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The Crime of Bending the Law From the Point of View of the Arbitrator of the Court of Arbitration and Application Practice

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Abstract

The article deals with the crime of bending the law of arbitrators of the Court of Arbitration in terms of particular features of the subject matter of this newly created crime in the Slovak legislation. The subjective nature of this crime raises the question of a possible collective offender, i.e., the Court of Arbitration consisting of various arbitrators whose conduct results in the collective award. It is also noteworthy to mention the objective side of this subject matter in case of arbitrators lacking law background (even if they are experts in the given field). The aim of this paper is to analyze what conduct of the arbitrator can be subject to criminal punishment or what conduct will demonstrate the elements of arbitrariness from the part of the arbitrator or the Court of Arbitration and what consequences such conduct will have for the award of the Court of Arbitration itself.

Keywords

Crime; Criminal Liability; Arbitrator; Criminal Code; Bending the Law.

1 Introduction

On October 21, 2020, the National Council of the Slovak Republic adopted the proposal of the Act No. 312/2020 Coll., thus amending the Act No. 300/2005 Coll., Criminal Code, and the Act No. 301/2005 Coll., Criminal Procedure Code. Upon amending the Criminal Code, with the effect on October 1, 2021, and in compliance with § 326a of the Criminal Code, the new **crime of bending the law** was legally introduced.

The crime of bending the law has long been contradictory and divided both wide, as well as expert public into its promoters and advocates against its opponents and objectors. However, the question is what consequences the new crime brings to arbitrators and courts of arbitration and what application problems may arise with regard to its establishment into the Slovak legislation? To answer these questions, it is necessary to analyze the facts of the crime of bending the law prescribed by § 326a of the Act No. 300/2005 Coll., Criminal Code ("Slovak Criminal Code") with the first paragraph setting forth that: *"Who in the position of a judge, an associate judge or an arbitrator of the Court of Arbitration intentionally modifies the law in course of decision-making and subsequently harms or gives an advantage to a person, shall be sentenced to one to five years in prison."* [1]

2 Conditions for Criminal Liability of Arbitrators

2.1 The Subject and the Subjective Side of the Crime of Bending the Law

The subject of the crime of bending the law can be a judge, an associate judge, or an arbitrator of the Court of Arbitration. These are all regarded as special subjects. As stated in the explanatory report, the scope of subjects is predefined by the nature of the decision-making of judges as well as by absenting research into court judgments by another executive element. As for arbitrators in the arbitration proceedings, the above-named attributes may also entail the private scope of courts of arbitration.

Analyzing the crime of bending the law from the point of view of the subject raises an interesting question of a possible collective offender in senate judgments or arbitrators of courts of arbitration. Awards of courts of arbitration seem to be much more interesting from the subjective point of view. The person of an arbitrator, who is not required to have any law background, commits the crime of bending the law only when being aware of abusing the legal norm for the purpose of providing an illegitimate advantage or harm to the recipient of the award.

1 § 326a Slovak Criminal Code.

Due to the unique nature of arbitration as well as qualification background imposed on arbitrators, committing the crime of bending the law by the Court of Arbitration is a much more complex topic covering the question of imputability of such judgment to one body (the Court of Arbitration) or alternatively to other subjects (arbitrators) in relation to one proceeding (one judgment) as well as the question of culpability of one body (the Court of Arbitration) or alternatively of other subjects in relation to one proceeding.

The above-named conflict shall be interpreted in accordance with the theoretical background which forms the basis for the Slovak legislation.

The subjective side of the crime of bending the law consists of intentional wrongdoing. This is the main component predefining the criminal liability. The Slovak criminal law applies **the principle of liability for wrongdoing.** This is to say there is no offence or punishment and eventually no criminal liability without wrongdoing. The wrongdoing expresses individual criminal liability because everybody is fundamentally liable only for what they had directly caused. Wrongdoing is an internal **psychological relation of an offender to objective elements of the crime**, i.e., to essential facts of the case.[2] At the same time, we should point out that wrongdoing is built on the rational (intellectual), as well as the willful element.[3]

If the Court of Arbitration adopts the award which, in terms of application of relevant statutes on the given facts of the case, upon using standard interpretational techniques and after taking into consideration the conventional court practice, will demonstrate the arbitrariness, the subjective side attribute against the Court of Arbitration will not be satisfied. The Court of Arbitration as the collective body pursuant to the Act No. 244/2002 Coll., on Arbitration ("Slovak Act on Arbitration") and designed for dispute settlement, shall not possess any wilful or rational element. It is therefore excluded for the Court of Arbitration to create a psychological relation to objective elements of the crime of bending the law and thus meeting the subjective requirement.

