The New Act Amending the Criminal Legislation in Slovakia and the Possible Impact of the New Crime of Abuse of Law on the Independence of the Judiciary[1]

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This article examines the essentials and the purpose of the newly introduced crime of abuse of law, based on the recently adopted Act on the enforcement of decisions on seizure of property and administration of seized property and on amendments to certain acts. The authors in this article provide a detailed analysis of the definition, as well as a comparison of the definition of the newly introduced crime of abuse of law with the legal regulation enshrined in the German Criminal Code, on which the new Slovak legislation is based. With regard to the systematic classification of the newly introduced crime, the authors also examine the need to introduce a new crime, mainly in terms of the existing crimes stipulated in Act No. 300/2005 Coll. Criminal Code. At the same time, the authors also address existing tools and mechanisms, such as disciplinary punishment, aimed at punishing misconduct in office and ensuring the professional integrity of the members of the judiciary. With a special regard to the constitutional provisions stipulating the immunities of the members of the judiciary, the authors also explore the conformity of the newly adopted definition of the crime of abuse of law with the Constitution of the Slovak Republic and its overall impact on the importance of independence of the judiciary.

Keywords: Independence of the judiciary; rule of law; crime of abuse law; criminal liability; crime of abuse of power by a public official; judicial immunity; disciplinary proceedings

1. Introduction – The Independence of the Judiciary as an Indicator of an Effective Justice System

Now, more than ever, Member States of the European Union (hereinafter "EU") have to learn from each other to improve the effectiveness of their justice systems in line with European standards. Improving and enhancing independence, effectiveness and transparency of the justice systems is essential for upholding the principle of rule of law. The proper functioning of a justice system is crucial for the effective fight against crimes, such as economic and financial crimes, as well as for ensuring that citizens can effectively enjoy their rights. In line with international and European

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standards and recommendations, judges undoubtedly play an essential role in the justice systems as the guarantors of independence of the proceedings and the guardians tasked with ensuring the fair trial and effective functioning of justice systems. Independent judiciary is key to a functioning democracy, forming a fundamental pillar of a democratic security.

The independence of the judiciary from executive and legislature is also vitally important for the proper functioning of the system of checks and balances.[2] As the judiciary is not immune to the environment in which it functions,[3] it is important to ensure that the judiciary carries out the powers entrusted to it independently, impartially and consistently, while respecting and protecting human dignity and respect for fundamental rights and freedoms. The notion of public perception of the independence of the national justice system must be also taken into account as an important indicator of the effectiveness of the national justice system. In relation to this, it must be noted that public perception of the independence and trust in the justice system is largely based on its impartiality and capacity to uphold the rule of law from any external pressure or political bias.

At the EU level, there are a number of existing tools used to measure the independence, as well as monitor and review any reforms concerning the national justice systems and their impact on the overall independence of the judiciary. Just recently, the European Commission has embarked on the journey of creating and developing a 'comprehensive European Rule of Law Mechanism', including a report that is to be issued on annual basis, reviewing and monitoring the situation of rule of law in every EU Member State.[4] The first Rule of Law report was published in September 2020, covering four pillars, including reviewing and monitoring the reforms to justice system and their impact on the independence of the judiciary.[5]

In addition, with regard to the overall perceived level of independence of the judiciary in EU Member States, the Rule of Law report points to the findings of the recently published 2020 EU Justice Scoreboard, an additional tool for comparing the performance of different justice systems in EU Member States.[6] The aim of the EU Justice Scoreboard is for the EU to monitor judicial reforms annually and provide a comparative overview of indicators that are relevant for assessing the effectiveness and functioning of judicial systems. Among others, it places also independence, as one of the requirements based on the principle of effective judicial protection under Article 19 of the Treaty on European Union and Article 47 of the EU Charter, at the forefront of important indicators for the functioning of the justice systems of EU Member States.[7] Independence, as an indicator for an effective justice system covers, on the one hand, the requirement of external independence, including the notion of exercising the functions autonomously, without being subordinated to other bodies; and on the other hand, internal independence and impartiality, including the notion of maintaining equal distance from the parties to the proceedings and their interest.[8]

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[2] See 2018 Report by the Secretary General of the Council of Europe on the State of Democracy, Human Rights and the Rule of Law, 'Role of Institutions. Threats to Institutions', Chapter 1., p. 11.

