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İÇİNDEKİLER / *CONTENTS*

Effective Prosecution of Hate Crimes as a Precondition for Their Prevention / Nefret Suçlarının Önlenmesi için Ön Koşul Olarak Etkili Kovuşturma
Besa ARİFİ.....1-14

The Appeal in the Italian Criminal Legal System: Legislative Reforms and Case Law / İtalyan Ceza Hukuku Sisteminde İstinaf: Hukuk Reformları ve İçtihat Hukuku
Massimo BOLOGNARI.....15-26

Legal Remedies in Criminal Procedural Law in the Republic of Macedonia / Makedonya Cumhuriyeti'nde Ceza Muhakemesinde Kanun Yolları
Gordan KALAJDZIEV, Gordana LAŽETIĆ.....27-53

Era of Change in the Hungarian Prison Law / Macaristan İnfaz Hukukunda Değişim Çağı
József PALLO.....55-71

"Toplantı ve Gösteri Yürüyüşü Düzenleme Hakkı" ile "Kötü Muamele Yasağı" Karşısında Kolluğun Güç Kullanma Yetkisi / The Use of the Power of the Police Versus the Right of Meeting and Demonstration Marches and Prohibition of Mistreatment
Eren SOLMAZ.....73-98

The Right to Appeal and Individual Application in Criminal Proceedings in Hungary, with Special Regard to the Defendant's Participatory Rights / Macaristan Ceza Muhakemesinde Özellikle Sanığın Katılma Hakları Bağlamında İstinaf ve Bireysel Başvuru
Zsolt SZOMORA.....99-115

Issue of Consent as a Defence of Deliberate Killing in English Law / İngiliz Hukukunda Kasten Öldürmede Ceza Sorumluluğunu Kaldıran veya Azaltan Bir Neden Olarak Rıza Sorunu
Z. Özlem ERSOY YILMAZ.....117-132

Dear Readers,

In introducing this first issue of the 6th volume of the Journal of Penal Law and Criminology (JPLC), I would like to begin with some exciting news, namely that our journal has recently been listed in the Clarivate Analytics' Web of Science Emerging Sources Citation Index (ESCI) database. With this, the JPLC is the first Turkish Journal oriented on penal law and criminology to have been indexed in ESCI. This progress strengthens our determination to further improve the content of our journal and lift its profile, establishing it as a platform to enable valuable collaborations in which scientists from both Turkey and the international arena will be able to work together as authors, reviewers and guest editors. As such, in order to facilitate the high standard publication of international works, we will start receiving academic submissions through the *ScholarOne* system (https://mc04.manuscriptcentral.com/jplc) and conduct editorial and peer- review process through this infrastructure.

As the journal of the Criminal Law and Criminology Research and Application Center of İstanbul University Faculty of Law, our hope is that the JPLC will continue to flourish in the spirit of the research and scientific education strategy of our Center, an important objective of which is collaboration. To that end, our Center is active in hosting academic activities and aspires continually to develop discourse in the field of criminal law and criminology, both at the national and international level.

This past year, our Center co-operated with the Turkish Court of Cassation (*Yargıtay*), in organizing the 13th Turkish Criminal Law Days, held in Ankara between 31 May and 2 June 2018. This edition of the Criminal Law Days had as its focus the difference between *dolus eventualis* and qualified recklessness and the role of mistake in criminal law. These important themes were discussed not only by some 200 Turkish academics from 50 universities and Turkish stakeholders, including members of the Court of Cassation, judges and prosecutors, but were also viewed comparatively, with the participation of colleagues from twenty different countries, who amongst them presented thirty papers.

Following the Criminal Law Days, our Center looks forward to our next international events. The first of those will be the 6th edition of the International Human Rights '*Law on the Bosphorus*' Summer School, with the collaboration of Leiden Law School of Leiden University, which will take place in August at Istanbul University. With the first Turkish-Italian Criminal and Public Law Days having being held in Modena, Italy, between 20-21 April 2018 (with as its theme the concept of establishing a criminal organization to commit crimes and the notion of organized crime from a criminological perspective), our Center has further launched a new platform for collaboration through which we hope to recover and improve our ties with the Italian legal system. Given the important role Italian law has played in Turkish criminal legal history, we are excited about the prospects this new co-operation will bring. Likewise, we are thrilled with the continuation of the Turkey-Slovenia Criminal Law Days, the 4th edition of which was held between 24-27 June 2018 in Slovenia's capital city Ljubljana (with as its theme offences against the justice system).

In keeping with our Center's strategy of collaboration, we hope to achieve a cross-over effect of the discourse we develop through our activities onto the pages of the JPLC. As such, the JPLC welcomes and will continue to publish national and international contributions in the field of penal

law and criminology. As another important goal of our journal will be the advancement of the further development of criminology in Turkey - in theory and in practice - the editorial board will attach great importance to securing a solid place for the criminological perspective in the JPLC and invites national and international scholars in this domain to consider submissions to our journal.

As for our short term planning for the JPLC, I am also delighted to announce that we will be marking our listing in ESCI with a celebratory five-issue 'thematic program'. Kicking off these flagship issues, the December 2018 edition of JPLC will be devoted entirely to young academics. For this issue, the editorial board will invite young Turkish scholars and their international counterparts conducting similar research in other jurisdictions, to collaborate and submit joint publications. The following four issues of the JPLC will be devoted to particular themes, all of which will be selected in light of their current importance for Turkey and its international associations in the field of penal law and criminology. Internationally recognized experts in the pertinent fields will be invited as guest Editors-in-Chief for each of these thematic issues.

Exciting times thus lie ahead for the JPLC, but of course, we are equally enthusiastic about this current issue. In this June 2018 edition we are happy to have been able to bring together an interesting selection of contributions from Turkish and international authors. At the same time, these contributions cover a wide range of themes, but also have in common a 'rights-based' perspective. In '*Effective Prosecution of Hate Crimes as a Precondition for Their Prevention*' Besa Arifi focuses on the proper role of Criminal Justice in the combatting of discrimination. Three contributions in this edition discuss rights from a procedural point of view, in particular in relation to appeal and remedies in criminal procedure. With his contribution on '*The Appeal in the Italian Criminal Legal System: Legislative Reforms and Case Law*', Massimo Bolognari discusses the state of affairs in this regard in Italy. Gordan Kalajdziev and Gordana Lažetić present an overview and analysis of '*Legal Remedies in Criminal Procedural Law in the Republic of Macedonia*'. With his '*The Right to Appeal and Individual Application in Criminal Proceedings in Hungary, with Special Regard to the Defendant's Participatory Rights*', Zsolt Szomora turns our attention to Hungary. In the context of more substantive rights, Eren Solmaz's contribution follows up with discussion of '*The Use of the Power of the Police Versus the Right of Meeting and Demonstration Marches and the Prohibition of Mistreatment*', while Jozsef Pallo walks us through his depiction of an '*Era of Change in the Hungarian Prison Law*'. Z. Özlem Ersoy Yılmaz's contribution closes this issue, with her discussion of '*Issue of Consent as a Defence of Deliberate Killing in English Law*'.

Hoping that you both enjoy and benefit from the works contained in this June 2018 edition, I would finally like to express my gratitude to all those who work hard to make the publication of the JPLC possible and thank future contributors and you, as our readers, for your valuable interest.

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Effective Prosecution of Hate Crimes as a Precondition for Their Prevention

Nefret Suçlarının Önlenmesi için Ön Koşul Olarak Etkili Kovuşturma

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ABSTRACT

The most serious problem in regard to dealing with hate crime in Macedonia is the fact that in the majority of cases, these crimes are not presented as hate crimes but as "normal" crimes lacking the recognition of the true motivation behind them. Thus the official hate crime rate in this country typically does not represent the true situation.

This article will analyze the importance of effective prosecution of hate crimes, both for the recognition of the problem and for future prevention of these crimes. It is evident that without institutional action these crimes will not only continue to happen, but they will also continue to be "hidden" from the official data, which unfortunately, does not solve but rather complicates the problem.

The article will analyze the legal regulation of hate crimes in Macedonia and the efforts that are being made to provide better legislation with the aim of effectively prosecuting such crimes. The official and shadow reports will be analyzed in a desk research method and comparison will be made in regard to the prosecution of hate crimes in the regional countries. Conclusions and recommendations will offer ideas about how the legislative amendments and solutions found in comparative practice can contribute to improvement in regard to prosecuting hate crimes in Macedonia.

Keywords: Hate crimes, hate speech, prosecution

ÖZ

Makedonya'da nefret suçlarıyla mücadele konusunda en ciddi sorun, bu tür vakaların çoğunlukla nefret suçları olarak değil, adi suçlar olarak değerlendirilip suçun arkasındaki gerçek saikin tanınmamasından kaynaklanmaktadır. Bundan dolayı, çoğu zaman ülkedeki resmi rakamlara göre nefret suçu oranı gerçek durumu yansıtmamaktadır.

Bu makale, nefret suçlarının sorunun tanınması ve gelecekte bu suçların önlenmesi için etkili bir biçimde kovuşturulmasının önemini analiz edecektir. Kurumsal yaklaşım olmaksızın, bu suçların sadece devam etmesi değil, aynı zamanda bu tür suçların resmi verilere görünür olmamasıyla birlikte sorunun çözülmesi yerine maalesef daha karmaşık hale getirmektedir.

Makalede, Makedonya'daki nefret suçlarının yasal düzenlemeleri ve nefret suçlarının etkili bir şekilde kovuşturma amacı ile daha iyi bir mevzuat sağlanması yönündeki çabaları incelenecekir. Resmi ve resmi olmayan raporların taraması yapılıp analiz edilecek ve bölgesel ülkelerdeki nefret suçlarının kovuşturulmasıyla karşılaştırması yapılacaktır.

Sonuçlar ve tavsiyeler, karşılaştırmalı araştırma sonucu ortaya çıkan yasal değişiklikler ve çözümlerin Makedonya'daki nefret suçlarının kovuşturulmasıyla ilgili gelişmelere nasıl katkıda bulunabileceği konusunda fikir sunacaktır.

Anahtar Kelimeler: Nefret suçları, nefret söylemi, kovuşturma

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1. Introduction

Hate crimes that are not properly prosecuted and punished represent a serious threat to the interpersonal, inter-ethnic and inter-confessional relations in a country. Failure of state institutions to prosecute such crimes indicates that the state is willing to tolerate them. Tolerance shown towards hate crimes creates marginalised groups and communities who distance themselves from the state institutions because of the feeling that they are not appropriately protected by the institutions that should guarantee their protection. This lack of trust in institutions creates many other problems which emerge from the marginalization and discrimination of a group of people.

Hate crimes are a reality in every country. Every state encounters different types and intensities of hate crimes. However, states differ among themselves in regard to their policies on prosecuting such crimes. Some states show clear intent and action aiming at the prosecution of these crimes. They make a distinction between these crimes and others, both in their legislation, and also in the way they implement their prosecution, putting them into the hands of the state institutions eligible to prosecute crimes. They create separate mechanisms with the particular intention of prosecuting hate crimes and they work closely with communities who usually appear as victims of these crimes.

Other states choose to ignore the problem of hate crime not wanting it to interfere with the relations between different communities. In fact, the decision to ignore hate crime and pretend it does not exist is what interferes with these relations and creates the above-mentioned lack of trust in state institutions. Therefore, ignoring the situation will not solve the problems related to hate crime but will only create new ones.

When we talk about the importance of tolerance in a multi-ethnic and multi-confessional society, we need to understand that tolerance is not a mere definition neatly written on paper that looks good when recited on important dates. Tolerance means serious action leading to the creation of an environment free of discrimination and marginalization, where the concept of the rule of law prevails. Tolerance means showing zero tolerance for any act that interferes with good relations among communities. Tolerance means fair and just prosecution of hate crimes.

This article will discuss the approach towards hate crimes, the importance of their

prosecution, as well as new developments in regard to amending the legislation and changing the traditional approach towards prosecuting hate crimes.

2. Current Legal Provisions and their Implementation in Practice

Between the years 2009 and 2014 amendments were made to the Criminal Code of RM (in force since 1996[1]) which introduced the concept of hate crimes in the positive criminal law of this country, concretely in article 39 paragraph 5, which reads:

> [w]hen determining the sentence, the court shall especially consider whether the crime has been committed against a person or group of persons or property, directly or indirectly, because of his/her sex, race, color of skin, gender, belonging to a marginalized group, ethnic origin, language, citizenship, social origin, religion or religious belief, other beliefs, education, political adherence, private or social status, mental or physical disability, age, family and marital status, property status, health condition, or any other ground provided in law or ratified international agreement.[2]

This kind of qualified sentencing and the above mentioned protected characteristics of the victim are further mentioned in articles 137/1, 144/4, 319/1, 394g/1, 417/1 of this Criminal Code which consequently criminalizes violation of equality between citizens, endangering of security, causing of hatred, division or intolerance on the basis of national, racial, religious and other form of discrimination, distribution of racist and xenophobic material through a computer system, and racial and other forms of discrimination. As explained by Kambovski the aim of this provision includes both the prevention of hate crimes as well as sending an institutional message that they will not be tolerated in this society.[3]

However, legal provisions that are merely written in the text of criminal law but are not implemented in practice hardly have any value. Although the concept of hate

1 Каневчев Методија, Кривичен законик - актуелизиран итегрален текст (Стоби Трејд: 2015).

2 Criminal Code of RM (Кривичен законик на РМ), adopted in 1996, Official Gazette of RM nr. 37/1996, amended in O.G. nr. 80/99, 04/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 51/11(2), 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 132/14, 160/14, 199/14, 196/15, 226/15.

3 Kambovski Vlado (2015) Предлог за основање на работна група за ревидирање На законските одредби кои се однесуваат на криминал од омраза и подготвување на препораки за нивна примена од надлежните органи. Skopje: Unpublished internal document prepared for the National Working Group on Hate Crimes.

crime was introduced in 2009, the problem, well established by the civil sector, is that hate crimes are not differentiated as such in the judicial practice of RM and therefore, persons who commit them, are usually only charged or convicted for 'normal' crimes without the bias element that differentiates them as hate crimes. Thus, a simple search in the OSCE official website on hate crimes[4] will show that in RM there are no official data in regard to numbers of charged, prosecuted or convicted persons in regard to this form of crime. The reason for this is the lack of an efficient mechanism in the institutions of police, prosecution and judiciary to identify hate crimes and categorize them as such. Moreover, the Helsinki Committee for Human Rights of RM, supported by the OSCE, has been developing a separate program on hate crimes since 2013, and since then, it has been following incidents that have elements of hate crime. The results are published in their annual reports[5] as well as on the web site which specializes in hate crimes[6]. These reports and the information on the updated web-site indicate that since 2013, a total number of 286 hate crime incidents have occurred, the majority of which fall into the category of ethnical belonging or citizenship (183), with the remaining fitting into the classifications of political affiliation or political belief (33), refugee or migrant status (30), inciting national, racial or religious hatred , discord or intolerance (23), religious affiliation or religious belief (20), sexual orientation or gender identity (18), and such like[7]. Moreover, the reports of the Helsinki Committee clearly indicate that according to their monitoring of the court proceedings that involve hate crime incidents, it is frequently noted that these crimes are not appropriately investigated and many perpetrators are either not identified or they are not found guilty, or alternatively, convicted to minor sentences[8]. These indications demonstrate that hate crimes are evident in RM showing clear characteristics despite the lack of official reporting by state institutions. Thus, ignoring this fact will not make these crimes go away. On the contrary, as held by the European Court of Human Rights:

4 http://www.hatecrime.osce.org/former-yugoslav-republic-macedonia

5 Helsinki Committee for Human Rights in RM (2015) and Helsinki Committee for Human Rights in RM (2014).

6 www.zlostorstvaodomraza.com

7 For accurate information please consult the following link: http://www.zlostorstvaodomraza.com/reports?l=en_US (accessed on August 8, 2016).

8 Thus, in an incident that occurred in Radishani-Skopje where an entire Ethnic-Albanian family experienced continuous violence and therefore was forced to leave and migrate abroad, only one person was found guilty whereas the others were not identified despite the security camera footages. More information on this case and other incidents followed by Helsinki Committee can be found in their Annual Report on Hate crimes of 2014. (Helsinki Committee for Human Rights in RM, 2014).

> [w]hen investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.[9]

3. International Recommendations and the Formation of the National Working Group on Hate Crimes, and Draft Amendments to the Criminal Code of RM

In this regard, it is very important that some recommendations made by international organisations are mentioned. For example, the 2014 Report of the Working Group on the UN Universal Periodic Review recommends RM to "[f]ight impunity for violence against marginalized persons motivated by their ethnicity, religion, or sexual orientation, particularly through an improved awareness of public opinion, and the police and judicial authorities."[10] Moreover, the EU Progress Reports on Macedonia for the year 2013 state that: "[d]ata on the reporting, investigation and prosecution of hate speech and hate crime is not collected systematically and training of law enforcement, prosecutors and judges needs to be stepped up",[11] and with the situation not changing in 2014[12] nor in 2015, they conclude that "Collection of data on the reporting, investigation and prosecution of hate speech and hate crime is still not systematic and several cases of hate speech in social media and blogs require adequate follow-up by the authorities".[13]

Due to this lack of progress, in 2015 the OSCE Mission in Skopje in cooperation with the Macedonian Academy for Sciences and Arts (hereafter MASA), led at that time by Academic Vlado Kambovski, worked together on creating a National Working Group on Hate Crimes consisting of representatives from the following

9 Identoba and Others v. Georgia, 2015, ECtHR, par. 67.

10 Recommendation 101.40 made by Belgium, Human Rights Council, Report of the Working Group on the Universal Periodic Review – The former Yugoslav Republic of Macedonia (26 March 2014), page 18, available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/MKSession18.aspx (accessed on August 8, 2016) " (UN General Assembly, Human Rights Council, 2014, p. 18).

11 The European Commission. (2013, October 16). The Former Yugoslav Republic of Macedonia 2013 Progress Report, p. 45.

12 The European Commission. (2014, October 8). The Former Yugoslav Republic of Macedonia 2014 Progress Report, p. 47.

13 The European Commission. (2015, November 11). The Former Yugoslav Republic of Macedonia 2015 Progress Report, p. 59.

institutions: the Faculty of Law, the Ministry of Justice, the Ministry of Interior Affairs, the Office of the Prosecution, the Judiciary, the National Contact Person for Hate Crimes by the Ministry for Foreign Affairs, the Academy for Judges and Public Prosecutors, the Civil Society Sector (Helsinki Committee), the Academic Community, the National Commission on Anti-Discrimination, MASA and the Macedonian Society for Criminal Law and Criminology.[14] The author of this paper is a member of the National Working Group on Hate Crimes (hereafter NWGHC). The group has worked on preparing draft amendments to the Criminal Code of RM which aim at a better definition of hate crimes in different articles of the Code. A separate definition is to be established in article 122 paragraph 23 that will define a hate crime as:

> …[a] criminal act against a person or legal entity or property related to it, that is committed entirely or partially because of the actual or presumed characteristic of the person that refers to race, color of skin, national and ethnic belonging, religion or religious belief, mental or physical disability, sex or gender identity, sexual orientation, political affiliation, age or belonging to a marginalized group.[15]

The definition will refer to the remaining article 39 paragraph 5, as cited above, when prescribing aggravating circumstances in cases of a crime having the bias element. Moreover, the previous list of separate crimes where the bias element will continue to represent an aggravating circumstance is to be enlarged according to the proposed draft amendment in order to include the following crimes that will include an additional aggravating circumstance when committed out of hate: murder (article 123), bodily injury (article 130), severe bodily injury, (article 131), coercion (article 139), unlawful deprivation of liberty (article 140), torture and other cruel, inhuman or degrading treatment and punishment (article 142), threatening safety (article 144), prevention or disturbance of public gathering, (article 155), rape (article 186), sexual assault of a helpless person, (article 187), sexual assault upon a child under the age of 14 (article 188), not providing medical help, (article 208), damage to objects of

14 Kambovski, V. (2015). Предлог за основање на работна група за ревидирање На законските одредби кои се однесуваат на криминал од омраза и подготвување на препораки за нивна примена од надлежните органи . Skopje: Unpublished internal document prepared for the National Working Group on Hate Crimes.

15 Камбовски, В. (2016). Предлог-амандмани на одредбите од КЗ што се однесуваат на казнените дела на омраза. Skopje: Unpublished internal document prepared for the National Working Gorup on Hate Crimes..

others (article 243), abuse of official position and authorization, (article 353), act of violence (article 386), and desecration of a grave (article 400).

4. Recommendations by OSCE-ODIHR in regard to the Draft Amendments of the Criminal Code of RM

The proposed draft amendments were thoroughly reviewed by the OSCE-ODIHR and a detailed feedback report was received with comments and recommendations that are currently in the process of adjustment by the NWGHC. The OSCE-ODIHR 2016 feedback report found that the two tier approach, namely that of using Article 39 paragraph 5 in parallel with the approach of crimes committed out of hate, should be enlarged, in order to include a larger list of crimes and provide better possibilities of identifying and prosecuting hate crimes. The OSCE-ODIHR further recommend to the Macedonian Authorities "to specify in law that judges are obliged to put on record the reasons for applying or not applying the provision of Article 39 para. 5 of the current Criminal Code in cases which involve potential bias motives on the part of the perpetrator."[16] They also recommend some fine-tuning adjustment of the old and new articles and paragraphs in order to provide a clear understanding of the concept of hate crimes and better implementation of the rules incriminating hate crimes. It is also interesting that the feedback report found that:

> [i]n the case of political affiliation, it is noted that while this ground is sometimes included as a protected characteristic in domestic legislation, it is not an immutable or fundamental characteristic and can often change over time. Additionally, it is a vague term open to various interpretations and potentially very difficult to prove in practice. For this reason, it is recommended to remove political affiliation as a protected characteristic from the Draft Amendments.[17]

However, it is important to note that Macedonia currently represents an extremely politicized society, and as explained by the reports cited above, hate crimes related to political affiliation or political belief are the second largest category of hate crimes committed in RM. Therefore, the political affiliation and political belief categories

16 OSCE-ODIHR. (2016). Comments on Draft Amendments to Certain Provisions of the Criminal Code of the Former Yugoslav Republic of Macedonia Regarding Bias-Motivated Crimes based on an unofficial English translation of the draft amendments provided by the OSCE Mission to Skopje. Warsaw: OSCE-ODIHR, p. 10.

17 OSCE-ODIHR, 2016, p. 13.

should be thoroughly discussed and seriously considered in the amendments taking into account the specific situation of this country. It would send the message that hate crimes of any kind will not be tolerated anymore and will be properly dealt with. In this regard, it is very important that the draft amendments include 17 additional crimes which will include the element of bias in comparison with the other remaining 5 crimes that included this element from earlier amendments. It is also crucial that a specific strategy on implementation of the amendments be created that will establish appropriate mechanisms for identifying and following hate crimes through acknowledging them in the data record and in the judicial decisions.

Additionally, it is very important to relate hate crimes to the victimological approach. In this regard, the OSCE-ODIHR makes the following recommendations:

> [t]o disaggregate official data on victims of crimes by ethnicity, gender, religion etc., and to supplement such data with crime victimization surveys, which may help provide insights into why individuals might be hesitant to report bias-motivated crime and learn of their experience with law enforcement agencies.[18]

In this context, it should be noted that in the new Law on Criminal Procedure of RM (2010, in force since 2013), there is a specific chapter[19] on the victims and their rights in the criminal procedure[20]. However, this chapter is not implemented appropriately due to the lack of institutional capacities. Hence, as explained elsewhere[21], there is no evident strategy nor are there available specialized state institutions for the implementation of the rights of crime victims in general, let alone the rights of hate crime victims.

As clearly indicated in the recommendations of OSCE-ODIHR,

> [s]uccessful investigations into potential bias-motivated crimes will also depend to a large extent on society's degree of confidence and trust in law enforcement agencies and the criminal justice system. If

18 OSCE-ODIHR, 2016, p. 16.

19 Law on Criminal Procedure of RM (Закон за кривичната постапка), adopted 2010, Official Gazette of RM nr. 150/2010, amended in O.G. nr. 51/11, 100/12; Chapter V, articles 53-56.

20 Калајџиев, Гордан, Лажетиќ-Бужаровска, Гордана.. Закон за кривичната постапка. (Академик: 2011).

21 Arifi, Besa (2015) Rights of Victims of Hate Crimes. Second International Scientific Conference, Social Change in the Global World - Proceedings (pp. 217-230). Shtip: Center for Legal and Political Research.

> institutions are seen as biased or corrupt, individuals, particularly persons from marginalized groups, are less likely to report such crimes.[22]

As Macedonia faces one of the largest political crises in its short history of independence[23], which has brought to light serious concerns in regard to the competence, independence and legitimacy of state institutions, especially the Prosecution and Judiciary, it is notable that the lack of confidence on the part of general public is very evident, hence, it represents a fundamental problem in dealing with hate crimes.

5. A Short Comparative Approach Towards Hate Crimes: Countries of the Balkan Region

Taking the the data collected in the OSCE-ODIHR hate crime reporting website into consideration[24] it can be noted that other countries in the region have a somewhat similar status as RM, some of them collecting and disseminating more detailed data on hate crimes that occur in their territories with others not providing sufficient information, which is also duly noted in this very useful website. Thus, it can be observed that official data by state institutions are found in Croatia, Serbia, Bosnia and Herzegovina and Slovenia, whereas no proper official data are found in Montenegro, Albania, Kosovo and Macedonia. The ODIHR has observed that Slovenia has not periodically reported reliable information and statistics on hate crimes to the ODIHR, that Croatia has not made public reliable data and statistics on hate crimes, that Bosnia and Herzegovina have not reported hate crime data disaggregated by bias motivation to the ODIHR, and that Montenegro has not periodically reported to the ODIHR the numbers of hate crimes recorded by police, Albania has not periodically reported reliable information and statistics on hate crimes to the ODIHR, whereas Macedonia does not collect data and statistics on hate crimes. There is no information available in regard to ODIHR key observations on Kosovo, although there is evident information in regard to the types of hate crime and number of incidents collected by the OSCE Mission in Pristina as well as by other NGOs. It is very indicative that only in the case of Macedonia the observation is that no data and statistics on hate crimes are officially collected, which highlights once

22 OSCE-ODIHR, 2016, p. 16.

23 One aspect of the crisis discussed in (Arifi, Besa, Presidential Pardon Debunks Fragility of Macedonian State Institutions, 2016, Balkans in Europe Policy Blog).

24 www.hatecrime.osce.org

again the urgent need for the adoption and implementation of the above explained draft amendments to the Criminal Court of RM as well as the application of other recommendations of the NWGHC.

The types of hate crime that are evident in the countries of the Balkan region show certain similarities in regard to the prejudices they are based in. Hence, the most evident tendency in hate crime incidents is interethnic intolerance and hatred, racism and xenophobia, in which the conflicts typically take part between the majority ethnicity and the ethnic minorities, between groups of different religious belief, as well as against the LGBT community. As previously noted, the Helsinki Committee for Human Rights of RM has indicated a high percentage of hate crimes that relate to the bias of political affiliation and political belief, which is unique to this country and is not found to such an extent in the other countries of the region. Moreover, the past years have demonstrated an increasing prejudice against refugees and migrants due to the high number of displaced persons who use the Balkan route.

It is evident that Croatia has developed a more efficient mechanism of identifying and following hate crime in comparison with other countries in the region. Due to the fact that the nature of hate crimes reported in Croatia is similar to those that occur in Macedonia (with the exception of the bias against political affiliation), as well as the fact that the general criminal law provisions are similar, the NWGHC participated in a study visit in Zagreb.[25] The good practices of state institutions were noted and contacts were established to exchange information in the future. It was also noted that due to Croatia already being a member of the EU, the expectation in regard to the implementation of EU standards related to hate crime is higher. Also, the advanced development in regard to institutional capacities for following and dealing with hate crimes was evident in the specific mechanisms implemented by the Prosecution, Judiciary as well as the institutional work with the victims.

6. The Importance of the Example of the United Kingdom in Dealing with Hate Crime

The NWGHC conducted a comparative analysis in regard to the approach towards hate crime in the Balkans, UK and Poland.[26] The author of this article conducted the

25 Agenda of the Study Visit of NWGHC in Zagreb, June 1-3. (2015). Unpublished internal document prepared for the National Working Group of Hate Crimes in RM

26 Пресек на анализите за компаративното законодавство за криминал од омраза. (2015). Skopje: Unpublished internal document prepared for the National Working Group on Hate Crimes.

research in regard to the UK[27] and Poland[28] and found that the UK is one of the countries that has developed very successful strategies on following, reporting and prosecuting hate crimes. The governmental hate crime action plan of 2014 known by the title "Challenge it, report it, stop it" indicates that the problem with hate crimes in the UK remains big, estimating that on average there are around 278,000 such crimes committed each year in the UK[29]. It also indicates the protected characteristics that typically appear in the hate crimes committed in the UK which include race, religion/ confession, disability, sexual orientation, and transgender-identity. It is interesting that the UK provides a very limited number of protected characteristics in comparison to Balkan countries, where there are usually dozens of protected characteristics in hate crime laws. For example, in the Criminal Code of RM there are 24 separate protected categories s of hate crimes in article 39 paragraph 5, whereas the Draft Amendments suggest a general definition of hate crimes where 14 protected categories are mentioned. The OSCE-ODIHR feedback report on the Draft Amendments suggested that general and unlimited categorization such as "member of a marginalized group" should be avoided due to the need for strictness of criminal law provisions.[30]

The most evident hate crimes in the UK involve racial and religious prejudice in the context of anti-Muslim hatred that has resulted in efforts of state institutions to work more closely with communities to tackle this problem. The action plan develops three core principles:

1) To prevent hate crime - by challenging the attitudes that underpin it, and intervening early to prevent it escalating;

2) To increase reporting and access to support - by building victim confidence and supporting local partnerships; and

3) To improve the operational response to hate crimes - by better identifying and managing cases and dealing effectively with offenders.

27 Detailed information in regard to hate crimes strategies in UK to be found in (Delivering the Government's hate crime action plan. (2014). Challenge It, Report It, Stop It. London: HM Government.).

28 Arifi Besa, Hate Crimes in UK and in Poland - A Comparative Analysis. Skopje: Unpublished internal document prepared for the National Working Group on Hate Crimes. Detailed information in regard to hate crimes strategies in Poland to be found in (Project for the American Jewish Committee Berlin . (2009). Study on National Legislative Efforts to Prevent and Combat Hate Crime. Berlin: Hogan Lovells International LLP).

29 Delivering the Government's hate crime action plan. (2014). Challenge It, Report It, Stop It. London: HM Government, p. 6.

30 OSCE-ODIHR, 2016, pp. 14-15.

These three pillars of the UK action plan on hate crime should be used as an example of good practice when creating a national strategy for prevention and punishment of hate crimes in Macedonia. The most important thing to be learned is the understanding that no state can afford to ignore hate crimes by not making efforts to better identify and acknowledge them. Another important attitude is the early intervention and prevention of escalation, which again is not very evident in Macedonia, bearing in mind the lack of efficiency of state institutions to effectively deal with these situations and to better identify and manage hate crime cases. Moreover, the importance of working with the victims and building their confidence in the state institutions is crucial for reporting hate crimes and it is not a coincidence that it was also emphasized in the OSCE-ODIHR recommendations. Moreover, the incidents reported by the Helsinki Committee for Human Rights often demonstrate the hesitation of the victims to report hate crimes due to the lack of confidence in state institutions. Efforts should be made to provide better protection for victims of hate crimes and to help them deal with the consequences through effectively managing the case due to legal provisions.

7. Conclusion

This article has established the importance of prosecuting hate crimes in multi-ethnic societies. The fact that Macedonia has not yet developed a comprehensive mechanism of officially identifying and prosecuting hate crimes as such raises serious concerns. Although penalized in the criminal code of RM, there is no official data on the amount of such crimes committed neither are there judicial verdicts that condemn the commission of hate crimes, rather, they are prosecuted as "normal" crimes without identifying the element of prejudice.

Important improvements in the legislation in regard to hate crimes have been developing due to the important role the OSCE mission has played in this regard. This mission has invested in the creation of a particular system of identifying hate crimes, which has been developed and implemented by the Helsinki Committee in RM, an NGO which has closely worked on this issue for several years. The OSCE mission has also supported the creation of the National Group on Hate Crimes that has developed the proposed amendments to the Criminal Code of RM. It is very important that these amendments are adopted by Parliament and become part of the positive legislation in Macedonia.

However, there remains more to be done in regard to implementing the current provisions as well as putting the new amendments into practice. The government needs to create separate strategies and mechanisms of official identification and prosecution of hate crimes. These mechanisms need to be activated in the offices of the prosecutors and police in order for them to be able to identify, classify and prosecute hate crimes as separate forms of crime. The comparative approach found in the UK and in Croatia can be taken as examples of good practices in this regard.

Finally, it must be understood that tolerance needs to be invested in. It will not come naturally, rather, the state institutions will have to prove that they are interested in prosecuting hate crimes and in equally protecting their citizens from them.

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The Appeal in the Italian Criminal Legal System: Legislative Reforms and Case Law

L'appello Nel Processo Penale Italiano: Tra Riforme E Prassi Giurisprudenziali

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ABSTRACT

This article deals with the crucial and vital issue of the appeal in the Italian criminal justice system. The first part of this study is focused on the historical framework and the main legislative reforms that have characterized the issue of appellate remedies. After this general overview, the article analyzes the different types of appellate remedies and the fundamental principles that govern them. However, the core of this article is devoted to the appeal, which has recently been affected by important legislative reforms that have reshaped it. After some preliminary remarks regarding the nature of the appeal in the Italian criminal justice system, the work deals with the form of the appeal, identifying the subjects who are entitled to lodge an appeal and the preconditions that justify the filing of it. The article is then focused on the appellate procedure, dedicating particular attention to the renewal of the trial evidentiary hearing in case of appeal of the public prosecutor against a first-instance acquittal. This case of renewal has recently been introduced by the Italian legislator following the case law of the European Court of Human Rights and of the Italian Court of Cassation. After analyzing such issues, this work identifies the outcomes of the appellate procedure. Finally, the article draws some conclusions about the issue of the appeal in light of the recent legislative reforms and case law.

Keywords: Appellate remedies, legislative reform, renewal of the trial evidentiary hearing

ABSTRACT (versione italiana)

Il presente lavoro analizza il tema dell'appello nel processo penale italiano. La prima parte dell'articolo è dedicata all'analisi delle origini storiche e delle principali riforme che hanno caratterizzato il sistema delle impugnazioni. Dopo questo quadro generale, il lavoro si occupa di individuare le principali caratteristiche e i principi che connotano i diversi mezzi di impugnazione disciplinati dal codice di rito. L'articolo si focalizza poi specificamente sull'appello, che è stato di recente profondamente riformato dal legislatore italiano. Dopo alcune considerazioni preliminari relative alla natura di questo rimedio, sono stati analizzati, alla luce della riforma, gli aspetti formali di tale mezzo di impugnazione, i soggetti che sono legittimati a proporlo e i presupposti che ne giustificano la presentazione. L'articolo si incentra poi sul giudizio di appello, dedicando particolare attenzione alla rinnovazione dell'istruzione dibattimentale in caso di impugnazione del pubblico ministero contro una sentenza assolutoria di primo grado. Si tratta di un istituto che è stato introdotto dal legislatore italiano al fine di conformarsi alla giurisprudenza della Corte europea dei diritti dell'uomo e della Corte di Cassazione. Infine, dopo aver analizzato tali problemi, il lavoro si focalizza sui molteplici esiti del giudizio di secondo grado e prospetta alcune questioni che la riforma pone con riguardo alla natura dell'appello e, più in generale, al sistema delle impugnazioni nel suo complesso.

Parole chiave: Impugnazioni, riforma del sistema delle impugnazioni, rinnovazione dell'istruzione dibattimentale

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1. Introduction

The Italian Code of Criminal Procedure (from now on, the Code) was approved in 1988 and replaced the one approved in 1930. This new Code marked a key turning point in the history of Italian criminal justice, changing the system from an essentially inquisitorial one[1] to an accusatorial one. However, the appellate system was almost identical to the one envisioned by the previous Code, which provided a wide range of appellate remedies in order to counterbalance the limited guarantees recognized in the first-instance proceedings[2]. Conversely, the new Code, drawn from an accusatorial perspective, was intended to provide greater guarantees during the first-instance proceedings, so that a wide possibility to appeal was less coherent with the system.