2 IVOR, J. et al. *Trestné právo hmotné. Všeobecná časť*. Bratislava: IURA EDITION, 2006, p. 135.
3 ŠÁMAL, P. § 15. In: ŠÁMAL, P. et al. *Trestní zákoník I. § 1–139. Komentář*. Praha: C. H. Beck, 2009, p. 165.

The above-mentioned assumption is also underlined by the principle of individual criminal liability of natural persons governed by § 19 of the Slovak Criminal Code.

In light of the above-mentioned, the existence of excessive, wilful award of the Court of Arbitration requires particular observation of the subjective side of the crime of bending the law especially in relation to all members of the Court of Arbitration. The theory of collective liability for the crime of bending the law shall subsequently mean the presumption of innocence, which is absolutely inadmissible in the rule of law. Therefore, it is crucial to individually assess fulfillment of all elements of facts of the case against arbitrator of the Court of Arbitration.

2.2 The Objective Side of the Crime of Bending the Law and the Possibility of Breach the Right to Defence

As far as the objective side of the facts of the case is concerned, the statutes require wilful application of the law resulting in harm or advantage conferred on another person. *"The German practice of courts emphasises that the absurd interpretation of the law itself is not sufficient but the intentional (wilful) abuse of the law (bending the law) must also occur, i.e. obvious improper application of the law that is likely to give an illegitimate advantage or a disadvantage to a party to the proceeding. A public official shall act in an improper manner, intentionally and wilfully, which means he must admit the possibility that his particular legal opinion is non-consistent (for instance, it does not correspond to previous judgments in the given matter and such change in his opinion has not been properly justified) while being aware of a significant impact of bending the law. Improper and unjust interpretation of the statutes may indicate intentional wrongdoing, which is not necessarily the rule (serious and improper breach of interpretational rules may also be caused by negligence due to a lack of education or experience of a public official)."* [4]

The explanatory report in relation to the objective side specifies that for the criminal liability to be enforced, the arbitrariness in decision-making may in principle be stated by the court having the competence to decide

4 ŠAMKO, P. Trestný čin prekrúcania (ohýbania) práva. *Právne listy* [online]. 26. 4. 2020 [cit. 21. 5. 2021]. Available at: http://www.pravnelisty.sk/clanky/a833-trestny-cin-prekrucania-ohybania-prava

in the given matter (the appellate court, the extraordinary appellate court, the judicial review court, the Constitutional Court of the Slovak Republic, the European Court of Human Rights ("ECtHR"), the Court of Justice of the European Union, etc.) with the exceptions being only those judgments that can be challenged or disputed by remedies and simultaneously showing the above named element of arbitrariness in decision-making.[5]

The explanatory report is the tool of authentic interpretation in terms of elements of the criminal subject matter. However, the authentic interpretation may lead us to an ambiguous situation minimally in relation to the objective side. As the explanatory report shall observe the arbitrariness element in judgments of higher-instance courts, the question still remains whether the civil jurisdiction, administrative jurisdiction, or the Constitutional Court of the Slovak Republic will "decide" on the objective side of the facts of the crime in relation to bending the law, whereas the conclusions of these courts will be binding for law enforcement authorities and criminal courts and in relation to the objective side. The investigation and criminal evidence will only pertain to consequences (harm or unjust advantage). As far as arbitration awards are concerned, in accordance with the unifying statement of the Constitutional Court of the Slovak Republic[6], the Constitutional Court is not eligible to adjudicate on complaints concerning procedures or awards of courts of arbitration, i.e., arbitration awards are not subject to judicial review or may not be disputed (note: the only exception is cancellation of the arbitration award by the court, but the Slovak Act on Arbitration does not allow such award to be disputed due to arbitrariness). Eventually, the award may be reviewed by another Court of Arbitration, but it is highly probable that any conclusions and outcomes expressed by the Court of Arbitration shall not be binding for law enforcement authorities and criminal courts due to the fact that courts of arbitration are not part of the public authority.