[3] Ibid.

[4] European Commission, Communication 'Further strengthening the Rule of Law within the Union, State of Play and possible next steps, 'COM (2019)163, 3 April 2019.

[5] European Commission, Communication, '2020 Rule of Law Report – The rule of law situation in the European Union', COM(2020)580, 30 September 2020.

[6] European Commission, Communication, 'The 2020 EU Justice Scoreboard', COM(2020)306, August 2020, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en#scoreboards.

[7] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1316 (7 September 2020).

[8] European Commission, Communication, 'The 2020 EU Justice Scoreboard', COM(2020)306, August 2020, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en#-scoreboards, See for example, ECJ, Cases 585/18, 624/18 and 625/18, A. K. and Others, [EU:C:2019:982], paras 121

2. The Ranking of Slovakia in Relation to the Perceived Independence of National Justice Systems of EU Member States

Based on the findings in the first Rule of Law chapter specific to Slovakia, concerns regarding the independence and integrity of the Slovak justice system continue to rise since August 2019.[9] The findings of the 2020 EU Justice Scoreboard also highlight the fact that concerns regarding the independence and integrity of the justice system remained in Slovakia for 2019 as well. Referring to the recent findings of the 2020 Eurobarometer survey on the perceived independence of the national justice systems in the EU among the general public, both the 2020 EU Justice Scoreboard and the 2020 Eurobarometer survey confirm that the perceived level of independence of the judiciary in Slovakia has remained very low, despite some efforts in the past to strengthen judicial independence and transparency.

In fact, 26% of respondents rated the independence of Slovak justice system as very bad and 38% as fairly bad. Pursuant to the Eurobarometer survey findings, out of all EU member States, the level of trust in Slovakia is the second lowest, just after Croatia.[10] In comparison with the previous years' results of the survey,[11] the level of mistrust has slightly increased by 4%. Only 26% of respondents perceived the level of independence of national justice system as very good or fairly good. Even the long-term trend since 2018 shows that the number of respondents who are more likely to rate the independence of the Slovak justice system as fairly good or very good, continuously decreases from 29% in 2018, through 28% in 2019, to 26% in 2020.[12] One of the main reasons most often stated by the respondents in relation to the perceived lack of independence of the justice system is the interference or pressure from the Government.[13] The overall country results for all EU Member States show that Croatia and Slovakia are the only Member States in which at least half of respondents indicated the interference or pressure from the Government and politicians as the main reason for the low level of trust in the independence of the judiciary.[14]

Given the persistent low perception and level of trust in the independence of national justice system, the functioning and the effectiveness of the justice system has been high on the agenda of the new government, as supported by their Program statement for the period of 2020-2024,[15] approved by the National Council of the Slovak Republic (hereinafter "Parliament") in April 2020. The areas of reform range from amendments to legislation concerning the composition and election of

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and 122; ECJ, Case 619/18, Commission v. Poland, [EU:C:2019:531], paras 73 and 74; ECJ, Case, 64/16, Associação Sindical dos Juízes Portugueses, [EU:C:2018:117], para. 44.

[9] European Commission, Commission staff working document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Slovakia', SWD(2020)324, 30 September 2020.

[10] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020.

[11] European Commission, Flash Eurobarometer 474, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2019.

[12] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020.

[13] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020; See also European Commission, Flash Eurobarometer 474, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2019.

[14] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020

[15] Program statement of the Government of the Slovak Republic for the period of 2020-2024 approved by Resolution No. 239/2020 of the Government of the Slovak Republic of 9 April 2020, available in Slovak language at: https://rokovania.gov.sk/RVL/Material/24756/1.

members of the Judiciary Council of the Slovak Republic; the reform of the composition of the Constitutional Court of the Slovak Republic with an aim to provide securities against the passivity of the Parliament in the case of non-election of candidates for constitutional judges, as well as with a measure against the concentration of power in the hands of one political representation, so that the majority of constitutional judges are not elected by one political representation; the abolition of the requirement of consent of the Constitutional Court as a condition for the detention of a judge and the Attorney General, the abolition of the decision-making immunity of judges; the natural replacement of judges by introduction of an age census for judges of general court (65 years) and the Constitutional Court (70 years); to the establishment of the Supreme Administrative Court, which will also fulfil the function of a disciplinary court for judges, prosecutors, executors, notaries, administrators or other legal professions.

