, according to which the relevant conduct must constitute a criminal offense under the national law of the other Member State or of the third country where that conduct was committed.[101]

Contrary to the previous preventive directives, the Criminal Law Directive obliges Member States to criminalize *self-laundering*. Thus, regarding the conversion or transfer of property, and the concealment or disguise of the true nature, source, location, disposition, movement, and rights with respect to, or ownership of the property derived from criminal activity, the perpetrator of the predicate offense can be held liable for money laundering. However, the perpetrator of the predicate offense is not punishable for the mere acquisition, possession, or use of the property.[102]

Given the differences between the criminal justice systems of the Member States, the Directive requires the Member States to ensure that *aiding, abetting, inciting, and attempting* money laundering is punishable as a criminal offense.[103]

The Directive also contains detailed provisions on the *penalties to be imposed*. It obliges the Member States to prescribe *effective, proportionate, and dissuasive criminal penalties,* and in serious cases, money laundering must be punishable by a *maximum*

98 Article 3(1) of the 6th AMLD. See: Article 1(3) of the 6th AMLD.
99 Preamble (13) of the 6th AMLD.
100 Article 3(2) of the 6th AMLD.
101 Article 3(3)–(4) of the 6th AMLD.
102 Article 3(5) of the 6th AMLD. See: Jacsó and Udvarhelyi, 2017b, p. 45.
103 Article 4 of the 6th AMLD.

term of imprisonment of at least four years. The Directive also provides Member States with the possibility to prescribe additional sanctions or measures when necessary.[104] Member States must regard as *aggravating circumstance* a situation where money laundering was committed within the framework of a criminal organization,[105] or the perpetrator is an obliged entity under the 4th AMLD[106] and has committed the offense in the exercise of their professional activities. Member States may also assess to consider a situation as an aggravating circumstance if the laundered property is of considerable value or the laundered property derives from certain types of predicate offenses.[107]

Apart from natural persons, the Directive also obliges Member States to ensure the *liability of legal persons*.[108] Among the *sanctions that can be imposed on legal persons*, the Directive lists criminal or non-criminal fines; exclusion from entitlement to public benefits or aid; temporary or permanent exclusion from access to public funding, including tender procedures, grants, and concessions; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; a judicial winding-up order; temporary or permanent closure of establishments that have been used for committing the offense.[109] Furthermore, the Directive also contains regulations in connection with the *freezing and confiscation of the proceeds derived from and instrumentalities used or intended to be used in the commission or contribution to the commission of the offenses*[110] and the *establishment of the jurisdiction of the Member States*.[111]

Finally, it is worth noting that, in July 2021, the European Commission proposed a package of legislative proposals to strengthen the EU's anti-money laundering and counter-terrorist financing rules. It comprised four legislative proposals regarding preventive regulation.[112] The legislative process has not yet been completed.

5.2. The protection of money laundering in the national Criminal Codes

In this part, we intend to analyze the national regulation of money laundering by the Central and Eastern-European Member States, during which we must present whether the Member States managed to *implement the provisions of the 6th AML Directive* into their national criminal law system. In this context, we would like to focus

104 Article 5 of the 6th AMLD.
105 A criminal organisation means a structured association, established over a period, of more than two persons acting in concert to commit offences that are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty to obtain, directly or indirectly, a financial or other material benefit. Article 1(1) of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [OJ L 300, 11.11.2008, pp. 42–45].
106 See: Article 2 of the 6th AMLD.
107 Article 6 of the 6th AMLD.
108 Article 7 of the 6th AMLD.
109 Article 8 of the 6th AMLD.
110 Article 9 of the 6th AMLD.
111 Article 10 of the 6th AMLD.
112 For more, see European Commission, 2021.

on the Hungarian regulation and briefly consider the provisions of the other Central and Eastern-European countries. We focus on criminal law and the provision in the national Criminal Codes and do not analyze the preventive rules against money laundering.

5.2.1. The regulation of money laundering in the Hungarian Criminal Code

Given the legal harmonization obligation resulting from the EU membership of the country, Hungary also ensures the *fight against money laundering with criminal and non-criminal measures*. In Hungary, money laundering has been criminalized since 1994. Parallel to the modification of the Hungarian Criminal Code, a new act was adopted that prescribed specific obligations for the members of the financial sector.[113]

The currently effective Hungarian Criminal Code regulates money laundering in a separate Chapter (XL Money Laundering), which contains *two criminal offenses*:

a) *Money laundering*[114]
b) *Failure to comply with the reporting obligation related to money laundering*[115]

According to the Hungarian legislator, the protected legal interest of money laundering is the fight against organized criminality and terrorist financing and also the trust in the proper functioning of the legal economy and the protection of the financial institutions and other participants in financial life. With the amendment of Act XLIII of 2020 (enforced on 1 January 2021), the legislator aimed to make the previous criminal policy objective of preventing the use of assets derived from crime more effective. The legislation created a more detailed and differentiated definition of the statutory offense, regarding the predicate offense and qualifying circumstances. The criminal offense of money laundering in the Hungarian Criminal Code can be divided into *four main categories of punishable conduct*:

a) Any person who conceals or disguises the origin of assets derived from criminal activity, including any right on and the location of such assets and any changes therein, is guilty of money laundering (*classical form of money laundering*).[116]
b) A person involved in receiving assets derived from a criminal activity from others with the intent to conceal or disguise the origin of the assets, including any right on and the location of such assets, and any changes therein, or in concealing, converting, transferring such assets, participates in the alienation of or uses such assets, performs any financial transaction or receives

113 Act XXIV of 1994 on the Prevention and Combating of Money Laundering. The current regulation about the Prevention and Combating of Money Laundering and Terrorism Financing is the Act LIII of 2017.
114 Sections 399–400 of the HCC.
115 Section 401 of the HCC.
116 Section 399(1) of the HCC.

any financial service in connection with those assets or makes the necessary arrangements to that effect (*intentional money laundering*).[117]

c) A person involved in receiving assets derived from a punishable activity from others, or in concealing, converting, transferring such assets, participates in the alienation of or uses such assets, performs any financial transaction, or receives any financial service in connection with those assets or makes the necessary arrangements to that effect with the intent of aiding efforts to prevent the enforcement of confiscation and asset recovery ordered against others, or with intent to prevent the enforcement of confiscation and asset recovery ordered against others (*abetting-like money laundering*).[118]

d) Any person who, in connection with assets derived from a criminal activity committed by others acquires, obtains the right of disposition over such assets or safeguards, conceals, handles, uses, consumes, converts, transfers, or participates in the alienation of such assets is also guilty of money laundering (*receiver-like money laundering*).[119]

Notably, the Hungarian Criminal Code criminalized *self-laundering*. However, the abettor or aider shall not be prosecuted if he or she commits the criminal offense defined in respect of assets derived from a criminal activity he or she has committed (regarding the third and fourth types of money laundering).

The *object of money laundering* is the *assets*, which encompasses the new types and elements of the property (e.g., various forms of electronic data like cryptocurrencies used for payment). As per the *'all-crime approach,'* assets must be derived from the *'punishable criminal offense."*[120] As noted, this approach is more severe than the EU legislation. Money laundering can be punished even if the perpetrator of the predicate offense is unknown or is not punishable. Therefore, the punishment of the perpetrator of the predicate offense is not a prerequisite for the punishment of the perpetrator of money laundering. Hence, *any criminal offenses committed by anybody and anywhere, punishable under Hungarian law, can be a predicate offense of money laundering*.[121]

The *punishment* for intentional money laundering *depends on the amount of the assets and other circumstances in accordance with the regulation of the 6th AMLD.* The punishment shall be imprisonment for up to five years for a *felony* if the value involved in money laundering is below the substantial value (not more than 5 million HUF). In the most serious cases, imprisonment shall be between five to 10 years. Other relevant circumstances by the qualifications are when money laundering is committed *on a*

117 Section 399(2) of the HCC.
118 Section 399(3) of the HCC.
119 Section 399(4) of the HCC.
120 Mezei, 2018, pp. 21–28.
121 See Gál, 2013, p. 51; Tóth, 1998, p. 41.

commercial scale, by a service provider per the Anti Money Laundering Act,[122] *or by a public official.*

The Hungarian legislator also punishes *negligent money laundering.*[123] Any person who engages in preparations for money laundering is guilty of a *misdemeanor* punishable by imprisonment not exceeding one year. Finally, it is important to note that it is not a criminal offense but an administrative offense if the value of the offense does not exceed HUF 50,000.

If we compare the regulation of the Hungarian Criminal Code with the provisions of the Criminal Law Directive of the EU, the *Criminal Code is mostly in conformity with the new EU Directive*. The Hungarian legislator also criminalizes self-laundering. Furthermore, the Criminal Code even prescribes *stricter rules than the EU Directive,* given that it punishes negligent money laundering, which is not an obligation but a possibility according to the relevant EU requirements.

5.2.2. The regulation of money laundering in other countries

If we analyze the regulation of the other Central and Eastern-European countries, we can see that money laundering is punishable in all national criminal codes. One of the most important questions is how a country addresses the predicate offenses and whether a country punishes the negligence form of money laundering.