If the above-mentioned practice should apply, a number of rights would be breached in relation to subjects of this crime, notably the right

5 Explanatory Report. *Národná rada Slovenskej republiky* [online]. [cit. 23. 5. 2021]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=482301

6 Statement of the Constitutional Court of the Slovak Republic of 18 November 2015, Case PLz. ÚS 5/2015, Constitutional complaints against courts of arbitration.

to effective defence. The point is that the facts of the crime shall contain all elements as requested by the Slovak Criminal Code. In this respect all elements are deemed necessary, equal, and obligatory. Unless all elements of the crime are present, the crime is excluded.[7] As far as the objective side of the crime is concerned, this may be defined by offender's conduct and its consequences. According to criminal law, offender's conduct may be described as the expression of offender's will outwards as an intentional activity focusing on a particular goal. This conduct connects his physical (expression) and psychological (will) element while both of these elements are intertwined. Unless one of these elements is present, the conduct cannot fall within the scope of criminal law.[8] All these facts have to be subject to proper investigation.

The statement about arbitrariness would be based on the legal review of the institution of a lower instance without the possibility for the judge or the arbitrator to express themselves on the reasons that might indicate arbitrariness. One exception might be the complaint procedure before the Constitutional Court of the Slovak Republic where the assumed offender breaching the basic right would express himself on the complaint. The question still remains, however, filing evidence for the benefit of the judge/arbitrator that might possibly be perpetrators of the crime. It is unimaginable for the defence to be excluded in its consequences in relation to one element of the facts of the case (the objective side) with the remainder of the facts of the case being the subject of investigation and criminal evidence. Regarding the fact that for sentencing the offender, all elements of the crime facts have to be satisfied without any doubt including facultative elements, criminal evidence and procedural rights have to be present during the overall criminal proceeding. The Slovak Constitution guarantees the right to defence to everybody against whom the criminal procedure has been initiated.[9]

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7 IVOR, J. et al. *Trestné právo hmotné. Všeobecná časť*. Bratislava: IURA EDITION, 2006, p. 99.

8 ČENTÉŠ, J. et al. *Trestný zákon. Veľký komentár*. Bratislava: Eurokódex, 2020, p. 15.

9 Judgment of the Constitutional Court of the Slovak Republic of 28 April 1999, Case II. ÚS 34/1999 – *"Právo na obhajobu do okamihu nadobudnutia právneho postavenia obvineného sa nezaručuje podľa čl. 50 ods. 3. Je implikované v ochrane podľa čl. 47 ods. 2 ústavy."*

The content of the right to defence needs to be understood *"… as creating conditions for proper application of procedural rights of the accused and his defence lawyer and the legal procedure determined by law enforcement authorities for the purpose of application of each right. This right shall be equally guaranteed across all phases of the criminal procedure. The right to defence consists of a number of consequent legal steps that are intertwined all through the criminal procedure. It refers to the opportunity to express oneself on all facts and circumstances charging the accused, the right to present circumstances, to propose and ensure evidence serving for defence, the right to file motions, petitions and remedies. It may also entail participation in hearings, delivery of correspondence, participation in confrontations, reconstructions as well as any other acts exercised before court when motion has been filed by the prosecutor. This sequence of events makes up the legal framework of defence while providing the possibility for factual fulfillment of defence by expressing ourselves on particular acts."*[10] The right to defence by means of the defence attorney shall not only purport to the main court procedure but, to certain limitations, to the preparatory procedure as well.[11] This has already been stated by the ECtHR in their judgment *Berlinski vs. Poland* where they claimed the breach of the right to defence due to ignoring the request for appointing the defence attorney in course of the preparatory procedure and as the matter of fact, the aggrieved party failed to have the defence attorney for a long time.[12]

In our opinion, excluding the objective side of the crime of the bending the law from the criminal procedure is in contravention to principles of the rule of law.

The above-mentioned conflict, in terms of consolidating the objective side of the facts of the crime of bending the law, has both European[13]

10 Resolution of the Supreme Court of the Slovak Republic of 26 October 2011, Case 1 Tdo V 19/2011.

11 SVÁK, J. *Ochrana ľudských práv (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práva)*. Žilina: Poradca podnikateľa, 2006, p. 488.

