

**Anti-corruption
Analysis
of the Law on the Enforcement of
Criminal Sanctions and
Supporting Rule Books**

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1. Aim and contents of the analysis

This analysis is aimed at determining whether the existing normative framework, above all "Law on the enforcement of prison sanctions (Off. gazette of the Republic of Serbia, no. 85/2005 i 72/2009), but as well rule books (see Annex 3) which are a part of a normative framework, positively or negatively influences origination and development of corruption, i.e. readiness for fight against corruption of all the actors on the level of Institutions for the enforcement of criminal sanctions (further in text Institution). In order to realize this intention the analysis will be carried out both on normative and functional level.

Normative level of the analysis scrutinizes discretion competences of the minister in charge, Director of Directorate and heads of institutions, then discretion competences of those in charge of reception, implementation of treatment programs, health conditions of prisoners and security in institutions. Besides discretion competences, normative analysis will be focused on transparency and conflict of interest on the level of the system for the enforcement of criminal sanctions.

Special position in the analysis will be given to the issue if there are effective mechanisms for determining and sanctioning of illegal and/or unethical acts reported by prisoners, their representatives or institution staff. Existence of such type of protection is necessary but insufficient condition for the fight against corruption, because without punishability of illegal or unethical (professional) treatment, there is no ambient for efficient fight against corruption.

Functional aspect of the analysis will be focused on understanding the sustainability of prison system i.e. defining whether and in which way there is inter-dependence between potential for corruption and condition (technical, material, cadre, normative...) in which institutions in Serbia are.

From the aspect of functional analysis it should be known that re-socialization of sentenced Serbian citizens is primary, i.e. a manifest function of institutions. We emphasize this from the reason that issue of corruption and establishment of efficient

anti-corruption systems on the level of the system for the enforcement of prison sanction cannot be imagined without the realization of this function. This is the kind of analysis that should point to the sustainability of penitentiary (finances, space, motivation of the staff and management, knowledges and skills) when speaking about realization of function trusted by the society- re-socialization of sentenced citizens. Non-realization of this function would be an indicator of non-sustainability of institution, but as well, an indicator of potential for corruption on the level of institution.

It is important to emphasize that corruption must not be observed isolated, i.e. as an incident, although there are cases when corruption is a consequence of caprice, exhibitionism, prestige and customs, but as a reflection to the existing ambient in which an individual or a group wish to accomplish their (il)legal rights in illegal or unethical manner.

Presented analysis has a preventive character because the approach to corruption is from analytic and phenomenon point, without wish to deal with investigation.

Our intention is to identify the points of risk for origination and survival of corruption. As well, we want this analysis to be an introduction into a dialogue that will improve or initiate anti-corruption mechanisms, especially if one bears in mind that from the following year all the penitentiaries will be legally obliged to develop and apply Integrity Plans¹.

Besides analysis this document contains proposals for recommendations (see Annex 2) for changes of normative framework which deviate, not in a small number of cases, from the needs of present time. This is specially related to the rule books that were difficult to find because there is no public available base of all regulations, which can be, alone, an introduction to non-transparency.

¹ More details available on the Anti-corruption Agency website:

http://www.acas.rs/sr_cir/sektor-za-poslove-prevencije/planovi-integriteta.html

2. Glossary

Introduction is followed by a part of the text in which we will give the meaning of terms that will be in the focus of analysis and they will serve for analysis.

We will first deal with definition of corruption. Bearing in mind the area in which we carry out analyses, we decided to use Klitgaard's ² definition of corruption, which is:

Corruption=monopoly + discretion competences - responsibility

Selection of this definition of corruption is above all conditioned by the nature of the system for the enforcement of criminal sanctions in Serbia, which, it self, represents a kind of monopoly because the enforcement of criminal sanctions is something that is carried out only by the State. That is why we can speak about the existence of natural monopoly whose existence must be taken into account when such analysis is done.

Discretion competence is when an official or responsible person evaluates the appropriateness of taking over some action, where the criterion for evaluation of appropriateness is interest of the service, not some other interest. It is important to emphasize that the existence of discretion competence itself does not mean the existence of corruption. This small, but basically important note is important, because, only if discretion competences are misused, i.e. non-existence of a clear system of rules and criteria may be a source for corruption.

Official misconduct represents any conduct which is unlawful and contrary to the interests of the service, especially that which is contrary to the constitution, law or other legal regulation or general act. According to that, each official whose activities are not in accordance with the interest of service misuses his official powers. This act is consisted in: *misuse* of personal official powers of competences, in *exceeding limits* of personal competences or in *non-performance* of personal duty so as to gain some

² http://en.wikipedia.org/wiki/Robert_Klitgaard

personal benefit or benefit for someone else or to make damage to someone or to seriously violate other person's rights by official or responsible person.