To reflect the Program statement of the Government and its pledge to reinstate the trust in the rule of law with an aim to reform the justice system, the Ministry of Justice introduced a number of reforms concerning the judiciary and the criminal legislation of the Slovak Republic. Most notably, in June 2020, the draft law on the enforcement of decisions on seizure of property and administration of seized property and on amendments to certain laws was introduced in the interdepartmental review procedure.[16] Among others, the new draft law brings a major amendment to the Criminal Code and the Criminal Procedure Code of the Slovak Republic, with notable reforms concerning the judiciary. Although efforts underway to reform the justice system should be applauded, considering the recent results of the EU surveys on the perception of independence of the judiciary, the amendment of criminal legislation and the Constitution of the Slovak Republic should be carried out with due care, and after a thorough consideration, subject to a complex review process, involving all necessary actors concerned.

The draft law on the enforcement of decisions on seizure of property and its draft provisions amending the criminal legislation of the Slovak Republic was adopted by Members of Parliament on 21 October 2020. However, the amendments and new crimes introduced by the draft law into the Criminal Code, having a great impact on the Constitution of Slovakia as well, raise a number of concerns. Most notably, challenges remain, and concerns increase regarding the impact of such legislative amendments on the independence and integrity of the judiciary, mainly due to the increasing influence of the legislative branch over the functioning of the judiciary.

3. The introduction of new criminal offences into the Criminal Code of the Slovak Republic

With the adoption of the new Act on the enforcement of decisions on seizure of property and administration of seized property and on amendments to certain laws into the Slovak legal order, the petitioner introduced, for example, in addition to the already existing criminal offense of abuse of power by a public official in Section 326 of Act No. 300/2005 Coll., as amended, (hereinafter "Criminal Code") a new criminal offence of abuse of law, in the form of *lex specialis*. However, the petitioner does not provide further justification for the introduction of such a crime into the Slovak legal order, only vaguely mentions the need for a new criminal offence by implementing the Program statement of the Government of the Slovak Republic for 2020-2024.

Draft provision on the crime of Abuse of Law:

[16] Draft law, LP/2020/234, available in Slovak language: https://www.slov-lex.sk/legislativne-procesy/-/SK/LP/2020/234.

After Section 326, Section 326a is inserted, which, including the title, reads as follows:

„Section 326a, Abuse of Law (1) Whoever, as a judge, associate judge or arbitrator of the arbitral tribunal, arbitrarily applies the law in the decision-making and thereby damages or favours another, shall be punished by imprisonment for one to five years. (2) An offender shall be punished by imprisonment for three to eight years if he commits the act referred to in paragraph 1 (a) on the protected person, or (b) for a specific purpose."[17]

3.1. The Crime of Abuse of Law in Slovak Criminal Legislation and the Crime of Bending the Law in German Criminal Legislation

Pursuant to the Program statement, the definition of the new criminal offence of abuse of law, was to a greater extent, inspired by German legislation under Section 339, the crime of abuse or "bending" the law in the German criminal code ("*Strafgesetzbuch*"). Yet, despite this, the newly adopted definition of the crime of abuse of law narrowed down the range of the possible perpetrators of the new crime from general (as is the case of German legislation) to a special, i. e. the perpetrator of the new crime of abuse of law can only be a judge, a lay judge or an arbitrator.

Under Section 339 of the German Criminal Code (hereinafter "StGB"), "*a judge, other public official or arbitrator who misinterprets law in favour or to the detriment of another party in proceedings or decisions in a legal case shall be punished by imprisonment for one to five years.*" At the same time a separate legal provision in Section 11 (1) no. 2 of the StGB states that a public official is any person who, under German law, is a state employee (state official) or a judge; performs other public functions, or is otherwise entrusted to perform tasks in the field of public administration at the office or in another similar place, or by their delegation, regardless of the chosen organizational form for the fulfilment of these duties. The crime of bending the law in German criminal law does not therefore affect only judges or arbitrators, but, on the contrary, covers all the above-mentioned public officials who may, in the exercise of their powers, commit the "abuse of law". Thus, the German legislature did not restrict the application of the criminal offense of bending the law exclusively to judicial proceedings, but, according to the wording of the provision, it may also concern disciplinary proceedings or proceedings before an administrative authority.