12 Judgment of the ECtHR of 20 June 2002, *Berlíński vs. Poland*, Cases 27715/95 and 30209/96.

13 E.g., Charter of Fundamental Rights of the European Union 2012/C 326/02, Directive No. 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive No. 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Directive No. 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

and international element[14]. At the same time, we should bear in mind that wording of the EU regulations (see the annotation no. 8 in the footer) is explicit in the meaning that within the EU law, all rights are imputable to suspects as well as the accused.

The right to defense is only one from various attributes of the right to fair trial pursuant to Art. 6 of the Convention on protection of human rights and fundamental freedoms. Art. 6 of the Convention states that everyone is entitled in full equality to a fair hearing. It is noteworthy that the guarantee of the fair hearing is of the procedural nature and shall not be interpreted as the guarantee of any material subjective right. Not the fair judgment but the fair trial serving as a basis for the judgment is guaranteed by Art. 6 of the Convention.[15] In addition thereto, the practice of the ECtHR has defined the background for assessing the fair criminal trial as a whole. In the case *Ibrahim et al. vs. the United Kingdom*[16], the ECtHR pointed out that when assessing the overall court procedure for the purpose of evaluating impacts of procedural flaws in the preparatory procedure on the overall fairness of criminal proceedings, the courts should take into consideration various factors whereas the ECtHR also provided their demonstrative calculation including the claimant's possibility to contest the authenticity of evidence and challenge its application.

Contradiction is widely considered a general legal principle of the procedural law, the rule of natural law governing each single court trial. It is its fundamental principle. If absent, we cannot speak about the procedure because the core of the procedure is confronting two parties each of them being given the opportunity to express their minds, raise objections or challenge arguments or evidence submitted by another party while presenting ours.[17] The subjects to criminal proceedings would be deprived of all the contradiction attributes when it comes to the objective side

14 E.g., The Convention for the Protection of Human Rights and Freedoms as amended by protocols no. 3, 5 and 8.

15 REPÍK, B. *Evropská úmluva o lidských právech a trestní právo*. Praha: Nakladatelství ORAC, 2002, p. 135.

16 Judgment of the ECtHR of 13 September 2016, *Ibrahim and others vs. UK*, Cases 50541/08, 50571/08, 50573/08, 40351/09.

17 REPÍK, B. *Evropská úmluva o lidských právech a trestní právo*. Praha: Nakladatelství ORAC, 2002, p. 147.

of the facts of the crime because the issue of willingness would be decided beyond the scope of powers of criminal jurisdiction.

One of the reasons supporting definite refusal of statements about arbitrariness of a higher-instance court is governed by provisions of § 14 of the Criminal Procedure Code in which the letter p) expressly sets forth that the competence of the Specialised Criminal Court shall not concern the crime of bending the law and therefore the competence of the given court shall only relate to proving all facts of this crime.

In light of the aforementioned, we assume that the statement on arbitrariness of a higher-instance court should be regarded as evidence in the criminal proceedings that the suspect/accused/convict may rebut by another evidence.

It may be interesting to observe in what manner the courts will approach the issue of proving the objective side of the facts of the crime of bending the law. *Šamko*, a judge at the District Court in Bratislava, assumes that courts should consider various expert opinions or expert views by lawyers, universities, think tanks, and many others that clarify their own interpretation of the legal norm. Consequently, the conclusions will differ depending on who will submit such evidence, the accused or the policeman. As a matter of conclusion, *Šamko* adds that expert evidence must be rejected due to the fact that it would mainly focus on legal issues, which is contradictory to the Slovak Criminal Code. To a certain extent, in criminal law the rule of thumb is that the court (or the law enforcement authority in a broader context) knows the law (and the amended legislation) and the court trial should prove what the law really refers to and whether it has not been misused by the judge or the arbitrator in their decision-making.[18] This opinion is widely accepted. Even though it is rather difficult to perceive how the criminal court will be able to make a statement on all legal issues, at the end of the day it will be the judge with appropriate legal background, legal practice, and judicial examination who will issue the corresponding judgment. In this case, the assumption of his maximum professionalism and expertise is highly presumed. What is more, he is able to base his conclusions