The crime of money laundering is regulated in Chapter V (*Crimes against property*) of the *Criminal Code of the Czech Republic*.[124] Money laundering can be committed by a person who conceals the origin or otherwise attempts to substantially complicate or render impossible to establish the origin of items or other asset values acquired via a criminal offense committed in the Czech Republic or abroad or as a reward for such a criminal offense or items or other asset values obtained for an item or other asset value referred to, or who allowed the commission of such an act to another person (intentional crime). The object of money laundering can be items or other assets from all criminal offenses (*all-crime approach*), similar to the Hungarian provision. However, if the property is derived from a particularly serious offense, the Czech Criminal Code provides for a more severe penalty. The Criminal Code expressly provides for the case where the predicate offense is committed abroad: it shall be punishable and shall be deemed to be an offense committed abroad, which fulfills the elements of an offense under the Act Czech Republic, irrespective of whether it is punishable under the law of the State in the territory of which it was committed.[125] Notably, the *negligence form* of the crime is also punishable.[126] In less severe cases, the punishment is imprisonment for up to four years, pecuniary penalty, prohibition of activity, or confiscation of items or other asset values. In the most serious cases, the

122 Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorism Financing.
123 Section 400 of the HCC.
124 Section 216 of the Czech Criminal Code.
125 Section 217/A of the Czech Criminal Code.
126 Section 217 of the Czech Criminal Code.

sanction is imprisonment for three to eight years or confiscation of property. It should be stressed that there is a special rule according to which, if the perpetrator commits such an act regarding an item or other asset value derived from a criminal offense for which the law stipulates a lighter punishment, the perpetrator shall be sentenced to this lighter punishment. If the money laundering is committed negligently, the sanction is imprisonment for up to one year, prohibition of activity, or confiscation of items or other asset values; in the serious case, imprisonment is for one to five years. The punishment depends on the amount of the asset. The legislator defined an aggravating circumstance as the situation where money laundering is committed by a member of an organized group, the asset value derived from an especially serious felony gains substantial profit for the perpetrator or for another, or the perpetrator uses his or her occupational position to commit such an act.

In the *Croatian Criminal Code*, the crime of money laundering is regulated in Chapter XXIV (*Criminal offenses against economy*).[127] Money laundering is punishable if the perpetrator invests, takes over, converts, transfers, or replaces a material gain from the criminal activity to conceal or disguise its illicit origin; conceals or disguises the true nature, source, location, disposition, movement, rights with respect to, or ownership of proceeds of crime; or acquires, possesses, or uses the proceeds of crime. The *negligence form* of the crime is also punishable. The criminal offense shall be punished with imprisonment from six months to five years. We could find the requirement of double criminality: if the material gain is derived from the criminal activity conducted in a foreign country, the perpetrator shall be punished when the activity is a criminal offense also under the domestic law of the country where it is committed.

The *Polish Criminal Code* regulates the crime of money laundering in Chapter XXXVI (*Crimes against business transactions and material interests in civil-law transactions*). Concerning predicate offenses, Poland also adopted the all-crime approach. Therefore, all offenses provided by the Criminal Code can be predicate offenses for money laundering.[128]

In *Romania*, money laundering is regulated in Law Nr. 129/11.07.2019 for preventing and combating money laundering and terrorist financing and for amending and supplementing some normative acts rather than the Criminal Code.[129] Per the definition of money laundering, the conduct of this crime is the exchange or transfer of assets, knowing that they come from the commission of crimes, to hide or conceal the illicit origin of the goods or help the person who committed the crime from which the assets originates to evade prosecution, trial, or punishment; the concealment or hiding of the true nature, source, location, provision, movement, or ownership of the assets or rights over them, knowing that such assets originated from crimes

127 Section 265 of the Croatian Criminal Code.

128 See more about the regulation and the evaluation of Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (Moneyval), 2021.

129 See Law no. 129/2019 to prevent and combat money laundering and terrorism financing, as well as to amend and supplement some legislative act; in details see Mirisan and Cirmaciu, 2019, pp. 387–397.

commission; or the acquisition, possession, or use of assets by a person other than the active subject of the offense from which the assets originate, knowing that they originate from the commission of crimes. Money laundering is the punishment of imprisonment from three to 10 years. The attempt shall be punishable. If the offense is committed by a legal person, it is also punishable. The acknowledgment of the origin of the assets or the purpose pursued must be established by objective factual circumstances, whether the offense from which the assets originate was committed in the territory of Romania, other Member States, or third countries.

In the *Serbian Criminal Code*, the crime of money laundering can be found in Chapter XXII (*Offences against economic interest*), where whoever converts or transfers assets knowing that such assets originate from a criminal offense to conceal or misrepresent the unlawful origin of the assets or conceals and misrepresents facts on the assets knowing that such assets originated can be held punishable.[130]

The *Slovakian Criminal Code* uses a different name for the offense instead of money laundering: *'legalization of the proceeds of crime.'*[131] It can be committed by any person who performs any of the following regarding income or other property obtained by crime to conceal such income or thing, disguise their criminal origin, conceal their intended or actual use for committing a criminal offense, frustrate their seizure for criminal proceedings or forfeiture or confiscation: transfers to himself or another, lends, borrows, transfers in a bank or a subsidiary of a foreign bank, imports, transits, delivers, transfers, leases or otherwise procures for himself or another, or holds, hides, conceals, uses, consumes, destroys, alters, or damages. The punishment shall be imprisonment of two to five years. In the most serious cases (e.g., if the offender obtains large-scale benefits, if the predicate offense is a serious felony, or if the money laundering is committed as a member of a dangerous group), the criminal offense is punishable by up to 20 years of imprisonment. Similar to the Hungarian regulation, the failure to comply with the reporting obligation related to money laundering is also punishable.[132] However, negligent money laundering does not constitute a criminal offense.

The *Slovenian Criminal Code* also contains the crime of money laundering[133] in Chapter XXIV *(Criminal offenses against the economy*). If a person accepts, exchanges, stores, disposes of, uses in economic activity or any other manner determined by the act governing the prevention of money laundering, conceals or attempts to conceal by laundering the origin of money or property that was, to his knowledge, acquired through the commission of a criminal offense, or commits the offense mentioned in the preceding paragraph, and is simultaneously the perpetrator of or participant in the criminal offense with which the money or property under the preceding paragraph was acquired, he or she shall be punished by imprisonment of up to five years.

130 Section 245 of the Serbian Criminal Code.
131 Section 233 of the Slovakian Criminal Code.
132 Section 234 of the Slovakian Criminal Code.
133 Section 245 of the Slovenian Criminal Code.

By high value, the punishment is imprisonment of up to eight years and a fine. If the crime is committed within a criminal association for the commission of such criminal offences, the perpetrator shall be punished by imprisonment of one up to 10 years and by a fine. Whoever should and could have known that the money or property had been acquired through a criminal offense shall be punished by imprisonment of up to two years. The negligent form of money laundering is also punishable.

Therefore, despite the harmonization efforts of the EU, there are significant differences between the national regulations. There is, however, a tendency for Member States to adopt the same approach to the scope of the basic offenses. There are also differences in the level of penalties and the criminalization of negligent money laundering.

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| Chapter 14 |

Fundamental Questions of Administrative and Criminal Investigations for the Protection of the Financial Interests of the EU

Ákos FARKAS

ABSTRACT

One of the most meaningful results of the past decades in the EU is forming a new criminal law cooperation system which is building on a new paradigm of operational cooperation between EU MSs. The new system pushed back to the background of the traditional, legal aid-based system. One of the characteristics of this is tighter cooperation in the investigation of both administrative and criminal. This contribution concentrates on presenting the features of this topic.

KEYWORDS

the administrative investigation, criminal investigation, protection of the financial interests of the EU, OLAF, Eurojust, EPPO

1. Foreword

After 30 years of the Maastricht Treaty, we live in a new era with regard to the law and institutional background of the EU. This long-lasting period brought many fundamental changes to the information on European criminal law. The common denominator of changes was the protection of the financial interests of the EU. However, as Stefanou et al. highlight, the catalyzer of changes was the unsolved problem of the illegal outflow of EU subsidies.

> 'By the late 1980s, Common Agricultural Policy (CAP) subsidies fraud was rife in some MS (Member States). The main problem was the unwillingness of national authorities and enforcement agencies to investigate, let alone prosecute – the alleged offenders. Most national enforcement agencies were geared towards protecting domestic financial interests, and fraud that involved

Farkas, Á. (2022) 'Fundamental Questions of Administrative and Criminal Investigations for the Protection of the Financial Interests of the EU' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc–Budapest: Central European Academic Publishing. pp. 403–411. https://doi.org/10.54171/2022.evcs.cls_14

> 'Community funding' was not a priority... The general picture that emerged was that some MS EU funding was seen as a 'fair game' and the inability of national authorities to investigate and prosecute reinforced the misconception that fraud against the EU was somehow not a priority.'[1]

This situation inspired the EU in 1995—by creating the Public Investment Fund convention—to create a supranational frame to protect financial interests. Since then, many changes have occurred. The changes had two directions: administrative and criminal law.