The choice of the (special subject) perpetrator pursuant to the current wording of the new legislation, raises number of concerns, for example, why prosecutors, should not be the subject of the criminal offence of abuse of law, as "arbitrary application of law", especially in criminal proceedings, can be problematic and socially very harmful even in the exercise of their powers. Despite the fact that after the evaluation of the interdepartmental review procedure on the proposed legislation and on the proposed point of the draft law, the original definition of the proposed crime of abuse of law applicable only to judges and arbitrators, was extended to also cover the persons of lay judges within the meaning of Act No. 385/2000 Coll. on Judges and Lay Judges and on amendments to certain acts (hereinafter "Judges and Lay Judges Act"), the range of possible perpetrators seems to remain too restrictive. In addition, it should be noted here that also from a systematic point of view, the proposed offense of abuse of law is included among the offences against public order in Title 8 of Part II part of the Criminal Code, i. e. criminal offences committed by public officials.[18]

[17] All translations to English are by the authors of the present work unless otherwise noted.

[18] See Explanatory statement to the draft law, available in Slovak language at: https://www.slov-lex.sk/legislativne-procesy?p_p_id=processDetail_WAR_portletsel&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=-column-2&p_p_col_count=1&_processDetail_WAR_portletsel_idact=10&_processDetail_WAR_portletsel_action=files&_processDetail_WAR_portletsel_cisloLP=LP%2F2020%2F234&_processDetail_WAR_portletsel_startact=1593069692000.

When addressing the issue of criminal liability and the range of subjects - perpetrators of the newly adopted crime of abuse of law, the extended explanatory memorandum, drafted after the end of the interdepartmental review procedure does not answer the question why the petitioner explicitly narrowed the range of subjects - perpetrators of abuse of law, only to judges, lay judges and arbitrators of the arbitration tribunals. In other words, taking into account the German model, i. e. the legal regulation of bending the law under Section 339 of the German Criminal Code, which served as a basic starting point for the proposed wording of the crime, and also with regard to the systematic classification of the newly proposed crime into Part II of the Criminal Code, containing crimes that punish criminal offences committed by public officials in the exercise of their powers in public affairs, it still remains unanswered why the petitioners did not identify with the German legislation on bending the law in its entirety when defining the range of possible perpetrators, and did not consider including public officials in general within the meaning of Section 128(1) of the Criminal Code (i. e. also persons such as a prosecutor, investigator or persons deciding on behalf of an administrative body) as perpetrators of the criminal offence of abuse of law.

We are of the opinion that if the introduction of a newly proposed criminal offence of abuse of law aims to protect "the constitutional right of the addressees to receive such a decision on their rights and obligations that is fair and does not result from arbitrary application of legal norms (Article 46 *et seq.* of the Constitution) by a subject who is required by law to decide on their rights and obligations as an impartial arbitrator", as is clear from the extended explanatory memorandum, there is a justified requirement to broaden the definition to include public officials as one of the possible perpetrators of the crime of abuse of law. According to our view, such an expanded definition would reflect that in legal matters, it is not only the narrow range of perpetrators (i.e., judges, lay judges and arbitrators) that decides, but rather the whole range of public officials (including persons such as police, investigators, notaries, executors, or for example, decision-makers on behalf of the administrative body). A definition of the perpetrator of the criminal offence, which would also include the broader category of public officials, would clearly ensure coverage of other areas of decision-making in which these persons may also "abuse the law" and arbitrarily exercise law and their powers and thus decide in clear contradiction with the law.