18 ŠAMKO, P. Trestný čin prekrúcania (ohýbania) práva. *Právne listy* [online]. 26 4. 2020 [cit. 21. 5. 2021]. Available at: http://www.pravnelisty.sk/clanky/a833-trestny-cin-prekrucania-ohybania-prava

on expert opinions on condition these will be properly verified. The investigator, however, takes a completely different position because he is not subject to any legal education requirements even though he is in charge of assessing fulfilment of the objective side of the crime of bending the law in course of preparatory proceedings – the above-mentioned arbitrariness – and in this respect, he will bring charges against the judge/arbitrator or not. Therefore, we would like to point to the judgment in the case *Salduz vs. Turkey* where the ECtHR emphasized the importance of the investigation stage within preparatory proceedings because the evidence obtained in this manner predefines the framework within which the crime shall be examined.[19]

2.3 Sufficient Qualification of Arbitrators and the Crime of Bending the Law

The question of assessing arbitrariness in application of the legal norm on the given facts of the case by arbitrators at courts of arbitration from the aspect of their legal knowledge and legal background seems to be a bit complex. As mentioned above, arbitrators of courts of arbitration are not subject to any legal education or law practice requirements. Even though contracting parties to the arbitration agreement are expected to choose the persons having sufficient qualification, which is a guarantee of a high-quality and sound decision in the matter, this hypothesis cannot be regarded as automatic. When it comes to objective decision-making, we should distinguish arbitrators of permanent courts of arbitration and *ad hoc* arbitrators. Permanent courts of arbitration still represent institutional enforcement of arbitration activities. As prescribed by the law, permanent courts of arbitration are obliged to issue the statute and rule of procedure. Therefore, permanent courts of arbitration are thought to select their arbitrators on the basis of qualifications and professional criteria for the purpose of building a good will and expertise in the given field. Professionalism of *ad hoc* arbitrators is barely supervized. Arbitration proceedings also relate to those subjects of the law who fail to understand arbitration clauses risking that trust in the contracting partner can easily be broken. Therefore, everybody is eligible to enquire to what extent

19 Judgment of the ECtHR of 27 November 2008, *Salduz vs. Turkey*, Case 36391/02.

the arbitrator's award is regarded as unwarranted due to the fact that he is not an expert in the law and its enforcement, is not familiar with legal doctrines and has never used certain interpretational methods. It is still questionable whether it is possible to apply the *iura novit curia* principle to arbitrators' decision-making. *"The iura novit curia principle does not only mean that the court knows the law but is also aware of the effects the law, as applied and enforced by the court, generates in relation to procedural and material position of the person eligible to court protection of his rights."* [20]

When taking into consideration the element of arbitrariness, this principle may be regarded as the starting point, i.e., the judge cannot plead non-guilty due to improper application of the legal norm by stating he did not know because with regard to the *iura novit curia* principle he could and should have known. Nevertheless, it might be a bit more complex to apply this principle to those judges who lack legal background and did not undergo the strict selection procedure and what is more, they do not represent any central authority or judicial body. On the contrary, it is the private law institute by means of which the crime of bending the law is being introduced, as declared by the explanatory report to the Act No. 312/2020 Coll.

Here applies the general irrebuttable presumption of knowledge of everything what has been published in the Collection of Acts pursuant to the provisions of § 15 of the Act No. 400/2015 Coll., on creation of statutes and the Collection of Acts of the Slovak Republic as amended. Still judges have a different position than arbitrators when it comes to presumption of knowledge of law and legislation. Art. 141 of the Slovak Constitution governs execution of justice in the territory of the Slovak Republic and determines two key features – independence and impartiality. Independence of courts and judges refers to professional independence of judges. If the judge is not sufficiently prepared for qualified interpretation and application of the law, the proper independence of the judge is far from being guaranteed.[21] As justice represents one of key aspects of the public authority, which is separated from other aspects, requirements for high-quality,

20 Report of the Constitutional Court of the Slovak Republic of 20 December 2001, Case I. ÚS 59/00.

21 DRGONEC, J. *Ústava Slovenskej republiky. Komentár*. Šamorín: Heuréka, 2012, pp. 1460–1461.

independent and impartial justice are demonstrated in the number of statutes governing the course of justice, qualification requirements for judges, selection procedures of courts, their disciplinary wrongdoings, etc. The fundamental requirements are specified in the Slovak Constitution. However, these attributes are not merely applicable to arbitrators or courts of arbitration. Even though the Slovak Act on Arbitration in the provision of § 6 para. 3 sets forth the requirements for selection of an independent and impartial arbitrator when being chosen by a specific person or court, we must admit that the control mechanism for fulfilment of this principle or the sanction mechanism are absent. Therefore, the requirement for an independent and impartial arbitrator is declared but the application practice is lagging behind. Competence and jurisdiction of courts is derived from the public authority with specific conditions and requirements for their control and fulfillment being imposed on the execution of justice. On the other hand, competence of the Court of Arbitration is derived from the will of contracting parties subject to arbitration agreement to settle their dispute before the Court of Arbitration.