Only with the approval of Law no. 46 of 20 February 2006[3] was the matter of the appellate remedies revised, on the one hand by forbidding the public minister and the accused from appealing against the first-instance judgements of acquittal[4], and, on the other hand, by increasing the cases in which a judgement can be appealed to the Court of Cassation. This reform was then substantially weakened by the intervention of the Constitutional Court, which, by declaring unconstitutional Law no. 46 of 20 February 2006, reintroduced the appeal of the public minister[5] and of the accused[6] against the acquittals.

In this context, the need to reform the matter of the appellate remedies became more and more urgent[7].

For this reason, the appellate system has recently been affected by a reform that has reshaped it. The legislative intervention is characterized by two stages: the first one coincides with the approval of Law no. 103 of 23 June 2017 (from now on, Law

1 More specifically the Code of 1930 was inspired by the biphasic process, which finds its origin in the Napoleonic *Code d'instruction criminelle*.

2 See Roberto E. Kostoris, 'Le modifiche al Codice di procedura penale in tema di appello e di ricorso per cassazione introdotte dalla c.d. «Legge Percorella»' (2006) Riv. dir. proc. 633.

3 For an articulated study on this legislative reform see Marta Bargis (ed.), *Impugnazioni e regole di giudizio nella legge di riforma del 2006* (Giappichelli 2007).

4 Except in some cases specified by law. See Roberto E. Kostoris, 'Le modifiche al Codice di procedura penale in tema di appello e di ricorso per cassazione introdotte dalla c.d. «Legge Percorella»' (2006) Riv. dir. proc. 633, 634.

5 See [2007] Constitutional Court 26.

6 See [2008] Constitutional Court 85.

7 See Marta Bargis and Hervé Belluta, *Impugnazioni penali. Assestamenti del sistema e prospettive di riforma* (Giappichelli, 2013); Roberto E. Kostoris, 'Le impugnazioni penali, travagliato terreno alla ricerca di nuovi equilibri' (2008) Riv. dir. proc. 915.

103/2017), which directly modified the Italian Code of Criminal Procedure and provided some directions to the Italian Government for further modifications[8]; the second one is represented by Legislative Decree no. 11 of 6 February 2018 (from now on, Legislative Decree 11/2018), which implemented the aforementioned directions.

This work aims to give a general overview of the appellate remedies in the Italian legal system with a specific focus on the appeal.

2. Appellate Remedies in Italy: A General Overview

a) General Profiles. The Italian criminal justice system is structured on three levels: the judges of first-instance, the Courts of Appeal, and the Court of Cassation, which is the apex court that ensures the uniform application of law.

Such structure is only partially reflected by the Italian Constitution (Art. 111 para. 7), which is limited to establishing that it is always possible to recourse to the Court of Cassation for violation of the law against judgments and decisions on personal freedom. So, as it can be seen, the intermediate level between the judges of first-instance and the Court of Cassation represented by the Court of Appeal is not recognized by the Constitution.

However, the current Code, following a long tradition that comes from the Napoleonic *Code d'instruction criminelle* and that is typical of the model of the biphasic process, expressly provides the aforementioned three-level structure and sets an articulate system of remedies, to which an entire section is dedicated (Book IX).

The appellate remedies are governed by the principle of taxativity (Art. 568 Code)[9], pursuant to which the law regulates the cases in which a judicial decision can be appealed and indicates which appellate remedies can be filed against it[10]. However,

8 For an analysis of the changes made by such reform to the Italian criminal justice system see, *ex multis*, Marta Bargis and Hervé Belluta (ed.), *La riforma delle impugnazioni tra carenze sistematiche e incertezze applicative* (Giappichelli 2018); Antonia Antonella Marandola and Teresa Bene, *La riforma della giustizia penale. Modifiche al codice penale, al codice di procedura penale e all'ordinamento penitenziario (L.103/2017)* (Giuffrè, 2017); Adolfo Scalfati (ed.), *La riforma della giustizia penale. Commento alla legge 23 giugno 2017, n. 103* (Giappichelli, 2017); Mitja Gialuz, Andrea Cabiale and Jacopo Della Torre, 'Riforma Orlando: le modifiche attinenti al processo penale, tra codificazione della giurisprudenza, riforme attese da tempo e confuse innovazioni' (2017) 3 Riv. trim. – Dir. pen. cont. 173; Marta Bargis, 'Appendice di aggiornamento' in Giovanni Conso, Vittorio Grevi and Marta Bargis (eds.), *Compendio di Procedura penale* (8th edn, Cedam 2016) 1.

9 See, *ex multis*, Marta Bargis, 'Impugnazioni' in Giovanni Conso, Vittorio Grevi and Marta Bargis (eds.), *Compendio di Procedura penale* (8th edn, Cedam 2016) 801, 804.

10 The appealable decisions are judgements, orders and decrees.

this principle is mitigated in case of judicial decisions on personal freedom and judgements. In fact, such decisions are always subject to appeal to the Court of Cassation, unless they are appealable in another way.

Moreover, there is another type of judicial decision that can be appealed to the Court of Cassation, even if there is not a specific provision. We refer to the case law that provides recourse to the Court of Cassation against so-called 'abnormal' decisions, which have a jurisdictional nature, but whose content is so anomalous that they lie outside the criminal procedural order.

b) The Subjects. The subjects who have the right to appeal are the public prosecutor (Art. 570 Code), the accused (Art. 571 para. 1 Code)[11] and the lawyer of the accused (Art. 571 para. 2 Code). In addition to these, the Code provides that judicial decisions can also be appealed by the civil party, exclusively with regard to points on civil issues (Art. 576 Code), by the person with civil liability for damages and by the person with civil liability for financial penalties, who may apply for an appellate remedy against the parts of the judgement concerning the liability of the accused and those concerning the restitution, compensation of damages and recovery of the costs of the proceedings (Art. 575 Code).

In order to be entitled to file an appeal, an abstract interest in the correctness of the decision is not sufficient, rather it is necessary that all these subjects have a concrete interest in the removal of the prejudicial effects of the decision[12].

c) Types of Appellate Remedies. The Italian Code of Criminal Procedure, following a consolidate tradition, provides two kinds of appellate remedies, namely the ordinary ones and the extraordinary ones.

The ordinary appellate remedies can be filed until the decision is final. These remedies are the appeal and the recourse to the Court of Cassation[13].

11 However, in order to reduce the workload of the Italian Supreme Court, the Law 103/2017 has removed the possibility for the accused of appealing personally to the Court of Cassation (see Art. 613 Code).

12 See on this aspect with regard to procedural law and, more specifically, to criminal procedure Stefania Carnevale, *L'interesse ad impugnare nel processo penale* (Giappichelli 2013) 1.

13 There are also other ordinary appellate remedies, as the opposition against the decree of conviction (Art. 461 Code), the opposition against the decree of the public prosecutor ordering the restitution of seized objects or rejecting the related request (Art. 263 para. 5 Code), the recourse to the Court of Cassation against the judgement of the Court of Appeal regarding the extradition (Art. 706 Code), the recognition of a foreign judgement (Art. 734 para. 2 Code) or the enforcement abroad of an Italian judgement (Art. 743 para. 4 Code).

The appeal, as we will see, can be brought before the Court of Appeal against the judgments of first-instance – either convictions or acquittals – and may be based both on substantial grounds and on legal grounds.

Otherwise, the recourse to the Court of Cassation may be lodged against the judgments of appeal, and, with certain limitations, directly against the judgments of first-instance, as well as against all the measures on personal freedom, and may be based on the arguments specified by law (Art. 606 Code).

In addition to such mechanisms, the Italian legal system also provides extraordinary appellate remedies, which can be used to appeal against decisions that have become final.

The first remedy is that of revision, which can be lodged before the Court of Appeal in favor of the convicted person in order to obtain the reopening of the criminal proceedings. This can be used if certain conditions provided by the law are in place, with the purpose of redressing a judicial error (Arts. 629 ff. Code). Such a remedy may be lodged only against judgements of conviction, while it is not possible to claim the revision of acquittals (the so-called revision *in pejus*).

The second remedy is represented by the extraordinary recourse for clerical or factual errors, which can be lodged by the convicted person against final judgments delivered by the Court of Cassation and allows the submission of a request for rectification of a clerical or factual error contained in such decision (Art. 625 *bis* Code).

The third remedy is that of the rescission of a final judgement, which has recently been reformed by Law 103/2017 and allows the convicted person, who has been absent during all the proceedings, to obtain the removal of a judgment that has become final and the re-opening of criminal proceedings (Art. 629 *bis* Code).

The fourth remedy is represented by the revocation of the judgement of no grounds to proceed[14]. In particular, such a decision may be appealed by the public prosecutor when new evidence arises or is discovered that, either alone or in addition to the evidence already gathered, may lead to the request for committal to trial (Arts. 434 ff. Code).

14 Such decision is pronounced at the end of the preliminary hearing when the judge deems that the accused shall not be committed to trial.

d) Other Appellate Remedies. Finally, it is worth adding that there are also other appellate remedies against different decisions rendered during the criminal proceedings. We allude to the precautionary measures (both personal and on property), which can be appealed, in case of coercive measure, with the remedy of re-examination, which allows a new evaluation of the facts that justified the issuance of the measure (Art. 309 Code). In all other cases, the precautionary measures can be appealed with the remedy of the appeal (Art. 310 Code).

3. The Appeal: Preliminary Remarks

After such an overview, it is worth focusing specifically on the appeal[15].

The appeal has a hybrid structure. Indeed, it is both an instrument for the control of the first-instance judgment, which may lead to the annulment of the decision, and a remedy that allows, within the limits of the subsections of the decision to which the appeal refers, a new evaluation of the factual and legal aspects of the case addressed by the first-instance judge. It follows that the nature of such an appellate remedy is not perfectly clear, even if the appeal is traditionally considered as an instrument for the control of the first-instance decision, as the cases in which the trial shall be renewed are exceptional[16].

In the following sections, we will see the main features of the appeal, analyzing the aspects that have been affected by the legislative reforms[17] and by the case law of both the Court of Cassation and the European Court of Human Rights.

3.1. The Form of the Appeal

The Italian Code of Criminal procedure states that both the accused and the public prosecutor are entitled to appeal a judgement[18]. The Legislative Decree 11/2018 reduced the cases in which these subjects may lodge an appeal. In particular, whereas before the legislative reform the conviction could be appealed by both the accused

15 For an analysis of the appeal in the Italian criminal justice before the legislative reforms see, among others, Massimo Ceresa-Gastaldo, 'Appello (diritto processuale penale)' (2010) III Enc. dir. 11; Giuseppe Di Chiara and Giovanni Tranchina, 'voce Appello (diritto processuale penale)' (1999) II Enc. dir. 200; Paolo Ferrua, 'voce Appello II) Diritto processuale penale' (1988) II Enc. giur. Treccani 1; Giorgio Spangher, 'voce Appello II) Diritto processuale penale' (1991) II Enc. giur. Treccani 1.

16 See, among others, Bargis (n 10) 840-841.

17 For a general overview of the changes to the appeal made by the reform see, among others, Giorgio Spangher, 'Il "nuovo" giudizio di appello' (2017) 10 Dir. pen. proc. 1.

18 Law 103/2017 has reintroduced the possibility for the accused and the public prosecutor to lodge an appeal against judgement of no grounds to proceed, that was repealed by Law 46/2006.

and the public prosecutor, now such a possibility is accorded only to the accused, while the prosecutor may lodge an appeal against such a decision only when it has established the presence of an aggravating circumstance with special effect or of a penalty of different kind from that provided for the crime (Art. 593 para. 1 Code). Conversely, the power to appeal a judgement of acquittal, which before the reform was accorded without distinctions to both the parties, is now generally recognized to the public prosecutor. Even the accused may lodge an appeal against an acquittal, except when such a decision has ascertained that the criminal act did not occur or the accused did not commit it (Art. 593 para. 2 Code)[19].

The appeal shall be lodged within the terms strictly specified by law (Art. 585 Code). The act shall indicate, under penalty of inadmissibility: a) the sections and the subsections of the decision to which the appeal refers; b) the requests, also evidentiary and c) the arguments, with specification of the legal and factual reasons sustaining each request (Art. 581 Code). Law 103/2017 introduced an important specification with regard to the form of the appeal. It provides that, in addition to the elements previously indicated, the appeal shall also contain the evidences which are claimed to be non-existent, have not been gathered, have not been assessed, or have been erroneously evaluated.

The Court of Appeal review is bound by the subsections of the first-instance decision to which the arguments refer (Art. 597 para. 1 Code), but the Court of Appeal can decide independently from such arguments. However, if only the accused appeals, the Court of Appeal cannot reform the judgment of first-instance in a less favorable way for him or her: for example, it cannot impose a more severe penalty or revoke benefits. This is the so called "prohibition of *reformatio in pejus*" (Art. 597 para. 3 Code).

In the perspective of reducing the length of the proceedings, Law 103/2017 re-introduced the agreement on the arguments for the appeal, which was included in the original version of the Code[20] and then repealed in 2008. The new regulation provides that the parties, except in case of serious crimes expressly indicated by the law, may agree on the acceptance, in whole or in part, of the arguments for the appeal and the waiver of other possible arguments. The Court of Appeal is not bound by the

19 Moreover, it must be highlighted that the Legislative Decree 11/2018 has also intervened on another aspect that concerns the legitimacy to appeal. Indeed, the reform has excluded the public prosecutor from the possibility to lodge an incidental appeal.

20 For an analysis of the agreement on the arguments for the appeal in the old Italian Code of Criminal Procedure see Elena Maria Catalano, *L' accordo sui motivi di appello* (Giuffrè 2001).

determinations of the parties, and, consequently, may reject the request. Differently from the previous discipline, there is no automatic reduction of the penalty, which is now decided on a case-by-case basis consistently with the criteria established by the Prosecutor General attached to the Court of Appeal (Art. 599 *bis* Code)[21].

3.2. The Appellate Procedure

The appellate trial may involve both the merit and the legal profiles of the decision of first-instance. It takes place at a public hearing and the accused is always entitled to participate. After the introductory report by the Judge Rapporteur, each party expresses its conclusions (Art. 602 Code).

The Court of Appeal is normally not entitled to collect new evidence or have the collected evidence recorded and presented again, and decides on the records of evidence already gathered by the judge of first-instance. However, there are some important exceptions to this rule: a) if a party has requested that evidence already gathered during the first-instance trial be taken anew or that new evidence be gathered, the Court orders the renewal of the trial evidentiary hearing[22] if it deems to be unable to decide on the basis of the available evidence (Art. 603 para. 1 Code); b) the renewal of the trial evidentiary hearing is always ordered when new evidence has been discovered or has arisen after the first-instance judgment (Art. 603 para. 2 Code); c) the renewal may be also ordered *ex officio* if the Court considers it absolutely necessary (Art. 603 para. 3 Code).

With Law 103/2017 the legislator introduced a new case of renewal of the trial evidentiary hearing. In particular, the appellate judge shall renew the evidence-gathering in case of appeal of the Prosecutor against a judgement of acquittal for reasons inherent to the assessment of oral evidence (Art. 603 para. 3 *bis* Code).

The approval of this rule was justified by the need to comply with the case-law of the European Court of Human Rights (from now on, EtCHR), which, emphasizing the importance of the principles of orality and immediacy, stated that the right to a fair trial enshrined in Article 6 ECHR requires that, "when an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of

21 See, for an overview of this aspect of the reform, Massimo Ceresa-Gastaldo, 'La riforma dell'appello, tra malinteso garantismo e spinte deflattive' (2017) 3 Riv. trim. – Dir. pen. cont. 163, 170-171; Gialuz, Cabiale and Della Torre (n 10) 173, 187-188.

22 With the expression "renewal of trial evidentiary hearing" we refer to the gathering of evidence at the appellate trial according to the procedures provided for the first-instance trial.

the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine these issues without a direct assessment of the evidence"[23]. According to the European Court, this direct assessment shall be performed when the evidence is decisive for the pronouncement of the judgement.

The ECtHR case law was soon taken up by the Court of Cassation, which highlighted that the Court of Appeal has to renew the gathering of oral evidence if the appellate judge is willing to convict an accused who was acquitted by the judge of first-instance and if such evidence was deemed decisive for pronouncement of the acquittal by this latter judge[24]. In this case, the Court of Appeal applies the same evidentiary rules as the first-instance judge.

The reasons supporting such conclusions are based on the need for criminal responsibility of an accused to be demonstrated "beyond any reasonable doubt". It is a very rigorous standard, which prevents the Court of Appeal from convicting without the direct assessment of oral evidence, consistently with the principles of orality and immediacy, which are all essential elements of accusatorial proceedings[25].

As it can be seen, the provision introduced by Law 103/2017, differently from what had been indicated by the Court of Cassation, would not seem to refer to the oral evidence being decisive, but to all evidence gathered during first-instance proceedings that are relevant for the ascertainment of criminal liability. In fact, the new regulation states that the appellate judge has the duty to renew the trial evidentiary hearing whenever the public prosecutor lodges an appeal against a first-instance judgment for reasons inherent to the evaluation of the oral evidence.

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23 See, among many others, *Dan v. Moldova* App no. 8999/07 (ECHR, 5 July 2011); and with specific regard to Italy *Lorefice v. Italy* App. no. 63446/13 (ECHR, 21 June 2017). However, it must be stressed that the European Court has considered that the renewal of the trial evidentiary hearing is not always necessary. Indeed, even if the appeal's conviction is based exclusively on a different evaluation of the written trial's minutes, the proceedings shall be considered fair if the court provides a particularly thorough reasoning for the departing from the assessment given to the evidence by the first-instance judge (see *Kashlev v. Estonia* App no. 22574/08 (ECHR, 29 April 2016), and, more recently, *Chiper v. Romania* App no. 22036/10 (ECHR, 13 November 2017)). See on this aspect Michele Caianiello, 'You can't always counterbalance what you want' (2017) 25 European Journal of Crime, Criminal Law and Criminal Justice 283, 285; Ceresa-Gastaldo (n 21) 163,166.

24 *Dasgupta* [2016] Court of Cassation, Joint Chambers 27620; for an analysis of this judgement see Hervé Belluta and Luca Lupària, 'Alla ricerca del vero volto della sentenza Dasgupta' (2017) 1 Dir. pen. cont. 5. See also *Patalano* [2017] Court of Cassation, Joint Chambers 18620, which extended the application of the renewal also to the decisions rendered at the end of the summary trial.

25 For an accurate synthesis of the path from EtCHR case law towards the legislative reform see Hervé Belluta and Luca Luparia, 'La parabola ascendente dell'istruttoria in appello nell'esegesi "formante" delle Sezioni Unite' (2017) 3 Riv. Trim. – Dir. pen. cont. 151.

Such regulation places itself on a long path that is far from being finished. In fact, the Court of Cassation, in its work of shaping the renewal of the trial evidentiary hearing, has specified that the renewal shall be ordered also when a conviction pronounced by the first-instance judge is reformed by the appellate judge into an acquittal[26].

However, such an issue was then referred to the Joint Chambers of the Court of Cassation[27], which decided that the appellate judge does not have the obligation to renew the trial evidentiary hearing in case of acquittal in appeal following the conviction pronounced by the first-instance judge, but that he/she only has the duty of thoroughly explaining the reasons for the departure from the assessment given to the evidence by the first-instance judge. The reason for such different evaluation is that the acquittal, unlike the conviction, has not to be proven beyond any reasonable doubt, so that it is not necessary to renew the evidence-gathering. Moreover, admitting the renewal of evidence gathering also in case of reversal from conviction to acquittal would be likely to result in considering the appellate trial as a restatement of the first-instance trial, with obvious consequences on the length of the proceedings[28].

In the same decision, the Joint Chambers of the Court of Cassation, in clarifying the content of the regulation introduced with Law 103/2017, also stated that the appellate judge does not have the duty to renew the gathering of all the evidence, but only of the oral evidence, which, being specifically contested by the public prosecutor, was erroneously evaluated by the first-instance judge and was deemed decisive for the judgement. In this way, the Supreme Court has brought the new regulation into line with its previous case law.

This is a very complex framework, which is characterized by multiple judicial interventions[29] and which demonstrates the difficulties of defining the nature of the appeal and the scope of the appellate trial.

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26 *Marchetta* [2017], Court of Cassation, Chamber II 41571. See Natalia Rombi, 'La riforma di una sentenza di condanna esige la rinnovazione della prova dichiarativa in appello?' (2018) 1 Proc. pen. e giust. 106.

27 In the Italian legal system, the Joint Chambers of the Court of Cassation have the duty to settle judicial disagreements between the Chambers of the Court of Cassation and to decide issues of special importance.

28 *Troise* [2018] Court of Cassation, Joint Chamber 14800. For a comment to this judgement see Novella Galantini, 'La riassunzione della prova dichiarativa in appello: nota a margine di Sezioni Unite Troise' (2018) Dir. pen. cont. 1 https://www.penalecontemporaneo.it/upload/6905-galantini2018a.pdf accessed 12 May 2018.

29 The judicial work of shaping the renewal of evidence-gathering is far from being finished, even after the legislative reform. See, for example, [2017] Court of Cassation, Chamber II 55068, which clarified that the appellate judge has not the duty to renew the gathering of the oral evidence that is deemed decisive, when it was ascertained that the witness was subject to bribery, provided that there are no elements that indicate a subsequent modification of such condition.

3.3. The Types of Decision Delivered by the Appellate Judges

Finally, the different outcomes of the appellate trial should briefly be mentioned.

If the Court of Appeal considers the appeal to be inadmissible, for example because of a formal defect of the act, it pronounces a judgement of inadmissibility (Art. 591 Code). Conversely, if the Court considers the appeal to be unfounded on merit, the appellate judge shall confirm the decision of first-instance. Moreover, if the Court grants the appeal, totally or partially, the Court amends the decision of first-instance (Art. 605 Code). Finally, if the Court detects certain causes of nullity of the first-instance trial[30], it declares the nullity of the decision and orders that the case file be forwarded to the first-instance judge for a new trial (Art. 604 Code).

4. Conclusive Remarks

The topic of the appeal is a very vital and relevant issue in Italy today. The most sensitive issues are represented, on one hand, by the nature of the appellate trial, and, on the other hand, by the need to ensure a reasonable length of the proceedings.

From the first point of view, despite the clarifications of the Court of Cassation, which limited the scope of the renewal of the trial evidentiary hearing introduced with Law 103/2017, the nature of the appellate trial is still a controversial issue, as it is constantly on the edge between a control on the correctness of the judgment of the first-instance judge and a restatement of the first-instance trial[31].

In this context, it is worth highlighting that the regulation of the appeal is subject to a constant work of remodeling by the Court of Cassation, whose outcomes are not always foreseeable.

From the second point of view, i.e. with regard to reasonable duration of the proceedings, the reduction of the cases in which the accused and the public prosecutor may appeal, on one hand, and the introduction of the agreement on the arguments of the appeal, on the other hand, seek to shorten the length of the proceedings, which in Italy is a very sensitive issue.

30 For example, when the accused was convicted for a different criminal act.

31 See, on this aspect, Antonia Antonella Marandola, 'Prime riflessioni sul "nuovo" giudizio d'appello' (2018) 2 Dir. pen. cont. 159, 174.

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Legal Remedies in Criminal Procedural Law in the Republic of Macedonia

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ABSTRACT

Macedonian criminal law legislation was subjected to some serious reform resulting in a nearly novel Law on Criminal Procedure (Official Gazette 150/10) adopted on 18.11.2010 with a suspended enforcement as of December 2013. This new law transformed domestic criminal procedure from a so-called mixed neo-inquisitorial procedure into a fully adversarial, thus almost fully abandoning the investigation principle and the court paternalism accompanying it. Court investigation was cancelled with trials now being held in an adversarial proceeding through cross examination of the defendant, witnesses and expert witnesses by the parties.

Constrained by time, the legal reform failed to introduce practically any important novelties in the area of remedies, so this field went without any significant change compared to the former LCP of 1997. Hence, it must be acknowledged that not only in Macedonia, but throughout the entire Western Balkan region, the reform of criminal procedure legislation pays very little attention to remedies, their redefinition within the context of the parties, the emphasized adversarial concept, including the equality of arms of the parties, the scope of the remedies, the grounds underlying the remedy, the hearings before the second-instance court, etc. Practically speaking, this led to the preservation of the remedy system from the LCP of former Yugoslavia.

The Macedonian system of criminal proceeding contains the following remedies:

-Ordinary: appeal to a first-instance judgment, appeal to a second-instance judgment, complaint to a decision.

-Extraordinary: Motion for the protection of legality; motion for extraordinary review of an effective judgment, and motion for a re-trial. The reform has made a small rationalization of the remedy system in the sense that the extraordinary remedy entitled 'Extraordinary mitigation of the sentence' has been taken out.

Keywords: Legal remedies, appeal, extraordinary mitigation

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I. CONCEPT, TYPES AND FEATURES

1. Introduction

Macedonian criminal law legislation has gone through the process of serious reform resulting in a new Law on Criminal Procedure (LCP) adopted in 2010 with a suspended enforcement *(vacation legis)* as of December 2013.[1] This new law has transformed the criminal procedure from a so-called mixed neo-inquisitorial procedure into a fully adversarial. Court paternalism was abandoned, as well as court investigation. There is a new concept of a main hearing based upon principles of adversarial proceeding through direct and cross examination of the defendant, witnesses and expert witnesses by the parties, not by the court.

Constrained by time, throughout the process of reform there was not enough time for in-depth analysis of the issues regarding legal remedies in criminal procedure. This is the main reason why this field is without any significant change compared to the former LCP from 1997. LCP from 2010 introduced changes into the system of legal remedies. Namely, there is a rationalization of the extraordinary legal remedies and more frequent hearings before the second instance court instead of returning the case to the first instance court.

However, it must be acknowledged that not only in Macedonia, but throughout the entire Western Balkan region, the reform of criminal procedure legislation pays very little attention to the concept of legal remedies, their redefinition within the context of criminal procedure based on the activities of the parties, the emphasized adversarial concept, including the equality of arms, the scope of the remedies, the grounds for filing the remedies, the hearings before the second-instance court, etc.[2] Due to such a situation, the remedy system from the LCP of former Yugoslavia has, in practical terms, remained intact in the new LCD.

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1 Official Gazette of the Republic of Macedonia, No. 150/2010, 100/2012 и 142/2016.

2 М. Шкулиќ, *Коментар Законика о кривичном поступку* (Службени гласник, Београд, 2007); Г. П. Илић, М. Мајић, С. Бељански, А. Трешњев *Коментар Законика о кривичном поступку* (Службени Гласник, 2012); D. Kos, D. Novosel, S. Nola, H. Božić, G. Klarić, A. Koridej, A. Pavičić *Zakon o kaznenom postupku i drugi izvori kaznenog postupovnog prava* (Narodne novine, Zagreb, 2014); B. Pavišić, *Komentar Zakona o kaznenom postupku* (Drugo izdanje, Dušević & Kršovnik d.o.o, Rijeka, 2013); Š. Pavlovič, *Zakon o kaznenom postupku* (2.Izdanje, Libertin Naklada: Biblioteka pravo i zakon, Rijeka, 2014); D.Tripalo, "Tijek kaznenog postupka - kontrola optužnice, rasprava, pravni lijekovi" (2008) Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, vol. 15, br.2; H. Sijerčić- Čolić, *Krivično procesno pravo, Knjiga druga – Tok redovnog krivičnog postupka i posebni postupci* (Pravni fakultet Univerziteta u Sarajevu, 2005); Tadija Bubalović, *Pravo na žalbu u kaznenom postupku* (Sarajevo, 2006).

The Macedonian system of criminal proceeding contains the following remedies:

- An appeal as a regular legal remedy: This can be filed against different decisions (a first-instance judgment; second-instance judgment; decisions; complaint to a decision);
- Extraordinary legal remedies: Motion for repetition of the procedure; motion for the protection of legality and motion for extraordinary review of an effective judgment.[3]

2. An Appeal as Regular Legal Remedy

Since 2010, the changes in the system of regular legal remedies in the LCP 2010 of the Republic of Macedonia do not concern the monistic system of regular legal remedies, so there is only one regular legal remedy – an appeal. It is directed toward remedying errors and shortcomings before the judgment becomes final.[4]

The same situation also prevails in the region of the Western Balkans.[5]

2.1. An Appeal Against Judgment Rendered by the First Instance Court.[6]

Main features of the appeal. An appeal is the only regular legal remedy in Macedonian criminal procedure legislation. It can be submitted against different decisions. An appeal is the sole remedy to challenge a judgment rendered by the first instance court. This remedy is complete because it challenges both substantial (*error facti*) and legal issues (*error juris*) pointed out as deficiencies of the particular judgment, as well as the procedure after which that judgement was announced.

As regarding the competent authority for decisions regarding the appeal, this legal remedy is devolutionary (Article 420 paragraph 2 of the LCP). Namely, the decision upon

3 Г.Лажетиќ – Бужаровска, Г.Калајџиев, Б.Мисоски и Д.Илиќ-Димоски, *Казнено процесно право - учебно помагало* (Правен факултет, Скопје, 2015). Г.Лажетиќ – Бужаровска, "Правните лекови во Предлог Законот за кривичната постапка на Република Македонија" (2011) Зборник во чест на проф. д-р Никола Матовски, Правен факултет „Јустинијан Први„ во Скопје.

4 Г.Лажетиќ – Бужаровска, Г.Калајџиев, Б.Мисоски и Д.Илиќ-Димоски, *Казнено процесно право - учебно помагало* (Правен факултет, Скопје, 2015).

5 Бужаровска, Г., Мисоски, Б., Груевска, А."Компаративно истражување на редовните и вонредните правни лекови" (2008) МРКК бр. 2-3; Tadija Bubalović, *Pravo na žalbu u kaznenom postupku* (Sarajevo, 2006); М. Шкулиќ, *Коментар Законика о кривичном поступку* (Службени гласник, Београд, 2007); B. Pavišić, *Komentar Zakona o kaznenom postupku* (Drugo izdanje, Dušević & Kršovnik d.o.o, Rijeka, 2013); Š. Pavlovič, *Zakon o kaznenom postupku* (2.Izdanje, Libertin Naklada: Biblioteka pravo i zakon, Rijeka, 2014).

6 In accordance with the Law on courts (Official Gazette of the Republic of Macedonia, no. 58/2006, 62/2006, 35/2008 and 150/2010), the basic courts are first instance courts.

the assessment of its merits and justification of the elaborated grounds is in competence of the higher court (*judex ad quem*) than the court having reached the prior judgment (*judex ad quo*). The second instance court is competent since there is an assumption that the judges are more experienced and competent for taking the final decision.

The appeal has suspensive effect, so the judgment cannot become effective before the decision regarding the appeal is taken by the competent higher court. (Article 410 of the LCP).

The appeal has also extended effect as regard the grounds for which it was submitted (Article 429 of the LCP). Due to this effect, the second instance court should consider any appeal in favor of the defendant, submitted due to wrongly established facts of the case or due to violation of the Criminal Code, which also contains an appeal in respect of the first court decision regarding the criminal sanction and forfeiture of illegal obtained property gain and assets. crime proceeds.

The privilege of cohesion (*beneficium cohaesionis*) of an appeal primarily refers to the co-defendants who have failed to use the right to an appeal (Article 430 of the LCP). Namely, if the second instance court, when proceeding upon an appeal, establishes that the circumstances for the favorable decision for the defendant in that case might also be beneficial for some other co-defendants who did not appeal against the judgment or appealed against it in respect of other issues, it shall proceed ex-officio as if such an appeal existed.

Authorized persons for appealing. Among the authorized persons that can appeal to the first instance court judgment are the parties, the defense attorney, and the legal representative of the defendant and of the victim. They are usually divided into two major groups: one that may ask for the judgment to be reviewed on behalf of the defendant; and one that may file an appeal to the detriment of the defendant. The public prosecutor is in both groups and can appeal both on behalf of and to the detriment of the defendant. (Article 411 p. 3 of the LCP).

The transformation of the procedure model from mixed (neo-inquisitorial) to adversarial (contradictory) led to the emergence of different opinions as to whether there should be a limit on the right to request review by the public prosecutor and to change their dominant position in the procedure with regards to the remedy for purposes of ensuring greater equality of arms of the parties in the procedure. However, the right of appeal of the public prosecutor remains possible.

Grounds for an appeal. Since the appeal is a completely regular legal remedy, it can be filed both for substantial and legal issues. The LCP has systematized all grounds in four basic groups (Art. 414, LCP):

1. Substantial violations of the provisions of the criminal procedure (*error in procedendo*) are violations of the LCP as a procedural law which have a decisive importance for the enforceability and lawfulness of a court judgment. All violations of the procedure do not have the same importance, nor does each one of them, due to its intensity, bring under question the sustainability of the judgment. The violations of the procedure can be divided into two categories, namely absolute and relative:

1.1. Absolute substantial violations of the procedure are those which make an assumption of the causal relation between the violation found and the irregularity of the judgment, and once the violation is established, the judgment must be nullified and the case returned for a repeat adjudication. Absolute violations to the LCP are listed in Art. 415 p. 1, items 1-12 of the LCP.

Judicial practice:

> .. According to the assessment of this court, the lower court has violated the provisions of the Law on criminal procedure under Art. 465 para. 1 item 2 in connection with Article 415 paragraph 1, item 1, because the first instance court was improperly constructed due to participation of the judge who had to refrain from acting in the present case... Such a circumstance is creating a doubt on the impartiality in the actions of the other judges in the same court, taking into account the collegial relations and the everyday contacts, that do not entrust the convict with the confidence and certainty that a fair and impartial trial will be ensured, which was actually manifested through the submitted request for exemption of all judges of that Basic Court. (Verdict of the Supreme Court of the Republic of Macedonia, No.12 / 2016 from 25.05.2017).

1.2. Relative substantial violations of the formal law are those violations where in each individual case it must be determined whether and to what extent the violation found has contributed to the irregularity of the judgment. In other words, after relative substantial violations are found it is necessary to consider if they had an effect or could have had an effect on the legality and regularity of the judgment. There is no legal assumption with them regarding the causal relation between the violation and

the judgment, but this relation must be determined in each and every case regarding the relevant circumstances.

2. Violations of the material law (*error in judicando*) are failures of application, i.e. incorrect application or interpretation of a provision of the Criminal Code. A violation of the Criminal Code is only the process of subsuming the facts under a certain abstract legal norm, i.e. its application in a specific legal case, but not the process of determining the factual state of play. The violations to the substantial law which may be the grounds for the filing of an appeal are precisely determined in the LCP (Art. 416, p. 1, items 1-6, LCP).

3. Incorrectly determined factual state of play (*error facti*) is a special ground to challenge the first instance judgment. Namely, the judgment may be appealed due to wrongly established facts of the case or when some of the decisive facts have been wrongly established or have not been established at all (Art. 417, LCP).

4. Decisions regarding criminal sanction, forfeiture of proceeds of crime, criminal procedure expenses, legal claim of property, as well as decisions regarding proclamation of the judgment through the press, radio or television. The judgment can be appealed upon this ground regardless of whether it convicted or acquitted the defendant (Art. 418, LCP).

Content of the appeal. The components of the appeal are precisely determined in the Article 413 of the LCP:

1) designate the judgment against which the appeal is filed;

2) list the ground for the annulment of the judgment;

3) rationale of the appeal;

4) a motion for the disputed verdict to be completely or partially nullified or reversed; and

5) signature of the person filing the appeal

With regards to whether or not the appeal may list new facts and evidence, the LCP introduces a new feature in that it precludes the proposal of evidence – the appeal cannot list new facts or new evidence except for those that the parties can prove were unable to be presented up to the completion of the evidentiary procedure due to being unknown or unavailable to them.

There is no preliminary decision on the justifiability of the grounds of the appeal in the sense that there is no preliminary assessment as the one in comparative law (*leave to appeal*) or an evaluation of whether the appeal is manifestly ill founded as is the case before the human rights court in Strasbourg.

Deadline for submission of an appeal. Any authorized person may file an appeal against the first instance judgment, within fifteen days from the day of receipt of the certified copy of the judgment (Article 410 paragraph 1 of the LCP.). If the person authorized to use the right to appeal, does not file an appeal within the prescribed deadline, the judgment shall become enforceable thereupon.