When it comes to the crime of abuse of law as defined in the German Criminal Code, it is also worth noting that the settled case law of the German Federal Court and the Federal Constitutional Court, in terms of preserving and protecting the independence of the judiciary, prefers a restrictive interpretation of Section 339 of the German Criminal Code. According to the German case law, a judge or a public official is liable for bending law only if he/she intentionally and in a serious way departs from the act and the law. The restrictive approach not only helps to preserve the independence of the judges and public officials, but also prevents the definition of the crime to be applied on simple mistakes in interpretation or application of legal norms. According to the German case law, the requirement that a judge must be aware of the particular importance of the legal norm infringed for the application of law at the time the offence is committed, ensures that the infringement itself is punishable, albeit intentionally, but only if the judge does not base his decision exclusively on the act and on the law.

3.2. The Crime of Abuse of Power vs. the Crime of Abuse of Law

In the context of German legislation on the offence of abuse of law, it must also be taken into account that the German criminal law does not contain, in addition to the offence of abuse of law under Section 339, other or similar provisions on the offence of abuse of power by a public official, as is the case for the Slovak Criminal Code. Similarly, when it comes to the crime of abuse of law

and its occurrence in the criminal legislation of the EU Member States, most EU Member States do not have such a specific and separate criminal offence, as such conduct is usually subsumed under the offence of similar character, such as the crime of abuse of power by a public official, the crime of bribery or corruption (e. g. Section 228 of the Criminal Code of Lithuania,[19] Section 329 of the Criminal Code of the Czech Republic,[20] or Section 302 of the Criminal Code of Austria[21]).

The Slovak Criminal Code also contains in Section 326 and Section 327 similar existing provisions, prosecuting and penalizing criminal offences which may be committed by public officials in connection with the exercise of their powers in public affairs and which aim to protect the exercise of rights and obligations of natural and legal persons and have interest in the proper exercise of the powers of a public official. Section 326 of the Slovak Criminal Code specifically stipulates the crime of abuse of power by a public official. Pursuant to Section 326, a public official, who with the intention of causing damage to another or obtaining undue benefit for himself or for another, exercises his/her powers in an unlawful manner, exceeds his/her powers, or fails to fulfil a duty resulting from his/her powers or from a court decision, shall be liable for a term of imprisonment of two to five years.

The purpose of this provision is to protect the proper exercise of the function of a public official. With regard to the perpetrators of the crime, the crime of abuse of power applies to all public officials who commit an illegal act and abuse their authority. Who falls under the category of a public official is set out in Section 128 of the Criminal Code and includes, for instance, not only judges, but also members of the National Council of the Slovak Republic, members of the Government, prosecutors, or other persons holding an office in body of public authority, mayors, heads

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[19] Section 228 of the Criminal Code of Lithuania:

1. A civil servant or a person equivalent thereto who abuses his/her official position or exceeds his/her powers, where this incurs major damage to the State, European Union, an international public organisation, a legal or natural person, shall be punished by a fine or by arrest or by imprisonment for a term of up to five years.

2. Any person who has committed the act provided for in paragraph 1 of this Article seeking material or another personal gain, in case of the absence of characteristics of bribery, shall be punished by a fine or by imprisonment for a term of up to seven years.

3. A legal entity shall also be held liable for the acts provided for in this Article.

[20] § 329 of the Czech Criminal Code abuse of power of an official:

(1) An official who intends to cause damage or other serious harm to another or to provide himself or another with an unjustified benefit

a) exercises its authority in a manner contrary to another legal regulation,

(b) exceeds its jurisdiction; or

c) fails to fulfil the obligation arising from its competence,

shall be punishable by a term of imprisonment of one to five years or a ban on activity.

[21] Section 302 of the Criminal Code of Austria:

Abuse of authority

(1) A civil servant who, with the intention of thereby harming another person's rights, exercises his authority on behalf of the federal government, a state, a community association, a community or another person under public law as their organ in enforcement of the law Performing official business, knowingly abused, is punishable by imprisonment from six months to five years.

(2) Anyone who commits the act while conducting an official business with a foreign power or a supranational or intergovernmental institution shall be punished with imprisonment of one to ten years. Anyone who causes damage in excess of 50,000 euros through the act must also be punished.

of self-governing regional authorities or members of local or regional self-governing authorities.

As regards the unlawful conduct under the crime of abuse of power by a public official, it can be characterized as a conduct by which public officials exceed the rights arising from their position in order to obtain a certain unjustified benefit which they would not otherwise be entitled to. At the same time, their actions cause damage to another. The Criminal Code does not specifically define the exact benefit, which is to be obtained, thus, it may be finances or status, etc. In essence, this is an intentional crime, therefore, public officials must act with the intent to obtain such an unjustified benefit.