Therefore, we must admit that in case of arbitrators, the arbitrariness shall be assessed through the prism of their former education and practice, which means the application of the *iura novit curia* principle will be rather restricted.

Arbitrators acting in consumer arbitration proceedings at permanent courts of arbitration take a different position. The specific enactment requires qualification in the field of law, legal practice as well as successful completion of expert examinations.[22] These conditions are similar to those that are requested for exercise of the function of the judge and therefore the application of the *iura novit curia* principle against these arbitrators is reasonable.

Therefore, it will be interesting to observe the future acting of the judge accused of perpetrating the crime of bending the law as the lawmaker did not think of this situation when introducing the new form of the crime. The situation regarding judges is clear – the provisions of § 22 of the Act No. 385/2000 Coll., on judges and associate judges as amended, provide the possibility of temporary suspension of exercise of the function

22 Provisions of § 4 along with § 5 of the Act No. 335/2014 Coll., on consumer arbitration proceedings as amended.

of the judge who is being prosecuted for the premeditated crime. The similar enactment is completely absent in relation to arbitrators, which is dangerous in terms of application of the rule of law. The latest judicial reforms introduced since 2020 have enabled cancellation of the statutes requesting the express consent of the Slovak Constitutional Court to the custody of the judge.[23] Unintentionally, the judges and arbitrators have been placed in the similar position as their custody will be decided by the corresponding court, i.e., the district court or the Specialised Criminal Court.

2.4 The Crime of Bending the Law and Other Legal Professions

In relation to the objective side of the crime of bending the law – the arbitrariness – which is known for the illogical and text and purpose-like contradictory (non-)application or interpretation of the statute, it would be wise to consider whether the lawmaker would not extend the special subject of this crime to other legal professions that are conferred to a greater or lesser extent the competence to decide about rights or obligations. The main reasoning why other subjects of the public authority deciding about rights and obligations are exempt from the scope of this crime, according to the explanatory report, is that exercise of powers of the public or state authority is subject to judicial review.

The Programme Declaration of the Government of the Slovak Republic (2020) states that the Government of the Slovak Republic will seriously consider introducing the crime of bending the law as amended by the German legislation. The similar enactment of the crime of bending the law – Rechtsbeugung – firstly appeared in the German legislation in the 19th century when it only fulfilled the complementary role and its practical application was rather sporadical. The crime of Rechtsbeugung was applied after the fall of the Nazi regime when the German system of criminal jurisdiction had to face former judicial injustice perpetrated by Nazi judges.[24]

23 Poslanci definitívne schválili reformné zmeny v justícii. *Ministerstvo spravodlivosti Slovenskej republiky* [online]. 9. 12. 2020 [cit. 23. 5. 2021]. Available at: https://www.justice.gov.sk/Stranky/aktualitadetail.aspx?announcementID=3060

24 QUASTEN, D. *Die Judikatur des Bundesgerichtshofs zur Rechtsbeugung im NS-Staat und in der DDR*. Berlin: Duncker & Humblot, 2003, p. 13.

The crime of Rechtsbeugung is governed by the provision of § 339 Strafgesetzbuch ("German Criminal Code") providing that: *"Ein Richter, ein anderer Amtsträger oder ein Schiedsrichter, welcher sich bei der Leitung oder Entscheidung einer Rechtssache zugunsten oder zum Nachteil einer Partei einer Beugung des Rechts schuldig macht, wird mit Freiheitsstrafe von einem Jahr bis zu fünf Jahren bestraft."*[25]

As amended by § 339 of the German Criminal Code, this crime may be perpetrated by the judge or any other public official or the arbitrator.[26] The public official refers to a policeman, a notary public, a debt enforcement agent, a mayor, a clerk working in the Land Registry, etc.[27] For instance, prosecutors were found guilty and sentenced under this enactment.[28] When looking for the subject of the crime of bending the law, it is obvious that the Slovak legislation did not follow the path of the German Criminal Code as the special subject of this crime is a bit limited in contrast to the German enactment. The German Criminal Code provides protection of rights to fair judgment in the manner that it affected almost all areas of public authority. The Slovak enactment had been limited exclusively to judicial and arbitrary judgments and neglected judgments in administrative matters. In this respect, the protection of the right to fair judgment is regarded as discriminatory as it does not apply a higher principle to the consequences but served as the background for legislative enactment of this crime.