Procedure after the appeal is submitted. The appeals procedure commences in the presence of the court that has issued the judgment under appeal. The court of first instance, under the LCP, has several actions that must be taken following the receipt of the appeal and before the case is submitted to the second instance court. Due to these obligatory actions of the first instance court, the whole appeal procedure is divided into two parts: the first part is linked with the action taken by the first instance court, and the second part has to do with actions in the second instance court after the appeal and whole file has been submitted.

1. Procedure before the first instance court (*iudex a quo*) The appeal is filed to the court having issued the first instance judgment and must include a sufficient number of copies for the court, as well as for the opposing party and the defense attorney for their answer (Art. 419 p. 1).

The court of first instance examines whether all necessary conditions for conducting the appeals procedure have been fulfilled. With regards to the appeal as a writ, the court is authorized to check the following circumstances:

a) contents of the appeal. The court first checks if the appeal contains all the elements prescribed. If not, the first instance court sends the appeal back to the defendant for its completion within a certain deadline, if the appeal has been submitted by:

- the defendant or another person on his behalf when the defendant does not have an attorney, or
- the victim or the private plaintiff who has no attorney.

The court will dismiss the appeal if the authorized person fails to complete the appeal within the given deadline, if there is no ground to overrule the judgment, if the

appeal lacks reasoning or if it is not signed by the person who has submitted it. If the appeal has been submitted on behalf of the defendant and it fails to list to which judgment the appeal refers , the first instance court will file it to the second instance court when it will be possible to determine to which judgment it refers. Thus the appeal will only be dismissed if the court cannot determine to which judgment the appeal refers ;

b) deadline for sending the appeal. The deadline in which the appeal has been filed is the second element inspected by the first instance court. The deadline for the submission of the appeal is set in law and it is 15 days (Art. 410, LCP). If the appeal is submitted after the given deadline, the presiding judge from the first instance court panel will dismiss the appeal with a decision.

c) Leave of appeal. This is the third element inspected by the first instance court. Since the subject of the appeal is precisely determined in the LCP (Art. 411), if the court of first instance finds that the appeal is filed by an unauthorized person, it means that it will be unpermitted and the president will dismiss it with a decision. An unpermitted appeal is one submitted by a person who is the subject of the appeal, but who has been renounced from the right to appeal or who has been renounced from the already filed appeal.

With regards to the care extended to ensure the principle of adversariality, the court of first instance is obliged to submit to the opposing party a copy of the appeal filed. The opposing party then has the right to respond to the court within 8 days as of the receipt of the appeal. The court of first instance submits the appeal and the answer to the appeal including all case files to the court of second instance within three days as of the receipt of the answer to the appeal, i.e. after the expiry of the deadline for the answer to the appeal.

2. Procedure before the second instance court (*iudex ad quem*) is the second part of the appeal procedure. When the file reaches the second instance court, a reporting judge is designated within three days.

The reporting judge is authorized to take certain procedural actions upon his own initiative with the purpose of enabling unhindered work of the panel, as follows:

- collect from the first instance court a report on the violations of the provisions of the criminal procedure,

- check the allegations in the appeal regarding new evidence and new facts through the first instance court or through the judge of the preliminary procedure of the court on whose territory the action should be conducted;
- collect the necessary reports or files from other authorities or legal persons;
- if he finds that the file contains the minutes and reports prescribed in Article 93 of the LCP, the file shall immediately be submitted to the court of first instance prior to the holding of the session of the second instance panel so that the president of the first instance panel can make a decision for them to be separated from the file. Once the decision becomes effective, he should submit them back to the judge of the preliminary procedure in order to keep them separately from the other file.

The court of first instance, i.e. the competent public prosecutor having conducted the investigative procedure, and from whom the reporting judge is requesting reports or undertaking of certain actions, is obliged to act under the request within 30 days.

Judicial practice:

The second-instance court violated the right to defend of the convicts in an appeal procedure when he did not inform the defendants and their attorney about the day and hour of the public session, although such a request was pointed out in the responses to the appeals lodged by the defendants (Supreme Court of the Republic of Macedonia, Collection of Court Decisions 2004-2014, p. 208).

Limits of examination of the first-instance judgment. When determining the scope within which the disputed judgment is examined with an appeal, Macedonian criminal and procedural law is based on the *tantum devolutum quantum appellatum* principle, i.e. the second-instance court examines the judgment in that part which is disputed by the appeal (Article 427 paragraph 1 of the LCP). This should be understood as meaning that the second-instance court does not, as a rule, engage in examining those parts of the first-instance judgment which are not questioned by the appeal, i.e. *ultra petitum* does not apply.

However, there are three exceptions to this general rule when the second-instance court must always examine the first-instance judgment *ex officio* with regard to the following grounds:

- when there are any of the absolute substantial violations of the provisions of the criminal procedure (Article 415, Paragraph 1, Items 1, 5, 6, 8 to 11 of the LCP);
- if the main hearing, contrary to the LCP provisions, was held in the absence of the defense attorney. The examination of these violations may be beneficial, but also to the detriment to the defendant, and
- if the Criminal Code (Article 416 of the LCP) has been violated to the detriment of the defendant regardless of who submitted the appeal. This may only serve to the benefit of the defendant and not to his detriment.

If an appeal filed in favor of the defendant does not contain the grounds for appealing nor an elaboration, the second-instance court shall be limited in its procedure and only examine the stated grounds *ex officio*, as well as examining the sentencing, safety measures and confiscation of property decisions as referred to in Article 418 of the LCP.

However, the appellate court is obliged *ex officio* to examine some violations of the criminal procedure and the Criminal Code even if those legal issues are not grounds of the appeal (Article 427 of LCP).

Judicial practice:

> ... the second-instance court was obliged to examine the verdict only in the part in which the appeal challenged it, so in the part that refers only to the convicted AJ, and not to alter the verdict regarding the convicted persons SK and CC, for which the defendants there was no appeal filled by the public prosecutor (Verdict of the Supreme Court of the Republic of Macedonia, No.61/2013 from 10.04.2013).

Decision-making process in second instance court. The second instance court makes decisions in two ways – at the panel session or by holding a hearing.

Decision-making at the panel session. After the listed procedural actions have been taken and the file has been studied, if the case refers to a crime prosecuted under the motion of the public prosecutor, the reporting judge, without any delay, submits the file to the competent public prosecutor who is obliged to review it and immediately, or within 15 days (30 days for more complex cases), return the file to the court. The public prosecutor, in returning the file, submits a written motion to the

court or will inform the court that there will be a written motion submitted and presented during the panel session.

The competent public prosecutor (from the higher public prosecution office) and the defendant and his attorney will be informed about the panel session, as well as the private plaintiff who has requested to be informed of the session within the term prescribed for the appeal or for the answer to the appeal or who has motioned to hold a hearing before the second instance court. Failure of the duly informed parties to appear in court does not prevent the panel session from being held. If the defendant has not informed the court of a change of his residence, the panel session may be held although the defendant has not been informed thereof. The public can be excluded from the panel session attended by the parties only in line with Art. 353, 354, 355 and 356 of the LCP.

The second instance court panel session is public at the request of the parties for a crime punishable by more than five years' imprisonment.

If the defendant is in custody, or serving the sentence, and has a defense attorney, the defendant's presence will be provided only if the panel president or the panel itself consider this to be necessary

In line with the LCP, the panel session is opened with a report by the reporting judge on the state of play, then the applicant explains the appeal followed by the opposing party being given the right to answer the allegations in the appeal, i.e. in the answer to the appeal. In doing so, it is crucial that the party does not repeat what is already contained in the report by the reporting judge. For the purpose of completion of the report, one may ask for certain files to be read. The defendant and their defense attorney always have the last word (*in favorem defensionis*). The plaintiff may, taking into consideration the outcome of the hearing, waive the indictment completely or partially or amend the indictment in favor of the defendant.

Minutes covering the course of the hearing are taken and attached to the case files.

Decision-making at the hearing. - A hearing before the second-instance court panel shall be held in the following cases:

- if it is determined that there is substantial violation of the provisions of the criminal procedure from Article 415 Paragraph 1 of the LCP, which according to the panel may be corrected by holding a hearing before the second-instance court panel;

- if it is determined that the facts of the case have been wrongly established during the first instance procedure; or
- when any new facts and evidence, presented in the appellant's brief for the first time, have been evaluated as admissible.

Should the panel at the session determine that it is necessary to hold a hearing, it shall be set for no later than 15 days from the day the panel session took place.

The second-instance court panel session shall be held in accordance with the provisions regulating the main hearing of the first-instance procedure, unless otherwise provided for in the LCP.

The defendant and their defense attorney, the plaintiff, the victim, the legal representatives and attorney of the victim and the private plaintiff, as well as the witnesses and witnesses-experts who are to testify upon the court's decision shall be summoned to the hearing before the second-instance court. The purpose of the hearing shall be to examine evidence which was unknown or unavailable in the course of the first-instance procedure, as well as that deemed by the panel necessary to be presented for correct determination of the factual state.

Judicial practice:

> There was a violation of the provisions of the Law of criminal procedure in an appeal procedure, when despite the request of the defense for holding a public session, the second instance court did not provide presence of the defendant who was currently serving the sentence of imprisonment, but held the public session in the absence of the defendant, noting that the defendant was properly informed about holding the public session through the administration of the institution. (Supreme Court of the Republic of Macedonia, Collection of Court Decisions 2004-2014, p. 202).

The decisions rendered by the second-instance court. These may be in the form of a decision or judgment. The second-instance court may render the following decisions:

- *overruling the appeal as untimely* (Article 432) - when the preclusive deadline for filing the appeal had not been met, resulting in the party losing his right to file an appeal afterwards;

- *overruling the appeal as inadmissible* (Article 433) - when it is determined that the appeal was filed by a person who was not authorized, or by a person who waived the right to appeal, or if it is established that the person withdrew the appeal, or filed another appeal following the previous withdrawal, or if an appeal is not allowed according to the law;
- *suspending the first-instance judgment and returning the case to re-trial* (Article 436) - when the second-instance court having accepted the appeal, or after *ex officio* examination of the judgment within the limits of examination of the first-instance judgment, determines that there is a substantial violation of the provisions of the criminal procedure unless it decides to hold a hearing. The second-instance court may order a new main hearing to be held before the first-instance court with a completely new panel, and it may suspend the first-instance judgment only partially should some portion of the judgment be set aside without damage toward lawful judging. When the first-instance judgment is suspended due to substantial violations of the provisions of criminal procedure, the explanation should state which provisions were violated and what exactly the violations found by the second-instance court were;
- *suspending the first-instance judgment and ordering a hearing before the second-instance panel* (Article 437) - When the second-instance court, accepting the appeal or *ex officio*, finds that the conditions for holding a hearing have been met. The second-instance court may only partially suspend the first-instance judgment if certain portions of the judgment can be set aside without harm to lawful judging and t hold a hearing regarding that portion of the judgment;
- *reversing the judgment and rendering a court reprimand* (Article 435, Paragraph 2) - If it is found that there are legal circumstances to render a court reprimand.
- *reversing the first-instance judgment* (Article 435 paragraph 1) - The second instance court, granting the appeal or *ex-officio*, shall reverse the first instance judgment. It shall take a decision in this regard in two cases: a) if it establishes that the decisive facts in the first instance judgment have been properly established, but the correct application of the law led to the different judgment; or b) when there is any violation as referred to in Article 415, paragraph 1, items 5, 9 and 10 of the LCP;

- *confirming the first-instance judgment* (Article 434) - When the second-instance court dismisses the appeal as unfounded and when it determines that there are no grounds for appealing the judgment, nor are there violations of the law which the second-instance court is obligated to consider *ex officio*.

2.2. An Appeal Against Decisions Rendered by the First Instance Court

During the procedure, starting from preliminary proceeding, and continuing through the stage of approval of the indictment to the phase of main hearing, the court decides on different legal issues with decisions. Procedural decisions are taken during the main hearing. They are part of the trial minutes and are not in written form and there is no possibility for the party to file an appeal against them during the procedure. Any decisions brought for the purpose of the preparation of the main hearing and the judgement may be disputed only through an appeal against the judgment (Article 440 paragraph 3, LCP).

However, there are two other types of decisions taken by the court that can be appealed against:

- any party or persons whose rights have been violated may appeal against the decision taken by the judge of the preliminary proceeding and other court's decisions in first instance, except for procedural decisions and those decisions for which the LCP explicitly stipulated that a separate appeal shall not be allowed.[7] (Article 440 paragraph 1, LCP);
- the decisions of the panel referred to in Article 25 paragraph 5 of the LCP issued before and during the investigation, by rule, cannot be challenged by a special appeal. However, a special appeal is being possible, but only as an exception, unless differently determined by the LCP (Article 440 paragraph 2, LCP).

Regarding the devolutionary of this appeal, it should be emphasized that the competent authority to decide upon the appeal against the decision taken by the judge of the preliminary proceeding is the panel referred to in Article 25 paragraph 5 of the LCP, which is actually the second-instance panel in the court of first instance. For the

7 The decisions of the court during the criminal procedure can be appealed unless those for which the LCP expressly forbids to be appealed, as for instance, a decision taken by the court about the manner in which the protected witness will be examined is not allowed (Article 228 paragraph 3 of the LCP), or one against a decision to postpone the main hearing (trial).

purpose of efficiency, those appeals are not within the competence of the higher courts. So, the devolutionary principle is not violated although the decision is taken by the panel in the basic court.

If there is a legislative possibility for filing an appeal against the decision of the panel referred to in Article 25 paragraph 5 of the LCP, the panel of the higher court is competent for taking a decision regarding the appealed decision.

2.3. An Appeal Against Decisions Rendered by the Second Instance Court.[8]

There is an exceptional legislative possibility for filing an appeal against the judgment of the second instance court only when the second instance court (Article 439):

1) passed a sentence of life imprisonment, or if the second instance court confirmed a sentence of life imprisonment passed by first instance court's judgment;

2) passed a judgment on the basis of a hearing before second instance court panel; and

3) if the second instance court reversed the acquittal judgment of the first instance court and passed a judgment declaring the defendant guilty.

The Supreme Court makes decisions at the session of the panel. There shall be no hearing before this court.

The appeal procedure in the Supreme Court is undertaken in accordance with the provisions that areapplicable to the second instance procedure.

3. Extraordinary Remedies

Main features. Once all the regular legal remedies have been exhausted and the higher court has rendered a decision thereof (i.e. the parties explicitly or implicitly expressed their will not to use the regular legal remedies, or the submitted legal remedy has been dismissed as unfounded), the first-instance decision remains in effect, rendering the hearing upon the case concluded and assigning it a status of a closed matter *(res judicata)*. The existence and use of extraordinary remedies is in the context of an endeavor to reach an appropriate and lawful judicial decision. Their existence and final outcome suspends the action of the maxim that any judgment has

8 In accordance with the Law on courts, the appellate courts (total number of four: Skopje, Bitola, Štip and Gostivar) are second instance courts.

been establishing the truth *(judicata pro veritate habetur.)*. Nonetheless, in certain cases new facts and evidence might be found or discovered that substantially amend the effective decision partially or fully. In such a situation, there is a possibility that the additionally submitted evidence and facts may lead to an alteration of the factual state on which the first-instance judgment is based. In certain cases, it may appear that the court has wrongly applied the law, i.e. that the circumstance discovered later leads to the fact that the court has rendered too severe a punishment, despite being within the legislative framework. Within the basic characteristics of the extraordinary legal remedies, except for suspensive effect, some of them are devolutionary, others are not. They are incomplete remedies with a different nature and some of them can be submitted for factual and legal issues or only for legal issues. As regards the authorized persons who may submit an extraordinary remedy, there are extraordinary legal remedies that can be submitted only by the defense, or only by the public prosecution or by both parties.[9]

There are three types of extraordinary legal remedies:[10]

1) **Repetition of the criminal procedure** – extraordinary legal remedy with suspensive but not with devolutionary effect. It can be filed only for factual matters *(question facti)* by any party. The final judgment can be challenged on several grounds: Reversing a judgment that entered into effect without repetition of the procedure; Repetition of the procedure which has been terminated with a final court decision; Repetition of the procedure in favor of the convicted; Repetition of the procedure to the detriment of the convicted or repetition of the procedure for a person convicted in absence. With a decision, the court can deny the request for repetition of the criminal procedure (if the request was submitted by an unauthorized person; if there are no legal grounds for repetition of the procedure; if the facts and evidence that the request is based upon were already presented in a former motion to repeat the procedure that was denied with a previous final court decision; if the facts and evidence are obviously not suitable to be used as a basis for repetition etc.) or the court can accept the request and allow for the criminal procedure to be repeated.

9 Бужаровска, Г., Мисоски, Б., Груевска, А., "Компаративно истражување на редовните и вонредните правни лекови" (2008) МРКК бр. 2-3.

10 Г.Лажетиќ – Бужаровска, "Вонредните правни лекови во кривичната постапка" (2009) Зборник на Правниот факултет „Јустинијан Први" во Скопје во чест на Тодор Џунов.

Judicial practice:

The extraordinary legal remedy "repetition of the criminal procedure" is not allowed for a procedure concluded with the revocation of the suspended sentence, since the final verdict with which the suspended sentence has been revoked cannot be put out of force. (Decision of the Court of Appeal in Bitola, KSJ.no.81/11, 07.07.2011, Bulletin of the Court of Appeal in Bitola, December 2012.)

2) **The request for protection of legality** – With suspensive and devolutionary effect. This is an extraordinary legal remedy through which the Public Prosecutor of the Republic of Macedonia may challenge the final judgments should they violate the Constitution of the Republic of Macedonia, the law or an international agreement ratified in accordance with the Constitution (Article 457). The Supreme Court decides upon this request of the public prosecutor. When deciding upon the request, the Supreme Court is bound by a privilege of cohesion (*beneficium cohaesionis*) and prohibition of changes for the worse**.**

3) **The request for exceptional re-examination of the final judgement -** With suspensive and devolutionary effect, this can be filed by any person convicted to an unconditional prison sentence or juvenile prison of at least one year. This extraordinary legal remedy is provided only for the defense. There are two additional conditions for filing this request: a) a request for exceptional re-examination of a judgment that had already entered into effect shall be filed within 30 days from the day when the defendant received the final and enforceable judgment and b) any convicted person who did not use a regular legal remedy against the judgment may not put forward a request for this extraordinary legal remedy.

4. Other Remedies for Protection of Constitutional Rights and Trial within a Reasonable Time

Constitutional complaint. In the Republic of Macedonia there is no constitutional complaint (appeal) in terms of *recurso de amparo* as a legal remedy protecting particular violations of the constitutional rights and freedoms before the Constitutional Court. More precisely, according to Article 110 of the Constitution of the Republic of Macedonia, to some extent this right exists for the violation of certain so called political rights - 1) freedom of conviction, conscience, thought and public expression of thought; 2) the right to political assembly and action and 3) discrimination

prohibition. Outside of these expressly stated rights and freedoms, there is no immediate protection afforded by the Constitutional Court for other freedoms and rights. This option, on the other hand, is very rarely used even for these rights and freedoms, hence the criticism in theory of this constitutional solution as a 'quasi-constitutional' appeal. In this regard, in 2014, the Government of the Republic of Macedonia proposed amendments to the Constitution envisaging a wider application of the constitutional appeal for violations of the right to life, freedom, a fair trial, privacy etc., but this initiative did not receive the necessary support and to a certain extent this and other proposed constitutional amendments remained wedged in the procedure.

Trial within a reasonable time. As a result of a vast number of cases related to the violation of the right to a trial within a reasonable time brought before the Court on Human Rights in Strasbourg, the Republic of Macedonia amended the Law on Courts (LC) from 2006. With the adopted Law on amendments and modifications of the Law on Courts from 2008 it introduced and put in motion a new legal remedy for the protection of the right of the citizens to a trial within a reasonable time. This law introduces the authority of the Supreme Court to rule on claims by parties and other participants in the procedure regarding the violation of the right to a trial within a reasonable time, in a procedure outlined by law before the court of the Republic of Macedonia, in accordance with the rules and principals set forth by the European Convention on Human Rights and stemming from the criteria outlined by the court practice of the European Court for Human Rights. The Supreme Court decides upon approximately 500 cases a year on these grounds, less than 20% of which, or some 100 cases a year, are criminal cases.[11]

After the exhaustion of the domestic legal remedies, the citizens of the Republic of Macedonia and all persons under its jurisdiction may ask for protection of their fundamental civil rights and freedoms before the ECtHR and before the UN Human Rights Committee. By the end of 2016, the ECtHR rendered 133 judgments in cases against the Republic of Macedonia and 410 decisions for admissibility of applications against the Republic of Macedonia.[12]

The introduction of this legal remedy was in accordance with the Recommendation

11 <http://www.vsrm.mk>accessed 3 March 2018.

12 <https://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf; https://www.echr.coe.int/Documents/CP_The_ former_Yugoslav_Republic_of_Macedonia_ENG.pdf> accessed 3 March 2018.

of the Council of Europe for effective remedies for excessive length of proceedings.[13] It recommended member states to take the necessary steps for ensuring that all stages of the domestic procedure are conducted within a reasonable time. There are procedural possibilities for speeding up the procedure, as well as existence of effective remedies before the national authorities for all requests regarding violation of the right to a trial within a reasonable time. For the very first time in the case of Atanasović et al. against the Republic of Macedonia the ECtHR considered that there was a lack of an effective remedy regarding the length of the proceedings in the Macedonian legal system. For these reasons, ECtHR assessed that there was a violation of Art. 13 of the ECHR since the applicants did not have a domestic remedy to exercise their "right to a trial within a reasonable time", guaranteed by Art. 6 para. 1 of the ECHR.[14] After a several years, the European Court established the effectiveness of this remedy with the decision based on the permissibility of the application of Ms. Shurbanovska and other applicants in 2008.[15] The ECtHR assessed that the Macedonian court had awarded an amount of compensation which is within the framework of the ECtHR practice in similar cases of lengthy court proceedings. As for the question whether the applicants can claim to be victims of a violation of Article 6 para. 1 of the ECHR with regard to the length of the proceedings, the ECtHR points out that they do not have victim status in this regard since the national authorities have established this position and awarded them fair compensation for the duration of the proceedings and set a time limit for the case to be completed.

II. QUESTIONS REGARDING PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

The right to a fair trial in the appellate procedure. According to the comparative law and the practices of the ECHR, the procedure upon an appeal and other legal remedies does not always reflect to the full extent all guarantees from Article 6 which apply to a first-instance trial. In this sense, the immediate participation of the parties

13 Recommendation CM/Rec [2010] 3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings.

14 *Atanasović et al. v. FYROM* App no 13886/02 (ECHR, 12 April 2006).

15 Decision as to the admissibility of Application no. 36665/03 by Slavica Šurbanoska and others against the FYROM (ECHR, 31 August 2010).

with their personal attendance and a contradictory dispute is limited and is required especially in cases where the higher court discusses the facts or renders a decision on the merits. The ECtHR reiterates that the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing and that the manner in which Article 6 applies to proceedings before courts of appeal depends on the special features of the proceedings involved. Account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.[16] In assessing the question whether the applicant's presence was required at the hearing before the court of appeal, according to the Strasbourg case-law regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it,[17] as well as of their importance for the appellant.[18] However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence.[19]

Nonetheless, as in other Western Balkans and European countries, in Macedonian legislation there are still serious remnants of the inquisitorial approach of the court and the dominant role of the public prosecutor. The Republic of Macedonia, similar to Croatia and some other states mentioned above, kept the old Yugoslav procedure in the legal remedies part, due to which are cases in ECtHR due to violation of the 'equality of arms' as an essential element of the right to a fair trial according to Article 6 of the ECHR.[20]

Specifically, the defendant is not always summoned to the second-instance court hearing, especially if they are in detention, in which case only the defense attorney is called. Moreover, the prosecution office is still in a privileged position before the

16 *Kamasinski v. Austria* Ser.A 168 (ECHR, 19 December 1989) 106; *Ekbatani v. Sweden* Ser.A 134 (ECHR, 26 May 1988) 27; *Monnell and Morris v. UK* Ser.A 115 (ECHR, 2 March 1987) 56.

17 *Helmers v. Sweden* Ser.A 212-A (ECHR, 29 October 1991) 31-32.

18 *Kamasinski v. Austria* Ser.A 168 (ECHR, 19 December 1989) 106; *Kremzow v. Austria* Ser.A 268-B (ECHR, 21 September 1993) 59; *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 55.

19 *Dondarini v. San Marino* App no 50545/99 (ECHR, 6 July 2004); *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 56.

20 *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013).

higher court.[21] The ECtHR considers that there has been a violation of Article 6 § 1 of the ECHR on account of the public prosecutor's presence at the Court of Appeal's session, of which the applicant was not even notified.

In the ECtHR's view, the applicant's failure to request notification should not be held against him, given the statutory inequality that the LCP created by providing only the public prosecutor with a right to be apprised of the appellate court's session automatically, while restricting that right for the accused to a specific request by him or her to attend. The Government did not provide any reasonable explanation for this procedural inequality flowing from the LCP. Therefore, the ECtHR considered no justified reason why such preferential treatment was offered to the public prosecutor, which acts as a party to the proceedings and is accordingly the applicant's adversary.[22] Moreover, given that the factual issue of the applicant's intention was under close scrutiny by the Supreme Court, there was an even stronger need to summon the applicant and give him the opportunity to be present at that court's session on an equal footing with the public prosecutor.[23]

The three-level judicial proceedings and its effect toward the estimation of the reasonable period. The yearly court reports make it clear that legal remedies are used extensively in the Republic of Macedonia, as is the case in the rest of former Yugoslavia, contributing to a delaying of the procedure. Furthermore, the number of repealed judgments returned to a repeated trial is also significant, again largely contributing toward the delaying of the procedure. The attempts of the legislator to have the higher courts more frequently resolve the dispute meritoriously, i.e. the decision that the once repealed case must be decided upon meritoriously in the repeated procedure, yielded limited results. This practice has been met with disapproval in the ECtHR. In several judgments, the ECtHR recalled that it is for the countries to organize their legal systems in such a way that their courts can guarantee everyone's right to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time.[24]

21 *Nasteska v. FYROM* App no 23152/05 (ECHR, 27 May 2010) 17; *Atanasov v. FYROM* App no 22745/06 (ECHR, 17 February 2011).

22 *Atanasov v. FYROM* App no 22745/06 (ECHR, 17 February 2011) 32; *Eftimov v. FYROM* App no 59974/08 (ECHR, 2 July 2015).

23 See, *mutatis mutandis*, *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 62-63.

24 *Kostovska v. FYROM* App no 44353/02 (ECHR, 15 June 2006) 41; *Lazarevska v. FYROM* App no 22931/03 (ECHR, 5 July 2007).

On the other hand, the ECtHR often finds significant delays due to the actions of the domestic courts. In this respect, it observes that the proceedings had lasted for several years before the Supreme Court. In the case of Dimitrijoski the ECtHR found that this time cannot be regarded as reasonable.[25] The workload of domestic courts, to which the Government referred in their observations, cannot be considered as an excuse for the protracted length of the proceedings.[26]

The delaying of court procedures is additionally affected by the refusal of the criminal courts to rule on the damages, i.e. the legal claims of the victim (which, according to the LCP should be a rule), generally referring the victims to a separate civil lawsuit.

Protection of fundamental rights and freedoms when the second-instance court is deciding without a hearing. We should note that the prosecution office is treated in a different manner and is even openly put in a privileged position both *ex lege* in the LCP itself and *de facto* through an unconcealed 'collegiality' with the court, which may often result in a problem considering the 'equality of arms'. This applies to what has already been mentioned (mandatory attendance and summons for the prosecutor), at times when the defendant is not summoned nor present, .

The issue of the somewhat strange role of the higher prosecution office in the appeal procedure is also relevant. In order to consider the effect of this problem, it is necessary to explain the organizational hierarchy and authority of the prosecution office in the domestic legal system. The basic prosecution offices (much like the basic courts) are authorized to act upon all criminal acts of the first instance. The higher prosecution office, following the judiciary reforms of 1995, no longer acts in the first instance upon severe acts according to the previous legislative solution, but remains competent to act solely before the appellate courts in appellate proceedings. Out of practical reasons and in view of the familiarity with the case, the basic prosecution office, which also responds to the defense appeal, continues to file an appeal concerning the first-instance judgment, but the appeal of the prosecution before the appellate court is represented by the higher prosecution office. The higher prosecution office is in this case authorized (but not obligated) to submit its own opinion, which is unfortunately not submitted for a response to the defense, as is the case with the appeal of the basic

25 *Dimitrijoski v. FYROM* App no 3129/04 (ECHR, 10 October 2013); *Mihajloski v. FYROM* App no 44221/02 (ECHR, 31 May 2007) 38.

26 *Dumanovski v. FYROM* App no 13898/02 (ECHR, 8 December 2005) 45.

public prosecution in the first-instance proceeding. Thus, the prosecution office has the advantage of submitting practically two legal opinions, whereas the defendant is unable to get acquainted with and to respond to the opinion of the higher prosecution office in a timely manner and to be well prepared for the hearing. This problem is particularly serious taking into consideration the fact that not only has Macedonia, but also Croatia, lost a case in the ECtHR over a similar situation.[27]

Principle of impartiality regarding the appellate hearing. There are special legal grounds in LCP regulating the compulsory exemption of a judge who has participated in a first degree ruling, where they cannot be included in the procedure before an appellate court. These grounds fall under *absolute grounds* for exemption *(iudex inhabilis)* and are enforced when a judge from the same criminal case participated as a judge of the preliminary proceedings or took part in the assessment of the indictment. The reason for the mandatory exemption of the judge is due to the fact that because of previously undertaken steps and rendered decisions with regard to the same case, the judge acquired preconceived notions which cannot pass the test of impartiality. This provision is in line with the ECtHR practice.[28] Namely, the ECtHR rules that impartiality requires the absence of prejudice or bias, and that their existence or lack thereof can be tested in different ways. According to its established court practice, the existence of impartiality in terms of Article 6 Paragraph 1 of the ECHR must be determined in accordance with the subjectivity test, where the personal conviction and conduct of a certain judge must be taken into consideration, i.e. has the judge had any personal prejudice or bias in a given case; and also according to the objectivity test, i.e. through determining whether the panel at the domestic court offered sufficient guarantees in order to exclude any justified doubt with regard to the impartiality of the judge.

Mandatory defense lawyer during appellate procedure. Although the right to have a defense lawyer, in particular indigent people's right to have a defense lawyer, in criminal proceedings, as required by interest of justice and fair trial, is listed among the fundamental human rights guaranteed by international instruments, the Constitution and the laws, it is completely dysfunctional in practice. Available data show that in Macedonia indigent people face difficulties in exercising their right to a defense lawyer in criminal proceedings, and defense services they do receive are

27 *Zahirović v. Croatia* App no 58590/11 (ECHR, 25 April 2013) 62-63.

28 *Morice v. France* App no 29369/10 (ECHR, 23 April 2015) 73-78.

inadequate and do not guarantee them justice. Few people are aware that except for mandatory defense, there are practically no cases in which defendants have been appointed attorneys only on the basis of their poverty status.[29]

The domestic law stipulates mandatory defense by means of a court-appointed defense lawyer in cases when due to the gravity of criminal charges or any other obvious handicap defendants are not able to represent themselves. In such cases, defendants (or their family members, etc.) can contract a defense lawyer of their choice, but if they do not have a lawyer, the court appoints them an 'official defense lawyer'.

LCP stipulates different stages and different circumstances in criminal proceedings when a defense lawyer must be involved. However, except in cases of children, the defense lawyer needs to be engaged in court proceedings, but not in police or prosecutorial proceedings. Hence, according to Article 74 of LCP, when defendants are deaf, hard-of-hearing or incapable of successfully representing themselves, or when criminal proceedings are initiated for criminal offences, and even one of them is punishable with life imprisonment, defendants must have a lawyer present at the first questioning (refers to court hearings). Persons' inability to represent themselves is a factual matter assessed by the court. Scholarly writings and court practice do not have a clear answer about situations in which persons are unable to represent themselves in order to be appointed a defense attorney.

Another novelty is the fact that defendants who have been given detention must have a defense lawyer for the entire duration of their detention. In cases of indictment for criminal offence which, by law, is liable to imprisonment for ten years or more, defendants must have a lawyer at the time they are presented with the indictment. Defendants tried *in absentia* must have a lawyer from the moment the court has ordered trial in absence. Finally, the new LCP stipulates mandatory participation of defense attorneys in sentence bargaining procedure from the very beginning.

Although the right to a lawyer formally covers the appeal procedure too, in practice it is rarely used. We found that unlike the basic courts which spend significant amount of money on this issue, the appellate courts do not have any budget for this purpose.[30]

29 G.Kalajdziev, *Effective defense in criminal proceedings in the Republic of Macedonia* (FIOOM - Skopje, 2014, <http://www.brrln.org/uploads/documents/36/Effective%20defence%20in%20criminal%20proceedings%20in%20the%20 Republic%20of%20Macedonia.PDF> accessed 3 March 2018).

30 G.Kalajdziev, *Effective defense in criminal proceedings in the Republic of Macedonia* (FIOOM - Skopje, 2014).

Reasoning in the second-instance courts' judgement. The judgments rendered by the judges of the appellate courts must contain a reasoning. The LCP contains particular provision envisaging that in the reasoning of the judgment, the second-instance court should assess the allegations presented on the appeal and elaborates the violations of the law it took into consideration *ex officio* while deciding. Nonetheless, depending on the nature of the rendered decision, the reasoning may differ significantly. Namely, when the appellate court holds a hearing and renders a decision, it acquires a status of a first-instance judgment for the parties and must contain a reasoning as is the case with the first-instance judgment. In cases when the appellate court decides to confirm, suspend judgement, send the case to re-trial or to reverse a judgment, the elaboration does not resemble the reasoning of the first-degree decision, but contains the necessary instructions required to be undertaken in the repeated procedure (when the judgment is suspended), and elaborates the reasons justifying the reversal of the judgment, i.e. the reasons behind the court's finding that the appeal (or appeals) are unfounded and the first-degree judgment should be confirmed.

Overcoming differences in the case-law among appellate panels and among appellate courts. The court practice is not a source of law in the Republic of Macedonia. The Supreme Court adopts general standpoints and general legal opinions, but they are mandatory only for the Supreme Court panels and not for the lower courts. Nonetheless, the lower courts abide by them owing to argumentation and for the sake of standard practice . The appellate courts may adopt standpoints and opinions on certain issues that lead to un-unified practices between two different appellate courts or between panels at one appellate court. The lower courts should, as a rule, follow the common standpoints adopted by the appellate judges, although in reality this is not always the case.

Macedonia has lost several cases before the ECtHR due to an un-unified court practice. In case of Atanasovski, the ECtHR noted that the Supreme Court changed the practice in the case of the applicant through decision-making contrary to the already established court practice concerning that issue.[31] In this respect, the ECHR stated that the development of court practice is not in itself contrary to the rule of administration of justice, considering the fact that failure to maintain a dynamic and evolutionary approach threatens to turn into an obstacle for reforms or the improvement

31 *Atanasovski v. FYROM* App no 36815/03 (ECHR, 14 January 2010).

of the court practice. Nonetheless, it was pointed out that the existence of an established court practice should be taken into consideration during the assessment of the scope of the elaboration given for a certain case. In this particular case, the Supreme Court deviated from both the lower court's practice and from its own. The requirements for legal security and protection of legitimate expectation do not include the right to a set practice, but considering the specific circumstances of the case, the ECHR feels that a well formed court practice imposes the obligation that the Supreme Court provides a more fundamental elaboration of the reasons justifying the deviation in every single case.

In the case of Stoilkovska, the applicant lodged a complaint that the appellate court stripped her of her right to a fair trial by rendering a decision in her case contrary to its prior court practice set in identical cases.[32]

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Era of Change in the Hungarian Prison Law

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ABSTRACT

As the Prison Code came into effect on 1 January 2015, it is now possible to evaluate its accomplishments. Some might say that this brief timespan is simply insufficient for obtaining the practical experience required to make universal claims or point out trends. As one year in the life of an act is indeed a short period, this statement is by no means beyond reason. Nevertheless, the novelty and the importance of the changes introduced by the Prison Code still allow for a brief summary. The author provides an overview of the theoretical and ethical foundations of prison law.