Such conduct of public officials is also conduct that contradicts the law or does not fulfil the obligations of a court decision. If this perpetrator commits such crime by reason of a specific motive, or against a protected person, the sentence of imprisonment is higher. However, a more severe penalty is imposed for the commission of a criminal offence resulting in damage, personal injury or death.

In relation to the already existing criminal offence of abuse of power by a public official in Section 326 of the Criminal Code, the question then remains as to why the minimum limit of the penalty rate is lower in the newly proposed criminal offence of abuse of law, which acts as a *lex specialis* to the criminal offence of abuse of power (1 to 5 years versus 2 to 5 years) as there is a special perpetrator. Neither the old explanatory memorandum, nor the expanded explanatory memorandum after the end of the interdepartmental review procedure give any answers to these questions.

3.3. The *Actus Reus* of the Crime of Abuse of Law and its Possible Impact on the Judiciary

The newly introduced crime is also problematic due to the *actus reus* of the crime as defined. Particularly, the very vague formulation of the conduct, which should represent the fulfilment of the *actus reus* of the crime, especially the phrase "arbitrary application of the law" appears quite problematic. Although the Slovak Criminal Code recognizes and at the same time, uses the term "arbitrarily" in several of its provisions, it should be noted that it, nevertheless, does not explain or further define it in any way.

In addition, the vague wording "arbitrary application of the law" to the *actus reus* of the crime of abuse of law can be very problematic in practice, as well. Despite the fact that the extended explanatory memorandum contains demonstrative examples of when a conduct can be characterized as an arbitrary application of the law, the wording itself as set out in the proposed definition is unclear and giving rise to broad interpretation. For instance, cases that will be more difficult to assess in practice may be problematic, as well as cases in which the subjects of the crime of abuse of law, i.e., judges, lay judges or arbitrators, will have to apply and interpret a legal norm that is not clearly formulated, i.e., clearly interpretable, according to the explanatory memorandum, but will instead allow for a number of possible interpretations. In our opinion, such a vaguely formulated *actus reus* of a crime cannot be accepted in a state based on the principle of rule of law.

It should be noted that in a situation where the legally vague notion of "arbitrariness" is not defined by law in any other way, the proposed definition of the crime of abuse of law gives law enforcement authorities that would assess court decisions in terms of compliance with the law and in terms of arbitrariness, disproportional power over judges. The extended explanatory memorandum to the draft law already clarifies the range of entities that will be responsible for investigating, prosecuting and deciding on an offense of abuse of law, with the Specialized Criminal Court having exclusive jurisdiction to act and decide on an offence of abuse of law, and the Members of the Special Prosecutor's Office and the National Criminal Agency having competence to investigate criminal

offences of abuse of law. However, in a criminal justice system built on rule of law, complying with the principle of separation of powers and the independence and impartiality of the judiciary, a police officer cannot determine in criminal proceedings whether or not a decision of a judge, lay judge, or arbitrator is arbitrary.

At the same time, the broadly conceived definition of the *actus reus* of a newly introduced offence could, in practice, trigger a wave of criminal complaints filed by parties to the proceedings that were not satisfied with the outcome of the proceedings or the legal opinion of the judge in the proceedings. Taking this into account, it is highly likely that the adoption of such legislation could probably cause the effect of another "extraordinary" remedy in practice, for example, in civil proceedings or in proceedings within the administrative judiciary. Criminal proceedings would therefore be abused in cases where a party to civil, arbitration, criminal or administrative proceedings would not be satisfied with the decision rendered. In the event that a dissatisfied party does not have an appeal under one of the special procedural rules governing court proceedings, the existence of the proposed facts could literally be abused as a "quasi-appeal".

Although most of such criminal complaints would possibly be evaluated and assessed as unfounded and at the same time no charges would be brought against the judges, associate judges or arbitrators concerned, such activity could not only unnecessarily burden the already overburdened system, but in practice, could lead to situations where, for example, a certain "uncomfortable" judge is eliminated and excluded from the possibility of deciding a case on the basis of a submitted criminal report. In addition, such activity could also have an overall adverse effect on the work of judges, lay judges and arbitrators, as the mere fact that an investigation would take place could be seen as a major intrusion on the reputation and status of a judge.