2.5 Application Problems Which May Arise Regarding to the New Crime of Bending the Law

Introducing the crime of bending the law is crucial to the Slovak legislation. However, as far as its legal enactment and functionality of this institute in practice are concerned, it is possible to identify various areas which are not covered by this enactment, and which are likely to raise issues

25 § 339 German Criminal Code.

26 ŠAMKO, P. Trestný čin prekrúcania (ohýbania) práva. *Právne listy* [online]. 26. 4. 2020 [cit. 21. 5. 2021]. Available at: http://www.pravnelisty.sk/clanky/a833-trestny-cin-prekrucania-ohybania-prava

27 MALIŠKA, M. et al. Vybrané aspekty pripravovanej novely Ústavy Slovenskej republiky v komparatívnej perspektíve. *Národná rada Slovenskej republiky* [online]. [cit. 25. 5. 2021]. Available at: https://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=486819

28 HELLENBART, V. Ohýbanie práva v nemeckej histórii a súdnej praxi. *Denník N* [online]. 4. 5. 2021 [cit. 21. 5. 2021]. Available at: https://dennikn.sk/blog/2371582/ohybanie-prava-v-nemeckej-historii-a-sudnej-praxi/

in practice. As for arbitrators, the enactment does not solve the situation regarding the award of the arbitrator (the Court of Arbitration) who will be lawfully charged with and sentenced for the crime of bending the law. In this aspect, the issue of the award of the arbitrator who was charged with the crime of bending the law is legally solved by the institute of the renewal proceedings application where charging the judge with this crime is governed by the provisions of § 397 letter c) of the Civil Dispute Code[29]. The Slovak Act on Arbitration governs conditions for revoking the arbitration award by means of the motion filed with the general court. This judicial review has certain limitations in terms of legitimate reasons for filing the motion. These are contained in the provisions of § 40 para. 1 of the Slovak Act on Arbitration where we may assume that the similar reason is mentioned in case of proceedings renewal governed by the Civil Dispute Code in relation to crime perpetration yet is not contained within the Slovak Act on Arbitration. When taking into consideration the unifying statement of the Constitutional Court of the Slovak Republic setting forth that the competence of the Constitutional Court of the Slovak Republic is not provided in the matter of complaints against procedures and awards of the Court of Arbitration, then the Slovak legislation really lacks the possibility of cancellation of the legitimate arbitration award of the arbitrator having been sentenced for the crime of bending the law.

The lawmaker should make certain adjustments and take into consideration the fact that the application practice brings situations where the subject of the law will possess effective and enforceable award of the arbitrator (the Court of Arbitration) who will subsequently be charged with the crime of bending the law in the given subject matter. This status is inadmissible.

The legal enactment also lacks the approach against the arbitrator who is subject to criminal proceedings. This legal loophole needs to be filled by similar enactment as the one that is applied to judges in case of criminal prosecution. In our opinion, it would be suitable to modify at least minimum requirements for exercise of the function of the arbitrator in terms of his professional qualification. The fact that arbitrators are not subject to any educational requirements has its basis in the existing enactment where

29 Act No. 160/2015 Coll., on Civil Procedure (Slovak).

arbitrators to consumer proceedings are requested to have legal education, practice, or exams, which we highly appreciate. Certain requirements for education may also be derived from institutionalism of permanent courts of arbitration of corporate bodies. Yet *ad hoc* arbitrators are not subject to any specific requirements. After introducing criminal liability of arbitrators, it has been highly recommended to modify their professional requirements to ensure at least similar conditions for the exercise of arbitration activities and therefore, improve the overall process of arbitration decision-making so as the institute of bending the law would be implemented to the minimum extent possible.