Keywords: Codification, prison law, dominant experiences, new legal institutions, vision

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I. Preceding Events

The Prison Code[1] is often criticized by the claim that its creation was rushed and abrupt, since after the initial ideas barely a year passed until the new law was accepted. It can be stated with confidence that the contributions of professionals during the drafting process, both on theoretical and practical grounds, virtually eliminated all factors that might have reduced the overall quality and effectiveness of the act and allowed for the successful codification of an otherwise very complex document It is crucial to note though, that contrary to previous practice, the foundations of the new act were laid down by prison service professionals, thus underpinning the goal of synthesizing practice and theory. The process of building from bottom to top has proven effective as the difference between the previous codification attempts (2009) and the new one is discernible.[2] These previous initiatives did not take the opinions of prison service professionals into account or if they did, they did so after the draft had been disseminated. The draft of 2009 contained a number of elaborate and beneficial elements which have been put to use during the codification process.[3]

As the Program of National Cooperation emphasized the need for respectable, strong laws[4], there are now various reasons in place for which the activity and function of the Prison Service is now regulated by an act.

- The first and most apparent weakness was that the normative background was represented by a law-decree[5] not conforming to the notions declared by the change of regime, as it was issued by the Presidential Council of the Hungarian People's Republic. It should be noted, though, that the principal issue with the law-decree was not with the content, but with the form. Indeed, its contents, especially when compared to the standards of the time, could easily be considered state of the art. As time went by, the law-decree had become outdated and obsolete. The fact that the provisions of the Criminal Code and its rules of proceedings were regulated by law while the Prison Code was only

1 Act no. CCXL of 2013 on the Execution of Punishments, Actions, Court- ordered Supervision and Post-charge Non-criminal Detention.

2 *Pallo, József*: Plans, Hopes and Stresses in Hungarian Legalisationin *Barabás, Tünde A. and Belovics, Ernin (eds)*: Sapiens in sapientia: Ünnepi kötet Vókó György 70. születésnapja alkalmából. Pázmány Press, 2016. p. 231.

3 Some controversial ideas have emerged though (for example the one that called for the minister's approval for the acceptance of internal regulations.)

4 Program of National Cooperation, III/2.3.

5 Law Decree no. 11. of 1979 on the Execution of Punishments and Actions.

regulated by a law-decree was also problematic.

- The second reason was concerned directly with the application of law as the regulation itself had been modified and amended frequently, which led to the fragmentation of the once uniform contents and the loss of previously unquestionable jurisprudential correspondence, thus increasing the difficulty of law application.
- The third issue with the previous regulation was that a number of its elements were unfinished, crude or entirely missing. The issue was addressed by the Act of 1993[6], which pushed the regulation towards European values. It is important to emphasize that even then there was a demand for a new and independent law. However, it was not realized; only a novel (amendment) was introduced, which brought in provisions on the specification of a prisoner's legal status, the expansion of the judges' jurisdiction and the optional mitigation of execution rules.
- The dynamically changing legislative background posed another argument for the new legislation, as the Act of 2012 on Administrative Offences and the following Prison Code (2013) all carried inductive elements with them, as the administrative custody of juveniles and the option of detention as a punishment became available.
- Technical reasons demanded new codification as well. According to the provisions of the law on legislative activity, [7]in the case of institutions whose operation is regulated by acts the legal warranties on their execution shall also be determined by acts. Previously, this obligation was unobserved, as the relevant norms were issued as decrees by the Ministry of Justice.
- Finally, there is a factor that – despite not being among the domestic obligations – has a significant influence on national legislative activity, namely the aggregation of relevant international regulations and the obligation of adhering to them. The European Parliament's guidelines of 1998 unambiguously express that the relevant legal background should be provided by law. The recommendations of the CPT and the plaintively topical verdicts (and their consequences) of the ECHR all have to be observed.

6 Act no. XXXII of 1993.

7 Act no. CXXX of 2010 on Legislation.

As these are the factors that served as a background for laying the foundations of the new act, they are taken note of in its preamble (introduction), which contains all the crucial principles that denote the importance, necessity and timeliness of its creation. The goals stated in it have dual meaning derived from the principal legislative authority, the National Assembly. The first is about the unquestionable importance of declaring the protection of fundamental human rights in general, and during the execution of punishments.[8] The second important principle recognizes the priority of European and international law and states that the right to execute punishments is exclusively possessed by the state and is combined with the legitimate use of violence when necessary, all the while adhering to the aim of complete employment of prisoners and the self-sustenance of prisons[9].

II. Major Changes

What is apparent now is that the drafting processof the new act was by no means an abrupt and spontaneous one as it includes all the crucial notions and aspects that facilitate the creation of a regulation that is up to date, even on an international scale. These are the following:

- The first notion is aimed at achieving a shift of paradigms in the philosophy of handling convicted people. Previously, the Prison Service had been using some sort of paternalistic approach which in the end belonged to the field of pedagogy. This word had become widely used from 1957 when the pedagogical services were established using a Soviet scheme and based on the principles of the word „vospitatel".[10] This paternalistic approach meant that the only expectation from the convicts was to observe the rules of the prison and adhere to them without causing any unnecessary problems. This allowed for obedience

8 *Pallo, József*: Plans, Hopes and Stresses in Hungarian Legalisationin *Barabás, Tünde A. and Belovics, Ernin (eds)*:Sapiens in sapientia: Ünnepi kötet Vókó György 70. születésnapja alkalmából.Pázmány Press, 2016. p. 233.

9 The Prison Code therefore determines an internal, professional aim, providing the necessary legal framework for it to function. It draws up the social expectation of full-scale employment as a pre-requisite element for successful reintegration and a self-sustaining prison service. The first step for achieving this goal is to extend the scope of options for self-sustenance. This means that the professional profile has to be altered and broadened in a way that during the execution of its tasks, it would produce and manufacture all the tools and items required for its operation, based on the provisions of the act. Further employment expansion and the reduction of procurement costs are necessary in order for this initiative to work.

10 *Pallo, József*: Plans, Hopes and Stresses in Hungarian Legalisationin *Barabás, Tünde A. and Belovics, Ernin (eds)*: Sapiens in sapientia: Ünnepi kötet Vókó György 70. születésnapja alkalmából. Pázmány Press, 2016. p. 234.

based on pure conformity. Contrary to this approach, the new Act's provisions demand a prisoner's cooperation in programs that may have a positive effect on their personality in order to initiate their „career in prison" (in a good sense). Accordingly, using the new terminology it can be stated that reintegrative activities are aimed at achieving a positive outcome for which the prisoner's cooperation and will to develop are crucial. The reintegrative activities organized by the Hungarian Prison Service are customized to fit the individual personal needs and are offered for each prisoner without prejudice. Furthermore, released prisoners receive support by the Probation Supervision Services (hereinafter: Services). Summing up the previous lines it can be stated that the practice of the assessment and evaluation of prisoners' behaviour has been improved by unprecedented system of conceptions in which simply adhering to the rules without active and voluntary effort is not sufficient anymore.

- Creating the synthesis of theory and practice was a principal factor during the drafting of the conception. Scholars analysed and assessed decades of experience with the primary goal of disposing of obsolete methods and tools in order to substitute them with new, modern ones all the while keeping those which had proved effective. The endeavour made to increase the number of employed prisoners, and to implement the tools of „treatment ideology", risk assessment and restorative justice, was widely known. These pursuits have led to significant results, a number of which can even be regarded as professional breakthroughs on various fields.

- The third factor was determined by the perpetually investigated question of *„Which one is more important: theory or practice?"* Until now, the tendency had been for the solutions for professional issues to be expected from theoretical experts. This had caused confusion on many occasions, so allow me briefly to return to the issues that arose with the legislative conceptions of 2005 and 2009. In those days we endeavoured to meet our obligations in a way that maintained professional pragmatism and retained control of our operations. In practice, this meant means that we were constantly searching for solutions that had already proved useful and valuable and we sought to implement them into legislation. This approach is by no means pointless. When Ferenc Finkey, one of the most influential Hungarian criminal lawyers, returned from the

> Washington Prison Congress in 1911, he said the following: "*While here in Europe, the process drafting and introducing new regulations is always preceded by scientific battles of theories, in the United States experts first make things happen, then science interprets principles*[11].

Clearly, Mr. Finkey's words cannot and should not be interpreted literally and by the letter. However, „walking with our eyes open" and having the intention of optimization are crucial to our profession. Consequently, the fundamental elements of the legislation's concepts were the shift in paradigms, synthesis of theory and practice and professional pragmatism[12].

III. Dominant Experiences

The current Prison Code consists of 438 sections, 6 parts and 33 chapters. As this legislation has introduced a large number of innovations with varying depths, I would only like to mention the major ones and their resulting practical experience.

- Law enforcement legal relationship (hereafter: legal relationship)[13]

The constitutional legal standing of persons undergoing execution of a prison sentence is altered significantly because of the new environment they are subjected to on the basis of the entitled authority's verdict. This peculiar status is a "legal relationship with the prison service", a term coined by the Prison Code in a relevant definition. Naturally, the legal relationship itself is a hierarchical one: the law enforcement authority responsible for the execution of the prison sentence makes up one part, while the convicted person or persons detained on other grounds make up the second.

Due to the nature of the legal relationship, the parties have specific rights and duties. Another characteristic is the fact that every right bestowed upon the prisoner or person detained on other grounds appears as a duty on the side of the authority responsible for the execution. In order to enforce adherence to the rules and make the prisoners fulfil their obligations, the authority may use and initiate any legally available measures and ramifications that may facilitate this endeavour.

11 *Finkey, Ferenc:* Az északamerikai büntetőjog mai vezéreszméi és reformintézményei. Értekezések a társadalmi tudományok köréből. Magyar Tudományos Akadémia, 1911.

12 *Schmehl, János and Pallo, József (eds)*: Korszakváltás a büntetés-végrehajtásban: Útmutató a 2013. évi CCXL. (Bv.) Törvény megismeréséhez. Büntetés-végrehajtás Tudományos Tanácsa, 2015.

13 PrisonCode 7 §.

The subjects of this legal relationship are the convict and person detained on other grounds, the authority responsible for the execution of sentences and the cooperating bodies and persons. Even though the legal standing of the convicts and persons detained on other grounds is characterized by their obligation to tolerate the handicap deriving from the fact that they are prisoners, their fundamental human rights cannot be harmed. However, it is important to note that the circumstances resulting from the peculiar situation and strict schedule under which the prisoners are submitted are not to be determined as legal violations. In order to protect this principle, a complex and highly organized control system of checks and balances is used coupled with the protection offered by the relevant provisions of the Prison Code.

The function of the law enforcement authority responsible for the execution of prison sentences is to execute them according to the provisions of the relevant legal regulations, thus ensuring that both the legal sanction imposed by the sentence and the aim of the punishment are realized. In order to facilitate the enforcement of this function a number of various special powers and entitlements are bestowed upon this authority which it can use whenever the relevant legal provisions allow it and in a way that is permitted.[14]

The object of the legal relationship is the aggregation of the legal norms ensuring the execution of sanctions determined by the Prison Code. It is validated by those who apply the law.

The relationship is therefore established between the state (as the bearer of exclusive competence and jurisdiction regarding punishments and legal sanctions) and the private individual detained as per the provisions of the relevant law. It is a compulsory relationship bestowing rights and duties on both parties while ensuring adherence to them with the warranty brought about by the rule of law.

To sum up, the new regulation has disposed of an old weakness by precisely and adequately determining the concept of legal relationship. This is an important step as it makes a large amount of legal material more exact and direct and at the same time ensures that the structure of the convicted persons' legal status is now represented by a more accurate content and form.

14 *Pallo, József*: Plans, Hopes and Stresses in Hungarian Legalisationin *Barabás, Tünde A. and Belovics Ervin (eds)*: Sapiens in sapientia: Ünnepi kötet Vókó György 70. születésnapja alkalmából. Pázmány Press, 2016. p. 237.

- The purpose of the prison sentence[15]

A distinctive attribute of the Prison Code is the fact that explanatory regulations are not limited to three sections, but are expanded to include basic conceptions in order to achieve terminological unity in a more detailed professional environment. The safe and secure application of the provisions requires that the subjects of the legal relationship (mainly the law appliers) attribute the same content and meaning to each of the terms and legal institutions.

The law determines a broad and complex concept regarding the aim of prison sentences, which underpins the sentiment of identifying the goals as a system of relations vastly exceeding the standard projections of criminal law.

As a consequence, the goal of the prison sentence requires dual interpretation, as the lawmaker determines the goals for the execution of specific-length imprisonments and actual life sentences alike.

Specific-length imprisonments require a dual mode of action. On the one hand, the convict needs to complete the terms of the punishment that he/she is subjected to according to the verdict of the court, but on the other hand the prisoner also has tosuccessfully reintegrate into society as a law-abiding citizen. Achieving the set goals in the case of specific-length imprisonments is only possible when the proper measures (called reintegrative activities) are employed. The emergence of this activity gives rise to the need for new professional terminology which is expected to supplant the outdated terminology of pedagogy to which it is superior. The activity itself involves all the programmes and functions that facilitate the prisoners' successful reintegration into society and the minimization or complete prevention of recidivism. For increased efficiency, external authorities and actors are allowed to participate in these programmes. The regulation lists programmes which are crucially important from a civic aspect, and on which the Hungarian Prison Service is focused, such as education (primary, secondary and in some cases tertiary), vocational training and employment (therapeutic). It must be emphasized that this three-part system includes a far broader array of elements which are not individually specified in the legislation. All this proves that reintegration is a flexible effort operating according to the regulations and the pragmatic foundations it is based on. Obviously, these activities and professional methods are – according to the principle of personalization – adapted

15 Prison Code 83 §.

to the needs and personality of the convict in question.

The Fundamental Law also sets forth the alternative of life sentences without parole, a sanction detailed in the Criminal Code. The law determines the goals of life sentences in a highly complex and abstract manner. Accordingly, in such cases the main purpose of the sanction is to execute the sentence in order to protect society. The number of prisoners who belong to this category amounts to around 50. It is important to note, though, that prisoners serving a life sentence without parole may not suffer discrimination in any way (accommodation, treatment, and fundamental rights should not be affected by the punishment). Despite the fact that prisoners in this category are the most threatening to society, it should by no means lead to any „extra" severities.

Previously there had been no provisions on the goals of life sentences without parole. This flaw was addressed by the Prison Code, as they now appear in the regulation as new elements. The purpose of the execution of a life sentence without parole verdict is a frequently debated fundamental question. The Prison Code, (acting upon the provisions of the Criminal Code) differentiates between specific-length sentences and life sentences without parole. It is well known that the topic of life sentences is a controversial one, subjected to everyday debates not only from the Hungarian Constitutional Court, but the European Court of Human Rights (hereafter: ECHR) as well. Objectively speaking, it could be pointed out that as long as the Fundamental Law and the Prison Code recognize this legal institution, the courts will continue utilizing it. In any case, the verdicts of the ECHR (e.g.: Kafkaris v. Cyprus[16]) require Hungary to narrow the scope of the use of life sentences and make mitigation possible[17].For the Prison Service, this means that it has to continue executing these sanctions in the future. Whereas the principal goal in the case of prisoners subjected to specific-length sentences is to develop their personalities in a way that enables them to become law-abiding citizens and reintegrate into society after their release, life sentences require safe and secure housing of a prisoner in order to protect society while structuring their activity in a way that harmonizes with the fundamental principle of human dignity.

- The system of structured principles[18]

16 *Kafkaris v Cyprus* (GC), No. 219906/04, (2008) ECHR.

17 *Nagy, Anita*: Szabadulás a büntetés-végrehajtási intézetből. Bíbor Kiadó, 2015.

18 Prison Code 83§.

Principles have a determining role from all legal aspects, as they unambiguously determine the moral, ethical and professional standards according to which a regulation can fulfil its function legally. Taxonomically we talk about the principles of legal systems (e. g.: legitimacy) and legal fields (e. g.: normalization) which are of course connected. As the principles of legal fields are derived from the principles of legal systems, no discrepancy may exist between them. They mostly appear already designated and appraised, but they may also be supplemented with principles derived from the concept of the regulation which is not originally referred to in law.

The largest and perhaps most important field of prison service law is the system of regulations on executing prison sentences. The priority of this field is emphasized by the presence of specific professional principles related to this legal institution. These are fundamental jurisprudential and professional values that contain all the provisions relevant to execution and which support the work of law appliers (as a standard) and lawmakers (as the determiners of a regulation's development). Recognizing the importance of these principles, the law lists them under a separate section as seen below.

- Summoning Activities[19]

If we ask people on the street what comes to their mind when we talk about prisons, they will most likely refer to the increasing problem of overcrowding and the restitutions the Prison Service has to pay because of this. Reducing the severity of overcrowding is of utmost importance. If we draw up an inventory of the tools we can employ in order to achieve this goal, we can see that while some of these involve methods that are available to external bodies – due to their requirement of legislative and law-making decisions (e.g.: alternative sanctions) - some others can facilitate the optimization of professional regulations in order to achieve this goal. The Hungarian Prison Service Headquarters' task of sending summoning notifications to begin custody (hereafter: notification) has been created with the previously quoted pragmatic principles in mind. This enables the prison service to directly influence the schedule of tasks related to executing prison sentences, thus increasing efficiency. Last year the Hungarian Prison Service Headquarters issued 4017 notification drafts[20]and the addressees' willingness to appear for prison admission amounted to

19 Prison Code 85§.

20 Source: self-evaluation report of the Hungarian Prison Service HQ 2017. (draft).

around 60%. The direct benefit of this approach is that the convicts' contacts may be established within as little as two days of the admission and employing them becomes possible within a week. Should the convict be admitted based on the notification draft issued by a court, the following administration would lead to a delay of up to a month. It is without a doubt that prisoner employment and contact are two vital elements of successful reintegration.

- Reintegration Custody[21]

Another method to reduce overcrowding suggested by the Prison Service is the institution of reintegration custody which theoretically means that – based on his or her behaviour – a prisoner's sentence may be reduced and at the same time better treatment may be offered. This has added another tool into the array of options of the progressive structure of executions, which is – basically – a special form of house arrest. Combining the two factors has – although with difficulties – led to the inclusion of the norm system in the Prison Code. The new legal institution was introduced on 1 April 2015, and the first application took place on 8 May. The experiences of the first 8 months have exceeded our expectations. Neither the courts, nor the prosecution had objections against the employment of the new tool, while the prisoners see it as a motivating factor as it is appealing to them. In 2015, 800 cases were filed, out of which 405 have received a positive verdict. The effectiveness of this legal institution is proved by the fact that it was revoked only in 4 cases.

Performing reintegration custody requires high-tech solutions, because the convict is equipped with a remote surveillance device which is part of a highly complex system. What is important is that in the future, the device can be used during external employment, hospitalization, or when prisoners visit sick relatives or attend funerals. Beyond the practical benefits it is important to mention that by using this device, a new, modern approach and practice will appear in the everyday activities of the Prison System which will conform to the expectations of the 21th century. This atypical house arrest includes all the benefits of probation, plus it facilitates the development of the prisoners' social and domestic relations, improves their employment outlook and has a positive effect on their quality of life.

As probation also makes earlier release possible, it is necessary to elaborate the differences and resemblances between probation and reintegration custody. Part of

21 Prison Code 187/A§.

the answer is the fact that while probation is an institution of criminal justice during which the court may decide to reduce the sentence based on the behaviour of the prisoner[22], reintegration custody is a tool which is purely and exclusively employed by the Prison Service. Effectively, the prisoner is serving his or her sentence outside of prisons in a way that the legal relationship stays intact. Beyond legal classifications, the two institutions differ in their aims, their time of enactment and the measures that follow after leaving the prison.

- Probation Supervision (hereafter: Supervision)[23]

No special knowledge is required to see that the reintegration activities performed within the prisons will not be successful if – after his or her release - the prisoner receives no acceptance or support which would help him or her to overcome the difficulties of the first and most difficult period of freedom. This is why the function of the affiliated probation supervisors is of great importance. The efficiency of this activity is proved by the fact that the number of released prisoners employed by the community and starting vocational training increased dramatically in 2017. Furthermore, another 1297 persons have managed to gain employment, creating the idea of what can be called labour market reintegration. This obviously has a positive effect on reducing the frequency of recidivisms, allowing the Prison Service to contribute to crime prevention activities. This pattern fits completely into the macrosocial scope of efforts we make. In 2015, probation officers had 5849 cases, out of which only in 227 ended with repeated offences, which amounts to a ratio of 3.8%. In 2017, 812 means-tests were conducted for the purpose of admission into reintegration custody, and the resulting professional documents were met with universal acclaim from the joint authorities (courts, prosecution). To sum up, it can be stated that the professional scope of reintegration activities has been expanded by including probation officers in the direct operations of the Prison Service, thereby increasing the efficiency of those who work in this field.

- Risk Analysis and Management System[24] (hereafter: System)

The lack of an effective device that would provide data regarding the frequency of recidivisms, the number of repeated offences and the related risks had become

22 Nagy, Anita: Szabadulás a büntetés-végrehajtási intézetből. Bíbor Kiadó, 2015. p. 83.

23 Prison Code chapter XXII.

24 Prison Code, 92-93§.

apparent before the new law came into effect. What posed another problem was that no data was available on the prisoners' willingness to change (and to reintegrate).

The Risk Analysis and Management System was created with these issues in mind, in the hope of addressing them. The System follows the prisoners' „career" from admission until release, providing adequate information on his or her prospective behaviour during and after incarceration. Basically, the System itself is a professional work process that involves getting to know the prisoners, analysing and assessing related information, adequate differentiation, classification and personalized decisions, all of which are based on a continuously operating monitoring system[25].

The System is built up of three major parts, based on three interdependent pillars: risk assessment and predictive measurement tools, reintegration programs aimed at reducing the risk factors during and after imprisonment and progressive regime rules.

a) The goal of the risk assessment procedure is to indicate, filter out and reduce dangerous behaviour facilitating the proper, personalized classification of each prisoner. What is worth noting is the extensive work of the probation supervisors whose focus is directed towards measuring the risk of recidivism. During the process the prisoners will be classified as low, medium or high-risk inmates. In practice, we exercise due flexibility regarding these questions which means that it is not only the results of the predictive measurement tools that we take into account, but also the feedback from each of the fields and any previously recorded data regarding the prisoner. The will to synthesize theory and practice becomes apparent here as well. We put special emphasis on risks posed by suicidal tendencies, escapes, all types of aggressive behaviour, the use of psychoactive substances and vulnerability (age, sexual orientation, high status occupied in the prison hierarchy).

b) Reintegration activities consist of programs addressed to reduce the risk factors provided by the predictive measurement tools. Currently this includes training addressed to reduce drug abuse, develop assertiveness and self-control. The pool of participants principally consists of medium or high-risk prisoners. Experience shows that participating prisoners are willing to start working in these groups but maintaining their interest is more difficult.

25 The formation of the Central Institution for Analytical Examination and Methodology is ongoing. As of current expectations, it will start its limited operation in 2016, putting emphasis on creating the methodology.

c) Our efforts to introduce progressive regime rules were enhanced by our dedication and the need to provide an answer to a controversial question of criminal law. Looking back on the previous codification attempts it is apparent that during each occasion, suggestions of altering the traditional regimes of prisons (strict, medium and light regimes) into something more flexible were frequent and they had often claimed 0that the system makes the legal background static. The resulting difficulties were directly experienced by the prison service. In every case, the question was settled quickly: the regimes remain unchanged as there is no intention from the lawmakers to change them. However, they tried to moderate the rigidity resulting from the regime categories by introducing various legal institutions (change of regime category, release on parole) or using the progressive elements of the Prison Code (mitigation of sentence rules, transitional groups). In spite of all this, the Prison Code further manages to increase the flexibility and permeability of the regime categories which is realized by the differences provided by them (visitation lengths, phone calls, deposit money[26]). It is often claimed that by using progressive regime rules, the earlier tool of mitigating the sentence rules is rendered obsolete. Surely the answer is not to be sought after from what influence and effect they have during execution, but from the fact that mitigation falls into the jurisdiction of the judge. Considering that the judge is independent from the execution of the sentence, it is mainly due to guarantees that mitigation is still utilized. Further alteration may increase the harmony between the rules of the progressive system and this legal institution. The elements of this alteration have to be created by practice, for which a pragmatic point of view is of utmost importance.

It would obviously be beyond the scope of this study to further elaborate on the detailed rules of the System, so I will only provide a brief summary of the results so far:

- We have adapted a method the purpose of which is to facilitate the achievement of reintegration aims while at the same time remaining a complex and close-

26 Béla Bartók (1881-1945), the famous Hungarian composer said the following a bout the „rubato", expressive and rhythmic freedom: *Like a thick trunk of tree standing in the storm, its can opyleaning left and right, but the trunk stands so lidly with its root sreaching deep into the ground."* Inourcase, this means that legal requirements related to progressive regime system optimalize the a vailable options, and by doing so they do not violate the provisions on regimes.

knit, yet adequately flexible system.

- The System offers definite, professional and differentiated standards regarding the threat level of a prisoner and provides fundamental standards adhering to the principles of personalized execution.
- The re-classification of risk factors is directly related to the reintegration willingness of the convicted person, thus measuring it accordingly (with the tools provided by the System) will provide detailed information about the personality of the prisoner which will contribute to decision-making processes in the future. By decision-making I refer to the verdicts of the judge responsible for the prison system, which often make leaving the institution or a determined short-term absence possible. A well-established decision can minimalize the risk of recidivisms during absence, so it can be stated that during this process, the prison system (and its specific tools) is contributing to the general crime-prevention efforts.

• Mediation Activity[27]

As a result of criminal philosophy's recent efforts, tools that facilitate mediation are now present in the field of criminal policy as well. Following their appearance a few years ago, realizing the ideology and concept of restorative justice during the execution of a prison sentence is now possible. The mediation procedure has been created with these fundamentals in mind, which is principally a tool that facilitates the solving of disciplinary procedures in alternative ways.

The mediation procedure allows for the termination of disciplinary procedures or the disciplinary punishment itself if the prisoner is willing to participate in it. Based on our experiences so far, we consider that by taking responsibility for their actions, the prisoners can contribute to the formation of a safe, secure and orderly prison environment that allows for personal comfort. Taking into account the fact that in the process parties directly try to solve the issues deriving from the conflict between them, there is an increased chance that the problem will indeed become resolved, especially when compared to disciplinary procedures, as they only provide formal sanction while not being an actual solution. Another argument confirming the importance of mediation is its potential to break the "code of honour" among the

27 Prison Code 171§.

prisoners. All the mediation activities that had been conducted were effective in making the prisoners realize their personal responsibilities while adhering to the contents of the compromise. A pre-requisite for the efficiency of mediation is the voluntary and willing participation of the prisoners. Without doubt, we now have a modern tool in prison regulation which will be useful in the future of reintegration. The main pillars of this endeavour are responsibility, self-respect and – fitting into the notion of the prison law – the obligation of cooperation.

IV. Closing Thoughts

The main purpose of this essay was to elaborate on the details and changes that prove there has indeed been a change of era in the Hungarian prison system. It is hoped that this essay has fulfilled its aims, despite being somewhat subjective at times.

Furthermore, it is hoped that as a result of the judicature's general reform, coupled with the Criminal Code and (soon to be introduced) Criminal Proceedings Code, a unified and close-knit criminal structure will be established which facilitates the adherence to the goals of legal policy and also meets international expectations. If we look past the direct professional benefits of the codification, we can see that it also has the indirect effect of initiating a brainstorm in the Hungarian prison policy and legislation which has not been experienced for a long time. It could be said that the Hungarian prison system is currently undergoing an inverted *„Sturm und Drang*" period. Following a period of longing, now we experience a storm enriched with creative power.

Even after a year of use it is apparent that the regulation boasts great potential and energy, and transforming this into kinetic power seems like an achievable goal. For us who apply the regulation on a daily basis, it seems like that beyond mere words and legal formulae there is something more elevated – philosophical – among its lines. The goals of the future will be to continue optimizing the regulation and making the Hungarian Prison System's publicity proportionate to the importance of its function. The Prison System provides a service to a whole community in order to reintegrate and reform prisoners and make them capable of living a law-abiding life. This is a merit on its own right.

Finally, to summarize the essentials and principal results of last year, it can be said that there are a lot more high quality answers than open questions and a greater

harmony than disharmony. As a direct consequence, the interpretation of the Prison Code remained unchallenged and unquestioned last year.

Being able to end this essay with these lines could prove that the current regulations have launched the Hungarian Prison System on a modern, up-to-date trajectory boasting an array of promising results and outcomes.

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"Toplantı ve Gösteri Yürüyüşü Düzenleme Hakkı" ile "Kötü Muamele Yasağı" Karşısında Kolluğun Güç Kullanma Yetkisi

The Use of the Power of the Police Versus the Right of Meeting and Demonstration Marches and Prohibition of Mistreatment

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ÖZ

Bu çalışma, idare tarafından kamu düzeninin sağlanması gerekçesiyle toplantı ve gösteri yürüyüşü düzenlemelerinin yasaklanmasına rağmen bazı sivil toplum kuruluşlarının öncülüğündeki bir grubun izinsiz olarak eylem yapması sonucu ortaya çıkan ihtilafların, Anayasa Mahkemesi Bireysel Başvuru yolundaki süreç ve sonuçları üzerine bir değerlendirmeyi içermektedir. Anayasa Mahkemesi'nin önüne gelen Bireysel Başvuruda, izinsiz olarak düzenlenen ve kolluk güçleri tarafından sonlandırılmaya çalışılan eylemler esnasında yaşanan arbedelerde yaralanan bazı göstericilerin, kötü muameleye maruz kaldıkları ve toplantı ve gösteri yürüyüşü haklarının ihlal edildiği iddiaları gündeme gelmektedir. Bazı göstericiler tarafından yaşanan olaylara ilişkin dava açılmış ancak ilgililer hakkında soruşturma izni verilmediğinden dolayı uyuşmazlığın esası hakkında bir yargılama yapılamamıştır.

Bunun üzerine Anayasa Mahkemesine başvuru yapan göstericiler, Kolluk güçlerinin orantısız güç kullandığını ve bunlar hakkında etkin bir soruşturma yapılmadığını iddia ederek Anayasal bir hak olan kişinin maddi ve manevi bütünlüğünün korunması, düşünce ve kanaat hürriyeti ile toplantı ve gösteri yürüyüşü düzenleme haklarının ihlal edildiğini ileri sürmüşlerdir. Anayasa Mahkemesi, başvurucuların gösteriler esnasında işlemiş oldukları fiiller üzerinden bir değerlendirme yapmak suretiyle karar vermiştir. Nitekim Yüksek Mahkeme, bazı göstericiler hakkında kolluk güçlerine karşı mukavemet gösterdiklerinden bahisle bir hak ihlali oluşmadığı kanaatine varırken bazıları hakkında ise kolluk güçlerinin müdahalesini gerektiren bir eylemlerinin bulunmadığı gerekçesiyle hak ihlali olduğuna karar vermiştir.

Anahtar Kelimeler: Toplantı ve gösteri, güç kullanma, kötü muamele

ABSTRACT

This study includes an assessment of the process and consequences of the Constitutional Court Individual Application for conflicts arising as a result of the unauthorized action of a group of non-governmental organizations, despite the ban on the organization of meetings and demonstration marches on the grounds of provision of public order by the administration.

The Individual Applicant before the Constitutional Court alleged that some demonstrators, who were injured in a brawl during unauthorized activity that law enforcement officers attempted to control, were exposed to ill-treatment and violations of their rights to meetings and demonstration marches. Some demonstrators have been sued against the law enforcement officials for events that have experienced, but there has been no trial to address the dispute because they are not allowed to investigate the persons concerned. In addition, the demonstrators who applied to the Constitutional Court claimed that the law enforcement officers used disproportionate force and that an effective investi-gation has not been held. The protection of the rights of the person's pecuniary and non-pecuniary integrity with a constitutional right, the freedom of thought and faith, and the right to meeting and demonstration marches, were violated.

The Constitutional Court made their decision by assessing the applicants' actions during the demonstrations. In actual fact, the Supreme Court believed that some demonstrators resisted the law enforcement officers and that there were no violations of their rights in the beatings, while other demonstrators were entitled to no such interven-tion of law enforcement forces and it was a violation.

Keywords: Meetings and demonstration, the use of power, prohibition of mistreatment

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EXTENDED ABSTRACT

The Constitutional Court has addressed the file "prohibition of mistreatment" and "the right of meeting and demonstration marches," which preceded the alleged infringement of a claim. The violation of these rights was assessed by the boundaries of the principle of moderation over concrete events. In this regard, the Supreme Court chose to show the reasons for the European Convention on Human Rights (ECHR) decisions as a reference.

However, in our opinion, the Constitutional Court should be dealt with as part of the effective investigation and prosecution, whether or not other rights are violated or infringed by these rights. The principle of moderation could be assessed. However, it is more important to determine whether an effective and complete investigation and prosecution is being prosecuted. Indeed, regarding the distribution of persons who use the right to conduct meetings or hold demonstration marches, the investigation into the ill-treatment should be independent and impartial and must be conducted publicly.

It was not possible to investigate the incident of the police officers who intervened with the demonstrators. Effective conduct of the investigation will ensure that the provision is fair. The ECHR has often chosen to violate the state's competent authorities due to an adequate and effective investigation. The ECHR resolutions emphasized that the competent authorities should act as carefully and quickly as they can demonstrate, and ensure that the principals are identified and punished.

Accordingly, while examining the individual application of the Constitutional Court, it was necessary to investigate whether the judicial arm held an effective investigation, because those conducting the investigation into the actions of the law enforcement officers and collecting the evidence are located in the same organization. As a matter of fact, law enforcement is not considered independent of the prosecution's position in this investigation. For these reasons, the Constitutional Court had to determine whether an effective investigation was held under the right of fair trial before evaluating the violation of the ban on the prohibition of abuse or meeting and demonstration marches. In the event of an effective investigation, it should be addressed in terms of infringement of rights, such as freedom, the principle of fair judgment, or equality of arms.

Indeed, the ECHR is entitled "The obligation of respect for human rights" Edge 1. The article states, "The High Contracting Parties shall recognize the rights and

freedoms described in the first part of this agreement to everyone in their jurisdiction." According to the ECHR, to be able to describe an investigation as effective and complete, the investigation must be conducted by an independent body, which is not involved in the crime. This ensures the participation of the applicants, thorough and meticulous conduct, public control, responsibility for the determination, and punishment of the violators as necessary. In addition, the necessary momentum and care should be taken in the investigation to protect the public's trust and avoid any undue tolerance in the opinions or complicity regarding illegal acts. The ECHR also decided as a requirement for the Convention that the competent authorities of the State should conduct an adequate and effective investigation, and that the Convention has not complied with the right to infringement. Therefore, the Constitutional Court on the individual application avenue, which was ordered to function as a safety valve against the application of the ECHR, is considered to be aware of the criteria of the ECHR. Otherwise, these and similar applications will inevitably be preceded by the ECHR and could lead to increased compensation due to the emergence of the long-lasting nature of the trial.

After the Supreme Court made this assessment, it was appropriate for law enforcement officers to assess the extent of the force they applied to the demonstrators in proportion to the principle of moderation. when it comes to this stage;

To ensure the public order of law enforcement personnel, it is necessary to determine how the force implemented to the demonstrators will be subject to a sanction if it exceeds the limits of conformity to the law. In this regard, the Criminal Code includes provisions entitled "torture crime" and "exceeding the limit on the difficult use authority". However, to form a crime of torture, the presence of actions that are not associated with human dignity is sought systematically and within a certain process. Among the qualified elements of this crime are those sought on the elements of deliberately injuring; on the other hand, it is necessary for law enforcement to intentionally act on the "crime of overcoming the limit of the difficult use authority," but the public official may have been authorized to implement a force in line with the "principle of moderation" to provide public order.