From the Maastricht Treaty to the Lisbon Treaty in the Three-Pillar System of the EU, the evolution of administrative law was faster because the law-making procedure on the First Pillar (FP) was more business-like, and the FP has an exclusive competence of administrative law, both legal and institutional. The direct application of EU law made the vertical connection between the EU Member States (MS) more manageable, making it possible to harmonize the material and procedural rules of agencies wholly or partly, whose exclusive or part-task is the protection of the financial interests of the EU, like European Anti-Fraud Office (OLAF), the European Security and Market Authority (ESMA), or DG Competition (DG Comp).

2. The characteristics of administrative investigations

The antecedent of OLAF was the Unité de Coordination de La Lutte Anti-Fraude (UCLAF), established in 1986. Until 1999, the creation of OLAF, the Commission transformed UCLAF several times as the MS and the Commission attempted to solve fraud problems. As Stefanou et al. note, the main problem with UCLAF was the operational level. Regarding the competencies of UCLAF, the Commission is divided between DG VI (Agriculture), DG XX (Financial Control), and DG XXI (Customs and Indirect Taxation). UCLAF did not have natural powers of investigation. The Court of Auditors Reports indicated that fraud continued to be a severe problem. Essentially, the first period in the development of EU anti-fraud bodies was characterized by the Commission's attempts to convince MS that tackling fraud against the interests of the Community is a severe problem and one that the MS should tackle directly.

The establishment of OLAF characterizes the post-1999 period. The main features of the institutional frame include functional independence, parallel functioning, and not sharing information, though they do not function in a network. As noted later, the situation changed regarding OLAF after establishing the European Public Prosecutor's Office (EPPO). These agencies are authorized to make administrative investigations of breaches of EU law and sanction the violations. The sanctions have a punitive character.

1 Stefanou, White and Yanthski, 2011, p. XV.

As Luchtman and Vervaele note, they sometimes intersect with criminal law enforcement primarily for natural reasons but sometimes for undertakings concerned.[2] During investigations, the agencies interact at the national and EU level. Therefore, they have an EU comprehensive mandate as EU authorities are also active on the territories of Various MS. These activities are complex. Luchtman and Vervaele note that the EU authorities can have autonomous or shared competencies and make investigations autonomous or shared with national authorities.

Finally, they must solve the problem of the applicable law in a vertical setting to achieve a level playing field (from unification to harmonization to bottom-up accommodation of EU law by national legal systems). Luchtman and Verveale emphasize that fulfilling these tasks requires a high degree of integration (substantive and procedural laws). Furthermore, a clear delineation of duties between the EU and national authorities is necessary to avoid problems with the principle of legal certainty, stipulating that rules involving negative consequences for individuals should be clear and precise and the application predictable for those subject to them. Per Luchtman and Verveale, while EU authorities conduct exclusive investigations, essential competencies and power remain in the hands of the MS:

1. the use of genuine coercive powers remain in the hand of the member states
2. autonomous EU inspections may be hampered by clashing national interests
3. EU authorities may need information from their national partners for the exercise of their duties (before and after the investigation)
4. The results of the independent investigation may be used in national proceedings

However, the admissibility of these results in the MS's administrative or criminal procedure requires coordination, particularly in harmonizing defense rights. Notably, where competencies are exclusively European, national law and authorities continue to play a role. Mixed investigations and mutual assistance are less intrusive from the perspective of MS and can better accommodate conflicts between national and EU legal order.

Accordingly, Luchtman and Verveale rightly note that there is a clear link between the models and the applicable rules.[3] In their view, particularly for an independent investigation, regulations must be based on a uniform legal framework defining the powers of authorities, including the possible consequences in cases of non-cooperation (through imposing fines but via ensuring assistance by national law enforcement). Moreover, it implies the power to enforce investigative acts (and introduce remedies at the corresponding EU level). This power is the case for European Central Bank (ECB), ESMA, and DG Comp.

Nevertheless, the OLAF framework differs significantly from the other authorities who conduct the independent investigation. In the OLAF regulations, the principal

2 Luchtman and Vervaele, 2017, p. 314.
3 Ibid., p. 326.

instruments do not state that the necessary investigative power should work autonomously; instead, they indicate what information should ultimately be made available to OLAF via forces of national law. In turn, the national-level specific legislation for OLAF is fragmented or absent in many cases. One refreshing example is the Netherlands, where specific legislation covered this aspect, but cooperation remains problematic, particularly in expenditure.

Luchtman and Vervaele note that the absence of such a framework induces uncertainty in practice (i.e., in France).[4] The OLAF 'administrative' statute before the EPPO regulation led to additional hurdles in Germany and the Netherlands, where customs and tax authorities have far-reaching (criminal law) powers in the national settings (e.g., Guardia di Finanza in Italy). Even so, they are not used or cannot be used for OLAF investigations. As soon as on-the-spot checks turn into suspicions, the inquiry must be halted and handed to the judicial authorities.

Notably, the diversity of rules among the MSs is sometimes disturbing, which is why there is a strong need for uniform regulations parallel to a robust national cooperation framework. Moreover, independent investigations still need cooperation with MS's law. The examples of ECB, ESMA, and DG Comp also show how vital a robust framework is for the national authorities. Luchtman and Verveale rightly note that only relevant rules and regulations can ensure

1. that there is a national counterpart for cooperation with the EU authority in each sector
2. that these authorities cooperate with the EU authority by sharing operational information
3. possess specific investigative power for that purpose (interviews, production orders, site visits), including the assistance of the police or equivalent forces and, in cases of concurrent jurisdiction, such as in competition law
4. provisions concerning admissibility as evidence (including the need for equivalent standards of legal protection)

However, such a framework was unavailable for the OLAF until recently. Thus, the national anti-fraud coordination service (AFCOS) provides beneficial services but is (mostly) a coordinative body. Given that OLAF's complicated mandate makes operational cooperation at the national level challenging, particularly for EU expenditure, other issues like powers, the sharing of information, and coordination have not come into play until now. The dividing ridge was the Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013 regarding cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations (Reg.Am.). The new Reg amends the former in two directions: efficiency enhancement and the relationship to EPPO.

4 Ibid., p. 322.

Efficiency regards the importance of procedural rights under the OLAF administrative investigation as a right to avoid self-incrimination, to be assisted, to use any of the official languages of the EU, to approve the record, or add observations. There was no controlling body for these rights that could validate the fair procedure in administrative and criminal procedures. The stake is the admissibility of evidence in both scenarios, which is why the Reg.Am created a new position in OLAF procedure, the controller, who shall monitor the Office's compliance with procedural guarantees referred to in Article 9, and the rules applicable to investigations by the Office.

At the national level, Section 12a, apart from the AFCOS units, established the anti-fraud coordination services to facilitate practical cooperation and the exchange of information between OLAF and the MSs, including operational details. The anti-fraud coordination services may assist the OLAF upon request such that the Office may conduct coordination activities following Article 12b, including, where appropriate, horizontal cooperation and exchange of information between anti-fraud coordination services.

The Reg.Am. gives a new dimension to the OLAF activity by opening the cooperation between other EU agencies. Within its mandate to protect the financial interests of the Union, the OLAF shall cooperate, as appropriate, with the European Union Agency for Criminal Justice Cooperation (EUROJUST) and with the European Union Agency for Law Enforcement Cooperation (EUROPOL). The Office shall agree with EUROJUST and EUROPOL on administrative arrangements to facilitate the cooperation. Such working arrangements may involve exchanging operational, strategic, or technical information, including personal data, classified information, and progress reports. The Reg.Am. makes connections to EPPO. This connection establishes new tasks for OLAF, primarily helping the EPPO's criminal investigations. The Office shall submit a report to the EPPO without undue delay on any criminal conduct in which the EPPO could exercise its competence.

Further tasks of the OLAF following its mandate to support or complement the EPPO's activity include

1. providing information, analyses (including forensic analyses), expertise, and operational support;
2. facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union;
3. conducting administrative investigations.

These changes in OLAF activity serve the proper fulfillment of the protection of the financial interests of the EU and address a new phenomenon: the networking of EU agencies. The Commission Special Report on Future of EU agencies notes that the potential for more flexibility and cooperation in 2021 emphasizes that EU agencies have a network function to share expertise and collaborate with national, European, and international partners. However, agencies have not yet explored the possibilities for achieving synergies and economies of scale, where they have similar activities. Moreover, the agencies depend on the necessary support from the Member States.

Further, some agencies operate in policy areas with a strong international dimension. Even so, they sometimes lack support from the Commission to share expertise with non-EU partners and more flexibility. To this flexible functioning belongs the harmonization of administrative and criminal procedural rules.[5]

3. Criminal investigation and the protection of the financial interests of the EU

In the classical view of criminal procedure, truth-seeking is the waiting room of criminal justice. Without finding the truth, it is not possible to decide on criminal responsibility. It is no accident that the search for truth is the primary function of the criminal process across diverse legal traditions. However, the criminal process of finding the naked truth is not complete. While searching for truth is a broadly accepted goal in the criminal process, no system seeks the truth at all costs. On occasion, the search for truth must yield to various aspects.