4. The Crime of Abuse of Law and its Conformity with the Constitution of the Slovak Republic

It should be recalled that the proposed and newly adopted definition of criminal offence of abuse of law is in clear conflict with the current wording of Art. 148(4) of the Constitution of the Slovak Republic, which ensures the immunity of judges and according to which it is not possible to prosecute a judge or a lay judge from among citizens for decision-making, even after the termination of their office. The Constitution of the Slovak Republic therefore explicitly prohibits the criminalization of a judge or a lay judge for decision-making. This immunity of judges and associate judges for decision-making serves as one of the guarantees of judicial independence.[22]

In line with the 2010 Recommendation of the Committee of Ministers of the Council of Europe on the independence, efficiency and responsibilities of judges, the independence of the judiciary is not a privilege for judges, but rather a guarantee of the respect for human rights and fundamental freedoms, enabling every person to have confidence in the justice system. [23] Promoting and securing the independence of the judiciary is inevitable to ensure the proper functioning of the justice systems. According to the 2010 Recommendation, "judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts."[24] The Recommenda-

[22] See Decision of the Constitutional Court of the Slovak Republic, 6 March 2003, PL. ÚS 24/03, Decision of the Constitutional Court of the Slovak Republic, 4 June 2014, PL. ÚS 15/2014.

[23] Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec (2010)12 and explanatory memorandum on Judges: independence, efficiency and responsibilities,' 17 November 2010, available at: https://rm.coe.int/16807096c1

[24] Ibid.

tion also underscores that the guarantees of the independence of the judiciary should be set out by the constitution or at the highest possible legal level in the legal systems of Member States.[25] Therefore, securing the independence of the judiciary as set out by Article 148 of the Constitution of the Slovak Republic is in line with the international and European standards and recommendations. In addition, adopted criminal legislation having an impact on the independence of the judiciary should be in line the Constitution of the Slovak Republic.

4.1. Finding the Right Balance between the Judicial Immunity and the New Definition of the Crime of Abuse of Law

A necessary precondition for the effective implementation of the newly introduced criminal offense of abuse of law is the amendment of the Constitution, and thus the amendment of Article 136(1) and Article 148(4) of the Constitution of the Slovak Republic, of which, however, the extended explanatory memorandum to the draft law on securing property is still silent. On the contrary, it even explicitly states, in the general part, that the draft law is in accordance with the Constitution of the Slovak Republic. Despite the forthcoming amendment to the Constitution of the Slovak Republic, which proposed deleting Article 148(4) of the Constitution of the SR and which is in the interdepartmental comment procedure, it is necessary to emphasize that the introduction of the crime of abuse of law, without approval of the amendment of the Constitution of the Slovak Republic, is in conflict with Article 136(1) and Article 148(4) of the Constitution of the Slovak Republic and the settled case law of the Constitutional Court of the Slovak Republic.

At the same time, also in the context of the above-mentioned reasons, if the deletion of Article 148(4) of the Constitution of the Slovak Republic, without adequate and appropriate balance of abolition of judges' decision-making immunity and introduction of mechanisms and safeguards that will prevent possible abuse of judges' criminal sanctions and continue to protect the principle of independence of judges, such waiver of decision-making immunity would not be in line with the rule of law. There is a legitimate concern that the adoption of the proposed wording of the offense of abuse of law and the waiver of judges' decision-making immunity without further action could, in practice, create a disproportionately wide scope for abuse of law by a judge and (at least) attempt to sanction him for a different legal opinion.

4.2. Disciplinary Proceedings of Judges According to a Special Regulation and their Relationship with the Crime of Abuse of Law

Given the nature of criminal means as means of *ultima ratio*, i.e., the subsidiarity of criminal repression, it remains questionable whether the introduction of a new crime of abuse of law in the proposed form actually ensures this balance. At the same time, it is important to recall the existence of a mechanism against arbitrary decision-making of judges, according to a special regulation, the Act on Judges and Lay Judges, which serves as an existing legislative instrument to punish the abovementioned proceedings. According to § 116(2)(e) of the Act on Judges and Lay Judges, a judge in disciplinary proceedings may be sanctioned for serious disciplinary offence, namely for an arbitrary decision in violation of the law. Such conduct by a judge would therefore be considered a serious disciplinary offense within the meaning of the Law on Judges and Lay Judges.