In other words, torture crime is the use of force when the public servant is conducting an activity that should not use force in any way. "Overcoming the difficult use of authority" is permitting an activity that can be used to force a certain limit if a crime crosses specific boundaries. Therefore, the subject of the individual application

and the Supreme Court is expected to conduct a breach of the "exceeding the limit on the difficult use authority" clause in the Turkish Criminal Code. However, when the Constitutional Court verdict is examined, it is observed that the reasons put forth by the Supreme Court are mostly the arguments for the crime of torture. While the same direction has many ECHR resolutions and theoretical knowledge in the doctrine, it is not accurate to assess the point of gravity through the crime of torture.

At the very least, as of the date of the application decision we are examining, such deficiencies can be reasonably met due to the Constitutional Court's individual application path as a new judicial authority. However, the determination and criticisms made over this decision are expected to have a positive impact on the decisions to be given by Constitutional Court in the forthcoming period. The Constitutional Court's alleged infringement assessments should accurately determine which rights should be assessed in terms of infringement, and focus on concise and shorter written decisions. In the case of the applicant's preference to the subject of the event, and referring to its own decisions, it is important to mention the first source of the attribution.

1. İrdeleme Konusu Olay

A- Anayasa Mahkemesi Bireysel Başvuru yoluna konu 2013/3924 numaralı *"Ali Rıza Özer ve Diğerleri"*[1] başvurusunun sebebi olan olaylar; TBMM'de ilköğretim alanında sistem değişikliği öngören bir kanun teklifinin görüşülmeye başlanması üzerine eğitim sektöründe örgütlenmiş bazı sendika, dernek ve platform yapısı altındaki çeşitli grupların söz konusu kanun teklifini protesto etmek amacıyla Ankara'da toplantı ve gösteri yürüyüşü yapmayı planlamasından kaynaklanmaktadır. Ancak Valilikçe, kamu düzeninin bozulması gerekçesi ile her türlü toplantı ve gösteri yürüyüşü ile benzer eylemler yasaklanmıştır. Ayrıca İçişleri Bakanlığı tüm il valiliklerine yazı göndererek, Ankara'da yapılması planlanan olası bir eyleme katılmak isteyen grupların şehirlerden çıkışlarına izin verilmemesi yönünde karar almıştır. Fakat bu kararlara rağmen İzmir'de izinsiz olarak toplanıp Ankara'ya gitmek isteyen bir grup ile kolluk güçleri arasında yaşanan olaylar neticesinde göstericilerden bazıları toplantı ve gösteri yürüyüşü haklarının ihlal edildiği gerekçesiyle Anayasa Mahkemesi'ne başvurmuştur.

1 Ali Rıza Özer ve Diğerleri App no 2013/3924 (AYM, 6 January 2015) <http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/8f680799-94b4-4f13-bf22-fe1b7c169346?wordsOnly=False.> accessed 10 June 2018

B- Göstericiler ile kolluk güçleri arasındaki olaylar iki ayrı günde cereyan etmiş, birbirinin devamı niteliğindeki fiillerden oluşmaktadır. Nitekim Yüksek Mahkeme de söz konusu başvuruyu incelerken, gelişmeleri birinci eylem ve ikinci eylem şeklinde nitelendirmiştir.

C- Bu minvalde, ***Birinci eylem;***

Sendika ve diğer sivil toplum kuruluşlarının İzmir'deki mensupları 27.03.2012 tarihinde saat 22.00 sıralarında bir araya gelerek Ankara'ya gitmek istemişlerdir. Ancak daha önce tedbir alan kolluk güçleri, topluluğu Ankara'ya götürecek otobüslerin gerekli evraklarının eksik olduğu gerekçesiyle grubun şehirden çıkışını engellemiştir. Bunun üzerine başka otobüslerle Ankara'ya gitmek isteyen grup yine kolluk güçleri tarafından engellenmiştir. Bu gelişmeler üzerine, gösterici grup bulundukları yolu trafiğe kapatmıştır. Kolluk güçleri, yolun trafiğe açılması için grubu ikaz etmesi üzerine yaklaşık 20 dakika trafiğe kapalı kalan yolun bir kısmı trafiğe açılmıştır. Topluluk daha sonra Ankara'ya yürüyerek gitmeye karar vermiş ve yol üzerinden Konak Meydanına doğru yürüyüşe geçmiştir. Bunun üzerine kolluk güçleri, defalarca, yapılan yürüyüşün yasadışı olduğu ikazında bulunmuştur. İkaza rağmen yürüyüşün devam etmesi üzerine polis ile göstericiler arasında kısa süren bir arbede yaşanmış ve bu sırada polis biber gazı ve cop ile göstericilere müdahalede bulunmuştur. Bunun üzerine göstericiler yürüyüşü durdurmuştur. Bu sırada bir polis memurunun bileği kırılmıştır. Bir sendika yöneticisi tarafından eylemin iki gün daha devam edeceğinin duyurulması üzerine topluluk bir süre daha bekledikten sonra, ertesi gün buluşmak üzere, dağılmıştır.

D- ***İkinci Eylem:*** 28.03.2012 tarihinde sendika üyeleri, protestoya devam etmek için Konak Meydanında toplanmışlardır. Eylem yapılacağından önceden haberdar olan güvenlik güçleri ise gerekli güvenlik tedbirlerini almışlardır. Grup, yürüyüş düzeni alarak ellerinde pankartlarla basın açıklaması yapmak üzere Valilik binasına doğru yürüyüşe geçmiştir. Kolluk güçleri, Valilik binasına doğru yürüyüşe izin verilmeyeceği ve yürüyüşün durdurulması gerektiğini bildirilmiştir. Ancak göstericiler ikazları dinlememiş ve kolluk güçlerini itekleyerek ellerindeki sopalarla bariyerleri yıkmaya başlamıştır. Çevik kuvvet polisi önce kalkanlar ile barikat oluşturarak grubu engellemeye çalışmış, ancak gruptan bazı kişilerin cam parçaları, parke taşları ve su dolu şişeler atması üzerine, saldıran gruba müdahaleye başlamıştır. Polis tazyikli su, boyalı su, biber gazı ve toplumsal olaylara müdahale aracı ile göstericilere müdahale etmiştir. Bu esnada bir polis memuru ayağından yaralanmıştır.

E- Aynı esnada, diğer bir grup da başka bir yoldan Valilik binası önüne geçmeye çalışmıştır. Ancak grubun Valilik binası önüne geçişine karşı önlem alan polis alternatif güzergâh göstererek iki grubu birleştirmiştir. İki bin kişiye ulaşan grup oturma eylemi başlatmıştır. Gösteriyi düzenleyen sendika temsilcileri ile güvenlik güçleri arasında yapılan müzakere sonucunda polis barikatı 50 metre geri çekilerek göstericilerin basın açıklaması yapmasına izin verilmiştir. Saat 16.30 sıralarında gösteriye katılanlar kendiliğinden dağılmıştır. Olaylara müdahale esnasında başvurucular yaralanmış veya biber gazına maruz kalmıştır[2].

2. İrdeleme

2.1. Çözümü Gereken Hukuki Sorun

Yukarıda belirtilen uyuşmazlık konusu olaylardan anlaşıldığı üzere, Anayasa Mahkemesi Bireysel Başvuruya konu hak ihlali iddiaları birden fazla hususta toplanmaktadır. AYM başvuruyu *"kötü muamele yasağı"* ve *"toplantı ve gösteri yürüyüşü hakkı"* ihlalleri bakımından değerlendirmeyi uygun görmüştür. Kanaatimizce, başvurunun konusu esasen *kötü muamele yasağı* ile *toplantı ve gösteri yürüyüşü hakkı*nın ihlali gibi görünse de, *hak arama hürriyeti*, *adil yargılanma hakkı* ve *silahların eşitliği* gibi hususlara da temas etmektedir.

Ancak irdelenmesi ve çözüme kavuşturulması gereken konu, sadece, bu haklardan hangisinin ihlal edildiği odağında toplanmamaktadır. Aslolan bu haklardan birinin veya bir kaçının ihlaline yol açan sebeplerin de tespit edilmesidir. Dolayısıyla başvuru konusu uyuşmazlığın yargı kolundaki safhalardan başlayarak sorun tespiti yapmak gerekir. Bu hususta, ceza yargısına konu olan uyuşmazlığa ilişkin etkili bir yargılama sürecinin cereyan edip etmediği tespit edilmelidir. Gerek soruşturma evresinde ve gerekse kovuşturma aşamasında uyuşmazlığı hakkaniyete uygun bir şekilde değerlendirecek incelemelerin yapılıp yapılmadığı önem arz etmektedir. Başka bir

2 Başvurucu Ali Rıza Özer'in 28.03.2012 tarihli adli muayene raporunda yaralandığı ancak hayati tehlikesinin olmadığı belirtilmiştir. Ayrıca başvurucuya toplam dokuz günlük iş göremezlik raporu verilmiştir.
Başvurucu Özcan Çetin'in 28.03.2012 tarihli adli muayene raporunda gözüne biber gazı geldiği, gözde yanma ve batma olduğu, gözde kızarıklık olduğu ve ilaç verildiği belirtilmiştir.
Başvurucu Orhan Bayram'a 28.03.2012 tarihinde düşme sonucu sağ omuzda ağrı şikâyeti üzerine iki günlük iş göremezlik raporu verilmiştir.
Başvurucu Veli İmrak'ın 28.03.2012 tarihli geçici adli muayene raporunda, hayati tehlikesi olmadığı, basit tıbbi müdahale ile giderilebilecek nitelikte yaralandığı belirtilmiştir.
Başvurucu Tunay Özaydın'ın 28.03.2012 tarihli tek hekim raporunda sağ el bileğinde travma olduğu ve üç gün istirahat etmesinin uygun olduğu belirtilmiştir.
Başvurucu Deniz Doğan'ın 28.03.2012 tarihli adli muayene raporunda burun sırtının sol tarafında 0,5 cm.lik cilt kesisi, ekimoz ve yumuşak doku şişliği olduğu belirtilmiştir.

ifadeyle, AYM Bireysel Başvuru yoluna konu olan uyuşmazlığa ilişkin bir hak ihlalinin meydana gelip gelmediğini tespit edebilmek için ***etkin bir soruşturma ve kovuşturma*** yapılıp yapılmadığını ortaya koymak gerekmektedir.

Nitekim toplantı veya gösteri yürüyüşleri hakkını kullananların dağıtılmasında kötü muamelede bulunanlara yönelik soruşturmanın bağımsız ve tarafsız olmasını ve kamuya açık şekilde yürütülmesi gerekmektedir[3]. AİHM ise aynı doğrultuda, yetkili makamların, örnek gösterilebilecek derecede özenli ve hızlı hareket etmesi[4] gerektiğine ve sorumluların tespit edilebilmesi ve cezalandırılmasını sağlamasına vurgu yapmaktadır[5]. Ayrıca AİHM, bir kamu görevlisinin AİHS'in 3. maddesinin ihlaline sebep olan suçlarla itham edildiği hallerde, gerçekleştirilen ceza yargılamaları ve hüküm verme sürecinin zamanaşımına uğramaması ve genel af veya af çıkarma gibi tedbirlere müsaade edilmemesi gerektiğini vurgulamaktadır[6].

AYM'nin önüne gelen söz konusu uyuşmazlığa ilişkin yargısal süreçlere bakıldığında ise, başvuruculara iddia ettikleri fiilleri gerçekleştiren kolluk görevlileri hakkında soruşturma izni verilmediği ve kovuşturmaya yer olmadığı kararı verilmiştir. Dolayısıyla kovuşturmaya yer olmadığına dair kararın isabetli olup olmadığı ve etkin bir soruşturma yapılıp yapılmadan verildiğinin irdelenmesi gerekir. Nihayetinde, AYM etkili ve eksiksiz bir soruşturma yapılıp yapılmadığını ve buna bağlı olarak kovuşturmaya yer olup olmaması gerekliğini tartışarak hak ihlalinin varlığını ortaya koymalıdır.

Diğer taraftan, başvuruya konu olan uyuşmazlığa zemin hazırlayan fiiller ve sonraki aşamada gerçekleşen yargısal süreçlere bakıldığında çözümü gereken hukuki sorunun birçok hususa daha temas ettiği anlaşılmaktadır. AYM kararında *"ilgili hukuk"* başlığı altında yer verilen mevzuat hükümlerinin dar kapsamda kaldığı söylenebilir. AYM, 2911 sayılı Toplantı ve Gösteri Yürüyüşleri Kanunu, 2559 sayılı Polis Vazife ve Salahiyet Kanunu, İçişleri Bakanlığı'nın "Toplumsal Olaylarda Görevlendirilen Personelin Hareket Usul ve Esaslarına Dair Yönergesi, Emniyet Genel Müdürlüğü'nün "Göz Yaşartıcı Silahları ve Mühimmatları Kullanım Talimatı"

3 Hüseyin İnce, 'Avrupa İnsan Hakları Mahkemesi İçtihatları Altında Barışçıl Gösterilerde Orantısız Güç Kullanılması' (2015) 5 UMD <http://dergipark.ulakbim.gov.tr/mdergi/article/view/5000145783/5000133111.> accessed 10 June 2018

4 Çelik and İmret v. Turkey, App no 44093/98 (ECHR 26 October 2004)

5 Orhan Kur v. Turkey App no 32577/02 (ECHR 29 September 2008)

6 Yaman v. Turkey App no 32446/96 (ECHR 02 February 2005)

ile Birleşmiş Milletler[7] ve Avrupa Birliği'nin[8] raporlarının bazı hükümlerine yer vermiştir.

Kanaatimizce, uyuşmazlık konusu fiillerin ceza hukuku kapsamında olması itibariyle hak ihlali değerlendirmesi yapıldığında, olayın tahkimine etki edecek Ceza Kanunu'ndaki hükümlere de yer verilmesi gerekliliğidir. Nitekim Türk Ceza Kanunu'nun "Zor Kullanma Yetkisine İlişkin Sınırın Aşılması" başlıklı 256. maddesi ile aynı Kanun'un "Görevi Yaptırmamak İçin Direnme" Başlıklı 265. maddesinin, AYM kararındaki "ilgili hukuk" bölümünde yer alan referanslar arasında olması gerekirdi.

2.2. Mercilerin Problemi Çözüm Tarzları

Birinci eylem ile ilgili olarak başvuruculardan Ali Rıza Özer, Özcan Çetin ve Orhan Bayram ile diğer bazı katılımcıların, 2911 sayılı Toplantı ve Gösteri Yürüyüşleri Kanunu'na muhalefet ve görevi yaptırmamak için direnme suçlarından şüpheli sıfatıyla beyanları alınmıştır. İkinci eylem ile ilgili olarak başvuruculardan Ali Rıza Özer, Özcan Çetin ve Orhan Bayram ile diğer bazı katılımcıların, 2911 sayılı Kanun'a muhalefet ve görevi yaptırmamak için direnme suçlarından şüpheli sıfatıyla beyanları alınmıştır.

Başvurucular ise 27-28 Mart 2012 günü meydana gelen iki ayrı olay için demokratik haklarının engellenmesi, *orantısız güç kullanarak görevi kötüye kullanma* ve *kasten yaralama* suçlarından şikâyetçi olmuşlardır. İzmir Cumhuriyet Başsavcılığınca, başvuruculaların şikâyetine ilişkin olarak *zor kullanma yetkisinin sınırlarının aşılması* ve *görevi kötüye kullanma* suçlarından iki ayrı soruşturma yürütülmüştür.

İzmir Cumhuriyet Başsavcılığının 2012/31529 sayılı soruşturma dosyasında, İzmir İl Emniyet Müdürü ve İl Emniyet Müdürlüğünün diğer görevlileri hakkında görevi kötüye kullanma suçundan 4483 sayılı Memurlar ve Diğer Kamu Görevlilerinin Yargılanması Hakkında Kanun kapsamında soruşturma izni talep edilmiş ancak İzmir

7 * Chemical Weapons Convention (adopted 3 September 1992, entered into force 29 April 1997) 1975 UNTS 4 (CWC)
* Eighth Unıted Natıons Congress On The Preventıon Of Crıme And The Treatment Of Offenders (Havana, 27 August-7 September 1990, A/CONF.144/28/Rev.l)
* Report Of The Special Rapporteur On The Rights To Freedom Of Peaceful Assembly And Of Association (A/HRC/20/27, 21 May 2012)

8 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (CPT/Inf (2009) 25).

Valiliğince bu talep reddedilmiştir. Kararın gerekçesinde *"iddiaların somut bilgi ve belgelere dayanmadığı, ilgililer açısından suç oluşturan ön inceleme yapılmasını gerektirecek bir durumun bulunmadığı"* belirtilmiştir. Başvurucuların anılan karara yaptığı itiraz, İzmir Bölge İdare Mahkemesinin 16.10.2012 tarihli kararı ile reddedilmiştir. Bunun üzerine Cumhuriyet Başsavcılığı, 26.11.2012 tarihinde usulüne uygun soruşturma izni bulunmadığından ve soruşturma şartı gerçekleşmediğinden şikâyet edilenler hakkında inceleme yapılmasına yer olmadığına karar vermiştir.

Başvurucular, polisin uyguladığı orantısız güçten kaynaklanan yaralanmalarına ilişkin İzmir İl Emniyet Müdürlüğü görevlileri hakkında *zor kullanma yetkisinin sınırların aşılması* suretiyle yaralama suçundan şikâyette bulunmuşlardır. İzmir Cumhuriyet Başsavcılığının başlattığı 2012/43793 sayılı soruşturma kapsamında hazırlanan 11.12.2012 tarihli bilirkişi raporuna[9] dayanarak güvenlik güçlerinin müdahalesinin yasal zor kullanma yetkisi kapsamında kaldığının kabulü ile 01.03.2013 tarihinde kovuşturma yapılmasına yer olmadığına karar verilmiştir. Bilirkişi raporunda başvuruculardan Veli İmrak, Tunay Özaydın ve Deniz Doğan hakkında ise bir tespit yapılmamıştır. Ancak Özcan Çetin'in birinci eylemde trafiğin aksamasına neden olduğu, ikinci eylemde grubu yönlendirdiği, Ali Rıza Özer'in birinci eylemde trafiğin aksamasına neden olduğu, ikinci eylemde bariyeri zorladığı, Orhan Bayram'ın birinci eylemde trafiğin aksamasına neden olduğu, ikinci eylemde elinde bulunan bayrak sopasıyla çevik kuvvet personeline vurduğu ve daha sonra sopayı polise fırlattığı tespit edilmiştir. Bilirkişi raporunda ve anılan Cumhuriyet Başsavcılığının kararında başvurucuların yaralanmasının nasıl olduğuna dair bir değerlendirme yapılmamış, raporda ve kararda polisin orantılı güç kullandığı belirtilmiştir. Anılan karara yapılan itiraz Karşıyaka 1. Ağır Ceza Mahkemesinin 16.04.2013 tarihli kararı ile reddedilmiştir.

Diğer taraftan, polisin hazırladığı fezleke kapsamında başvuruculardan Ali Rıza Özer, Özcan Çetin ve Orhan Bayram'ın da aralarında bulunduğu 68 kişi hakkında İzmir Cumhuriyet Başsavcılığının 02.04.2013 tarih ve 2012/43840 soruşturma numaralı iddianamesi ile ikinci eylem kapsamında "Kanuna Aykırı Toplantı ve Yürüyüşlere Silahsız Katılarak İhtara Rağmen Kendiliğinden Dağılmama" suçundan cezalandırılmaları talebiyle İzmir 7. Asliye Ceza Mahkemesinde kamu davası açılmıştır. Mahkeme 09.12.2013 tarihli kararı ile 2911 sayılı Kanun'un 32. maddesinin

9 For the contents of the report; <http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/8f680799-94b4-4f13-bf22-fe1b7c169346?wordsOnly=False.> accessed 10 June 2018

üçüncü fıkrasının son cümlesi gereğince (CMK'nun 223/4/d-son cümlesine göre) ceza verilmesine yer olmadığına karar vermiştir.

İzmir Cumhuriyet Başsavcılığının 09.08.2012 tarih ve 2012/56697 soruşturma no.lu iddianamesi ile başvuruculardan Orhan Bayram ve Ali Rıza Özer'in de aralarında bulunduğu 35 kişi hakkında görevi yaptırmamak için direnmek suçundan cezalandırılmaları için İzmir 2. Asliye Ceza Mahkemesi nezdinde kamu davası açılmıştır. Mahkeme, "sanıkların müsnet suçu işlediklerine dair kesin ve inandırıcı delil elde edilemediği" gerekçesiyle beraat kararı vermiştir.

Bu safhaların ardından Bireysel Başvuru yoluna gidilmiştir. Esasen, Bireysel Başvuruya konu olaya ilişkin yargı kolunda yeterli bir muhakeme yapılmadığını ifade etmek mümkündür. Nitekim kolluk kuvvetlerinin orantısız güç kullanarak kasten yaralama suçunu işleyip işlemediklerinin tespitine ilişkin soruşturma izni verilmemesinden dolayı herhangi bir yargılama yapılamamıştır. Diğer taraftan, aralarında başvuruculardan da bulunduğu göstericilerin, kanuna aykırı gösteri düzenlemek ve katılmak suretiyle kamu görevini yaptırmamak için direnme suçunu işleyip işlemediklerine ilişkin davalar yeterli ispat aracı olmadığından beraatla sonuçlanmıştır. Dolayısıyla Yüksek Mahkeme'ye, bireysel başvuruya konu hak ihlaline yol açan bir yargı kararının varlığından öte bir değerlendirme kalmıştır.

AYM Bireysel Başvuru yoluna müracaatlar, genellikle bir yargı kararının ilgililerin hukuki statülerinde hak ihlaline yol açtığı iddiası ile gündeme gelmektedir. Ancak söz konusu başvuruda böyle bir durumdan söz etmek mümkün değildir. Çünkü başvuru konusu olaya ilişkin yargı kolunda esasa ilişkin bir yargılama safhası gerçekleşmemiştir. Her ne kadar Bireysel Başvuru sonucunda bir hak ihlalinin oluştuğu kanaati oluşmuş ve yeniden yargılama imkânı doğmuş olsa da, uyuşmazlığın esasına ilişkin bir değerlendirme ilk olarak bu safhada yapılmıştır.

AYM, başvurunun esasına ilişkin değerlendirmeyi, iki başlık altında, *"kötü muamele yasağının ihlali"* ve "*toplantı ve gösteri yürüyüşü hakkının ihlali"* şeklinde iki hak bakımından ele almıştır. Bu hakların ihlalini kolluk görevlilerinin yapmış olduğu müdahalenin orantılılığı kapsamında incelemiştir. Ancak her iki hak bakımından yapmış olduğu değerlendirmelerde farklı alt başlık usulleri tercih etmiştir. Kötü muamele yasağının ihlali iddiasını Anayasa'nın 17. maddesinin maddi boyutunun ve usul boyutunun ihlali bakımından iki başlık altında irdelemiştir. Toplantı ve gösteri yürüyüşü hakkının ihlalini ise daha kapsamlı ele alarak (genel

ilkeler, genel ilkelerin uygulanması, müdahalenin mevcudiyeti hakkında, müdahalenin haklı sebeplere dayanması hakkında, müdahalenin kanuniliği, meşru amaç, demokratik bir toplumda gerekli olma ve ölçülülük) incelemiştir.

2.3. Kötü Muamele Yasağının Hukuki Niteliği

2.3.1.Genel Olarak

İşkence zalimane, insani olmayan, haysiyet kırıcı muamelelerin en şiddetlisi, insan haklarını ihlal eden en ciddi bir hukuksuzluktur[10]. Bir başka deyişle, işkence, uzun süreli ve tekrarlanarak sistematik biçimde uygulanan fiziksel ve ruhsal acı veren davranışlardan oluşmaktadır[11]. Bir fiilin işkence sayılması için; (i) kuvvetli bedensel veya ruhsal acı ya da ıstıraba yol açması, (ii) failin resmi sıfatla hareket eden bir kimse olması veya bu sıfatı haiz bir kimsenin, üçüncü kişileri kullanmak suretiyle dolaylı olarak hareket etmesi, (iii) işkence görenin geçici veya sürekli olarak üçüncü kişinin himayesi altında bulunması, (iv) acı ve ıstırap veren hareketlerin belirli bir amaca yönelik ve kasıtlı olarak yapılması gerekir[12].

Ancak kavramsal olarak, işkencenin diğer kötü muamelelerden ayrı bir özellik barındırdığı ileri sürülmektedir[13]. Dolayısıyla işkenceyi dar ve geniş anlamda olmak üzere iki biçimde kullanmak ve işkence dışında kalan muameleleri geniş anlamda işkence tabiriyle karşılamak daha uygun bir yaklaşım olacaktır[14]. Böylelikle bir yandan diğer muamelelerin esnetilebilmesi, sıradanlaştırılabilmesi riskinin önüne geçilebilecek; diğer yandan da aralarında şu ya da bu şekilde bir farklılık olduğu imajı ilk bakışta verilebilecektir[15].

Ancak hukukumuz bakımından bu ayrım yasal düzenlemelerde dikkate alınmamıştır. Gerek AİHS'de gerekse Anayasamızda ve Türk Ceza Kanunu'nda "işkence" kavramı tercih edilmiştir.

Anayasa'nın 17. maddesi kişinin dokunulmazlığı, maddi ve manevi varlığı başlığı

10 Sulhi Dönmezer, *Özel Ceza Hukuku Dersleri* (Fakülteler Matbaası, İstanbul 1984) 132

11 Nur Centel and Hamide Zafer, *Ceza Muhakemesi Hukuku* (4th edn, Beta Yayınevi, İstanbul 2006) 224

12 İlhan Üzülmez, *Türk Ceza Hukukunda İşkence Suçu* (Turhan Kitabevi, Ankara 2003) 10, 12

13 "İşkencenin kötü muameleler arasında özel ve ağırlıklı bir yeri olması nedeniyle işkence kavramı kötü muamelelerin jeneriği olarak görülmekte ve bu nedenle de kenar başlık olarak kötü muamele değil işkence kavramı kullanılmaktadır." Ömer Anayurt, *'Avrupa İnsan Hakları Mahkemesi İçtihatlarında İşkence Kavramı'* (2008) XII 1-2 **Gazi Üniversitesi Hukuk Fakültesi Dergisi**, 425

14 "İşkenceye bitişik diğer muameleler de işkence kavramı içerisinde kullanılsa bile işkencenin her zaman diğerlerinden ayrı bir ağırlık ve konumunun olduğu unutulmamalıdır." *Anayurt*, (n13) 424

15 *Anayurt*, (n 13) 425

altında, kimseye işkence ve eziyet yapılamayacağını, insan haysiyetiyle bağdaşmayan bir cezaya veya muameleye tabi tutulamayacağını düzenlemektedir.

Aynı zamanda AİHS'in "İşkence Yasağı" başlıklı 3. maddesinde[16] de, hiç kimse işkenceye, insanlık dışı ya da onur kırıcı ceza veya işlemlere tâbi tutulamayacağı düzenlenmiştir. Ayrıca İnsan Hakları Evrensel Bildirgesi'nin 5. maddesinde[17] ve işkencenin önlenmesine dair bazı uluslararası sözleşmelerde[18] de benzer hususlar güvence altına alınmıştır.

Türk Ceza Kanunu'nun 94 ve 95. maddelerinde "işkence" suçu düzenlenmiştir. 94. maddenin gerekçesinden de anlaşılacağı üzere işkenceye ilişkin iç hukukumuzdaki düzenlemeler uluslararası mevzuata atıfta bulunmak üzere aynı minvalde düzenlenmiştir. Madde gerekçesinde dikkat çeken bir husus ise, işkence suçunu işleyen kamu görevlilerinin bazen üstlerinden aldıkları emirleri uygulamak suretiyle işkence suçunu işledikleridir. Bu gibi durumlarda amirler de işkence suçu işlemiş gibi cezalandırılmaktadır[19].

Diğer taraftan, Türk Ceza Kanunu'nun 256. maddesinde "zor kullanma yetkisine ilişkin sınırın aşılması" başlıklı bir suç tipi düzenlenmiştir. Bu hüküm kamu idaresinin güvenilirliğine ve işleyişine karşı suçlardan biri olarak ihdas edilmiş olmakla birlikte kamu görevlisine, görevini yaptığı sırada, kişilere karşı görevinin gerektirdiği ölçüde kuvvet kullanılması yetkisi vermektedir. Kullanılacak kuvvetin derecesinin takdiri hususunda kolluk görevlisine bir yetki tanındığı söylenebilir. Ancak toplu kuvvet olarak müdahale gerektiren durumlarda yetki ve sorumluluk kolluk amirine bırakılmıştır[20].

2.3.2. "Zor Kullanma Yetkisine İlişkin Sınırının Aşılması" ile "İşkence Suçu" Arasındaki Farklılık

Zor kullanma yetkisi, kanunla verilen yetkiye dayanılarak usulüne uygun güç kullanılmasıdır. Kanun koyucu, bu amaçları gerçekleştirmek için bazı kamu

16 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3

17 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5

18 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNGA 27 (1); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf/C (2002) 1); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) UNGA (A/RES/57/199)

19 Adem Sözüer, *Türk Ceza Hukuku Reformu Mevzuatı* (Alfa Basım, İstanbul 2013) 216

20 "…toplu kuvvet olarak müdahale edilen durumlarda "amirin emri" kurumu gündeme gelecek ve kolluk görevlileri tarafından işlenen fiiller bu kapsamda değerlendirilecektir." Muhammed Demirel, *Amirin Emri* (Onikilevha Yayıncılık, 2014) 170

görevlilerine zor kullanma yetkisi vermiştir. 2559 sayılı Polis Vazife Salahiyet Kanununda kolluk görevlilerine zor kullanma yetkisi tanınmıştır. Kanunun *"Zor ve silah kullanma"* başlıklı 16. maddesinde, "*Polis, görevini yaparken direnişle karşılaşması halinde, bu direnişi kırmak amacıyla ve kıracak ölçüde zor kullanmaya yetkilidir. Zor kullanma yetkisi kapsamında, direnmenin mahiyetine ve derecesine göre ve direnenleri etkisiz hale getirecek şekilde kademeli olarak artan nispette bedenî kuvvet, maddî güç ve kanunî şartları gerçekleştiğinde silah kullanılabilir"* denilmektedir.

AİHM de, bir müdahalenin "kanunla öngörülmesi", AİHS'in 11. maddesi uyarınca bir ya da daha fazla "meşru hedefi" yerine getirmeye yönelik olması ve bu hedeflere ulaşılmasının "demokratik bir toplum açısından gerekli" olması koşullarını aramakta; aksi takdirde 11. maddenin ihlal edileceğini ifade etmektedir[21]. Zor kullanma yetkisi ile donatılan kamu görevlileri, görevlerini ifa ederlerken kişiler üzerinde görevlerinin gerektirdiği ölçünün dışında kasten zor kullanmaları durumunda "zor kullanma yetkisine ilişkin sınırın aşılması" suçu kapsamında soruşturma ve kovuşturmaya tabi olmalıdır.

İşkence suçu ise, bir kişiye karşı sistematik olarak ve belirli bir süreç içerisinde insan onuruyla bağdaşmayan "bedensel veya ruhsal yönden acı veren" veya "algılama veya irade yeteneğini etkileyen" veya "aşağılayıcı" hareketlerde bulunmak suretiyle oluşur[22]. "İşkence" hiçbir istisnası olmaksızın bir suçu ifade etmektedir.

Kanaatimizce bu iki husus tamamen birbirinden ayrılmaktadır. "İşkence" bütünüyle bir suçu ifade etmektedir. Dolayısıyla işkence yapmak hukuki temelden yoksun eylemde bulunmak anlamına gelir. Diğer taraftan zor kullanma yetkisinin aşılması, ölçülülük ilkesi kapsamında belli bir aşamaya kadar güç kullanmayı meşru kılan ancak bu sınırın aşıldığı takdirde bir suçun oluşması anlamına gelen eylemlerdir.

Başka bir ifadeyle, zor kullanma yetkisi hukuka uygun bir şekilde doğmakta iken işkence için hiçbir şekilde hukuka uygunluktan bahsedilemez. İşkencenin tanımından yola çıkıldığında da farklılıkların olduğu anlaşılmaktadır. İşkence suçu bir kişiye karşı sistematik olarak ve belirli bir süreç içerisinde insan onuruyla bağdaşmayan "bedensel veya ruhsal yönden acı veren" veya "algılama veya irade yeteneğini

21 Disk and Kesk v. Turkey, App no 38676/08 (ECHR, 27 November 2012)

22 Mehmet Emin Artuk and Ahmet Gökcen and A. Caner Yenidünya, *Ceza Hukuku Özel Hükümler (*14th edn, Adalet Yayınevi, İstanbul 2014) 174; Timur Demirbaş, *Türk Ceza Hukukunda İşkence Suçu* (AÜ Basım Evi, Ankara 1992) 5; Üzülmez, (n12) 15

etkileyen" veya "aşağılayıcı" hareketlerde bulunmak suretiyle oluşur[23]. Ancak zor kullanma yetkisi kamu görevlisine görevini yaptığı sırada ve görevin gerektirdiği ölçüde kuvvet kullanabilmesinin mevzuatla tanınmış olmasıdır[24]. Bu yetkinin gerektirdiğinden fazla kuvvet uygulandığı takdirde bir suç oluşmaktadır. Dolayısıyla işkence suçu ile zor kullanma yetkisinin aşılmasını aynı potada eriterek değerlendirme yapmak isabetli olmayacaktır.

Zor kullanma yetkisinin aşılması suçu ile işkence suçu bir suç tipi olarak nitelik bakımından birbirinden ayrı zemine sahiptir. AYM'nin de hak ihlali iddiasına konu başvuruda bu ayırıma dikkat etmesi gerekirdi. Çünkü başvuru konusu olayda kolluk görevlilerinin kamu düzenini sağlamak üzere, hukuka aykırı yapılan bir gösteriyi sonlandırmak amacıyla yaptıkları bir müdahale söz konusudur. Burada işkence söz konusu değildir.

2.3.3. Anayasa Mahkemesi'nin Gerekçelendirme Metodu ve Kullandığı Referans İçtihatlar

AYM Bireysel Başvuru incelemesinde uyuşmazlığın kötü muamele yasağının ihlalinin maddi boyutunu değerlendirirken çoğunlukla "işkence" suçuna ilişkin hukuki argümanları kullanmıştır. Bu kapsamda hem AİHM'nin daha önce vermiş olduğu çeşitli kararlardan ve önceki Bireysel Başvuru kararlarından alıntılar yapmak suretiyle bir gerekçelendirme metodu izlemiştir.

Şöyle ki AYM, söz konusu Bireysel Başvuru kararının;

72. paragrafında Anayasa'nın 17. maddesini ifade ederken önceki bir kararına atıfta bulunmuştur[25]. Ancak zaten anayasal hüküm olan bir kuralı ifade ederken önceki bir kararına atıfta bulunmak gereklilik arz etmemektedir. 78. paragrafta ise Yüksek Mahkemenin atıfta bulunduğu 2012/969 no'lu *Tahir Canan* başvurusu, bir mahkûma karşı infaz koruma memurunun kasten yaralama ve hakaret suçu işlemesi ile ilgilidir[26]. 78. paragrafta yapılan bir başka atıftaki, AİHM'nin 5310/71 başvuru

23 Artuk and Gökcen and Yenidünya (n 22) 15

24 Artuk and Gökcen and Yenidünya, (n 22) 984

25 "72. Herkesin maddi ve manevi varlığını koruma ve geliştirme hakkı Anayasa'nın 17. maddesinde güvence altına alınmıştır. Anılan maddenin birinci fıkrasında insan onurunun korunması amaçlanmıştır. Üçüncü fıkrasında da kimseye "işkence" ve "eziyet" yapılamayacağı, kimsenin "insan haysiyetiyle bağdaşmayan" ceza veya muameleye tabi tutulamayacağı belirtilmiştir" Cezmi Demir v Diğerleri App no 2013/293 (AYM, 17 July 2014) 80

26 Tahir Canan App no 2012/969 (AYM, 18 September 2013)

no'lu İrlanda/birleşik Krallık kararı ise gözaltı süresi ile ilgilidir[27]. Keza 78. paragrafta bir başka referans olan AİHM'nin 30873/96 başvuru no'lu *Eğmez/Kıbrıs* kararı, polisin yakalama anındaki kötü muamelesi ile ilgilidir[28]. 79. paragrafta 2013/293 başvuru no'lu *Cezmi Demir ve D.* kararı hırsızlık şüphelilerinin gözaltında maruz kaldıkları işkence ve kötü muamele ile ilgilidir[29]. Ayrıca 99. paragrafta atıfta bulunulan, 2012/752 numaralı bireysel başvuru kararının 51. paragrafına[30] bakıldığında, bu paragrafın AYM'nin, E.1999/68-K.1999/1, E. 2005/151-K. 2008/37 ve E.2010/58-K.2011/8 sayılı iptal kararlarından alıntı olduğu görülmektedir. Kanaatimizce bu hususlar eleştirilmeye değerdir.