First, consider the characteristics of uncovering the facts of a criminal case (Tatbestand).

a) The general view is that the search for truth is retrospective. Thus, criminal authorities try to investigate the evolution of a criminal event that is complete. The methodology of such an investigation is to set up versions. In this context, performance is not unambiguous evidence to answer the whos and whys. Finding the correct version sometimes takes time. The duration can influence the uncovering of the facts of crimes.
b) The criminal authorities should use investigation tools defined in criminal procedural laws and use these tools only in the ways the laws prescribe. If the rules breach these regulations, it can have severe consequences for the criminal case and responsibility.
c) The most universally accepted principle of truth-finding protects individual rights like dignity, privacy, and liberty. Many procedural rights developed in the process—the right to counsel, to an impartial adjudicator, to confront adverse witnesses, to receive notice of changes—are generally consistent with an emphasis on accuracy.

These characteristics regard the basis of uncovering the truth in criminal procedure and the limits of truth-seeking. Likewise, regarding performance, it is not unambiguous evidence to answer the questions of whos and whys. Finding the correct version sometimes takes time. The duration can influence the uncovering of the facts of crimes. If the performance is terrible, the investigation runs incorrectly. The

5 European Court of Auditors, 2020, p. 45.

measures taken will be vain, and mistaken concepts of committing crimes can lead to the wrong verdict.

Regarding the use of the tools of evidence, authorities often do not use the devices correctly or breach these rules. For example, the interrogator uses an incompetent interrogation technic; the interrogation protocol is incorrect. No wonder guarantees, like the right to avoid self-incrimination, double jeopardy, and the exclusion of unlawfully obtained evidence, may hurdle the search for truth. Nevertheless, under the influence of human rights ideals, countries worldwide have come closer together in their willingness to adopt such protections and limit the search for truth when necessary to ensure fairness.

Before finding the truth, there are further barriers that stem from the organizational characteristics of criminal justice. The organization of criminal justice everywhere in the world is a publicly financed institution where the operational costs available are inadequate to uncover and judge all crimes. Such a lack has two-fold consequences. First, criminal justice (police, prosecution services, courts) selects the cases per their significance. Thus, the criminal justice may give up uncovering the facts of crimes. Second, they try to find new ways to judge crimes. However, the rapid changes in the permanent staff of the police limit the chances of finding the truth, as the skilled 'old foxes' with knowledge and experience interrupt the smooth knowledge transfer. Self-education in truth-seeking can result in a high proportion of faulty products. The other characteristic of criminal justice organizations is work overload in the permanent pressure to produce more output, which can negatively influence accurate and efficient truth-finding.

Truth-finding has systemic limits. At least, in Hungary, the criminal judge has no obligation to uncover the accused person's guilt if there is no proposal from the prosecution side. Shortcomings in higher education and institutional training limit the chances of truth-finding. An excellent example from the Hungarian experiences is that, in the police higher education, the protocol making or interrogation techniques are in the curricula of the police academy but do not get enough importance. The result is devastating. Judges of the first-instance criminal courts do not study how to reason on the final judgment, which is why the reasoning and evidence are usually incomplete. Notably, in many cases, false and incomplete confessions or expert opinions cannot be filtered by judges successfully. Finally, plea bargaining, which in adversarial systems has been practiced for decades and accepted by courts since at least the 1970s, has spread rapidly since the 1990s in inquisitorial systems, overcoming longstanding resistance 'to trading' with justice.

In each MS, the goal of the criminal investigation is to find the truth. Nevertheless, truth-finding is realized in different languages under different rules and is not interchangeable among MSs. After establishing EPPO, the situation has become much more manageable in the case of budgetary crimes. However, these crimes represent only a tiny part of the content of criminal codes. This remote part is what Jung called sectoral integration.

The effect of the EPPO is that the information, the function of criminal investigation, and the accusation of all budgetary crimes is in the hand of the European public prosecutor, independent of which MS is the perpetrator of these crimes. The place of the commission of most budgetary crimes is a single MS, where the competencies, criminal procedural rules, and the language of the procedure raise no problems.

The EPPO has a network (EUROJUST, EUROPOL, OLAF, EJN [European Judicial Network] local authorities) from which it can obtain a wide range of information flow for its work and execute European investigation orders concerning budgetary crimes in its competence. It means that all data for its practical work and accusation are open, supposing that all the evidence meets the national Code of Criminal Procedure, especially the procedural guarantees. The situation is different from those mentioned above when the investigations concern two or more MSs. In such a situation, the EPPO must solve several problems.

1. First is the determination of the jurisdiction of which MS the EPP charges against the perpetrator of budgetary crimes. This decision will determine and fix the crucial rules of evidence, the court procedures, and procedural guarantees, and exclude the future problems of 'ne bis in idem.'
2. Second, the EPP must make a thorough examination of the legal elements of the criminal act (Tatbestand, büntető tényállás) that have a central role in evidence taking.
3. The EPP must determine the investigative tasks in the MS of jurisdiction and other MS(s) where the perpetrator(s) committed budgetary crimes under investigation.
4. The investigation may include cooperation with local and other MS authorities, executing European investigation order, initiation of the release European arrest warrant, initiation of arrest at the court with jurisdiction and
5. cooperate with the EPPO network (EUROJUST, EUROPOL, EJN, OLAF).

It is worthy of consideration to introduce the European testimony, which was part of the Corpus Juris 1997 (CJ). Article 32 of CJ notes that an affidavit, direct or presented at the trial via an audiovisual link, is admissible if the witness is in another MS or recorded by the EPP in the form of a 'European deposition.' If MSs would generally accept the European testimony, it could help eliminate the differences between national procedural regulations.

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Chapter 15

Children's Rights and the Criminal Protection of Minors

Erika VÁRADI-CSEMA

ABSTRACT

The development of the criminal law protection of minors relates to the rise of children's rights. Even today, this area of law exerts one of the most powerful effects on juvenile criminal justice. It also serves as a filter through which the quality of the regulations regarding minor offenders and victims can be measured. Therefore, the study examines the topic of children's rights, primarily its evaluative aspect. It discusses the facts related to the suppressing of attacks against minors and the rules for juvenile offenders in the complex review of the criminal law rules affecting minors. Common historical influences play an important role in the development of the criminal policy of Central and East-Central European countries. Belonging to the Soviet era and the socialist state system provided a common ideological framework for the attitude toward young offenders and for defining the framework of, for example, parental rights and educational tools. The political change in each country caused a serious social cataclysm, which sometimes induced the development of a more marked penal policy and the need for more decisive action against juvenile offenders. Meanwhile, international documents played an important role in the spread of new alternative or community sanctions. The accession to the Council of Europe and later to the EU brought the noted countries back into a common framework.

The study focuses on the CEE-countries, and aims to provide a general overview, from a historical perspective, of the development of children's rights and criminal justice.

KEYWORDS

children's rights, criminal policy, juvenile justice, criminal policy tools, CEE countries

'Momma has been in the habit of whipping me almost every day.'
(Mary Ellen Wilson[1])

On April 11, 1874, the New York Times[2] reported on the criminal proceedings that were going on before Judge Abraham R. Lawrence in the Supreme Court Chambers.

At the center of the case was eight-year-old Mary Ellen Wilson, who suffered cruel treatment from the two defendants, Francis and Mary Connolly. The accused woman

1 New York Society for the Prevention of Cruelty to Children, 2022.
2 New York Times, 1874.

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with her previous husband, Thomas McCormack, adopted the child, an orphan at a young age.[3]

On April 21, 1874, the sentence was issued. The judge found Mary Connolly guilty of felonious assault and was sentenced to one year of hard labor in the penitentiary.

1. Children's rights in the focus

The history of the development of children's rights closely relates to the development of the protection of children by juvenile justice. The role of criminal law in enforcing the rights of minors is two-fold: it wards against the most serious attacks that harm or threaten the interests of children, with the coercive force resulting from the exercise of state criminal power while considering the biological and psychological characteristics of minors, their special social status, and their vulnerable situation, which result in special vulnerability. However, considering the level of their intellectual, psychological, and mental maturity, rules for juvenile offenders are partially different from those of adults, and, when applied, the focus is typically on individual prevention. Education is the means to achieve the latter.

Regarding both approaches, the enforcement of children's rights can be a common measure of the quality of regulation. In the 21st century, children's rights are ever-expanding and growing in depth; thus, their enforcement through national criminal law, criminal procedure law, or penal law regulations is a priority.

1.1. The first steps

Mary Ellen's story is a good example of how the protection of children,[4] especially against parenting methods, did not initially receive special attention in modern societies. Comprehensive legal protection was lacking, and a general concept of children's rights was not developed. However, by the end of the 1800s, several important rules were already in place in the USA.