Use of official position exists when official or responsible person takes over an action, which is normally in line with his official position or competence, but he does not do that for the interest of the service, but to gain in this way for himself or some natural or legal person, some interest (of property or non-property character) or to make some damage to someone or to severely violate other person's rights.

Excess of official powers exists when official or responsible person takes over actions out of the range of official powers thus gaining benefit for himself or someone else or makes damage to someone else or severely violates some right.

Non-performance of official duties exists when official or responsible person consciously and voluntarily does not perform official action from the range of his competence which he is obliged to perform, or when he performs that action in the way that the goal that should be realized cannot be realized.

Third element of definition of corruption is the first element of definition of fight against corruption and it is:

Anticorruption = integrity + anti-corruption resources+ interested power

It is about responsibility (criminal and moral), i.e. integrity as a mechanism for strengthening the same responsibility.

Integrity occurs in three forms: institutional, professional and civil.

Institutional integrity comprises individual honor, professionalism, ethnicity, institutional wholeness and compatibility, as well as the way of acting in line with ethic values aimed at reducing risk that public competences are done contrary to purpose for which they were established, which contributes to the improvement of work quality of institution's work and increase of trust within public.

Professional integrity implies regulation of use of right to expertise in the way that will enable autonomous work of the owner of expertise and disable misuse of expertise

by experts through clear and realizable sanctions to exclusion from the profession in form of confiscation of right to expertise.

Civil integrity implies accomplishment of right based on and in line with law with readiness to use legal mechanisms of protection of denied rights in cases of violation of law, as well as readiness to give support to other citizens or group of citizens in accomplishment of guaranteed rights in legal way.

Anti-corruption resources are normative and institutional mechanisms, then professional staff, knowledge, practices and skills which directly contribute to diagnosing, standardizing, sanctioning, prevention and monitoring of corruption.

Interested power represents the existence of actors (individuals, groups, institutions) ready to contribute to anti-corruption by using their competences and influence in the way in which integrity of anti-corruption will not be harmed.

Functional analysis of institution is based on measuring sustainability, i.e. level of realization of needs, interests and rights of members and clients of an institution, in line with internal and external normative system, i.e. how much and how the institution realizes functions given by the society. From this it derives that an institution can be unsustainable from external and internal side. Internal aspect of non-sustainability is reflected in non-existence of consent of the interest among the members and institution's clients with its material-technical, normative and value system. External aspect is reflected in non-existence of compatibility of social function of an institution with its material-technical, normative and value system.

Corruption on institutional level represents a state of *non-sustainability of an institution* due to which *alternative structures* emerge (of management, communication, coordination, criteria, values, models of selection), *latent functionality* (role which an element or part of the system has in survival of unsustainable system). Thus, non-sustainability of an institution creates two kinds of deviations: innovative and corruptive. Innovative deviations are in function of raising sustainability of institution, different from corruptive which spoils the institution.

Absence of sustainability of institution is a path to its corruption because corruptive organization of institution is the way for it to survive, by establishing alternative, i.e. corruptive manner of existence. Corruptive shape of institution is a reaction to condition of disorganization and anomy both on institutional and social level³.

Conflict of interests is a situation in which an authority has a private interest which influences, can influence or it seems as it influences, actions of authorities in performing public functions i.e. duty, in the way that it endangers public interest.

Transparency implies making decisions in line with principles, laws and other clear rules, as well as there is public availability of information, in line with the law which stipulates this area and in line with building integrity and trust in institutions.

3. Analysis

In this part we will first analyze the "Law on the Enforcement of Criminal Sanctions" further in text Law.

In the beginning it could be noticed that the Law itself establishes an *oligarchic distribution of power and authority*, on the level of institutions for the enforcement of sanctions.

Article 26

Director of Directorate for Criminal Sanctions manages the work of the Directorate.

The Government of Serbia appoints the Director for a five-year term of office following the proposal of the minister in charge of the judiciary

Director of Directorate represents the Directorate and is responsible for proper and lawful enforcement of penal sanctions within the Republic of Serbia.

A person with university education and minimum nine years of experience in sentence enforcement tasks or in the judiciary after graduation at second degree university studies (graduation academic studies-master, specialized academic studies- specialized vocational studies), i.e. basic studies lasting for 4 years may be appointed as Director of Directorate.

Article 27

³ More detailed in S.Gredelj, Z.Gavrilović, N.Šolić (2005) Profesija (i) korupcije (Profession and (of) Corruption, Beografika, Belgrade

A penal institution is managed by a Head.