AYM hak ihlali incelemelerinde elbette AİHM'in ve kendisinin daha önce vermiş olduğu kararları gerekçe olarak kullanmalıdır. Hatta esası farklı olan uyuşmazlıklardaki referansları da pek tabi ki kullanabilir. Ancak bu başvuruda dikkati çeken husus kötü muamele yasağı kapsamında birbirinden farklı esası olan uyuşmazlıklarda ortaya çıkan işkence ve benzeri uygulamaların referans gösterilmesidir. Hâlbuki bu başvuruya konu olayda işkence suçundan öte zor kullanma yetkisinin aşılması tartışması söz konusudur.

Hemen belirtmek gerekir ki, AYM başka paragraflarda daha uygun gerekçeler de tercih etmiştir. Ancak Yüksek Mahkeme tekrarlara düşmekle birlikte uzun bir metin halinde karar yazmayı tercih etmiştir. Esasen daha kısa bir metin halinde uyuşmazlığın özüne dokunur gerekçeleri özetlemek suretiyle bir karar yazımı tercih edilebilirdi.

Nihayetinde AYM Anayasa'nın 17. maddesinin maddi boyutunun ihlalini bu şekilde etraflıca değerlendirdikten sonra yine aynı argümanlarla, kolluğun gerektiği kadar güç kullanabileceğini, bunun kötü muamele sayılmayacağını ancak ölçülülük kapsamında orantılı olması gerektiğini belirterek maddi vakıa üzerinden somut olayı değerlendirmek suretiyle karar vermiştir.

Nitekim Yüksek Mahkeme, başvuruculların da tutum ve davranışlarını ele alarak bir

27 Ireland v. the United Kingdom App no 5310/71 (ECHR, 20 March 2018)

28 Egmez v. Cyprus App no 30873/96 (ECHR 21 December 2000)

29 Cezmi Demir v Diğerleri App no 2013/293 (AYM, 17 July 2014)

30 "51. Anayasa'nın 17. maddesinde düzenlenen yaşam hakkı kapsamında, … devlet, pozitif bir yükümlülük olarak, yine yetki alanında bulunan tüm bireylerin yaşam hakkını gerek kamusal makamların, gerek diğer bireylerin, gerekse kişinin kendisinin eylemlerinden kaynaklanabilecek risklere karşı koruma yükümlülüğü altındadır (AYM E.1999/68, K.1999/1, K.T. 6/1/1999). Devlet, bireyin maddi ve manevi varlığını her türlü tehlikeden, tehditten ve şiddetten korumakla yükümlüdür (AYM, E.2005/151 K.2008/37, K.T. 3/1/2008; E.2010/58, K.2011/8, K.T. 6/1/2011)" Serpil Kerimoğlu v diğerleri, App no 2012/752 (AYM 17 September 2013)

kısmı bakımından hak ihlaline hükmederken bir kısmı için ihlal oluşmadığına kanaat getirmiştir. Bu değerlendirmeyi yaparken bayrak sopasıyla polise vurmak, barikatları zorla geçmeye çalışmak ve kamu düzenini tehlikeye sokacak fiillerde bulunmak gibi somut olay değerlendirmeleri yapmıştır.

2.4. Toplantı ve Gösteri Yürüyüşü Hakkının Hukuki Niteliği

2.4.1.Genel Olarak

Toplantı ve gösteri yürüyüşü hakkı, diğer birçok modern hak gibi, belli bir çatışmanın sentezi olarak, vatandaşların sorunlarını kamuoyunda tartışma, egemenlik kurumlarıyla paylaşma, talep ve isteklerini temsilcilerine iletme arzularının bir ürünüdür[31]. Toplantı ve gösteri yürüyüşü hakkı ifade özgürlüğünün toplu ve özel bir şekilde kullanılması anlamına gelmektedir[32].

Toplantı ve gösteri yürüyüşü hakkı, demokratik devlet için[33] temel haklardan biri olup, demokratik toplumun kurucu unsurlarındandır[34]. Gösteri, belli bir isteği veya isteksizliği, bu eylemi gerçekleştiren öznelerin varlığı veya jestleri ya da sesleri veya sessizlikleriyle açıklamaktadır[35]. Gösteri nutukla birlikte yapıldığında toplantıya dönüşmektedir[36]. Toplanma kavramıyla gerçek kişilerin bir araya gelmesi kastedilmektedir[37]. Toplanma belirli bir amaç için olduğunda toplantı sayılır. Ne var ki, belirli bir amacın bulunması da, bir insan topluluğunun toplantı sayılmasına yetmez. Ayrıca, bu toplantının örgütlenmiş olması da gerekir[38]. Toplantı ve gösteri

31 Martin Quilisch, '*Die Demokratiche Versammlung: Zur Rechtsnatur der Ordnungsgewalt des Leiters öffentlicher Versammlungen. Zugleich ein Beitrag zu einer Theorie der Versammlungsfreiheit*' (1970) Duncker & Humblot 40: trans; Tolga Şirin, *30 Soruda Toplantı ve Gösteri Yürüyüşü Hakkı* (Onikilevha Yayıncılık, İstanbul 2013) 13

32 "…toplantı ve gösteri yürüyüşünün amacı, bir yandan kişilerin bir konu hakkındaki düşüncelerinin başkaları tarafından bilinir hale gelmesiyken, diğer yandan bu düşüncelerin benimsetilmesi için genel olarak karar organlarına baskı kurma hedefi var. Bu amaçlara ulaşılabilmesi için de öncelikle toplantının veya gösteri yürüyüşünün kamuoyu tarafından fark edilmesini sağlayacak koşulların oluşması gerekiyor ki bunun ön koşulu da uygun yer ve zaman seçimi olarak karşımıza çıkıyor." Nur Zeliha Kaman, *'Toplantı ve Gösteri Yürüyüşü Hakkına İlişkin Hukuksal Çerçeve'* (2014) Toplantı ve Gösteri Yürüyüşü Düzenleme Hakkı ve Demokratik Toplum Düzeni Kavramıyla İlişkisi Çalıştayı, 25

33 "Özgür bir ülkede yaşayanlar, ellerindeki hakları koruyabilmek için serbestçe toplanabilmeli, düşündüklerini birbirlerine aktarabilmelidir. Yöneticileri seçimle iş başına gelen ülkelerde toplanabilmenin önemi daha bir açıklıkla gösterir kendini." İlhan F. Akın, *'Toplanma Özgürlüğü'* (1964) İÜHFM C30 S3-4 545,567

34 Osman Doğru, *'İnsan Hakları Avrupa Sözleşmesi Uygulamasında Toplanma ve Örgütlenme Özgürlüğü'* (2006) TBBD S64 39,69 43

35 Ömer Anayurt, *Türk Anayasa Hukukunda Toplanma Hürriyeti* (Kazancı Yay., İstanbul 1998) 18

36 Şirin, (n31) 13

37 Şirin, (n31) 18

38 Akın, (n33) 546

yürüyüşü hakkının kullanılması için en az kaç kişinin bulunması gerektiği ise tartışmalıdır. AİHM'e göre bir kişinin tek başına bile bu hakkı kullanması mümkün iken, Avrupa ülkelerinde ve Türkiye'de bu hakkın kullanılması için en az iki veya üç kişinin varlığı aranmaktadır[39].

Toplantı ve gösteri yürüyüşü hakkı, hem uluslararası hukuk metinlerinde hem de ulusal düzenlemelerde anayasal düzeyde korunan bir hak olarak güvence altına alınmıştır. Türk hukukunda ise bu hak, Anayasa'nın 34. maddesinde kaleme alınmıştır. 2911 sayılı Toplantı ve Gösteri Yürüyüşleri Kanunu ile de hakkın kullanılmasına ilişkin gerekli düzenlemeler yapılmıştır.

Türkiye Cumhuriyeti Anayasası'nın 34. maddesine göre, *Herkes, önceden izin almadan, silahsız ve saldırısız toplantı ve gösteri yürüyüşü düzenleme hakkına sahiptir*. Ancak Anayasa'nın 34. maddesinin devamında*, toplantı ve gösteri yürüyüşü hakkının, ancak millî güvenlik, kamu düzeni, suç işlenmesinin önlenmesi, genel sağlığın ve genel ahlâkın veya başkalarının hak ve özgürlüklerinin korunması amacıyla ve kanunla sınırlanabileceği* düzenlenmiştir. 2911 sayılı Toplantı ve Gösteri Yürüyüşleri Kanunu'nun[40] 3. maddesinde ise; herkesin önceden izin almaksızın, şiddet veya silah kullanmadan gösteri veya toplantı yapabileceği hüküm altına alınmıştır.

Avrupa İnsan Hakları Sözleşmesi'nin "Dernek kurma ve toplantı özgürlüğü" başlıklı 11. maddesinde de; "Herkes, asayişi bozmayan toplantılar yapmak, dernek kurmak, ayrıca çıkarlarını korumak için başkalarıyla birlikte sendikalar kurmak ve sendikalara katılmak haklarına sahiptir" şeklinde düzenlemelere yer verilmiştir. Ancak AİHS ve AİHM toplantı ve gösteri yürüyüşünün şekline ilişkin kesin kriterler koymamıştır. Nitekim bu nitelikteki toplantıların dinamik bir şekilde, yani bir yürüyüş şeklinde ya da statik biçimde veya oturma eylemi şeklinde olabileceği ve bunları belli bir liste ile sınırlandırmanın da mümkün olmayacağı ifade edilmektedir[41].

AİHS'in 11. maddesinin ikinci fıkrasına göre de; "Bu hakların kullanılması, demokratik bir toplumda, zorunlu tedbirler niteliğinde olarak milli güvenliğin, kamu

39 See for details; Şirin, (n31) 18

40 Kanun'un "Tanımlar" başlıklı 2. maddesinde toplantının; "belli konular üzerinde halkı aydınlatmak ve bir kamuoyu yaratmak suretiyle o konuyu benimsetmek için gerçek ve tüzel kişiler tarafından bu kanun çerçevesinde düzenlenen açık ve kapalı yer toplantılarını", gösteri yürüyüşünün; "belirli konular üzerinde halkı aydınlatmak ve bir kamuoyu yaratmak suretiyle o konuyu benimsetmek için gerçek ve tüzel kişiler tarafından kanun çerçevesinde düzenlenen yürüyüşü" ifade ettiği açıklanmıştır.

41 David Mead, *'The Right to Peaceful Protest under the European Convention on Human Rights-A Content Study of Strasbourg Case Law'* (2007) 4 **EHRLR** 345,350

emniyetinin korunması, kamu düzeninin sağlanması, suç işlenmesinin önlenmesi, sağlığın veya ahlakın veya başkalarının hak ve özgürlüklerinin korunması amaçlarıyla ve ancak yasayla[42] sınırlanabilir. Maddede, bu hakların kullanılmasında silahlı kuvvetler, kolluk mensupları veya devletin idare mekanizmasında görevli olanlar hakkında meşru sınırlamalar konmasına engel değildir" şeklinde sınırlama öngörülmek suretiyle, toplantı ve gösteri yürüyüşü hakkının sınırsız olmadığı ortaya konulmuştur.

Toplantı ve gösteri yürüyüşleri, çoğulcu demokrasinin kurulması, farklı kültürel, dini, siyasi, sanatsal ve benzeri fikirlerin oluşabilmesi ve bir arada yaşayabilmelerinin içselleşmesi açısından önemlidir[43]. Nitekim toplantı ve gösteri yürüyüşü hakkının kullananlara karşı, karşıt göstericilerin de gösteri yapanları protesto etmesinin, 11. maddenin güvencesi altında bir toplantı ve gösteri yürüyüşü hakkı olduğu ileri sürülmektedir[44].

Görüldüğü gibi gerek Türkiye Cumhuriyeti Anayasası ve gerekse AİHS, toplantı ve gösteri yürüyüşü hakkının ancak "demokratik bir toplumda gerekli olma" kriteri gözetilmek şartıyla, kamu güvenliğinin korunması, kamu düzeninin sağlanması, suç işlenmesinin önlenmesi, sağlığın ya da ahlakın veya başkalarının hak ve özgürlüklerinin korunması amacıyla sınırlanabileceğini düzenlemektedir. Bununla birlikte soyut kamu düzeni ve kamu güvenliği tehlikesine dayanarak toplantı ve gösteri yürüyüşü yasaklanmamalı, göstericilerin saldırgan ve tehdit edici herhangi bir davranış sergileyip sergilemedikleri tespit edilmelidir[45].

AİHM'e göre ise, önceden belirtilmiş bazı durumlarda güç kullanımının mahsuru yoktur. Ancak söz konusu gücün kullanılması, "kaçınılmaz olması halinde" ve "aşırı olmamak kaydıyla" olabilir[46]. Dolayısıyla somut olayda, fiziksel güç kullanımına başvurmanın muhakkak gerekli olup olmadığının ve kullanılan gücün orantılı olup olmadığının tespit edilmesi gerekir[47].

AİHM'e göre, gösteri yürüyüşüne katılanlara yönelik yapılan müdahale sonucunda, katılımcıların vücutlarının çeşitli yerlerinde ciddi şekilde ezik, sıyrık ve şişlik tespit

42 "Yasayla sınırlandırma yazılı veya yazılı olmayan bir kanun hükmü ile olabilir.", Francis G. Jacobs and Robin C. A. White, *The Europen Convention on Human Rights*, , (Clarendon Press, Oxford 1996) 224

43 Case ,Yargıtay CGK, E. 2014/9-147, K. 2014/376, T. 16.9.2014, KBB.

44 D. J. Harris and others, *Law of the European Convention on Human Rights*, (Oxford University Press, Oxford 2009) 517

45 Case Yargıtay CGK, E. 2015/9-111, K. 2015/381, T. 10.11.2015, KBB.

46 Rehbock v. Slovenia, App no 29462/95 (ECHR 28 November 2000)

47 Subaşi and Çoban v. Turkey, App no 20129/07 (ECHR 09 July 2013)

edilmesi, biber gazı sebebiyle mide bulantısından mağdur olmaları ve bunalım belirtileri göstermeleri, AİHS'in 3. maddesi kapsamında değerlendirilmektedir[48].

AYM ise, bireysel başvuru yolu ile önüne gelen uyuşmazlıkta gösterilerin ***"barışçıl"*** niteliğine sıklıkla vurgu yapmıştır. Bu minvalde, yapılan eylemlerin, *"barışçıl yöntemlerle"*, *"barışçıl amaçlarla"* ve *"barışçıl bir şekilde"* yapıldığına işaret edilmiştir. Ayrıca *"barışçıl toplantı hakkı"* ve *"toplanma hakkının barışçıl niteliği"* gibi kavramları da aynı doğrultuda kullanmıştır. Barışçıl olarak toplantı ve gösteri yürüyüşü hakkı, ifade özgürlüğünün bir başka görünümü olarak değerlendirilir ve bu çerçevede demokratik bir toplum bakımından temel hak niteliğindedir[49].

AİHM de, toplantı ve gösteri yürüyüşü hakkı ile ilgili olarak; *"Kamuya açık alanda düzenlenen gösteriler, trafiği aksatmak gibi etkilerle günlük yaşam düzenini bir derece bozabilir. Göstericiler şiddet içeren hareketlerde bulunmadıkları sürece, resmi makamların, Avrupa İnsan Hakları Sözleşmesi'nin 11. maddesi kapsamında güvence altına alınan toplantı hakkının özüne halel gelmemesi için* ***barışçıl nitelikteki*** *toplantılara belirli derecede hoşgörü göstermesi gerekmektedir."* şeklinde değerlendirme yapmaktadır[50]. Hatta toplantı ve gösteri yürüyüşü hakkının diğer kimselere rahatsızlık vermesi halinde dahi bu hakkın barışçıl bir şekilde kullanılmasıyla bertaraf edilebileceği ileri sürülmektedir[51].

2.4.2. Anayasa Mahkemesinin Gerekçelendirme Metodu

AYM, toplantı ve gösteri yürüyüşü hakkının ihlal edilip edilmediğini etraflı bir şekilde incelemekle birlikte bu hakkın *demokratik bir toplumda gerekli olma*sına değinmiştir. Bu kapsamda idarenin hakkın kullanılmasını engelleyen önlemlerinin *ölçülülük* ilkesi kapsamında olup olmadığının tespitini yapmıştır.

Yüksek Mahkeme, toplantı ve gösteri yürüyüşü hakkı ihlalini, hakkın bireysel bir hak olması itibariyle[52], kişiler ve davranışları bakımından ayrı ayrı değerlendirmek

48 Subaşi and Çoban v. Turkey

49 Osman Doğru and Atilla Nalbant, *'İnsan Hakları Avrupa Sözleşmesi Açıklama Ve Önemli Kararlar',* C2 430 <http://www.insanhaklarihukuku.com/wp-content/uploads/2016/01/%C4%B0HAS-A%C3%A7%C4%B1klama-ve-%C3%96nemli-Kararlar-cilt-2-Do%C4%9Fru-Nalbant.pdf.> accessed 10 June 2018

50 Disk and Kesk v. Turkey

51 Ziya Çağa Tanyar, *'Avrupa İnsan Hakları Mahkemesi İçtihadında Toplantı ve Gösteri Yürüyüşü Hakkı'* (2011) AÜHFD, S 60(3) 593,634 608

52 "Bireysel özgürlük olan düşünce özgürlüğü, çoğu kez kolektif özgürlük olan toplantı ve gösteri özgürlüğü ile eşzamanlı olarak kullanılır. Daha doğrusu demokratik sistemin bütünleyici birer parçasını oluşturan toplantı ve gösteriler, çoğu zaman bir düşünce ve kanaatin açıklanması ve yayılmasına hizmet ederler" Ali İşgören, *Türk Hukukunda Toplantı ve Gösteri Yürüyüşleri*, (2th edn, Seçkin Yayınevi Ankara 2011) 62

suretiyle, kolluk görevlilerinin müdahalesinin orantılı olup olmadığına karar vermiştir. Nitekim bazı göstericilerin polis bariyerlerini yıkmaya çalışmaları ve buna karşılık savunma amacıyla yapılan polis müdahalesi ölçülülük ilkesi kapsamında mütalaa edilmiş ve bir hak ihlali oluşmadığı belirtilmiştir. Ancak bazı göstericilerin kolluğun müdahalesini gerektirecek bir davranışta bulunmamaları karşısında polis müdahalesi sonucu yaralanmış olmaları orantılı bir müdahale olarak kabul edilmemiş ve toplantı ve gösteri yürüyüşü hakkının ihlaline yol açtığı ifade edilmiştir.

AİHM de aynı hassasiyeti göstermektedir. AİHM kararlarında önceden izin alınmamış olsa bile barışçıl bir şekilde yapılan gösterilerde kolluğun bir miktar tolerans göstermesi gerektiği vurgulanmaktadır[53]. Hatta doktrinde, ifade özgürlüğü ve dolayısıyla toplantı ve gösteri yürüyüşü yapma özgürlüklerinin belirli bir ölçüde abartmayı hatta tahrik etmeyi de kapsadığı ileri sürülmektedir[54]. Kanaatimizce bu özgürlüklerin ve toleransların, kamu düzeninin bozulmasına yol açmayacak oranda kullanılması gerekmektedir. Aksi takdirde tersi bakımından ölçülülük ilkesi aşılmış olur.

Esasen, en nihayetinde, AYM toplantı ve gösteri yürüyüşü hakkının ihlalini de kötü muamele yasağının varlığına, başka bir ifadeyle zor kullanma yetkisinin aşılmasına bağlamıştır. Dolayısıyla bu değerlendirmeleri tek bir eksende toplayarak yapmak mümkün olabilirdi. Nitekim önceki bölümde olduğu gibi bu bölümde de somut olay üzerinden bir ölçülülük değerlendirmesi yapılarak hak ihlalinin oluşup oluşmadığına karar verilmiştir.

3. Değerlendirme

Yukarıda ayrıntılı bir şekilde aşama aşama açıklanmak suretiyle irdelenmeye çalışılan olayda; AYM bir hak ihlali iddiasıyla önüne gelen dosyayı *kötü muamele yasağı* ve *toplantı ve gösteri yürüyüşü hakkı* kapsamında ele almıştır. Bu hakların ihlalini ise somut olaylar üzerinden ölçülülük ilkesinin sınırları bakımından değerlendirmiştir. Bu hususta AİHM, kararlarındaki gerekçeleri de referans olarak göstermeyi tercih etmiştir.

Ancak kanaatimizce AYM, gerek yukarıda belirtilen hakların gerekse başka hakların da ihlal edilip edilmediğini öncelikle ***etkin soruşturma ve kovuşturma*** kapsamında ele almalıydı. Bunun haricinde yine ölçülülük ilkesi değerlendirmesi

53 See for details, Oya Ataman v. Turkey, App no 74552/01 (ECHR 5 December 2006)

54 Doğru and Nalbant, (n49) 430

yapılabilirdi. Fakat başvuruya konu uyuşmazlıkta etkili ve eksiksiz bir soruşturma ve kovuşturma yapılıp yapılmadığının tespiti daha fazla ehemmiyet arz etmektedir. Nitekim toplantı veya gösteri yürüyüşleri hakkını kullananların dağıtılmasında kötü muamelede bulunanlara yönelik soruşturmanın hızlı bir şekilde yapılması, bağımsız ve tarafsız olması ve kamuya açık şekilde yürütülmesi[55] gerekmektedir.

Olayda, göstericilere müdahalede bulunan kolluk görevlileri hakkında soruşturma izni verilmemiştir. Etkili soruşturma kavramı, Ceza Muhakemesi Hukuku kapsamındaki soruşturma kavramıyla sınırlı olmayıp soruşturma izni verilmesine ilişkin yapılan ön inceleme, soruşturma ve kovuşturma aşamalarının tamamını kapsamaktadır. Devletin, kişinin maddi ve manevi varlığını koruma hakkı kapsamında sahip olduğu pozitif yükümlülüğün bir de usule ilişkin boyutu bulunmaktadır. Bu usul yükümlülüğü çerçevesinde Devlet, doğal olmayan her türlü fiziksel ve ruhsal saldırı olayının sorumlularının belirlenmesini ve gerekiyorsa cezalandırılmasını sağlayabilecek etkili resmî bir soruşturma yürütmek durumundadır. Bu tarz bir soruşturmanın temel amacı, hukukun etkin bir şekilde uygulanmasını güvence altına almak ve kamu görevlilerinin ya da kurumlarının karıştığı olaylarda bunların, sorumlulukları altında meydana gelen olaylar nedeniyle hesap vermelerini sağlamaktır[56]. Yürütülen ceza soruşturmalarının amacı, kişinin maddi ve manevi varlığını koruyan mevzuat hükümlerinin etkili bir şekilde uygulanmasını ve sorumluların ölüm ya da yaralama olayına ilişkin hesap vermelerini sağlamaktır[57].

Ceza soruşturmaları, sorumluların tespitine ve cezalandırılmalarına imkân verecek şekilde etkili ve yeterli olmalıdır. Soruşturmanın etkili ve yeterli olduğundan söz edebilmek için soruşturma makamlarının resen harekete geçerek olayı aydınlatabilecek ve sorumluların tespitine yarayabilecek bütün delilleri toplamaları gerekir[58]. Dolayısıyla kötü muamele iddialarının gerektirdiği soruşturma; bağımsız, hızlı ve derinlikli bir şekilde yürütülmelidir. Bu bağlamda soruşturmanın derhâl başlaması, bağımsız biçimde, kamu denetimine tabi olarak özenli ve süratli yürütülmesi ve bir bütün olarak etkili olması gerekir. Kamu görevlileri tarafından

55 İnce, (n3) 23

56 Case of Jasinskis v. Letonya, App no 45744/08 (ECHR 21 December 2010)

57 Serpil Kerimoğlu v diğerleri, App no 2012/752 (AYM 17 September 2013)

58 Batı and Others v. Turkey App no 33097/96 (ECHR 3 June 2004) and De Souza Ribeiro v. France 57834/00 (ECHR 03 June2004)

yapılan işkence ve kötü muamele iddiaları hakkında yürütülen soruşturmanın[59] etkili olması için soruşturmadan sorumlu olan ve tetkikleri yapan kişiler olaylara karışan kişilerden bağımsız olmalıdır.

Soruşturmanın etkin bir şekilde yapılması, verilecek hükmün adil olmasını sağlar[60]. AİHM de Devlet'in yetkili makamlarının yeterli ve etkili bir soruşturma yürütememesi sebebiyle, çoğu kez hak ihlali kararı vermiştir[61]. AİHM, yetkili makamların, örnek gösterilebilecek derecede özenli ve hızlı hareket etmesi[62] gerektiğine ve sorumluların tespit edilebilmesi ve cezalandırılmasını sağlamasına vurgu yapmaktadır[63]. Ayrıca AİHM, bir kamu görevlisinin AİHS'in 3. maddesinin ihlaline sebep olan suçlarla itham edildiği hallerde, gerçekleştirilen ceza yargılamaları ve hüküm verme sürecinin zamanaşımına uğramaması ve genel af veya af çıkarma gibi tedbirlere müsaade edilmemesi gerektiğini vurgulamaktadır[64].

Dolayısıyla AYM'nin de Bireysel Başvuruyu incelerken adli kolluğun etkin bir soruşturma yapıp yapmadığını irdelemesi beklenirdi. Çünkü müdahaleyi yapan kolluk görevlileri ile soruşturmayı yürüten, delil toplayan ve inceleme yapan kişiler aynı teşkilat içerisinde yer almaktadır. Nitekim kolluk, soruşturmadaki konumu gereği, savcılık kurumundan bağımsız olarak düşünülemez. Bu sebepledir ki, AYM kötü muamele yasağının veya toplantı ve gösteri yürüyüşü hakkının ihlalini değerlendirmeden önce adil yargılanma hakkı kapsamında **etkin soruşturma** yapılıp yapılmadığını tespit etmeliydi. Etkin soruşturma yapılmadığının tespiti halinde ise başvuruyu hak arama hürriyeti, adil yargılama ilkesi ve silahların eşitliği gibi hakların ihlali bakımından ele almalıydı. Nitekim AİHS'in "İnsan haklarına saygı yükümlülüğü" kenar başlıklı 1. maddesinde, *"Yüksek Sözleşmeci Taraflar, kendi yetki*

59 "Bir dönem Türkiye'de, …Ceza Kanunu'nda öngörülen korumanın etkinliğinin zayıflatılmasının yapılan soruşturma sisteminde boşluklar yarattığı, bunun da güvenlik güçleri mensuplarının fiillerinin hesabını vermeme, hatta bu durumdan yararlanma imkânı verdiği ifade edilmiştir…
Görülüyor ki, memurlar açısından getirilen özel yargılama kuralları, … , maddi gerçeğin araştırılması ilkesinin bir sonucu olarak etkin bir soruşturma yapılmasını engellediği için birçok olayda Türkiye'nin mahkûm edilmesi sonucuna yol açmıştır." Bahri Öztürk, *'Yaşama Hakkı ve İşkence Yasağı (Yasak Sorgu Metodları)'*, (2003) İKÜHFD, 43

60 Sesim Soyer Güleç, *'Ceza Muhakemesi Hukukunda Soruşturmanın Etkinliği İlkesi ve Takipsizlik Kararları Üzerindeki Etkisi'*, (2013) C15 DEÜHFD 1393,1464 1427

61 "Etkin bir soruşturma için, soruşturmanın suça karışmış olma ihtimali olan kişilerden bağımsız olarak yürütülmesi, resmi bir soruşturmanın yapılması, soruşturmanın ivedilikle ve makul sürede yapılması ve soruşturmanın kamunun denetimine açık olması gerekmektedir." Se efor details, Burak Bilge, *'AİHM İçtihatları Bağlamında Etkin Soruşturma Yükümlülüğü'*, (2014) C5 S2 İÜHFD

62 Çelik and İmret v. Turkey, App no 44093/98 (ECHR 26 October 2004)

63 Orhan Kur v. Turkey App no 32577/02 (ECHR 29 September 2008)

64 Yaman v. Turkey App no 32446/96 (ECHR 02 February 2005)

alanları içinde bulunan herkese bu Sözleşme'nin birinci bölümünde açıklanan hak ve özgürlükleri tanırlar" hükmü yer almaktadır. AİHM'e göre, etkili ve eksiksiz bir soruşturmadan söz edilebilmesi için soruşturmanın suça karışanlardan bağımsız bir organ tarafından, başvuranların katılımı sağlanarak yürütülmesi[65], eksiksiz ve titiz bir şekilde yapılması, kamu denetimine açık olması, ihlalden sorumlu olanların belirlenmesi ve cezalandırılması konularında sonuca götürebilecek nitelikte olması gereklidir[66]. Ayrıca kamuoyunun güvenini korumak ve yasadışı eylemlere göre her türlü hoşgörü ya da suç ortaklığı izleniminden kaçınmak amacıyla soruşturmada gerekli olan ivedilik ve özen gösterilmelidir[67]. AİHM de Devletin yetkili makamlarının yeterli ve etkili bir soruşturma yürütmesi gerektiğini Sözleşmenin gereği olarak görmekte ve buna riayet edilmediği gerekçesiyle hak ihlali kararı vermektedir[68]. Dolayısıyla AİHM'e yapılacak başvurulara karşı bir emniyet supabı işlevi görmesi amacıyla ihdas edilmiş olan AYM Bireysel Başvuru yolunda AİHM'in kriterlerine dikkat edilmesi isabetli olacaktır. Aksi takdirde bu ve benzeri başvuruların AİHM'in önüne gitmesi kaçınılmaz olacaktır[69]. Böylece yargılamaların uzun sürmesinin de yol açacağı hak ihlalleri ile birlikte Devlet artan miktarda tazminatlara mahkûm olacaktır.

Yüksek Mahkeme bu değerlendirmeyi yaptıktan sonra kolluk görevlilerinin göstericilere müdahale ederken uygulamış oldukları kuvvetin orantılı, gerekli ve elverişli olup olmadığını ölçülülük ilkesi kapsamında değerlendirmesi yerinde olurdu. Bu aşamaya gelindiğinde ise;

Kolluk personelinin kamu düzenini sağlamak amacıyla göstericilere kuvvet uygulaması hukuka uygunluk sınırlarını aşması halinde bunun nasıl bir yaptırıma tabi olacağını belirlemek gerekir. Buna ilişkin Türk Ceza Kanunu'nda işkence suçu ve zor kullanma yetkisine ilişkin sınırın aşılması başlıklı hükümler yer almaktadır. Ancak

65 AİHM; "Etkili hukuk/giderim yolu" kavramı, "tazminat ödenmesine" ek olarak, Devlete eylemden "sorumlu olanların tespiti ve cezalandırılmasına elveren nitelikte düzgün ve etkili soruşturma yapması" ve şikâyetçinin soruşturma usulüne etkin katılımını/erişimini sağlaması" yükümlülüklerini yükler. M. Semih Gemalmaz, *AİHS (Madde 3 / İşkence Yasağı) Analizi* (Ankara Barosu, Ankara 2006) 385

66 Serkan Cengiz and others, *Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları* (TBB, Ankara 2008) 10

67 Cengiz and others (n66) 10

68 Meryem Çelik and Others v. Turkey, App no 3598/03 (ECHR 16 April 2013)

69 "Türkiye Cumhuriyeti, insan hakları ihlallerini soruşturmama konusunda hayli deneyimli. Avrupa İnsan Hakları Mahkemesi, bugüne kadar ölüm şikayetleriyle ilgili 32 davada, işkence ve kötü muamele şikayetleriyle ilgili 51 davada Türkiye'nin **soruşturma yükümlülüğünü ihlal ettiğine** karar verdi. Bu kararlardan anlıyoruz ki devlet, nasıl **etkili soruşturma** yapılmaz sorusunun cevabını kendi deneyimleriyle çok iyi biliyor." Osman Doğru, *'Soruşturma(ma)'*, Radikal Gazetesi, 14 Temmuz 2013, <http://www.radikal.com.tr/radikal2/sorusturmama-1141905/> accessed 10 June 2018

işkence suçunun oluşabilmesi için *sistematik olarak ve belirli bir süreç içerisinde insan onuruyla bağdaşmayan* hareketlerin varlığı aranmaktadır. Bu suçun nitelikli unsurları arasında kasten yaralama suçuna ilişkin unsurlarda aranmaktadır. Diğer taraftan zor kullanma yetkisine ilişkin sınırın aşılması suçunda da kasten hareket etme gerekliliği aranmakla birlikte kamu görevlisine kamu düzeninin sağlanması amacıyla ölçülülük ilkesi sınırlarında bir kuvvet uygulama yetkisi verilmiştir.

Başka bir deyişle, işkence suçu[70] kamu görevlisinin hiçbir şekilde kuvvet kullanmaması gereken bir faaliyeti yürütürken kuvvet kullanması şeklinde iken zor kullanma yetkisinin aşılması belli bir sınıra kadar kuvvet kullanılabilen bir faaliyete ilişkin söz konusu sınırın aşılmasından sonra suçun oluşmasıdır. Dolayısıyla bireysel başvuruya konu olayda Yüksek Mahkeme'nin TCK'da yer alan zor kullanma yetkisine ilişkin sınırın aşılması hükmü üzerinden de ihlal değerlendirmesi yapması gerekirdi. Ancak AYM kararı incelendiğinde, Yüksek Mahkemenin gerekçelerinde çoğunlukla işkence suçuna ilişkin argümanlara yer verdiği görülmektedir. Hâlbuki aynı minvalde birçok AİHM kararı ve doktrinde teorik bilgi mevcut iken konunun ağırlık noktasını işkence suçu üzerinden değerlendirmek isabetli olmamıştır.

Diğer taraftan, görevi yaptırmamak için direnme suçunun oluşması cebir veya tehdit kullanılmasını gerektirmektedir. Bu suçun oluşması için kullanılan cebrin kasten yaralama suçunun temel şekli veya daha az cezayı gerektiren hali kapsamında değerlendirilebilecek boyutta olması gerekir. Dolayısıyla eylem yapılırken kamu görevlisine karşı gösterilen cebrin bu kapsamda ele alınması gerekir.

Ayrıca 2911 sayılı Toplantı ve Gösteri Yürüyüşü Kanunu'nun 32. maddesinde, *kanuna aykırı toplantı veya gösteri yürüyüşlerine katılanlar, ihtara ve zor kullanmaya rağmen dağılmamakta ısrar ederlerse, altı aydan üç yıla kadar hapis cezası ile cezalandırılır,* denilmektedir. Bu hükümden anlaşılacağı üzere hukuka aykırı bir eylem yapılırken eylemin sonlandırılması için zor kullanmak gerekebilir ve bu kuvvetin sınırının aşılıp aşılmaması ile eyleme katılanların söz konusu 32. maddeye göre cezalandırılması ayrı ayrı değerlendirilmelidir.

En nihayetinde, incelemekte olduğumuz başvuru kararının verildiği tarih itibariyle, AYM Bireysel Başvuru yolunun henüz yeni bir yargısal merci olması

70 "İşkence ve eziyet teşkil eden fiiller, aslında müessir fiil, hakaret, sövme, tehdit, ırza tasaddi veya ırza tecavüz niteliği taşıyan fiillerdir. Aslında bu fiillerin suç açısından arz ettiği özellik, … bunların belli bir amaç doğrultusunda işlenmiş olmalarıdır." İzzet Özgenç and Cumhur Şahin *'İşkence Suçu'*, (2000) S1 GÜHFD 11

sebebiyle bu tür eksiklikler makul karşılanabilir. Ancak bu karar üzerinden yapılan tespit ve tenkitlerin önümüzdeki dönemde AYM tarafından verilecek kararlar üzerinde olumlu bir etki oluşturması beklenmektedir.