According to § 116(3) of the Act, the Disciplinary Chamber may impose disciplinary measures for

[25] Ibid.

such a serious disciplinary offense, including transferring a judge to a lower court, reducing the salary, or issuing and publishing a decision that the judge did not prove the source of his property gains in the year. At the same time, in accordance with Section 116(3)(b) of the Act on Judges and Lay Judges, it should be noted that in the event that a judge repeatedly commits a serious disciplinary offense under Section 116(2)(e), i.e. repeatedly arbitrarily decides in violation of the law, despite the fact that a disciplinary measure has already been imposed on him/her for such a serious misconduct, such repeated serious disciplinary misconduct (recidivism) of a judge is considered incompatible with the performance of the judge's function. Section 117(5) of the Act on Judges and Lay Judges obligatorily imposes a disciplinary measure, which is dismissal from the position of a judge.

Taking into account the existing complex legal regulation of disciplinary punishment of judges for arbitrary decisions in violation of the law, it remains questionable whether the proposed normative means in the form of introducing new crimes, such as the crime of abuse of law, i.e. the application of criminal law, is necessary from the point of view of proportionality in relation to the use of other possible normative means to achieve the objective of protecting the administration of justice. Since, as mentioned above, the principle of *ultima ratio* should also be applied in the drafting and creation of criminal legislation, not only in their application, it remains questionable whether it is necessary, even in a comprehensive regulation of disciplinary punishment of judges for arbitrary decisions contrary to the law under a special regulation. In addition to the previous remarks, we must also emphasize that it is also necessary to resolve the relationship between the new crime of abuse of law and the provision of § 116(2)(e) of the Act on Judges and Lay Judges, about which the extended explanatory memorandum to the draft law was silent.

5. Concluding remarks

When it comes to the adoption of the new criminal legislation, the new crime of abuse of law appears to be redundant, not only in relation to the already existing means to prosecute judicial misconduct, but also in terms of the vague definition of the subject matter of crime. Undoubtedly, the suggested definition does not meet the requirements of clarity and certainty and questions also remain about the reasons for explicitly choosing only judges, lay judges and arbitrators as the category of possible perpetrators of the crime.

While the existing tools at the EU level used to measure the independence and monitor the reforms concerning the national justice systems and their impact on the overall independence of the judiciary, such as the EU Justice Scoreboard or the Eurobarometer Survey, show that the lack of trust in the independence of the justice system remains an issue in the Slovak Republic, rapid adoption of number of reforms in the area of criminal law, which may not be well-reasoned, may question not only the principles of democratic law-making, but also raise concerns regarding the possible impact of such legislation on the independence and integrity of the judiciary.

The importance of promoting justice while building strong, and most importantly, independent institutions undoubtedly contributes to upholding the principle of rule of law. However, the line between the efforts to strengthen the effectiveness of the judicial system and the excessive interference with the functioning of the judicial system is in fact very fragile, and thus, careful attention must be paid to prevent increasing attempts by the legislative or executive to influence or exercise any form of pressure on the judiciary that could ultimately undermine the independence and the integrity of the judiciary as a whole.

It is important to recall that the principle of the independence of the judiciary, one of the guarantees according to which the judges cannot be prosecuted for their decisions, is not absolute and does

not have absolute precedence over other values with which it can theoretically come into conflict. However, there is a need to invest more in proper conduct of legislative processes, as well as the assessment of the need of new legislation, especially if such legislation can have a major impact on the functioning and independence of the judiciary. The principle of rule of law depends on the domestic institutions that define it. Therefore, it is necessary to find an appropriate balance between the need to preserve and protect the independence of the judiciary and the requirement to hold responsibility for a possible illegal decision by a judge. Any legislation adopted even with the intent to raise the trust in the independence of the national justice systems, should not undermined the rule of law and the European human rights system.