3 Conclusion

As mentioned above, the crime of bending the law has its proper place within the Slovak legal system. It is the newly implemented institute in the criminal law which will need some time to be properly implemented into the legal practice. It is not possible to foresee what position the decision-making practice and practice of courts of the highest judicial authorities will adopt towards the interpretation of particular traits of the facts of this crime. It is obvious, however, that the key aspect will be the interpretation regarding its objective side, more precisely, determining who will assess the objective side in the context of the aforementioned explanatory report and reference to the supervisory authority.

The crime of bending laws refers to protection of the constitutional right to judgment about rights and obligations that will be fair and will not result from intentional application and interpretation of legal norms.[30] As amended by the legality as set forth in § 2 para. 5 of the Criminal Procedure Code, the prosecutor shall prosecute those crimes he was notified of. On the basis of the officiality principle[31], criminal authorities and courts are obliged to act from their official obligation. Therefore, the investigation shall relate to all judgments where arbitrariness occurs as the objective element of the specific crime. Waiting for the higher-instance authority to determine

30 Explanatory Report to the Act No. 312/2020 Coll., on enforcement of the judgment on seizure of property and trusteeship of the seized property as amended.

31 Provisions of § 2 subpar. 6 of the Criminal Procedure Code.

the arbitrariness in the statement of the revoking decision might possibly be explained as not providing the right to fair judgment. In our law practice, we encountered only few judgments where the courts stated the arbitrariness despite the fact that some judgments completely rejected elementary legal bases on which the constitutional system and the legal doctrine supported by judicature are built. Even though the majority of these judgments are revoked, the statement about arbitrariness is absent, which might raise the question regarding the possibility of prosecution of judges/associate judges/arbitrators issuing these judgments.

Literature

ČENTÉŠ, J. et al. *Trestný zákon. Veľký komentár*. Bratislava: Eurokódex, 2020, 998 p.

DRGONEC, J. *Ústava Slovenskej republiky. Komentár*. Šamorín: Heuréka, 2012, 1620 p.

Explanatory Report. *Národná rada Slovenskej republiky* [online]. [cit. 23. 5. 2021]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=482301

HELLENBART, V. Ohýbanie práva v nemeckej histórii a súdnej praxi. *Denník N* [online]. 4. 5. 2021 [cit. 21. 5. 2021]. Available at: https://dennikn.sk/blog/2371582/ohybanie-prava-v-nemeckej-historii-a-sudnej-praxi/

IVOR, J. et al. *Trestné právo hmotné. Všeobecná časť*. Bratislava: IURA EDITION, 2006, 530 p.

LACIAK, O. *Právo na obhajobu a jeho podoby v trestnom konaní*. Bratislava: Wolters Kluwer, 2019, 119 p.

MALIŠKA, M. et al. Vybrané aspekty pripravovanej novely Ústavy Slovenskej republiky v komparatívnej perspektíve. *Národná rada Slovenskej republiky* [online]. [cit. 25. 5. 2021]. Available at: https://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=486819

Poslanci definitívne schválili reformné zmeny v justícii. *Ministerstvo spravodlivosti Slovenskej republiky* [online]. 9. 12. 2020 [cit. 23. 5. 2021]. Available at: https://www.justice.gov.sk/Stranky/aktualitadetail.aspx?announcementID=3060

QUASTEN, D. *Die Judikatur des Bundesgerichtshofs zur Rechtsbeugung im NS-Staat und in der DDR*. Berlin: Duncker & Humblot, 2003, 293 p. DOI https://doi.org/10.3790/978-3-428-50920-1

REPÍK, B. *Evropská úmluva o lidských právech a trestní právo*. Praha: Nakladatelství ORAC, 2002, 263 p.

SVÁK, J. *Ochrana ľudských práv (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práva)*. Žilina: Poradca podnikateľa, 2006, 1116 p.

ŠÁMAL, P. § 15. In: ŠÁMAL, P. et al. *Trestní zákoník I. § 1–139. Komentář*. Praha: C. H. Beck, 2009, pp. 157–181.

ŠAMKO, P. Trestný čin prekrúcania (ohýbania) práva. *Právne listy* [online]. 26. 4. 2020 [cit. 21. 5. 2021]. Available at: http://www.pravnelisty.sk/clanky/a833-trestny-cin-prekrucania-ohybania-prava

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