Bu minvalde, AYM'nin hak ihlali değerlendirmelerinde, ihlal iddiasının hangi hak bakımından değerlendirilmesi gerektiğini isabetli bir şekilde tespit etmesi, AYM'nin karar yazımında tekrara düşmeden daha özlü ve kendine münhasır nitelikte kararlar yazması, gerekçelerinde başvuru konusu olayın özüne yakın örnek içtihatlar tercih etmesi ve kendi kararlarına atıfta bulunurken atfın ilk kaynağını da belirtmesi önem arz etmektedir.

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The Right to Appeal and Individual Application in Criminal Proceedings in Hungary, with Special Regard to the Defendant's Participatory Rights

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ABSTRACT

This paper covers the system of appeal as an ordinary legal remedy in criminal cases under Hungarian criminal procedural law. First, the system of courts as an institutional background will be outlined, then the procedural and substantial conditions of appeal will be described. The framework of any remedial (appellate) system is determined by the following factors: the personal scope of the right to appeal, the grounds of appeal, the rights of the participants in the appellate proceedings, the form of court proceedings, the scope of revision, and the type of decisions the appellate court can deliver. This paper briefly describes all these factors so that the typical features of appeal under Hungarian criminal law can be seen. The paper covers both the institution of first and second appeal, highlighting the cases where a second appeal needs to be made available. Furthermore, the functioning of the constitutional complaint in criminal cases will also be drafted. This kind of constitutional remedy was first put into practice in the Hungarian procedural and constitutional system in 2012. Of the various problem points, the paper focuses on the participatory rights of the defendant in appellate procedures, highlighting the main debate and features of this topic under Hungarian criminal procedural law.

Keywords: Appeal, criminal procedure, Hungary

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1. Introduction

The framework of any remedial (appellate) system is determined by the following factors: the personal scope of the right to appeal, the grounds of appeal, the participatory rights of the defendant and other parties in the appellate proceedings, the form of court proceedings, the scope of revision, and the type of decisions the appellate court can deliver.[1] The paper briefly describes all these factors so that the typical features of appeal under Hungarian criminal law can be seen. The aim of the paper is to review the relevant provisions of Hungarian criminal procedural law, with reference to legal literature.

2. Institutional Background: The System of Courts, The Basic Right to Legal Remedy and The System of Legal Remedies in Criminal Procedures

The system of trial jurisdictions in Hungary includes Municipal Courts, County Courts, Regional High Courts of Appeal and the Supreme Court (named Curia). That is, we have a four-level courts system and a three-level system of procedure. The jurisdictional system of Hungary is established uniformly, with no special courts for criminal trials, juvenile offenders or military procedures. The *criminal courts of first instance* are the Municipal Courts and the County Courts. Generally, the Municipal Courts are entitled to deal with criminal offences unless the Code of Criminal Procedure refers the trial of first instance to the competence of the County Court in case of certain serious felonies.

The *criminal courts of second instance* are the County Courts and the Regional High Courts of Appeal, depending on where the first-instance proceedings were launched. There are twenty County Courts and five Regional High Courts of Appeal (the latter located in Budapest, Szeged, Pécs, Debrecen and Győr). The *criminal courts of third instance* are the Regional High Courts of Appeal and the Supreme Court.[2]

The general form of legal remedy against the (non-final) decisions of first-instance courts (so-called *ordinary legal remedy*) is called *appeal* under the Code of Criminal

1 On the central questions of legal remedies, see Csongor Herke and others, *A büntetőeljárás elmélete (The theory of criminal procedure)* (Dialog-Campus 2012) 321-337.

2 On the system of courts in Hungary, in detail, see Krisztina Karsai and Zsolt Szomora, *Criminal law in Hungary* (Kluwer Law International 2015) 26-27.

Procedure in Hungary (Act XIX of 1998, hereafter referred to as CCP). The first Code of Criminal Procedure was enacted in 1896, which made appeals against first-instance judgements possible and put into place the possibility of a second appeal as well. The institution of second appeal was abolished in 1951, then re-enacted by the 2006 amendment to the 1998 CCP. Apart from this change of the levels of appeal, the basic principles of the system of first appeal have not changed since 1896.

The *first appeal* can be lodged with no restrictions, while a *second appeal* is available only in a limited scope. A second appeal may only be lodged if the accused was acquitted in first instance and convicted in second instance, or inversely. That is, if the decisions of the first- and second-instance courts differ concerning the guilt of the defendant (see below 6).

If a judgment becomes final, irrespective of the level of the court by which it has been passed, a request for review on points of law may be lodged to the Supreme Court exclusively responsible for reviewing the case on this *extraordinary remedy* (so-called Curia review on the points of law). The admissibility of this extraordinary legal remedy has strict conditions. Furthermore, no review is available if the case was closed in the third-instance. Another extraordinary legal remedy is the re-opening of the case (re-trial, on the points of fact).[3]

3. The First Appeal: Procedural and Substantial Conditions[4]

The CCP divides the so-called conclusive decisions of the first-instance court into two groups (Arts 330-332 CCP):

- judgement on the merits of the case (verdict of conviction and verdict of acquittal);
- ruling on terminating the procedure.

Both types of decision may be subject to appeal.

A conclusive decision means that the first-instance court finishes the first-instance procedure and can no longer take any evidence or make any other or any further decision on the case. However, a first-instance conclusive decision is not necessarily final in the sense of having a legally binding effect.

3 On these extraordinary legal remedies, see Karsai and Szomora (n 2) 213-216.

4 In general, see, Ervin Belovics, 'A másodfokú bírósági eljárás (Second-instance procedures)' in Mihály Tóth (ed) *Büntető eljárásjog* (HVG-ORAC 2013) 422-477; Zsanett Fantoly and Anett Gácsi, *Eljárási Büntetőjog. Dinamikus Rész (Criminal procedural law, Dynamic Part)* (Iurisperitus 2014) 165-189.

An appeal lodged against the fist-instance decision excludes this decision's becoming final. If no appeal is filed, the first-instance decision becomes final. *If a first-instance decision becomes final, its legal character and consequences are exactly the same as that of second- or third-instance final decisions.*

In Art. 324 CCP, the following parties shall be entitled to lodge an appeal against the judgement of the court of first instance, *without any substantial restrictions*:

a) the defendant,

b) the public prosecutor,

c) the substitute private accuser,[5]

d) the defence counsel – even without the consent of the defendant.

As for the public prosecutor, s/he may lodge an appeal both to the detriment and the favour of the defendant. This rule does not apply to the substitute private accuser who may file an appeal only to the detriment of the defendant.

The following participants are entitled to file an appeal *in a limited scope*:

a) the heir of the accused – against orders granting a civil claim,

b) the legal representative and the spouse of the defendant of legal age – even without the consent of the defendant – against an order for compulsory psychiatric treatment,

c) the private party,[6] against a ruling on his/her civil claim in its merit,

d) those against whom a ruling has been made in the judgment, against the ruling affecting him/her.

As for the *procedural conditions* (Art. 325 CCP), after the announcement of the judgment, the entitled persons shall declare whether they exercise the right of appeal. This declaration has either to be made right after the announcement of the judgement (as a last action of the trial), or within three days after the announcement of the judgement. In the latter case, the appeal shall be presented in written form. If the right of appeal has immediately been exercised, i.e. without a three-day delay,

5 In case the public prosecutor terminates the procedure or drops the charge, the victim may act as a substitute private accuser and have the case adjudicated by the court

6 The victim who has suffered financial damages resulting from the criminal offence and enforces a civil claim against the defendant in criminal proceedings

presenting a written appeal is not compulsory. Nevertheless, a written appeal may be presented later.

Should a person entitled to appeal not be present when the judgment is announced, s/he can file a written appeal eight days after s/he was served with the judgment.

The appeal can be based on grounds *both of fact and law*, that is, and appeal may be lodged for legal and factual reasons. The appeal can be filed against any ruling (disposition) given in the first-instance judgment and also against the reasons, explanation given therein (Art. 346 pars 2 and 3 CCP).

Legal reasons can be the question of guilt, the qualification of the criminal offence, the imposing (or applying) of sanctions and other relevant issues, or the violation of the CCP. Factual grounds concern established elements of the criminal offence or defects of the evidence (or evidentiary process). There are only a few cases in which the CCP excludes the appeal; for example, if the public prosecutor drops the charge, or if the court consequently terminates the criminal procedure by a non-appealable decision (without finding the defendant guilty).

As for *substantial conditions and the reasoning of appeal* (Art. 323 CCP): the appellant has to indicate the specific disposition in the judgment against which the appeal is directed and s/he has to indicate the goal of the appeal as well. However, the wrong indication of the appeal's ground or any other mistakes related to the appeal shall not be a reason for rejecting the consideration of the appeal. Furthermore, if the public prosecutor lodges an appeal to the detriment of the defendant, s/he must expressly underline this fact, because only the appeal to the detriment of the accused opens the possibility of the aggravation of the penalty at the second instance (see below 4).

4. The Scope of Revision at Second Instance

The court of second instance disposes of a *broad right of revision* (Arts 348-349 CCP): it reviews the judgment contested by the appeal together with the previous proceedings. The dispositions of the judgment concerning the substantial facts of the case, the establishment of guilt, the qualification of the criminal offence, the imposition of punishment and the application of measures shall be reviewed regardless of the appellant's person and the reason for the appeal. The court of appeal decides *ex officio* on the other issues related to those above (e.g., on the dispositions concerning

the civil claim and the cost of criminal proceedings). Consequently, the Hungarian CCP follows the *principle of full revision*.[7]

However, there are also dispositions that can be revised only upon a particular request due to the principle of *favor defensionis.* For example, if the accused was charged with committing two criminal offences, but the court established his guilt only of one of them and the latter decision was appealed by the defendant, the – partial – acquittal concerning the other criminal offence cannot be revised (it becomes partially legally binding, i.e. final). The same is the case for two or more accused; If all the convicted persons do not appeal, the revision by the court of second instance can affect only the part of the judgment that concerns the appellant. This rule is broken in two special cases, namely the court of second instance can also acquit the non-appellant convict or mitigate his/her unlawfully severe punishment (Art. 349 par. 2 CCP).[8]

As a main rule, the court of appeal makes decisions based on the facts of the case established by the court of first instance (*bound by the facts*). As an exception, the appellate court is entitled to take new evidence if reference to new facts or evidence is made in the appeal. The evidence that was collected at first-instance cannot be presented again unless the first-instance judgment is unsubstantiated (see below 5). However, *the taking of new evidence and establishing new facts is only possible on one condition*, namely *if it results in the acquittal of the defendant or the termination of the procedure (favor defensionis)* (Art. 352 par. 3 CCP).[9]

5. Decisions Made at Second Instance

The possible outcomes of an appeal can be the following: the court of second instance upholds or modifies (*reformation*) or repeals (*cassation*) the judgment of the court of first instance, or it rejects the appeal.

The court of appeal upholds the judgment of the court of first instance if the

7 In detail, Tamás Hága, 'A másodfellebbezés joghatálya, a felülbírálat terjedelme és a tényálláshoz kötöttség a harmadfokú bírósági eljárásban (The scope of second-appeal, the scope of revision and the binding effect of the facts laid down in the revised judgment at third-instance)' (1-2/2013) Büntetőjogi Szemle 19-29.

8 Ibid.

9 István Hegedűs, 'Az eltérő tényállás megállapíthatósága a másodfokú eljárásban (Finding different facts in second-instance procedures)' in *Dr. Maráz Vilmosné Emlékkönyv* (Szegedi Ítélőtábla 2013) 51-53; Lajos Balla, 'Részbizonyítás a másodfokú eljárásban (Taking partial evidence in second-instance procedures)' in Mihály Tóth (ed) *A büntetőítélet igazságtartalma* (Magyar Közlöny Lap-és Könyvkiadó 2010) 106-120.

appeal is not justified. But also in such case, the court of appeal should revise the judgment (because of the fact of the appeal) *ex officio*, and if the revision results in the recognition of the correctness of the judgment, the court of second instance upholds that judgment (Art. 371 CCP).

If the court of first instance misapplied a legal regulation and the judgment does not need to be repealed (e.g., the violation of law by the court of first instance can be redressed at the second instance), the court of appeal modifies the judgment and adopts a decision in compliance with the law (Art. 372 CCP). There is a very important limitation to the appellate court's power of modification: *the prohibition of reformation in peius*. In general, the principle means that as a result of filing an appeal the appellant should not be placed in a worse position than before the appeal. In Art. 354 CCP, 'the acquitted person cannot be convicted at the second instance or the penalty imposed by the court of first instance cannot be increased in lack of an appeal lodged to the detriment of the accused. If an appeal is lodged to the detriment of the accused, the prohibition expires and the revision by the court of second instance can result in conviction or more severe penalty than that imposed by the court of first instance.[10]

Exercising the revision, the most powerful legal means of the superior court is the repeal of the judgment of first instance in order to remedy any severe defects of the procedure at first instance. Art. 373 CCP lists the causes of *mandatory repeal*: in the cases listed, the repeal is absolute and unconditional, and the consideration of the circumstances is not at the discretion of the second-instance court. These causes primarily have a *procedural character*, they are not connected to the wrongful application of substantive law.[11]

In the criminal procedure, there may also be other – not so grave – procedural irregularities having a significant impact on conducting the procedure or the

10 Csongor Herke, *Súlyosítási tilalom a büntetőeljárásban (The prohibition of the reformatio in peius)* (PTE ÁJK 2010).

11 The Court of Appeal repeals the judgment of the Court of First Instance and orders the Court of First Instance to conduct a new procedure if the court was not lawfully formed; the judgment was delivered with the participation of an excluded judge or a judge who was not present at the trial from the outset; the court has overrun its substantive competence; the trial was held in the absence of a person whose presence is mandatory by law; or the publicity was excluded (in camera trial) unlawfully. An important ground of repeal is if the Court of First Instance did not fulfil its obligation to explain the reasons of its decision, and this omission precludes that the Court of Appeal could revise the judgment on merit (inappropriate explanation means the lack of relevant conclusions, the lack of connections between facts and legal consequences or between evidence material and facts etc.) (Art 373 CCP). In detail, Tamás Háger, 'Abszolút eljárási szabálysértések az elsőfokú büntetőperben (Absolute procedural mistakes in the firs-instance procedures)' (2/2014) Büntetőjogi Szemle 49-56.

establishment of guilt, the qualification of the offence or the imposition of the sentence. These irregularities can be, in particular, if the persons participating in the procedure were prevented from or restricted in exercising their lawful rights. In such cases the court of second instance considers the circumstances (the fact whether the procedural error impacts the judgment significantly) and can decide upon the repeal but also upon the redress of the defects (Art. 375 CCP).[12]

The repeal of the judgment of the first instance can be based upon a *factual ground* as well, if the judgment is unsubstantial and this cannot be remedied at the second instance. A further condition here is that this factual imperfection had significant impact on the establishment of guilt, imposition of a penalty or the application of a measure. According to Art. 352 par. 2 CCP, the judgment of *the court of first instance shall be regarded as unsubstantiated* if the facts of the case are not clarified; the court of first instance has failed to establish the facts of the case or established them insufficiently; the established facts of the case are contrary to the contents of the documents; or from the facts established, the court of first instance has drawn erroneous conclusions. As mentioned above, different facts can only be stated if the accused will be acquitted or the procedure terminated based on the evidence taken (*favor defensionis*).[13]

In a limited scope, the judgment made at second instance may be subject to appeal (so-called second appeal) (see below 4). If, for lack of a second appeal, the judgement rendered at second instance becomes final, it can be subject to extraordinary legal remedies, namely Curia review on the points of law or re-opening of the case. The conditions on both extraordinary legal remedies are laid down in detail in the CCP (Arts. 408 and 416), both being available in a narrow scope, that is, simple mistakes in law or facts may no longer eliminate the final character of the judgment.[14]

12 On the cassation in general, István Sódor, 'Kasszáció a magyar büntetőeljárási jogban. Gondolatok a büntetőeljárási törvény újrakodifikálásáról (Cassation in Hungarian criminal procedure – Some thoughts on re-codifying criminal procedural law)' in György Vókó (ed) *Tiszteletkötet Dr. Kovács Tamás 75. születésnapjára* (Országos Kriminológiai Intézet 2015) 255-265.

13 In detail, Tamás Háger, 'A megalapozatlanság kiküszöböléséhez vezető folyamat a másodfokú büntetőperben (Eliminating unsubstantiated decisions at second instance)' (2/2013) Jogelméleti Szemle 29-43.

14 Karsai and Szomora (n 2) 213-216.

6. The Second Appeal and the Procedure of Third Instance[15]

The possibility of 'second' appeal is not available in every case. The 'second' appeal is only admissible if the court of second instance has (allegedly) violated the criminal law and if the adjudications of the main question (the question of guilt) by the two lower courts are completely conflicting. In particular, a second appeal is only possible if the court of second instance, first, acquits an accused who was convicted by the court of first instance, or, second, convicts an accused (or applies compulsory psychiatric treatment against him/her) who was acquitted by the court of first instance, or, third, convicts the accused for an offence which was not adjudicated by the court of first instance (Article 386 CCP).

The availability of a second appeal precludes the second-instance judgment's becoming final. Consequently, decisions of the court of appeal can only become final if no second appeal is available (if neither of the three cases mentioned above exist) or if no second appeal was filed. As for the legal character and consequences, there is no difference between a judgment that becomes finalized at the second or the third instance. However, *there is an important difference considering the possibility of extraordinary legal remedies*: if a judgment becomes final at the third instance, a Curia review on the points of law is no longer available with reference to the serious violation of substantive criminal law (Art. 416 par. 4 CCP), while judgements becoming final at the second instance may be subject to Curia review also in this case.[16]

The *procedural conditions* are the same as those presented in connection with the first appeal (see above 3). The accused, the public prosecutor, the private accuser, the defence counsel and the relative of the accused (if compulsory psychiatric treatment has been applied) are entitled to lodge the appeal; the public prosecutor can appeal both to the detriment and in favour of the accused, the substitute private prosecuting party only to his/her detriment.

15 On the introduction of the thrid-instance procedure in Hungarian criminal procedural law, Ervin Cséka, 'Kétfokú fellebbvitel büntetőügyekben (egykor és ma) (Two-level appeal in criminal procedures today and in the past)' in Katalin Gönczöl and Klára Kerezsi (eds) *Tanulmányok Szabó András 70. születésnapjára* (Magyar Kriminológiai Társaság 1998) 54-64; Ervin Cséka, 'A kétfokú fellebbvitel bevezetése büntető eljárásjogunkba (Introducing the two-level system of appeal in Hungarian criminal procedural law)' in Károly Tóth (ed) *Tanulmányok Dr. Besenyei Lajos egyetemi tanár 70. születésnapjára* (Szegedi Tudományegyetem Állam- és Jogtudományi Kar 2007) 147-158.

16 In general, Belovics (n 4) 484-492; Fantoly and Gácsi (n 4) 190-204; Herke and others (n 1) 345-347.

By way of significant difference to second-instance proceedings, both the public prosecutor and the defence counsel shall present a written explanation to the appeal as well, pointing out the availability of the second appeal. However, the court of third instance is not bound by the reasons given in second appeals.

Independently of the narrow admission of the second appeal, the court of third instance is, however, empowered (and obliged) to *ex officio* revise the judgment challenged by the appeal, together with the previous proceedings of the courts of both first and second instance, the compliance with the procedural rules, and the substantiation of the judgment of the second instance (Art. 387 par. 1 CCP). That is, the principle of *full revision* prevails also at the third instance.[17]

The decisions can be classified the same way as in case of court procedure at the second instance (see 5 above), the same rules apply including the prohibition of reformation in peius as well.[18] As mentioned above, if a judgment becomes final at the third instance, a *Curia review* on the points of law is no longer available with reference to the serious violation of substantive criminal law (Art. 416 par. 4 CCP), while judgements becoming final at the second instance may be subject to Curia review also in this case. *Re-opening* a trial is still possible after a final judgment of third instance if its conditions are met.

7. Participatory Rights in Appellate Procedure

7.1. General Forms of Court Procedure[19]

From the point of view of publicity, four different forms of court procedure can be distinguished: trial (*tárgyalás*), public hearing (*nyilvános ülés*), hearing (*ülés*) and in camera session (panel session) (*tanácsülés*) (Art. 234 Be.). This also represents *a sequence of hierarchy concerning procedural guarantees*. It must be emphasized in advance that court practice has elaborated the limitations of transition from one form of procedure to another: once a second-instance trial or public hearing has commenced, the transition to an in camera session is prohibited (Curia Decision 2003. 934. BH).

The principle of publicity can to the greatest extent be realized in a trial or public

17 Háger (n 7).

18 In detail, Tamás Háger, 'A harmadfokú büntetőbírósági eljárás egyes központi kérdései, különös tekintettel a harmadfokú bíróság ügydöntő határozataira (Some central questions of third-instance procedures, with special regard to the decisions of the appellate court)' (2/2014) Miskolci Jogi Szemle 29.

19 Fantoly and Gácsi (n 4) 75-78.

session. The *trial* is the primary form of court procedure and aims at taking of evidence (Art. 234 par. 1 *Be*). The first-instance court rules on the defendant's criminal liability after taking of evidence in a trial (some exceptions may be made in special procedures; see below). If the court of second-instance carries out evidentiary actions, it also has to open a trial. Holding a trial at third-instance is excluded.

Public hearing is the secondary form of court procedure. It is however the most typical in second- and third-instance proceedings where no evidentiary actions take place. It must be emphasized that the trial and the public hearing *make no difference in terms of personal participation*.

Publicity is limited in case of holding a *hearing*, which embodies a procedural action of preparatory character. As a main rule, no evidentiary actions may take place at a hearing (except the investigating judge in certain cases). The *Be* provides three main types of hearing: hearings held by the investigating judge; preparatory hearing (after the filing of the indictment and before opening the trial) and personal hearing (in proceedings subject to private accusation). *Only the parties can be present at such hearings*: the public prosecutor (private accuser, substitute private accuser), the defendant and the defence counsel, and those subpoenaed or notified can attend (Art. 234. par. 4 *Be*).[20]

Publicity and personal participation is excluded in case of *in camera sessions* (or in other words, panel sessions). Only members of the court and the keeper of the minutes can be present, and taking of evidence is excluded (Art. 234 par. 5 *Be*). Two main types of in camera sessions can be distinguished: first, a panel session held after the trial or public hearing in order to pass the judgment; second, so-called *ex actis* session in simple cases. The latter is now precisely defined in the *Be*, which lists the cases that can be dealt with by in panel sessions. A panel session can embody also a part of the trial, the public hearing or the hearing.

7.2. Presence at Higher Instances

Appeals can be dealt with at an in camera session, public hearing or trial. Appeals can be adjudicated at an *in camera session* if the case does not require a contradictory procedure since it can be adjudged on the basis of the documents.

20 This means that the victim or civil party can only be present if s/he has been subpoenaed or notified of the hearing, which, for example is never the case when hearing on pre-trial detention is held.

Of critical importance in Hungary was the fact that the CCP had not provided for clear rules on when a case *at second instance can be adjudicated at an in camera session*, which did not comply with the maxims following from legal certainty and fair trial. Article 360 paragraph 1 included the following general clause: the presiding judge rules, within 30 days after receiving the files, on whether the case will be dealt with at a trial, a public hearing or in camera session. No further provisions were given in the CCP. Thus it is not surprising that the ECtHR dealt with cases in which the rules on the in camera session were contested.[21]

The Constitutional Court examined the provision of the CCP cited above and declared it unconstitutional in its Decision 20/2005. (V. 26.) AB, also stating that the Hungarian Parliament had omitted to provide precise rules on the forms of court procedures at higher instances, the omission of which leads to an unconstitutional situation. The Constitutional Court found that the rights of all private parties in criminal proceedings had been violated by this general rule because, first, the parties were not to be notified of an in camera session being held, second, no minutes were kept at an in camera session. Since no requirements and limitations to the presiding judge's decision on the form of the court procedure were laid down in the *Be*, the possibility of also approving the first-instance decision, or, furthermore, issuing a reformatory decision was given to the second-instance court, without hearing any of the parties, i.e. at an in camera session. The decision of the Constitutional Court also emphasized that that both the international conventions, the case law of the ECtHR and the CCP regards the whole scope of the court procedure as a consistent and uniform procedure, i.e. the effective participation of the defendant and other private parties cannot be restricted to the first-instance court proceedings. An opposite approach would transform the court procedure at higher instance into an inquisitorial phase again, in which the exclusion of the defendant's and the defence counsel's participation would to a far greater extent be possible than in the investigation phase. This absurd consequence following from Art. 360 CCP infringed the Constitution.[22]

Following from the Constitutional Court Decision 20/2005 (V. 26.) AB, the cases

21 ECtHR, *Csikós v. Hungary*, judgment of 5 December 2006, Appl. No. 37251/04; ECtHR, *Talabér v. Hungary*, judgment of 29 September 2009, Appl. No. 37376/05; ECtHR, *Sándor Lajos Kiss v. Hungary*, judgment of 29 September 2009, Appl. No. 26958/05; ECtHR, *Goldmann and Szénászky v. Hungary,* judgment of 30 November 2010, Appl. No. 17604/05.

22 Reference to the decision of the Constitutional Court also by György Berkes and others, *Büntetőeljárási Jog. Kommentár a gyakorlat számára (Commentary on the Code of Criminal Procedure)* (HVGORAC 2009) 909-911.

in which the appeal can be adjudged in camera are exclusively listed in Art. 360 CCP (declaring the appeal for inadmissible, transferring the case to the competent court, suspending the case etc.). Beyond these administrative actions not affecting the merits of the case and in order to serve the goal of greater speed, the CCP also provides the possibility for an in camera decision if the appeal was lodged only for the favour of the defendant and the facts laid down in the first-instance judgement are well substantiated, i.e. no further evidence needs to be taken.[23] But in such cases, the possibility of requesting a public hearing or a trial must be given to the defendant and his/her counsel so they can participate in person. An *in camera* decision on the merits of the case only being made if such a request is missing.

The general form of court procedure in second instance is a *public hearing*. The court holds a public hearing if the case cannot be dealt with in camera and a trial is not necessary. If the defendant has properly been subpoenaed, the public hearing can be held despite his/her being absent. A judgment on the appeal can also be passed if the outcome of the public hearing does not make the hearing of the defendant necessary (Art. 362 par. 3 CCP). The public prosecutor's attending the public hearing is not compulsory (Art. 362 par. 2 CCP).

The legal conditions for opening a *second-instance trial* are as follows: 1) the case cannot be dealt with in camera; 2) evidence needs to be taken, which is not possible at a public hearing; 3) any other cases where the presiding judge decides to open a trial (Art. 363 par. 2). The defendant must be subpoenaed at least five days before the trial date. Should the defendant notify the court of his/her unwillingness to attend the trial or if no appeal has been lodged to the detriment of the defendant, the trial can be held despite his/her absence (Arts 364-365 *Be*).

The court of third instance generally adjudges the second appeal at a public hearing. The rules on the form of court procedure at second instance apply to the procedure of third instance as well, with the exception that holding a trial and taking evidence in third instance is not allowed.

7.3. The Defendant's Statement at Higher Instances

The defendant has the right to make a statement at any stage of the procedure so s/he has to be provided with the possibility of making a statement if s/he decides so (Art. 117 par. 5 CCP).

23 The fact that an appeal was lodged only in favour of the defendant triggers the *prohibition of reformatio in peius* in higher instances (see above 5).

Invoking this right, the defendant or his/her counsel often files an evidentiary motion *at second instance* so that the defendant who previously remained silent can now make a statement or s/he can modify his/her statement made in first instance. Since it is the first-instance court's duty to take every evidence necessary to find the facts of the case, the appellate court is entitled to review what the first-instant court has done but not to supplement with what the first-instance court has failed to do. Consequently, a motion for the defendant's making a statement can usually not be accepted in the second-instance procedure. Evidentiary actions can be carried out in the second-instance procedure only exceptionally, that is, if the first judgement is unsubstantiated (see above 5). The defendant may make a statement in the appellate court procedure only in such a case.

As already mentioned, evidentiary actions are generally excluded in the court procedure of *third instance*, i.e. the defendant can never make a statement.

8. The Constitutional Complaint - Individual Application to the Constitutional Court[24]

After the 2012 Constitution of Hungary entered into force (called the Fundamental Law of Hungary), the system of constitutional complaints has been available. Constitutional complaints are adjudicated by the Constitutional Court, which is located entirely outside the ordinary justice system. The Constitutional Court has expressed in many of its decisions that it takes the ECtHR case law as a minimum standard when reviewing domestic justice decisions [e.g. Decision of the Const. Court 13/2014 (IV. 18.) AB].

A court decision may be challenged by constitutional complaint if 1) the court decision was rendered on the merits of the case or the decision concludes the ordinary court procedure 2) this court decision violates the applicant's basic right under the Fundamental Law and 3) the legal remedies have already been exhausted or they are not available. If these conditions are met, any person affected by the judgment has the right to file a constitutional complaint (Art. 27 of Act CLI of 2011 on the Constitutional Court). In practice, it is mostly the convicts who file a complaint but there are also some cases where victims filed constitutional complaint [Const. Court Decision 1/2015. (I. 16.) AB is an example on the latter].

24 Cf. Adél Köblös and others, 'Az alkotmányjogi panaszeljárás általános szabályai (General rules of constitutional complaint procedures)' In Botond Bitskey and Bernát Török (eds) *Az alkotmányjogi panasz kézikönyve* (HVG-ORAC 2015) 59-121.

As for the review procedure, it *has no contradictory character*, the applicant will not be heard (procedure in writing), the procedure can be based only on the documents of the criminal procedure. Besides the complaint itself, there is no other formal way of presenting arguments. The court whose decision is contested cannot express its views either.

The criminal court *may suspend* the enforcement of the final judgment in case a constitutional complaint has been filed. If the Constitutional Court requires the criminal court to do so, the enforcement of the final judgment *shall be suspended* (Art. 429/B-C CCP).

As written above, only conclusive or final decisions can be subject to constitutional complaint. In the interpretation of the Constitutional Court, the clause "affecting the merit of the case" excludes the review of any coercive measures ordered in criminal proceedings (such as arrest, pre-trial detention, seizure etc.). Consequently, the ECtHR does not require the exhaustion of constitutional complaint in case of pre-trial detention, and complaints filed to the ECtHR are admissible without the applicant's having turned to the Constitutional Court.[25]

The review carried out by the Constitutional Court is *limited to basic rights issues*. In most of the criminal cases, the relevance and the compliance with Article XXVIII of the Fundamental Law is the subject of the review (right to a fair trial, right to the legal judge, right to defence, presumption of innocence, right to legal remedy, nullum crimen / nulla poena sine lege, prohibition of ne be is in idem). Other typical basic rights affected are the non-discrimination clause (Art. XV), the freedom of expression (Art. IX), the right to human dignity (Art. II).

The Constitutional Court never considers wrongful application of criminal law unless it affects the constitutional content (scope of protection) of the relevant fundamental rights. The Constitutional Court *may not revise the facts of the case,* that is, it is bound by the facts established in the final judgment while performing the constitutional review [see e.g. Const. Court Decisions 1/2015 (I. 16.) AB].

If the Constitutional Court finds that the final judgment rendered by the criminal court violates a basic right guaranteed by the Fundamental Law, it quashes the

25 Numerous ECtHR judgements were made against Hungary regarding pre-trial detention. Cf. *Kutatási jelentés Magyarország – Az előzetes letartóztatás gyakorlata: Az alternatív kényszerintézkedések és a bírói döntéshozatal vizsgálata* (*Research report of the Hungarian Helsinki Comittee on the practice of pre-trial detention in Hungary)* (Magyar Helsinki Bizottság 2015) 13-15.

judgment concerned (it can be a judgment of any instance, including review judgments of the Curia, the Supreme Court of Hungary). If a final judgment has been quashed by the Constitutional Court, the court procedure (or a certain instance of the court procedure) has to be repeated. In the course of the repeated court procedure, the aspects, maxims and explanation laid down in the Constitutional Court decision shall be taken into account by the criminal Court (Art. 43 par. 3 of the Act on the Constitutional Court and Art. 403 par. 3 CCP).

An additional issue of implementation is that the Constitutional Court can lay down so-called "constitutional requirements" in its decisions (Art. 46 par. 3 Const. Court Act), which mostly affect the interpretation and application of the Criminal Code and the CCP, and which requirements must be considered in every future judgment of the criminal courts.[26]

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26 E.g. Decision 8/2013. (III. 1.) AB on the appointment of defense counsel; Decision 21/2016 (XI. 30.) AB on the exclusion of judges.

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Issue of Consent as a Defence of Deliberate Killing in English Law

İngiliz Hukukunda Kasten Öldürmede Ceza Sorumluluğunu Kaldıran veya Azaltan Bir Neden Olarak Rıza Sorunu

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ABSTRACT

In this article, the issue of whether consent should provide a complete or a partial defence of deliberate killing will be challenged within the scope of English law. In order to answer this, the article first determines what makes consent of the victim powerless in current English law. Next, the following topics will be addressed. First, what consent means and what the legal and moral effects of it are. Second, the reasons behind the current law for not recognizing consent as a defence of deliberate killing. Finally, this paper discusses whether or not consent should serve as a defence of deliberate killing. Although it may be claimed that consent reduces the wrongfulness of the act, it will be argued that consent alone should never provide a defence for those who deliberately kill others, due to an objective moral reasoning, namely human dignity.

Keywords: Deliberate killing, defence, consent

ÖZ

Bu makalede, İngiliz hukukunda kasten öldürme suçunda rızanın ceza sorumluluğunu kaldıran veya azaltan bir neden olarak kabul edilip edilmemesi sorunu ele alınacaktır. Bunu cevaplamak için öncelikle günümüzde İngiliz hukukunda kasten öldürmede mağdurun rızasını neyin etkisiz bıraktığı belirlenecektir. Daha sonra aşağıdaki konulara değinilecektir; ilk olarak, rıza nedir ve rızanın yasal ve ahlaki etkileri nelerdir, ikinci olarak, uygulanan hukukun rızayı kasten öldürmede ceza sorumluluğunu kaldıran bir neden olarak saymamasının arkasındaki sebepler nelerdir ve son olarak da rızanın kasten öldürmede ceza sorumluluğunu kaldıran bir neden olarak hizmet edip etmemesi gereği tartışılacaktır. Her ne kadar rızanın eylemin haksızlığını azalttığı söylenebilirse de insan onuru denilen nesnel ahlaki sebepten ötürü, rızanın tek başına kasten öldürmede hiçbir şekilde ceza sorumluluğunu kaldıran bir neden sayılmaması gerektiği tartışılacaktır.

Anahtar Kelimeler: Kasten öldürme, meşru savunma, rıza

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EXTENDED ABSTRACT

Current criminal law in England and Wales does not recognize consent of the victim as a defence of deliberately killing others. Although in cases of terminal illness patients have the right to deny life-saving treatment or to request pain-killers even in fatal doses, it is an offence to deliberately act to end a person's life in English law. A person's consent does not serve as a defence in these cases of terminal illnesses, let alone killing for gratification. However, the right to consent to pain, injury or death always attracts interest as a result of a number of criminal trials which include consenting victims in a range of activities such as mercy killing, active euthanasia and cannibalism. Hence it is an ongoing debate whether consent or request of a victim should affect the criminal liability of the perpetrator, either by diminishing liability completely or by decreasing the degree of it.

Historically, before the seventeenth century the 'volenti non fit injuria (a person is not wronged by that to which she consents)' maxim was valid, and so individuals were free to consent to almost anything. With the change in the system of punishment towards monopolization, the victim was no longer the central figure in the normative and centralised judicial structure. Inevitably, historically private offences turned into the public offences. As a result, consent of the victim lost its power in certain criminal acts which the state considers as damaging to itself. In this conventional conception of consent, when a perpetrator breaches the law she threatens the head of the state to define and guarantee the citizens' rights. Currently, although there is a meaningful distinction between both consensual acts of mercy killing and killing for gratification, still as a matter of public policy, no one can consent to her own death.