The excessive physical disciplining of children was prohibited. However, in New York, another law focused only on children receiving state welfare that gave the right to remove children neglected by their caregivers. The interpretation of such laws was challenging in the practice. Hence, New York City authorities were reluctant to intervene, although they had information about the situation of Mary Ellen.

For many reasons, such as high child mortality, the acceptance of corporal education tools, the prevalence of child exploitation given the industrial revolution, and serious social problems (e.g., poor public safety, poverty, and civil war), society did not show special sensitivity to children's vulnerability. Thus, although the people living in the girl's previous residence knew about the abuse, no substantive intervention was made.

3 Markel, 2009.
4 See Watkins, 1990, pp. 500–503.

Criminal proceedings were rarely conducted, especially against the parents. Their right to raise their children was universally recognized, and among the used methods, punishment was widely allowed. According to the opinion of the court:

> 'The right of parents to chastise their refractory and disobedient children, is so necessary to the government of families and to the good order of society, that no moralist or law-giver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretences. But at the same time that the law has created and preserved this right, in its regard for the safety of the child it has prescribed bounds beyond which it shall not be carried.'

On this theoretical ground, the court in the case of 'Johnson and Wife vs. The State'[5] stated, that '(I)f a parent in chastising his child exceed the bounds of moderation, and inflict cruel and merciless punishment, he is a trespasser and liable to be punished by indictment.' It means that the extent (not the usage) of punishment was classified as an offense; that is, whether it exceeds 'the bounds of moderation and reason, and was barbarous in the extreme.'

Abusive behavior and cruel teaching methods of adults toward children were tolerated in society. However, there were legal ramifications when it 'was grossly unreasonable in relation to the offense, when the parents inflicted cruel and merciless punishment, or when the punishment permanently injured the child.'[6] In some egregious cases, criminal charges were brought.

Millions of children in the USA lived in a situation similar to Mary Ellen's during this era as well. The little girl's story changed when they moved into New York's (NY) 'Hell's Kitchen' district. One new, chronically ill, and homebound tenant neighbor informed her Methodist mission worker that she often heard the cries of a child across the hall. When Etta Angell Wheeler met the little girl, she found that she was neglected and abused. She decided to help the child, but despite her efforts, she did not get any meaningful legal redress or protection for Mary Ellen. The terrible situation of children is indicated by the fact that in 1866 there was already a law protecting animals in the state of New York, and in April of this year the American Society for the Prevention of Cruelty to Animals (ASPCA) was founded. Early examples[7] of action against attacks on animals are known, though the property value and economic usefulness of farm animals (such as horses) played a major role in these cases (e.g., in 1788, in the county of Berks, the trial court convicted the defendant for a 'maliciously, wilfully, and wickedly killing a horse').[8] Cruelty to male children, if of a sexual nature, was already punishable as sodomy and bestiality: '*if any man shall*

5 Johnson v. State, 21 Tenn. 283, 2 Hum. 283, 1840.
6 Mason, 1972, p. 304.
7 1846 Vt. Laws 34.
8 Republica v. Teischer, 1 Dall. 335, 1788.

commit the crime against nature with a man or male child, or any man or woman shall have carnal copulation with a beast.'[9] However, this was possibly not in the interest of the child but because of a violation of the general moral perception. The 1867 New York Anti-Cruelty Law[10] provided extensive protection to 'any living creature' regarding acts classified as a misdemeanor. This general legal protection was lacking in the case of children, even if the abused Mary Ellen was as troubled and intimidated as a small animal.

Given this approach and in the absence of other official possibilities, Etta Angell Wheeler turned to Henry Bergh, the president of the animal welfare organization, informing him about Mary Ellen's situation. Although Bergh participated in the proceedings as a citizen, he had greater opportunities as the president of the organization. Having gained the support of the media, the case eventually made it to the front pages of the newspapers. During the proceedings, the fact of cruel treatment and neglect and the omissions and bad decisions of the authorities was established. Apparently, the NY Department of Public Charities and Correction's decision on the placement of the child was illegal, as it was based only on the statement of the then-husband, Thomas McDormick, about being the child's biological father, without proper documentation of the relationship or adequate supervision of the child.

As a result of the lawsuit, which became the focus of interest in the newspapers,[11] the attitude of the public changed, and, in 1874, the New York Society for the Prevention of Cruelty to Children[12] was founded as the world's first child protective agency. Next to Mr. Bergh, the co-founders were Elbridge Thomas Gerry, who, as the legal counsel of ASPCA, helped in the case of Mary Ellen. The society, financed by the Quaker philanthropist, John D. Wright, aimed to develop children's rights and give protection to high-risk and abused children, making efforts to prevent child abuse and neglect with education or with the strengthening of parental skills.

Child rescue movements based on the doctrine of 'parens patriae' played a prominent role in the USA in laying the foundation for the development of juvenile criminal justice. Thanks to these movements, after the practice of houses of refuge and of the reform schools, the first juvenile court was created in Chicago, in 1899.

On the other hand, in Europe, the acceptance of the tenets of the "mediation school" – particularly associated with the name of Franz von Liszt – creates the principle basis for special criminal law reactions against to youth offenders.

The 'parens patriae' theory had a very strong influence on the first criminal regulations against children. The Juvenile Court Act made it possible for the court to act not only in the cases of delinquent, but also dependent and neglected children, or if the child demonstrated antisocial behavior[13].

9 1821 Me. Laws 5.
10 Favre and Tsang, 1997.
11 See Shelman and Lazoritz, 2005.
12 New York Society for the Prevention of Cruelty to Children, 2022.
13 Lévay, 2009, p. 180.

1.2. Changing social vulnerability, strengthening children's rights

Social sensitivity toward the situation of children has undergone a long development in modern history,[14] from taking action against the most flagrant, cruel treatment of children to paying attention to psychological disadvantages.

In the beginning, society's general perception allowed such behavior against children, which nowadays qualifies as physical or sexual abuse. Corporal punishment was a generally accepted means of education, which was appropriate for parents and a wide range of adults. Sexual activity during childhood was not considered harmful; in some cultures (e.g., ancient Rome or Greece), sexually immature or barely mature young boys were taught intellectually and sexually and their teachers were the respected, knowledgeable men of the community.

Finally, with the change in public thinking, society detected and punished harsher forms of abuse and serious cases of child beating. For example, in 1655, in Massachusetts, a master abused his 12-year-old apprentice, who died. In this special case, the offender was found guilty of maltreatment.[15]

Physical abuse was constantly at the center of public attention, and the state has developed various solutions to benefit child victims. However, they did not guarantee the actual protection of children. In the first part of the 19th century, in the cases of parents' maltreatment, neglect, or harsh abuse, young victims were apprenticed to a master, who had the right to use corporal (physical) punishments against apprentices. The other solution was that these children were placed in an almshouse or poorhouse, which was also a gathering place for poor and delinquent children. It was a common practice for the authorities to place street children under the age of 15 in these institutions if they begged and were vagrants or convicted of a crime or other disturbances.[16] The change in society's sensibilities accelerated significantly in the 20th century.

As a first step, society recognized the importance of physical abuse and neglect and confronted forms of emotional abuse and its consequences. It affected criminal law regulations (e.g., prohibiting mental neglect) and the functioning of institutional systems. The importance and harmful effects of rejection, scapegoating, and more serious forms of emotional deprivation were stated, which also affected the everyday practice of the institutions. Society was also constantly developing, slowly understanding the extremely vulnerable situation of sexually abused children and the serious consequences of sexual abuse.

In the last stage of development among professionals and public opinion, the perception that loving care and the resulting emotional security are essential for the development of a healthy personality became increasingly common, ensuring that it is primarily, though not exclusively, the responsibility of parents.

14 Csemáné Váradi, 2007, pp. 210–211.
15 Watkins, 1990, p. 500.
16 Watkins, 1995, p. 500.

1.3. The history of the declaration of children's rights

In 1924, the General Assembly of the League of Nations adopted a declaration for more effective protection of the situation of the child.[17] This step was initiated by the 'International Union for the Help of Children.' The Geneva Declaration of the Rights of the Child laid down five important principles. Although the declaration was not based on government responsibility, as is clear from the basic idea of 'it calls on humanity to do everything in the interests of the child,' it is a serious step in the history of children's rights. Among the principles, the last two deserve to be highlighted to illustrate the specific spirit of the declaration. Principle 4 notes that the child must be put in a position to earn a living and be protected against all exploitation. Principle 5 draws attention to the fact that the child must be brought up with the awareness that they will put their best abilities at the service of their fellow human beings.

The next significant document was created at the 1959 UN General Assembly. The Declaration on the Rights of the Child[18] represents a different understanding, and its wording shows a more decisive action. Proponents of the document call on governments to recognize and ensure children's rights through appropriate legislative measures. The number of principles has also been further expanded. Principle 7 establishes the child's right to education to prepare them for their future career. Principle 9 prohibits child labor if the child cannot be employed before reaching the appropriate minimum age. Principle 10 notes that the States Parties must raise the child with the awareness of putting their best abilities at the service of their fellow men. Further, education must occur in the spirit of friendship and peace between people.