The minister in charge of the judiciary appoints the Head at the reasoned proposal of the Head of the Directorate for a term of five years.

The Head represents the penal institution and is responsible for lawful and proper work in the institution.

The Head may have a deputy who is appointed at the reasoned proposal of the head of the Directorate, by the minister in charge of the judiciary

A person with minimum seven years of work experience after graduation in the enforcement of sanctions in judiciary, advocacy, army or police, after acquired high education on the second-level studies (graduation academic studies-master, specialized academic studies- specialized vocational studies), i.e. basic studies lasting for 4 years, may be appointed Head or Deputy Head of Penitentiary.

Article 28

Head of Service manages the work of a service.

Director of directorate, at the reasoned proposal of the Head of Penitentiary assigns the Head of the Service

A person with high education on the second-level (graduation academic studies-master, specialized academic studies- specialized vocational studies), i.e. basic studies lasting for 4 years and with 5 years of work experience on the same or similar jobs, may be assigned to the post of Head of Service.

As it could be seen, selection of Director of Directorate, Head of Institution and Head of Service within Institution is done in discreet, non-transparent way, with general conditions and without open call.

Why is that a problem? How is it related to corruption or fight against corruption?

First, way of selection, i.e. appointment of someone to the role of proposer may turn him into patron (protector) of a person subordinated to him. It is out of suspicion that the evaluation of subordinated by superior is determined by a fact that evaluator proposed evaluated one for the position that is being evaluated at the given moment while it is possible that he would have to sanction him in the future.

It leads to conflict of interest when there are needs for investigation and/or sanctioning of breach of law, by the superior who proposed or selected the mentioned ones.

Everything given here leads us to the conclusion that managing part of the system for the enforcement of criminal sanctions is *more equal* than other segments of this system. Interesting symbiosis of managers (minister in charge, Director of Directorate, Head of Institution, Head of Service) creates a respectable amount of authority and power from whose will are dependant, not only the quality of management but also realization of re-socialization function of institutions, where punishability for committed violations of law has priceless meaning. Managers are those who hold a stick that they can (ab) use without being punished, because they do not have to say what are the things that must be done, and not in order to get "stick" or carrot.

That is why it is of crucial importance to adopt the decision based on which Justice and Administration Committee as a competent assembly committee would have power to give proposals or possibility to, together with Committee on Labor, Ex-Servicement and Social Issues, Committee on Health and Family, Committee on Defense and Security, organize a public hearing when director of directorate is selected. Other possibility is to select the Director of Directorate based on public open call where the members of the selection commission would be amended with representatives of expert and interests public, primarily by organizations of civil society. Participants in the open call would have to represent the work plan which would be in line with strategic commitments in this area on the level of the state, as well as concretization of positive international practices with reference to EU.

Part of the Law, Part 3, is related to the publicity of work of institutions in the system of the enforcement of criminal sanctions. Transparency of work is guaranteed with articles 29 and 30 of the Law.

Article 30

The Director of Directorate allows individual and group visits to penal institutions.

Attention shall in particular be given to enabling visits of the representatives of domestic and international

institutions and associations for human rights, the representatives of the media, scientific workers dealing with crime researches and students of relevant universities.

The Director of Directorate may allow a person visiting an institution to have a conversation with a prisoner or certain sentenced person, with or without an authorized officer being present.

Article 30 contains discretion competences of the Director of Directorate which may influence the publicity of work. Namely, realization of rights to visit must be stipulated in the way that it specifies who and under which criteria may realize individual or/and group visit, and that it is not in the domain of discrete competences of director of directorate.

In the next part we will deal with the analysis of discrete competences on the level of articles of the Law.

First article of the law which has discretion contents is related to the right to deviate from commitment and assignment of prisoners.

Article 37

Prisoners are committed to penal institutions pursuant to the act on assignment issued by the Minister in charge of the Justice.

Exceptionally, upon the request of a prisoner, the Director of Directorate may deviate from the assignment act if there are justifiable reasons to do so and change the place of enforcement of criminal sentence.

The prisoner is entitled to appeal the decision of Director of Directorate from Paragraph 2 of this Article, to the Minister in charge of justice, within three days upon reception of the decision. The appeal does not delay the enforcement of the decision.

.....

Formulation *“Exceptionally, upon the request of a prisoner, the Director of Directorate may deviate from the assignment act if there are justifiable reasons to do so and change the place of enforcement of penal sentence”* gives right to Director of Directorate to deviate from the assignment act and change the place of the enforcement of penal sentence, for justified reasons that are not clearly listed.

In the part of the Law which stipulates right to correspondence, there is a new, discretion competence of Directorate in close-type institution.