Putting paternalistic and subjective moral reasons such as the state or the public's interest in prohibiting its citizens from harming themselves aside, as they may extend the scope of criminal law to an undesired level, an objective moral reason, namely 'human dignity' as in the Kant's second formulation of the Categorical Imperative, can be argued to constitute a strong foundation for limiting personal autonomy. Dignity is an essential characteristic of all human beings, therefore a degrading conduct might be wrongful even if it does not violate the victim's rights due to consent. In this respect, consent as an exercise of personal autonomy remains valid until the act crosses the boundaries of degrading human dignity to a serious degree. When the consenter's dignity is violated, meaning when she is treated as a mere means to her end rather than as end in itself, consent loses its power as a justifying

reason. From this point of view, confirming that harm is not only a violation of rights but also the violation of human dignity leads us to conclude that consent should always be at least partial defence, since it negates one part of harm, namely violation of rights. In this respect, considering active euthanasia or mercy killing as an act of respecting ones' dignity and also not a violation of a person's rights, these kinds of acts along with other strict conditions should not be subject to criminal liability at all. It can be said that even in these circumstances of respect, consent alone cannot serve as a defence for deliberate killing, therefore consent to being killed just for gratification should neither provide complete nor partial defence.

English law embraces consent fully when absence of consent is an intrinsic and essential element of the offence, as in the example of rape, kidnapping or theft. However, for other offences involving physical harm, consent plays the role of defence only for limited number of cases, such as, actual bodily harm, lawful sports and medical treatment. Although legally and morally there is some difference between killing for mercy or active euthanasia (which is legal in some countries, but under strict conditions) and killing for gratification, in both cases consent by itself does not constitute a defence for criminal liability. However, consent not only represents a defence but is also a part of personal autonomy which is one of the foundations of the modern state. Therefore, there needs to be more explanation than bare legal prohibitions for not being able to consent for acts concerning one's own body.

1. Introduction

Current criminal law in England and Wales does not recognize the consent of the victim as a defence of deliberately killing others. Under English law, even suicide was a criminal act until 1961. The Suicide Act of 1961, while declaring suicide to no longer be punishable, decreed that aiding, abetting or encouraging another person's suicide is subject to up to 14 years imprisonment.[1] However, even if it hastens the death of a terminally-ill patient, it is legal to administer fatal doses of pain-killers as long as the purpose remains to relieve the pain and not to end the patient's life. By way of example, Dr. Moor was acquitted from the murder charge of his 85 year old terminally ill cancer patient after giving him a dose of diamorphine.[2] Additionally, patients have the right to refuse life-saving treatment whether it could lead to death

1 Suicide Act 1961, ss 1 and 2.

2 'Dr Moor: Landmark Verdict' (*BBC News,* 28 November 2000) <http://news.bbc.co.uk/1/hi/health/background_briefings/euthanasia/331263.stm> accessed 7 February 2018.

or not, and doctors have to respect that request.[3] For instance, Mary Ormerod weighed less than four stone (around 25 kg) when she died as a result of the withholding of her nutritional supplement with the permission of her daughters.[4] Although this is the current view of English law, it is also valid for the USA and most other western countries.[5] Another type of killing on demand arose with the sensational German case of Armin Meiwes, who was sentenced to life in prison for murder, despite the fact that to be killed was the victim's wish.[6] These cases of deliberate killings do not require any health problems and are generally for the pure gratification of the killer and appear where the victim has either requested to be killed or consented to be killed. Hence it can be said that although deliberate killing means killing someone knowingly and willingly, it needs to be asked whether the motivation of killing under other conditions should affect the validity of consent. Therefore, it is an ongoing debate whether consent or request of a victim should affect the criminal liability of the perpetrator, either by diminishing liability completely or by decreasing the degree of it.[7]

As can be understood from this short introduction, the issue of whether consent should provide a complete or a partial defence of deliberate killing, either for motivations of mercy or gratification, needs to be further evaluated. In the following pages it will first be determined what makes consent of the victim powerless in current English law. In order to answer this question, what consent means and what the legal and moral effects of it are needed to be addressed first. Later, the reasons behind current English law for not recognizing consent as a defence of deliberate killing will be identified, and finally, whether or not consent should serve as a defence of deliberate killing will be questioned. Although it may be claimed that consent reduces the wrongfulness of the act, it will be argued that consent alone should never provide a defence for those who deliberately kill others when it undermines human dignity.

3 See Nigel Biggar, *Aiming to Kill: The Ethics of Suicide and Euthanasia* (Darton, Longman and Todd 2004).

4 'Whose Decision Is It Anyway?' (*BBC News,* 28 November 2000) <http://news.bbc.co.uk/1/hi/health/background_briefings/euthanasia/331268.stm> accessed 7 February 2018.

5 See John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press 2002).

6 The Associated Press, 'German Court Sentences Cannibal to Life in Jail' (*World News,* 5 September 2006) <http://www.nbcnews.com/id/11909486/ns/world_news/t/german-court-sentences-cannibal-life-jail/#.WwKhXC_BLu0> accessed 7 February 2018.

7 See Roger Leng, 'Consent in Criminal Law' (1988) 13 Holdsworth Law Review 129.

2. The Meaning of Consent and Its Legal and Moral Effects

The right to consent to pain, injury or death always attracts the interest of authors from criminal law and moral philosophy fields. As a result of a number of criminal trials which include consenting victims in a range of activities from mercy killing to cannibalism, such as those mentioned above, the notion of consent and its effects have gained attention from the public, as well as from academics and legislators, thus raising the profile of this issue. In the following subsections, historical and current conceptions of consent as well as how it is exercised and the legal and moral effects of it will be addressed.

2.1. The Historical Conception of Consent

Common law considers deliberately injuring or killing someone as wrong. This presumption of wrong might be overruled by the perpetrator's defence of justification, and the consent of the victim would provide such a defence, yet traditionally, English law does not accept the defence of consent on homicide charges. This special rule of consent to physical harm historically derives from Anglo-American jurisprudence in the seventeenth century. Before that, the 'volenti non fit injuria (a person is not wronged by that to which she consents)' maxim was valid, which was a private law principle in Roman law in the early sixth century and, hence, individuals were free to consent to almost anything. As a result, this was used to prevent the perpetrator from prosecution.[8] With the change in the system of punishment towards monopolization, the victim was no longer the central figure in the normative and centralised judicial structure. Instead of the violation of the victim's interest, disorder in society became the new interpretation of crime. Inevitably, historically private offences turned into the public offences. The state became the only victim and the prosecutor of the crime. As a result, consent of the victim lost its power in certain criminal acts which the state considered as harm to itself. In this conventional conception of consent, the state is assumed to be the only victim of a violation of the criminal law and when a perpetrator violates the law she threatens the head of state to define and guarantee the citizens' rights.[9]

8 Vera Bergelson, 'The Right to Be Hurt: Testing the Boundaries of Consent' (2007) 75 George Washington Law Review 165, 171-173.

9 Vera Bergelson, 'Consent to Harm' (2008) 28 Pace Law Review 683, 686-688; See also Keith M. Harrison, 'Law, Order, and the Consent Defense' (1993) 12 St. Louis University Public Law Review 477, 478-482.

2.2. The Current Conception of Consent

Today, similarly, although there is a meaningful distinction between deliberate killing for gratification and mercy, still as a matter of public policy, no one can consent to her own death. At the present time, English law embraces a number of offences that can only be committed if there is a lack of consent of a certain person to a certain conduct or a certain consequence. The reason for this is that these offences include some interference with the personal right of the individual and generally a person has the liberty to waive her rights; consent hereby nullifies the harm in these cases. Some may claim that these offences are examples of consent providing a defence. However, considering the technical and more limited description of the defence as a factor which will cancel out liability even though the positive elements of the offence are proved, the absence of consent constitutes an intrinsic element of the offence here. Hence, it cannot be seen as a defence.[10] On the one hand, the role of consent in offences such as, rape, kidnapping or theft, can be described as inculpatory, but in other cases, by defeating the prima facie harm, consent removes the possibility of an offence. On the other hand, in cases involving physical harm, the role of consent becomes exculpatory, because even it is morally and legally excused, consensual bodily harm or death still remain harmful.[11]

In order to explain the role of consent in detail, George Fletcher determines that, for common law countries, inculpatory and exculpatory functions of an element demonstrate the distinction between a duty to obey, a prohibitory legal norm and a right to violate it when justificatory circumstances exist. He gives the offence of reckless driving as an example to exhibit that while it is unimaginable to ban driving at all, reckless driving can be banned. In this case, 'recklessly' is an element of the definition of the offence, not a defence.[12] Briefly, consent may be considered as a defence only when the act itself violates a prohibitory norm. Having intercourse with someone or entering someone's home does not violate a prohibitory norm if consent is present. By contrast, killing or injuring an individual are by themselves morally bad activities. Even though a defence may justify them, it cannot make them morally neutral.[13]

10 Leng (n 7) 129.

11 Bergelson, 'The Right to Be Hurt' (n 8); Bergelson, 'Consent to Harm' (n 9).

12 George P. Fletcher, *Rethinking Criminal Law* (Oxford University Press 2000) 566-568.

13 Bergelson, 'The Right to Be Hurt' (n 8) 203.

2.3. Exercise of Consent as a Defence

As explained above, consent provides a defence only with regards to offences that preserve certain personal rights that might be waived. Except for the offences in which the lack of consent has to be proved by the state as an element of the offence, customarily consent has been completely irrelevant for offences such as homicide. The reason for this is, as stated above, in homicide and bodily injury cases, a lack of consent of the victim is not a necessary element of the offence. It is the rule that an individual's consent does not diminish the criminal liability of a perpetrator for a forbidden act.[14]

In common criminal law, only within three circumstances does the consent of the victim excuse the perpetrator for inflicting bodily harm: first, if the injury is trivial; second, if the injury occurred as a reasonably foreseeable harm while participating in a lawful activity or in an activity that is not forbidden by the law; and last, if the bodily harm was inflicted as an accepted form of treatment.[15] In short, you are not allowed to consent to harm unless your activities are on the list of things approved by the state.[16] Other than a few cases such as horseplay[17], reasonable surgical interference, cosmetic enhancements, tattooing, piercing[18], properly supervised games and sports[19], one cannot consent to an injury of the level of actual or grievous bodily harm or to be murdered. Also, the House of Lords and the European Court of Human Rights stated that no one can consent to injury beyond actual bodily harm, and to those few circumstances that are mentioned above, even in private and between adults.[20]

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14 Harrison (n 9) 479; Joseph Henry Beale, 'Consent in the Criminal Law' (1894-1895) 8 Harvard Law Review 317, 324-325.

15 Model Penal Code (1985) s 2.11.

16 Bergelson, 'Consent to Harm' (n 9) 687; Offences Against the Person Act 1861, s 47; *A-G ref No 6 of 1980* [1981] QB 715.

17 *R v Jones* [1987] Crim LR 123 (CA).

18 *R v Wilson* [1996] Crim LR 573 (CA).

19 *R v Coney* (1882) 8 QBD 534, Judge Stephens: *'When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults.'*

20 *R v Brown* [1994] 1 AC 212 (HL); *Laskey, Jaggard, and Brown v The United Kingdom* [1997] Case No.109/1995/615/703-705.

To be valid, consent has to be positive and genuine, meaning it must be different from just a submission and not be vitiated by fraud, mistake, force, threats and abuse of power. In addition, the nature of the act must be comprehended. Furthermore, particular groups of people such as children, the mentally ill and intoxicated persons cannot give valid consent.[21] In respect to American penal law, Vera Bergelson, who is an American author, divides the consent defence into two types: complete and partial defence. To provide complete defence, a victim's rational and voluntary consent for the injurious act, needs to be subjectively compassionate and the perpetrator's act must generate an overall positive balance of harm and evils, including the victim's personal interests and dignity. She believes that otherwise the rational and voluntary consent should be accepted as a partial defence, as it lessens the wrongfulness of the conduct.[22]

2.4. Legal and Moral Effects of Consent

Taking into consideration that conventionally criminal harm is known as wrongful interference with the victim's interest, since consent waives the victim's rights, it can be said that the perpetrator who kills or injures based on consent does not violate the victim's rights. Nevertheless, despite the fact that neither rape nor kidnapping are less serious offences than assault, while consent of the victim converts them into a legal activity, it cannot change either the legal or the moral nature of assault.[23]

According to Heidi Hurd, through our rights and others' obligations, significant limits are generated to exercise the right of liberty for others. Nevertheless, by making promises we create obligations for ourselves. In addition, by authorizing and withdrawing consent we constitute rights for others.[24] She describes that consent can morally change another person's deed in two different ways, namely by 'moral transformative' and 'stained permission'. In the former way, consent makes the conduct right while it would otherwise be wrong. Take the example of theft which turns into a gift when the consent element is present. In the latter way, even though consent does not morally turn a wrong deed into a right one, it permits another person to commit a wrong act. This second function of consent becomes ineffective for the actions that are forbidden by the law.[25]

21 *Burrell v Harmer* [1967] Crim LR 169; *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] AC 112 HL.

22 Bergelson, 'Consent to Harm' (n 9) 701-711.

23 Ibid 703.

24 Heidi M. Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121, 123.

25 Ibid.

An important consequence of distinguishing the role of consent is if the consent is an element of an offence, the full burden of proof will rest with the prosecution. Moreover, if consent is in the definition of the charged offence, since the presence of consent nullifies the defendant's *mens rea*, there will be no conviction. Thus, when consent plays an inculpatory role, it generates a better situation for the defendant. In short, it is important to identify the role of consent in order to examine its effects.[26]

3. Reasons Behind Current English Law for Not Recognizing Consent as a Defence of Deliberate Killing

Having considered the current state of the law of consent, it is time to clarify the reasons for not allowing consent to serve as a defence of deliberate killing. There are a wide range of theories from religious to moral, from paternalistic to liberal, which are used to rationalise limiting one of the most important values that a free democratic society is built upon, namely personal autonomy.

In moral philosophy, the ability to consent reflects individual autonomy. It is believed that 'the capacity for autonomy is the capacity for self-legislation.'[27] In other words, 'consent is intimately related to the capacity for autonomous action; one who cannot alter others' obligations through consent is not fully autonomous.'[28] In a similar vein, modern political theory associates the legitimacy of the state with the consent of its citizens.[29] From a Millian liberal point of view, a person's liberty can only be limited if her act is intended to cause harm to others.[30] Neither immorality of the act nor the harm to self is sufficient to limit one's liberty.[31]

In contrast, others may state that the public's interest in the safety of its citizens and the tendency of injurious acts to breach the peace or to cause severe bodily harm are the rationales behind invalidating consent to bodily harm.[32] Criminal courts also share the view that the state has an interest in prohibiting its citizens, who have capacity to be productive for society, from harming themselves. Another argument on behalf of the state interest in self-regarding the decisions of its citizens is the risk that

26 Bergelson, 'Consent to Harm' (n 9) 696.

27 Hurd (n 24) 123.

28 Larry Alexander, 'The Moral Magic of Consent (II)' (1996) 2 Legal Theory 165, 165.

29 See Markus Dirk Dubber, 'Toward a Constitutional Law of Crime and Punishment' (2004) 55 Hastings Law Journal 507.

30 John Stuart Mill, *On Liberty* (2nd edn, J. W. Parker and Son 1859).

31 Ronald Dworkin, 'Introduction' in R. Dworkin (ed), *The Philosophy of Law* (OUP 1977) 1.

32 Beale (n 14) 325.

these citizens would become a 'public charge'.[33] Nonetheless, some could find this justification of limiting the individual's rights merely on utilitarian grounds as problematic. It can be claimed that this logic may lead us to prevent the poor from having children or even to the sterilization of intellectually disabled ones against their will. Moreover, it can be argued that such an approach, which gives the state the right to criminalise any conduct merely for not being useful to society, dangerously extends the moral limits of criminal law. For instance, the question of whether we should criminalise possession and distribution of unhealthy food substances to solve obesity related health problems might come to mind as an extreme measure.[34]

Regarding the attitude that the criminal law of England adopts towards consent, a former judge, Lord Devlin, conveys that English law is very concerned about moral principles. He states that subject to certain exceptions inherent in the nature of particular crimes, criminal law has never permitted the consent of the victim to be used as a defence.[35] He explains the reasons for this view as follows: first, crime constitutes an offence against society. And second, although a killer who acts only upon the consent of the victim may not harm anyone, this nonetheless threatens one of the moral principles upon which society is founded, namely 'the sanctity of human life'.[36] To support his claims, he concludes that acts such as euthanasia or killing another at his own request, suicide, attempted suicide and suicide pacts, duelling, abortion, and incest are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others, yet they were once forbidden by the law.[37]

As well as paternalistic and subjective moral rationales that encroach upon personal autonomy, courts and academics propose various non-paternalistic rationales for invalidating consent to bodily harm. Bergelson divides them in two categories, namely 'harm to self' and 'harm to others'. 'The first theory presumes that the apparent consent was not truly voluntary and rational and, therefore, is invalid. The

33 *State v. Bass*, 120 S.E. 2d 580, 586 (N.C. 1961); Bergelson, 'The Right to Be Hurt' (n 8) 34.

34 Bergelson, 'The Right to Be Hurt' (n 8) 191.

35 Patrick Devlin, 'Morals and The Criminal Law' in R. Dworkin (ed), *The Philosophy of Law* (OUP 1977) 66, 70-71.

36 Ibid.

37 Ibid (Suicide pact is a defence in UK by the Homicide Act 1957, s 4; Sam Jones, 'Pensioner Cleared of Killing Wife of 50 Years in Failed Suicide Pact' *The Guardian* (30 April 2010) <https://www.theguardian.com/society/2010/apr/30/suicide-pact-not-murder?INTCMP=SRCH> accessed 7 February 2018, as well as passive euthanasia as mentioned in the introduction, and sexual intercourses between adults in private is not within the scope of UK criminal law.)

second maintains that, unless the consensual injurious act is prohibited, society will suffer significant harm.'[38]

3.1. Harm to Self

It is true that in some situations, as in the extreme example of the Meiwes case which is mentioned above, it is hard to believe that the victim was rational while he consented to such harm. Therefore, it might be said that his consent should not be validated. Additionally, although victims are not subject to duress or coercion, it can be thought that they may not be consenting voluntarily.[39] As Joel Feinberg, an American author, points out, it is questionable whether a severely suffering or depressed person can give a voluntary and rational consent to justify her death or not.[40] Conversely, Bergelson asserts that although it is disturbing, the truth that mentally competent adults may genuinely wish to be harmed needs to be encountered, after several psychiatric evaluation tests are completed.[41]

3.2. Harm to Others

Feinberg suggests an autonomy-respecting argument which could still tolerate the state's interference with its citizens' private decisions.[42] He underlines that society has to intervene for the sake of others who will have to carry the burden of economic cost and misery thereafter. He concludes that '…it is not the individual whom the state paternalistically seeks to protect from his own unwise decisions; it is rather society at large who will suffer if the individual is permitted to act as he wishes.'[43] Furthermore, the empirical form of 'slippery slope' arguments, which Feinberg describes as part of a 'falling dominoes', implies that allowing people to consent to be harmed would eventually lead to a significant harm to society.[44] In parallel with this, Roger Leng considers that acknowledging the consent to be a complete or partial defence to homicide would lead to direct or indirect pressure on elderly, infirm and handicapped persons to request or consent to be killed, a point which should be highly considered.[45]

38 Bergelson, 'The Right to Be Hurt' (n 8) 185.
39 Ibid.
40 Joel Feinberg, *The Moral Limits of The Criminal Law: Harm to Self*, vol 3 (OUP 1986) 345.
41 Bergelson, 'The Right to Be Hurt' (n 8) 186.
42 Feinberg (n 40) 345.
43 Ibid.
44 Ibid.
45 Leng (n 7) 136.

On the contrary, Bergelson underlines that to avoid loopholes, higher proof of rationality and voluntariness of the consent should be requested by the law, rather than taking away the right to consent altogether. Courts have the right to request sound evidence of the victim's consent, but the risk of abuse should not be the foundation of a rule banning consensual harm altogether.[46] It should be noted that the possibility of abuse and mistake is not a sufficient and conclusive reason to forbid consensual deliberate killing. Although the possibility of abuse and mistake is relevant to the issue, the risk of exploitation of the norm is just another point to consider regarding providing reliable legal institutions and effective safeguards.[47] In short, there is need for morally and conceptually more coherent rationales that focus on the victim's interest and the perpetrator's reasons for the harmful act.[48]

4. Views on Consent as a Defence of Deliberate Killing

In order to plausibly answer the question whether consent should provide a defence of deliberately killing others or not, it is also necessary to consider the recent arguments on the issue.

4.1. Consent is Limited

In relation to the issue of consent, Dennis Baker emphasizes the distinction between waiving rights as exercising personal autonomy and waiving rights as violating rational autonomy and a person's human dignity. He suggests the implication of Kant's second formulation of the Categorical Imperative as a moral limit to consent. He states that although, in general, consent justifies wrongful harmdoing to others, it can be objectively limited by other objective notions of greater significance. Consent nullifies offence only if the act causes actual bodily harm or when lack of consent is an intrinsic and essential element of the offence, consent is not absolute under English law. Even though the notion of consent preserves personal autonomy, it does not allow one to degrade or destroy the consenting party's human dignity. An individual can forfeit or alienate her personal autonomy whereas she cannot alienate her rational autonomy. Until the harm crosses the boundaries of degrading human dignity to a serious degree, consent as an exercise of personal autonomy remains valid. When the consenter's dignity is violated, meaning when she is treated as a

46 Bergelson, 'The Right to Be Hurt' (n 8) 188.

47 Yale Kamisar, 'Some Non-Religious Views against Proposed Mercy Killing Legislation' (1958) 42 Minnesota Law Review 969, 976.

48 Bergelson, 'Consent To Harm' (n 9) 701-711.

mere means to her end rather than as end in itself, it is hard to recognize consent as a justifying reason.[49] Similarly, it can also be stated that the right to be respected as a rational being is cardinal and cannot be waived.[50]

4.2. Considering Consent as a Partial Defence

It is widely accepted that dignity is essential to our humanity. Human dignity can be defined as '…an expressive value demanding that people's behaviour, physical and verbal, convey a certain attitude to other people, namely an attitude of respect.'[51] Moral dignity is an essential characteristic of all human beings therefore a degrading conduct might be wrongful even if it does not violate the victim's rights. The recent concept of criminal harm is not only restricted to a violation of the victim's autonomy, but also involves the violation of the victim's dignity.[52] It would not be wrong to propose that regarding consensual physical harm, as in the Meiwes case, it was not the victim's right to life that was violated since the victim consented to be killed and eaten, but the victim's dignity was violated as his equal moral worth was denied. Hence, consensual killing to experience cannibalism and similar activities should certainly be punishable. However, confirming that harm is not only a violation of rights but also the violation of human dignity, leads us to conclude that consent should always be at least partial defence, since it negates one part of harm, namely violation of rights. It should be considered that a consensual but degrading act is less wrongful than an identical non-consensual act.[53]

For instance, the German Criminal Code, section 216 regulates a special offence called 'killing at the request of the victim; mercy killing'[54], which should not be confused with voluntarily active euthanasia as it does not require an illness. As a result of the killing's wrongfulness is diminished by the consent, section 216 provides lesser sentences than for other types of homicide.[55] Some may claim that even though a mercy killing of a suffering, terminally ill patient violates the patient's interest in

49 Dennis J. Baker, 'The Moral Limits of Consent as a Defense in the Criminal Law' (2009) 12 New Criminal Law Review 93, 112.

50 Thomas Hill, *Autonomy and Self-Respect* (Cambridge University Press 1991) 15-16.

51 Mehir Dan-Cohen, 'Basic Values and the Victim's State of Mind' (2000) 88 California Law Review 759, 771.

52 Dubber (n 29) 515; R. Antony Duff, 'Harms and Wrongs' (2001) 5 Buffalo Criminal Law Review 13.

53 Bergelson, 'The Right to Be Hurt' (n 8) 170; Bergelson, 'Consent To Harm' (n 9) 708.

54 Similar regulation takes place in the Criminal Code of the Republic of Austria 1974 (amended 2015), article 77.

55 Fletcher (n 12) 332.

living, however, when warranted by the patient's condition and motivated by compassion, such killing respects and preserves the dignity of the dying individual, and, therefore, should not be subject to criminal liability at all.[56]

4.3. Difference between Deliberate Killings

The recent concept of criminal harm with regards to consent guides us to separate killing as against human dignity from killing for mercy. It can be argued that euthanasia involves a humanitarian motive which distinguishes it from merely killing. Some further argue that, in euthanasia cases, forcing one to stay alive against her will rather than helping her death can be seen degrading. 'Human dignity is not possible without the acknowledgement of personal sovereignty.'[57] Many may see voluntary active euthanasia as shortening the patients' lives, even though patients consider it better off for them. Hence, Ronald Dworkin argues that 'Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny'.[58] However, no one suggests that consensual cannibalistic or similar activities which include deliberate killing for gratification should completely be kept out of criminal law.

Having evaluated these arguments on consent above, it can be said that validity of a consent ends when the consented act crosses the boundaries of human dignity. Dignity is an essential characteristic of all human beings, therefore a degrading conduct might be wrongful even if it does not violate the victim's rights due to consent. In this respect, consent as an exercise of personal autonomy remains valid until the act crosses the boundaries of degrading human dignity to a serious degree. When the consenter's dignity is violated, meaning when she is treated as a mere means to her end rather than as end in itself, consent loses its power as a justifying reason. From this point of view, confirming that harm is not only a violation of rights but also the violation of human dignity, leads us to the conclusion that consent should always be at least partial defence, since it negates one part of harm, namely violation of rights. In this respect, considering consensual active euthanasia or mercy killing as an act of respecting ones' dignity and also not a violation of her rights, such consensual acts along with other strict conditions should not be subject to criminal liability at all. It can be said that even in these

56 Bergelson, 'Consent To Harm' (n 9) 707.

57 Feinberg (n 40) 354.

58 Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins Publishers 1993) 217; Keown (n 5) 52-53.

circumstances of respect, consent alone cannot serve as a defence for deliberate killing, there are other requirements such as an illness, therefore consent to being killed just for gratification should neither provide complete nor partial defence.[59]

5. Conclusion

In summary, it can be understood that English law embraces consent fully when absence of consent is an intrinsic and essential element of the offence, as in the example of rape or trespassing. However, for other physically harmful offences, consent plays the role of defence only for a limited number of cases, such as, actual bodily harm, lawful sports and medical treatment, whether in private or not. Although there are some moral and legal differences between killing for mercy and killing for gratification, in both cases consent by itself does not constitute a defence for criminal liability. However, consent does not represent only a defence but also constitutes a part of personal autonomy which is one of the foundations of modern state. Therefore, bare legal prohibitions are not regarded as sufficient to explain the reasons behind not being able to consent for acts concerning one's own body. Yet, in this paper, the perception of consent and its limits and impacts has been demonstrated from a different point of view. Considering paternalistic and subjective moral reasons such as state or public's interest in prohibiting its citizens from harming themselves aside as it may extend the scope of criminal law to an undesirable level, an objective moral reason 'human dignity' as in the Kant's second formulation of the Categorical Imperative has been argued to constitute a strong foundation for limiting personal autonomy. Accordingly, the questions of one's voluntariness or rationality for consenting to being killed and the effects of it which may occur on vulnerable individuals can also be overcame by strict regulations. Dignity is an essential characteristic of all human beings, therefore a degrading conduct might be wrongful even if it does not violate the victim's rights due to consent. In this respect, it has been stressed that consent as an exercise of personal autonomy remains valid until the act crosses the boundaries of degrading human dignity to a serious degree. When the consenter's dignity is violated, meaning when she is treated as a mere means to her end rather than as end in itself, consent loses its power as a justifying reason. In the light of given considerations, although it may be acknowledged that consent reduces the wrongfulness of the act to a certain degree, consent alone should never provide a defence for those who deliberately kill others.

59 Bergelson, 'The Right to Be Hurt' (n 8); Bergelson, 'Consent to Harm' (n 9).

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YAZARLARA BİLGİ

TANIM

Ceza Hukuku ve Kriminoloji Dergisi (Journal of Penal Law and Criminology), açık erişimli, hakemli, Haziran ve Aralık aylarında olmak üzere yılda iki defa yayınlanan bilimsel bir dergidir. Ceza Hukuku ve Kriminoloji Dergisi, İstanbul Üniversitesi Hukuk Fakültesi Ceza Hukuku ve Kriminoloji Araştırma ve Uygulama Merkezi'nin bir yayınıdır.

AMAÇ ve KAPSAM

Ceza Hukuku ve Kriminoloji Dergisi (Journal of Penal Law and Criminology), öncelikle ceza hukuku ve kriminoloji alanlarına odaklanan, suç ve suçlulukla ilişkili konularda yazılan makalelere açık olan bir dergidir. Ceza Hukuku ve Kriminoloji Dergisi, yüksek kalitede içerikle bu alanlara katkıda bulunan ve bilgi paylaşımı sağlayan uluslararası bir platform sunmayı amaçlar. Dergide, Türkçe makalelerin yanı sıra İngilizce, Almanca, Fransızca, İspanyolca ve İtalyanca makalelere de yer verilir. Derginin hedef kitlesini akademisyenler, araştırmacılar, profesyoneller, öğrenciler ve ilgili mesleki, akademik kurum ve kuruluşlar oluşturur.

EDİTORYAL POLİTİKALAR VE HAKEM SÜRECİ

Yayın Politikası

Dergiye yayınlanmak üzere gönderilen makalelerin içeriği, derginin amaç ve kapsamı ile uyumlu olmalıdır. Dergide, orijinal araştırma niteliğindeki yazıların yayınlanmasına öncelik verilmektedir.

Genel İlkeler

Ceza Hukuku ve Kriminoloji Dergisi'nde daha önce yayınlanmamış ya da yayınlanmak üzere başka bir dergide halen değerlendirmede olmayan ve her bir yazar tarafından onaylanan makaleler değerlendirilmek üzere kabul edilir.

On değerlendirmeyi gecen yazılar iThenticate intihal tarama programından gecirilir. İntihal incelemesinden sonra, uygun makaleler Editor tarafından orijinaliteleri, metodolojileri, makalede ele alınan konunun onemi ve derginin kapsamına uygunluğu acısından değerlendirilir.

Makalede daha önce yayınlanmış alıntı yazı, tablo, resim vs. mevcut ise, makale yazarı, yayın hakkı sahibi ve yazarlarından yazılı izin almak ve bunu makalede belirtmek zorundadır. Gerekli izinlerin alınıp alınmadığından makalenin yazarı sorumludur.

Bilimsel toplantılarda sunulan özet bildiriler, makalede belirtilmesi koşulu ile kaynak olarak kabul edilir. Gönderilen makale biçimsel esaslara uygun ise editör, çift taraflı kör hakem değerlendirmesi için gelen yazıyı yurtiçinden ve/veya yurtdışından üç hakeme sunar, çeviri yazıyı ise bir hakeme gönderir.

YAZARLARA BİLGİ

Makale yayınlanmak üzere Ceza Hukuku ve Kriminoloji Dergisi'ne gönderildikten sonra yazarlardan hiçbirinin ismi, tüm yazarların yazılı izni olmadan yazar listesinden silinemez ve yeni bir isim, yazar olarak eklenemez, yazar sırası değiştirilemez.

Yayına kabul edilmeyen makale, resim ve fotoğraflar yazarlara geri gönderilmez. Yayınlanan yazı ve resimlerin tüm hakları Ceza Hukuku ve Kriminoloji Dergisi'ne aittir.

Yazarların Sorumluluğu

Makalelerin bilimsel ve etik kurallara uygunluğu yazarların sorumluluğundadır. Yazar, makalenin orijinal olduğu, daha önce başka bir yerde yayınlanmadığı ve başka bir yerde, başka bir dilde yayınlanmak üzere değerlendirmede olmadığı konusunda teminat sağlamalıdır. Uygulamadaki telif kanunları ve anlaşmaları gözetilmelidir. Telife bağlı materyaller (örneğin tablolar, şekiller veya büyük alıntılar) gerekli izin ve teşekkürler kullanılmalıdır. Başka yazarların, katkıda bulunanların çalışmaları ya da yararlanılan kaynaklar uygun biçimde kullanılmalı ve referanslarda belirtilmelidir.

Gönderilen makalede tüm yazarların akademik ve bilimsel olarak doğrudan katkısı olmalıdır. Bu bağlamda "yazar" yayınlanan bir araştırmanın kavramsallaştırılmasına ve dizaynına, verilerin elde edilmesine, analizine ya da yorumlanmasına belirgin katkı yapan, yazının yazılması ya da bunun içerik açısından eleştirel biçimde gözden geçirilmesinde görev yapan kişi olarak görülür. Yazar olabilmenin diğer koşulu ise, makaledeki çalışmayı planlamak veya icra etmek ve/veya revize etmektir. Fon sağlanması, veri toplanması ya da araştırma grubunun genel süpervizörlüğü tek başına yazarlık hakkı kazandırmaz. Yazar olarak gösterilen tüm kişiler, sayılan tüm ölçütleri karşılamalı ve yukarıdaki ölçütleri karşılayan her kişi, yazar olarak gösterilmelidir. Yazarların isim sıralaması ortak verilen bir karar olmalıdır. Tüm yazarlar, yazar sıralamasını Telif Hakkı Devir Formunda imzalı olarak belirtmek zorundadırlar.

Yazarlık için yeterli ölçütleri karşılamayan, ancak çalışmaya katkısı olan tüm kişiler, "teşekkür/bilgiler" kısmında sıralanmalıdır. Bunlara sadece teknik destek sağlayan, yazıma yardımcı olan ya da sadece genel bir destek sağlayan, finansal ve materyal desteği sunan kişiler örnek olarak gösterilebilir.

Bütün yazarlar, araştırmanın sonuçlarını ya da bilimsel değerlendirmeyi etkileyebilme potansiyeli olan finansal ilişkiler, çıkar çatışması ve çıkar rekabetini beyan etmelidirler. Bir yazar kendi yayınlanmış yazısında belirgin bir hata ya da yanlışlık tespit ederse, bu yanlışlıklara ilişkin düzeltme ya da geri çekme için editör ile hemen temasa geçme ve işbirliği yapma sorumluluğunu taşır.

Editör ile Hakem Sorumlulukları ve Değerlendirme Süreci

Editör; makaleleri, yazarların etnik kökeninden, cinsiyetinden, cinsel yöneliminden, uyruğundan, dini inancından, siyasi ve felsefi düşüncesinden bağımsız olarak değerlendirir. Ayrıca editör, yayına gönderilen makalelerin adil bir şekilde çift taraflı kör hakem değerlendirmesinden

geçmelerini sağlar. Gönderilen makalelere ilişkin tüm bilginin, makale yayınlanana kadar gizli kalacağını garanti eder. Hakemden gelen rapor doğrultusunda yazının yayınlanmasına, yazardan rapor çerçevesinde düzeltme istenmesine ya da yazının geri çevrilmesine karar verir ve yazarı durumdan en kısa sürede haberdar eder. Editör, içerik ve yayının toplam kalitesinden sorumludur. Ayrıca editör, gerektiğinde hata sayfası yayınlamalı ya da düzeltme yapmalıdır.

Editör; yazarlar, editörler ve hakemler arasında çatışmaya izin vermez. Hakem atama konusunda tam yetkiye sahiptir ve dergide yayınlanacak makalelerle ilgili nihai kararı vermekle yükümlüdür. Yayın etiği konusunda COPE kaynağına bakabilirsiniz.

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Hakemler; makaleleri, yazarların etnik kökeninden, cinsiyetinden, cinsel yöneliminden, uyruğundan, dini inancından, siyasi ve felsefi düşüncesinden bağımsız olarak değerlendirirler. Araştırmayla ilgili, yazarlarla ve/veya araştırmanın finansal destekçileriyle çıkar çatışmaları olmamalıdır. Değerlendirmelerinin sonucunda tarafsız bir yargıya varmalıdırlar. Hakemler, yazarların atıfta bulunmadığı konuyla ilgili yayınlanmış çalışmaları tespit etmelidirler. Gönderilmiş yazılara ilişkin tüm bilgilerin gizli tutulmasını sağlamalı ve yazar tarafından herhangi bir telif hakkının ihlal edildiğini ve intihal yapıldığını fark ederlerse editöre raporlamalıdırlar. Hakem, makale konusu hakkında kendini vasıflı hissetmiyor ya da zamanında geri dönüş sağlayamayacağını düşünüyorsa, editöre bu durumu derhal bildirmeli ve editörden hakem sürecine kendisini dahil etmemesini istemelidir.

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YAZARLARA BİLGİ

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