The rights of the child are defined, with a general argument, in several documents on human rights. Thus, certain aspects of the child's situation are affected by the International Covenant on Civil and Political Rights[19] (8th act of 1976) or the International Covenant on Economic, Social, and Cultural Rights[20] (9th act of 1976). However, the documents contain provisions governing children and declaring the additional rights of children in this area, such as the 1949 Geneva Convention on the Protection of the Civilian Persons and Population in Time of War,[21] which considers the need for the

17 League of Nations, 1924.

18 United Nation General Assembly, 1959. Until May 7 2022 only USA and Somalia didn't ratificate the declaration.

19 The Covenant was adopted by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976. By May of 2012, the Covenant had been ratified by 167 states.

20 The Covenant entered into force in 1976, and, by May 2012, it had been ratified by 160 countries. The International Covenant on Economic, Social, and Cultural Rights (1966), together with the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), make up the International Bill of Human Rights. In accordance with the Universal Declaration, the Covenants recognize that '... the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'.

21 Protection of Civilian Persons and Populations in Time of War.

special protection of children, or humanitarian law during its further development. Two protocols were adopted in 1977 to supplement the Geneva Conventions, requiring increased protection for children in the case of international and non-international armed conflicts.

1.4. The Rights of the Child—The New York Convention

The birth of the New York Convention on the 'Rights of the Child'[22] (CRC) can be considered the most significant result. According to the Convention, every child has the right to

- equality regardless of race, color, gender, religion, or origin (Article 2 – without discrimination);
- special protection for the sake of healthy mental, physical and spiritual development (Article 4 – protection of rights);
- grow up in a family and not be separated from his parents. If the child so desires, he has the right to maintain contact with both parents (Article 5 – parental guidance);
- proper nutrition, health care, and have a roof over your head;
- special care, if disabled;
- love, understanding, and protection;
- free education, play, and rest;
- be among the first to receive help in the event of a disaster;
- be protected against neglect, cruelty, and exploitation;
- without discrimination, in love, be brought up in the spirit of peace and tolerance.

The Central and East-Central European (CEE) countries are parties to the Convention, the related reports[23] of which are a continuous control for the enforcement of children's rights within criminal law regulations. Thus, several articles have special importance in connection with criminal law in every CEE country[24].

The Convention defines a child as someone between the age group 0–18 and uses it with general validity. Article 1 CRC (definition of the child): 'Everyone under the age of 18 has all the rights in the Convention.' Meanwhile, a different terminology appears in the criminological and criminal law, and in the juvenile criminal law literature of the region. From the victim's side, the concept of a minor is decisive, including children under the age of 18. The concept of a child typically means a young person under the age of 14, while a juvenile typically refers to the 14–18 age group. Other age limits also play a role in each country, primarily depending on national regulations (e.g., 12, 16 years).

22 United Nation General Assembly, 1959.
23 Committee on the Rights of the Child accorting to the Article 43 of CRC.
24 CRC was ratificated at 1990 by Romania, at 1991 by Poland and Hungary, at 1992 by Slovenia, Croatia, at 1993 by Slovakia and Czech Republic, at 2001 by Serbia.

In certain countries, beyond age, intellectual and mental maturity can play a role as a condition for criminal liability.

2. Children's rights and criminal law: International documents as a common framework

The connection between criminal law and children's rights is two-fold: protection against attacks on children requires special measures, as does their appearance as perpetrators. The connection between the two phenomena is close; thus, the national regulations affect the issue with a correspondingly different weight. The quality and effectiveness of the intervention are important in both cases: children who experience child abuse and neglect, given ineffective child protection, criminal law solutions, and lack of protection are approximately nine times more likely to become involved in criminal activity[25].

2.1. Child and juvenile victims in the system of documents prohibiting specific forms of crime

Several forms of crime are known, the victims of which are primarily, or in most cases, children and juveniles. Countless international documents[26] have been created to prevent such acts and the victimization of young people. Thus, the Stockholm Declaration and Action Plan, the Yokohama Resolution, the Council of Europe Recommendation No. 16/2001 on the protection against sexual exploitation of children, and the Cybercrime Convention[27] are related to the sexual exploitation of children.

Children and young people as victims of domestic violence are protected, for example, by the recommendations of the Committee of Ministers of the Council of Europe on the protection of children against ill-treatment[28], domestic violence[29], or witness intimidation, and on their right to defense[30].

Other documents are noteworthy, despite their low importance in the CEE countries. Thus, the 1999 convention of the International Labor Organization prohibits child labor; all forms of slavery or practices similar to it, such as the sale, trading, and debt settlement of children or forced labor; using the child to perform illegal activities, such as prostitution or making pornographic products; and types of work that justify this by their nature or circumstances, such as work that endanger the health, safety, and moral development of the child (e.g., their use in mines and gold panning).

25 See Lévay, 2016; Lévay, 2019.
26 Lévay, 1989.
27 ETS 185/2001.
28 R(79)17.
29 R(85)4.
30 R(97)13.

However, the children of some CEE countries are exposed to increased danger, such as child trafficking and forced prostitution. Among the many international resolutions and guidelines on human trafficking, the Recommendation of the Ministers of the Council of Europe regarding child and young victims of sexual abuse, pornography, prostitution, and human trafficking should be highlighted: the supervision of marriage agencies and organizations dealing with adoptions is necessary to prevent child prostitution or other sexual exploitation of children and young people either abroad or domestically; the authorities, especially the police, must closely monitor the departure and arrival of children, especially if they are not with their parents or guardians; and child and youth victims of human trafficking must be given increased protection and supported by all means.

Meanwhile, the noted international recommendation on the protection of children against sexual abuse is also an important document in this context. It advocates for the widest possible use of the flow of information and clarification, mainly to draw attention to dangerous situations that can lead to the development of organized crime against children, especially girls; increased awareness of child trafficking and the sexual exploitation of children by all bodies that can do something about it (e.g., employees of foreign representation bodies, the media, non-governmental organizations); attracting the attention of the media and highlighting its role in the prevention of child trafficking; and addressing the topic of child trafficking and the sexual exploitation of children as part of school studies, as such information may help protect children in the outside world as well.

2.2. Juvenile justice system

The common characteristics of the international source materials on the subject[31] are that, among the options that can be taken in response to a crime, they argue for the primacy of alternative sanctions, diversion, and reparation, and see any form of deprivation of liberty as a last resort. Among the UN documents on child and juvenile offenders, we can single out the Beijing Rules,[32] the New York Convention,[33] and the Riyadh Guidelines,[34] given their importance. They favor the priority of alternative sanctions, community punishments, and diversion, referring to custodial sanctions and other forms of deprivation of liberty (e.g., pre-trial detention) only exceptionally, in specific cases, and in connection with an application under strict conditions.

The documents of the Council of Europe[35] reflect a similar spirit when, for example, regarding the definition of a comprehensive social response to juvenile crime, they note that the juvenile criminal justice system is only part of the fight against youth crime. Accordingly, when criminal justice is used as a tool, the goal is reintegration,

31 Csemáné Váradi, 2008, pp. 11–21; Csemáné Váradi, 2010, pp. 152–163.
32 United Nation General Assembly, 1985.
33 United Nations General Assembly, 1989.
34 United Nation General Assembly, 1990a.
35 Council of Europe, Committee of Ministers, 1988.

the method of which is education. Other documents [e.g., Council of Europe R(88)6[36], Rec(2000)20][37] also touch on this issue. Although ET Recommendation No. R20(2003) [38] on action against juvenile delinquency and the role of the criminal justice system refers more strongly to the importance of quick, early, and consistent response, it clearly states that 'the juvenile justice system should be understood as a component of a broader, community-based strategy that takes into account the wider family, school, residential and peer group contexts within which crime occurs.' [39]

That is, the intervention must be such that it provides the opportunity for the victims and affected community to participate in this process and even creates an opportunity to restore the disturbed social peace and balance regarding the affected community. Accordingly, classic criminal law intervention should target serious crimes, violent crimes, drug- and alcohol-related crimes, and juvenile offenders who regularly commit crimes. However, even in this context, the document emphatically states that 'the member states must develop a wider spectrum of new and more effective (but in accordance with the requirement of proportionality) alternative sanctions and measures for serious, violent, and repeated juvenile delinquency... involve the parents of the offender ... and, where possible and appropriate, provide for mediation, restitution, and restitution to the victim.' [40] From the cited provisions of the document, a special approach to custodial sanctions and other forms of deprivation of liberty is justified; special attention and clearly and precisely defined provisions are required during their application. Most of the documents provide the rules of implementation tangentially or in more detail.

The specific execution method of deprivation of liberty is, therefore, decisive; this issue is affected by both the Tokyo[41] and Havana Rules.[42] According to the provisions designed to protect juveniles deprived of their freedom, to facilitate their release and integration into society, institutions must be established that are most similar to the 'outside world,' where security measures can be reduced to the minimum level. These decentralized, smaller institutes that facilitate contact between the juvenile and their family and are integrated into the social, economic, and cultural environment of the community may help reach the goals.

36 Ibid.
37 Council of Europe, Committee of Ministers, 2000.
38 Council of Europe, Committee of Ministers, 2003.
39 Council of Europe, Committee of Ministers, 2003, II 2: The juvenile justice system should be seen as one component in a broader, community-based strategy for preventing juvenile delinquency, that takes account of the wider family, school, neighbourhood and peer group context within which offending occurs.
40 Council of Europe, Committee of Ministers, 2003, III 8: To address serious, violent, and persistent juvenile offending, member states should develop a broader spectrum of innovative and more effective (but still proportional) community sanctions and measures. They should directly address offending behaviour and the needs of the offender. They should also involve the offender's parents or other legal guardian (unless it is considered counter-productive), and, where possible and appropriate, deliver mediation, restoration, and reparation to the victim.
41 United Nations Standard Minimum Rules for Non-custodial Measures.
42 United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The Council of Europe recommendation,[43] examining new ways of addressing juvenile crime and the role of the criminal justice system, contains guidelines for the criminal justice system for juveniles and the conditions and practice of its application but not for the specific implementation of individual legal consequences (punishments, measures). Meanwhile, in the field of treating serious, violent, and repeated juvenile delinquency, the document addresses the need for intervention on criminological factors that cause or directly contribute to delinquency and targeting the risk of repeated delinquency (e.g., antisocial attitudes, drug consumption, low-level of knowledge, school failure, and parental neglect).

The reintegration of the young person after release can be made possible by stronger family involvement in the process. Family decision-making group conferences, which are still held in penitentiary institutions, have good experience in this area. At the European Union (EU) level, the opinions that consider it necessary to expand the scope of alternative conflict management options and apply new models, with particular attention to certain violations and groups of perpetrators, have also strengthened (it was embodied in Directive 2012/29/EU, addressing the establishment of minimum standards for the rights, support, and protection of victims of crime and the replacement of Framework Decision 2001/220/IB). In the proposal of the Commission acting during the preparation of the Directive[44], it is noted in detail that 'restorative justice services encompass a range of services... include for example, victim-offender mediation, family group conferences and adjudication circles'[45].

The 'Greifswald Rules'[46] contain special provisions for juvenile offenders to strengthen and support their rights and safety, subject to social sanctions and measures or any form of restriction of freedom, and promote their physical, mental, and social well-being. The recommendation applies to juveniles (i.e., persons under the age of 18) and young adults (i.e., persons between the ages of 18 and 21), regardless of whether they have committed a crime or show 'only' antisocial behavior within the scope of civil law. According to III, which deals with the execution of deprivation of liberty, certain provisions of Part 1 apply to the execution of (custodial) punishments for juveniles and other forms of deprivation of liberty, be it in the field of child protection or health care, regardless of their final or temporary nature (e.g., pre-trial detention or other temporary deprivation of liberty measures).

The execution of the sentence reintegrates juvenile prisoners into society, which requires a diverse range of measures. As juveniles deprived of their liberty are particularly vulnerable, authorities must ensure the protection of their physical and mental integrity and well-being. Mediation or other restorative measures should be encouraged at all levels of addressing juvenile offenders. Although it approaches the

43 Council of Europe. Recommendation Rec(2003)20 of the Committee of Ministers to Member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice.
44 Article 11.
45 European Commission, 2011.
46 Council of Europe, Committee of Ministers, 2008.

issue from a different angle, this direction is strengthened by the EU's new children's rights strategy, 'Child-friendly justice.'

Since the entry into force of the Convention on the Rights of the Child, it has been declared in countless forms: the fact that the protection of the interests of the child is declared at the legal level does not necessarily mean that a state completely fulfills its obligations in the document. It will depend on the specific implementation of the given legal institution. This notion is supported by the jurisprudence of the European Court of Human Rights. In 1999, in cases brought against the United Kingdom, it was expected that in the proceedings against a child offender 'full consideration should be given to the child's age, maturity, and mental and emotional development, and [the child] should be encouraged to understand the proceedings and actually participate in it.' [47] In this case, while the appropriate training of professionals can yield a positive shift, the similarly marked critical expectations regarding assigned guardianship institutions require other responses.

The previous document (Toward an EU Strategy on the Rights of the Child)[48] aimed to develop a comprehensive strategy to promote and ensure the enforcement of children's rights in all internal and external actions of the European Union and support Member States' efforts in this area. Although the Council of Europe did not have a children's rights agenda until 2006,[49] there were separate initiatives. Examples include the Warsaw summit, where an action plan was adopted in 2005, or the 28th conference of European Ministers of Justice in Lanzarote in 2007.

Finally, the 'Stockholm Strategy'[50] of the Council of Europe was announced between the years 2009 and 2011. The document notes that, similar to all other areas, the general principles of the Convention on the Rights of the Child are applicable in the field of justice regarding appropriate treatment. They ensure the protection of children's rights. The best interest of children is a primary aspect that must influence any legislative, administrative, or judicial decision.[51] It is an important requirement to involve children and consider their opinions when making decisions that affect them. Thus, the Council of Europe must especially promote the implementation of child-friendly national justice systems by developing European guidelines.

One of the most recent documents on the topic at the EU level was the 2011–2014 Strategy of the EU, Child-friendly justice. The first document in connection with this subject was the 'Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice'[52], adopted at 17 November 2010. The name highlights the importance of enforcing children's rights in the field of justice. Accordingly, everything from legal representation to participation, protection, mediation, or the special training of professionals addressing children (judges, prosecutors) must be

47 Hammarberg, 2013, p. 15.
48 European Commission, 2006.
49 Daneghian-Bossler, 2013, p. 209.
50 Council of Europe, 2009.
51 Herczog, 2013, pp. 201–204.
52 Council of Europe, 2011.

investigated. Hence, how does the child's best interest appear in the regulations and in everyday operations?

Increasingly, the EU strategy also shows decisively the need that is expressed in the real enforcement of children's rights within the justice system. Thus, training[53] is particularly vital, whether for members of the justice system or other professionals. Beyond the fact that it creates an opportunity to get to know the most important questions and techniques of child psychology and communication with children, given the exchange of experiences and different professional approaches, there is an opportunity for joint thinking and case analysis that is multidisciplinary in terms of methodology and interdisciplinary in terms of results.

One of the first strategies, the Council of Europe's Children's Rights Strategy,[54] was adopted in February 2012 to assist in the interpretation of international standards at the member state level while promoting a range of child-friendly services and systems. Further, the Strategy designated the elimination of all forms of violence against children, the protection of the rights of children in vulnerable situations, and the promotion of their participation as additional tasks.

3. Historical roots, common theoretical background

Looking back at the development of criminal justice for juveniles, in contrast to the history of criminal law, it does not have a very long history. It appeared in most European countries only in the 20th century and can be dated to the beginning of the 20s. There are several reasons for this relatively short history. First, the approach that defined youth as an independent group with specific social problems had to gain ground in public thinking. However, it had to be preceded by the development of other social sciences and a shift in research in that direction, primarily sociology, educational sciences, pedagogy, psychology, and especially criminology.

How great an impact they had (and still have) on legal and political thinking can be easily traced in the development of criminal legislation regarding juveniles. The turning point occurred because the legal policy began to treat the affected juveniles as persons at risk from an educational perspective, with deficiencies in this respect. It possessed substantive legal and procedural legal consequences. After all, the goal of the justice system was to eliminate the juvenile's educational shortcomings, a task that is challenging to limit in advance regarding its duration. Hence, the use of various measures that were relatively indefinite in time, primarily involving deprivation of liberty, could become accepted, regardless of whether they were conducted in a correctional institution or penitentiary. The relatively indefinite nature was shown in the fact that their duration depended on the success of the education. We have

53 Tuite, 2013, p. 208.
54 Daneghian-Bossler, 2013, pp. 210–213.

encountered this situation in the regulations of several countries, such as Germany; in fact, it existed in the Scandinavian states and England (with borstals) until the beginning of the 80s. The inclusion of the juvenile judge as a quasi 'substitute father' represented the procedural aspect of everything, especially in the legal systems of welfare states.

From the beginning of the 80s, a very significant change took place in legal policy, the basis of which was created by the results of recent criminological research. Accordingly, juvenile delinquency was characterized by its episodic nature and the dominance of petty crimes, and, usually, there were no deficiencies in education (i.e., in this context, the necessity of state intervention could also be questioned). This notion was supported by the findings of the latency studies concerning juveniles. According to the basic premise[55] of the ubiquity of juvenile crime, among minor crimes against property and wealth, juvenile delinquency can be considered a normal phenomenon because, regardless of the juvenile's upbringing, family, social, and social situation, and the economic and cultural characteristics of the given country, it is a uniformly occurring phenomenon everywhere. If we consider the findings of follow-up investigations, premature criminal law intervention, especially involving deprivation of liberty, hinders or prevents the socialization of juveniles rather than helping it. The follow-up studies[56] made it obvious that the norm-violating lifestyle becomes a relatively well-defined life stage, which usually ends with entry into adulthood, even following the life course of multiple and intensive offenders. That is, it becomes just an episode in the young person's life and socialization.

Principles of juvenile criminal justice, such as subsidiarity or the ultima ratio nature of prison sentences, were based on these items. The low weight of the acts, their episodic nature, their degree of danger to society, and the apparent redundancy of intervention directly induced the establishment of the legal institution of diversion from the traditional criminal law path. Diversion makes it possible to avoid or reduce state intervention while mobilizing the educational power of the juvenile's microenvironment and involving other areas of law (e.g., child protection, labor policy, social policy, and local community policy) in prevention, thereby promoting the expansion of their toolkit.

Ultimately, given these processes and basic principles, a differentiated and multilevel system of legal consequences regarding the strength of the intervention was created in the criminal law of juveniles in Western Europe, within which priority is always given to measures involving smaller interventions. As per empirical studies conducted throughout Europe on sanctions, the view that the various sanctions are interchangeable, replaceable, and represent an alternative for the law enforcer has become generally accepted.[57]

55 Kaiser, 1996, p. 392.
56 See e. g. Kerner, 1993.
57 Albrecht, Dünkel and Spieß, 1981, pp. 310–326.

Both theory (either in the field of criminology or sociology of law) and practical research support and recognize the advantages of individual legal consequences in the field of individual prevention over other legal consequences, such as the diversion of formal convictions,[58] certain outpatient measures belonging to youth protection (including the guilty-victim agreement and public service work)[59] relative to confinement or similar sanctions,[60] and probation relative to a suspended prison sentence.[61] The priority of legal consequences that do not involve intervention is based on the increased pressure the juvenile offender feels given the expectations of him. In the relationship between the norm-breaker and society, the young person receives a 'moral credit' from society as a one-sided gesture, anticipating his later positive behavior, which obliges him to act as a norm-follower.

At the level of criminology theory, the raison d'être of diversion was based on the premise of the 'labeling approach,' which proves the stigmatizing nature of the effects on youth during the formal criminal justice system (procedure, punishment, and execution). This effect can be eliminated by diversion. Criminology theory is essential in the creation of the offender-victim agreement as a possible diversionary tool. In the 1950s, it became obvious that the perpetrators accept the fact of committing a crime with various neutralization techniques, and the victim and the effect of their act on the victim are completely sidelined.

Meanwhile, if, within the framework of the mediation procedure, they are forced to face the victim as a person and the damage and suffering they have caused, it is an experience they cannot turn off, even with their neutralization techniques, which entails a potential norm violation. The situation will be present as a factor influencing their decision. Moreover, the criminology theory brought with it the demand and necessity for the creation of other diversionary devices, primarily related to leisure activities. Juvenile crime is closely related to the problems and opportunities of young people regarding how they spend their free time. Therefore, if we show them how else they can spend their free time, and if we outline how to get to various opportunities offered by society and the state and where to turn, we can expand their range of possibilities. The noted measures (e.g., the obligation to participate in a social training course or some other 'experiential pedagogic' measure) serve this purpose beyond removing the young person from the official process.

Of course, the perpetrators of more serious crimes, mainly of a violent nature, require legal consequences that represent a stronger intervention. Emphasis must be placed partly on the most forceful forms of measures and partly on sanctions involving deprivation of liberty, especially considering that violent crime among juveniles is increasing throughout Europe.

58 Dünkel, 1990, p. 436.
59 Dünkel, 1990, p. 553.
60 Schumann, 1985.
61 Dünkel and Spieß, 1992, pp. 117–138.

4. Main characteristics of juvenile justice in Central and East-Central European Countries in the 2000's

In Central and East-Central Europe, the need to reform criminal law appeared primarily through the political need to comply with the principles declared by the UN and the Council of Europe. It was only made more powerful by the changes in the political-economic system that occurred at different times but, to some extent, in each country, bringing with it the necessity of reforming the criminal law of juveniles. The reform became urgent because (somewhat uniformly from the middle and end of the 1980s) juvenile delinquency reached unprecedented levels. Although the individual states uniformly recognized the inevitability of these tasks, serious differences can be found in their actual solutions.

In some countries, such as Croatia, Slovakia, the Czech Republic, Russia, or the Baltic states, the development of an independent justice system for juveniles has come to the fore. It was necessarily related to the development of procedural law structures required by the rule of law, where special educational principles important for juveniles must be considered.

Meanwhile, in Bulgaria,[62] for instance, there were reservations about the organization of juvenile justice, especially regarding the adoption of independent criminal law rules for them. Instead, they saw prevention primarily within the framework of child and youth protection. It was also a general phenomenon that, beyond the ambulatory educational measures, the different forms of diversion from the traditional route have been made. The restorative justice legal institutions construction was considered necessary and inevitable, and the various strict punishments associated with the deprivation of liberty were considered equally important, primarily regarding juvenile recidivists and perpetrators of violent crimes. The reasons are also similar in almost all the countries examined:

- It was considered one of the important tools of general prevention.
- It was also important from the perspective of reassuring the population dissatisfied with the level of juvenile crime and the efficiency and rigor of the justice system.
- Many places lacked the appropriate infrastructure for the application of ambulatory measures.
- Doubt and resentment characterized the profession (primarily, those working in the justice system) and public opinion.

The situation has induced the use of custodial sanctions almost as often as before. Even so, the high rate of juvenile crime and the seemingly intractable problem did not induce a return to the previous system of sanctions applicable to young people. A good example was Russia, where, despite the high juvenile crime rate, the proportion of

62 Margaritova, 2010.

probation and suspended prison sentences exceeded the number of prison sentences to be carried out.

Detention centers with a shock effect, such as the old German solution (detention of juveniles) or the English 'detention center,' can be found in some countries. Thus, while Estonia, for example, was experiencing its renaissance, in Croatia, a young person could be locked up in such disciplinary centers for three months.

Increasingly many countries exert efforts to reduce the length of prison sentences, which are traditionally considered long, especially for juveniles. (Thus, according to Croatian law, the upper limit of the sentence was five years, exceptionally 10 years, as in German law.) The missing infrastructure is a serious problem. There is a particularly large shortage of professionally qualified social workers and social pedagogues. The main reason for this and other problems, especially the development of youth protection at an adequate level, is the lack of money.

It would probably help to change the way of thinking of the public and authorities and even make it easier to raise funds for reforms and introduce and generalize victim-offender agreements if the judicial system's hitherto aloof behavior were to change with the experiments of the kind conducted (like, for example, in Germany). Thus, everyone will see and monitor how this institution conducts examinations in practice, and the results can become obvious to everyone.

5. Conclusion

Although Mary Ellen's fate had a good turn (she lived a full life, became a children's teacher, businesswoman, and finally died surrounded by her grandchildren at the age of 92), still *today*, many children in similar situation aren't that lucky. The USA National Child Maltreatment Statistics[63] report about 3.9 million child maltreatment in 2020, and 90.6% are victimized by one or both parents. Child abuse reports involved 7.1 million children, but less than 50% (3.1 million children) received prevention and post-response services. Among the unlawful behavior is physical (17.5%) and sexual (9.3%) abuse and psychological maltreatment (6.1%), and neglect (74.9%). Children in early childhood are at the highest risk: 67.8% of all child fatalities were younger than 3 years old. In the USA alone, thousands of children die from abuse and neglect annually (e.g., 1750 children in 2020).

Many years have passed since the case of Mary Ellen Wilson, and although we have moved into the era of information society and industry 5.0, the protection of children is still an unsolved problem – and not only in the USA, but in the CEECs too, as the Committee on the Rights of the Child regularly reports. The lack of access to justice, communication problems, symbolic legal protection, incomplete functioning of the signaling system, institutional violence... are many obstacles that also affect the countries of the region.

63 Child Maltreatment Statistics, 2020.

The connecting points of the countries' regulations are the specific nature of the legal field, the social importance of children and juveniles, and the common historical and ideological framework. Many international documents regulating the field of law have similar solutions and a common theoretical basis. The differences between the individual countries are, thus, less important and can be perceived more in connection with some basic issues like the minimum age of criminality, the independence of the regulation, or the structure of the institutional system.

The directions for moving forward are also similar: in addition to the existence of regulations, attention is to be primarily shifted to practical problems, more efficient functioning of the institutional system, and more complete enforcement of children's rights in practice.

In theoretically, in the children's rights, the child, parents (guardians) and the state are treated as equal actors[64]. However, both the state and the parent have a special responsibility for the observance of children's rights. International and national rules protecting rights are very important, but if the unlawful actions remain hidden, the protection of children will not be effective. Sufficient sensitivity, adequate knowledge, and early recognition of problems depend on the adult environment. This is decisive not only from the point of view of becoming a victim, but indirectly also from the point of view of becoming a possible perpetrators. To achieve the effective practice is the direction of the development of the juvenile justice too.

64 See more at Lux, 2018.

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