Article 75

Every prisoner is entitled to unlimited correspondence at his own expense.

In closed-type institutions with special security, closed-type institutions and closed wards of an institution, at proposal of the Head of Penitentiary or Director of Directorate, Court of first instance located in the same place as penitentiary, can, if required for maintaining order, security and safety, prevention of criminal acts and protection of damaged ones, for a limited period of time, bring the decision to have the content of correspondence supervised for a certain period of time. From the same reason, the Court may deny the right to correspondence.

The prisoner is entitled to appeal the decision of the Court specified in Paragraph 2 of this Article within three days directly to the High Court. The appeal does not delay the enforcement of the decision.

In case of suspicion of sending and receiving not allowed items within the letter, the letter sent to the prisoner, as well as the one that he is sending, will be opened with him being present and will be inspected. Items that are not allowed will be confiscated.

The prisoner has the right of confidential correspondence with his defense counsel, ombudsman or competent organs and international organizations for protection of human rights.

Discretion competence is reflected in Paragraph "In case of suspicion of sending and receiving not allowed items within the letter, the letter sent to the prisoner, as well as the one that he is sending, will be opened with him being present and will be inspected. Items that are not allowed will be confiscated". At the same time this Article reduces transparency for it denies the right of addressing national organizations dealing with human rights or any other organization of civil society that is registered and works in line with the laws of the Republic of Serbia. In this way, national organizations are put in unequal position. All given also stands for the Article 76 of the Law that stipulates Right to phone calls.

The following article that gives discretion competence to Director of Directorate is Article 90.

Article 90

Upon the request of a prisoner who is a first-time offender with a sentence not exceeding six months, the Director of Directorate may allow him to work where he was working at the time of receiving the commitment order, if there are justifiable reasons and the criminal offence is not related to his job.

Non-existence of clear criteria based on which the Director of Directorate brings a decision as well as absence of obligation to require and get the opinion of the Treatment Service, make this acting a discreet one.

Lack of criteria that would be in function of re-socialization of prisoner, give the Head of Penitentiary a discretion competence to allow a cash award anticipated by Article 94.

Article 94

The Head of Penitentiary may allow a cash reward to a prisoner for special achievements.

Director of Directorate shall determine the highest amount of remuneration for work and the amount of cash reward.

The same applies to the following Article of the Law.

Article 95

A prisoner may freely dispose with 70% of the work remuneration or cash reward, and the rest is set aside as a savings fund.

The Head of Penitentiary may allow a prisoner to use the money from the savings fund if it is necessary for the prisoner or his family.

The Head of institution is given discretion competence to freely estimate whether the money is "necessary for the prisoner or his family" - without obligation to consult treatment service, because work is a measure that can have impact on re-socialization. That is why it would be good to list all the things that savings could be spent on, with previous opinion of treatment service.

In Article 104, discretion competences of Head of Penitentiary have stronger legal power than expert estimation given by doctors.

Article 104

Upon the request of a prisoner, the Head of Penitentiary may allow him to be examined by a specialist if the doctor didn't suggest such examination.

The prisoner bears the costs of examination, unless Head of Penitentiary decides otherwise.

Head of Penitentiary has discretion competences regarding bearing of expenses.

As in Article 104, as well in Article 111 there is no clear criterion based on which the Head of Penitentiary brings a decision to allow external/part time education to a prisoner and there is no obligation for the Head of Penitentiary to get the opinion of the treatment service.

Article 111

The Head of Penitentiary may allow a prisoner external/part-time education.
The costs of such education shall be borne by the prisoner.

In the part of the Law that stipulates realisation of special rights of prisoners, Article 115 can be observed as a source of discretion competences.

Article 115

The Head of Penitentiary may grant the following special rights to prisoners who are well-behaved and diligent at work:

.....

Namely, key term “well-behaved and diligent” is not defined in sense that concrete behaviors of prisoners that could be considered as good behavior and diligence are listed.

Director of Directorate is given discretion competences by Article 116.

Article 116

Upon the request of a prisoner or recommendation of the Head of Penitentiary, and where there are justifiable reasons to do so, the Director of Directorate may transfer a prisoner from one Institution to another.

The Director of Directorate may for security reasons transfer a prisoner *ex officio*.

A prisoner may appeal against the decision of the Director of Directorate referred to under Paragraphs 1 and 2 of this Article to the minister in charge of the judiciary, within three days of the delivery of the decision.

Appeal to the Decision made by the Director of Directorate does not delay the enforcement of the Decision.

Formulation " where there are justifiable reasons to do so" requires additional definition, i.e. specification which are those reasons that are justified so that the

decision, itself, could be with least consequences of (un)willingness of the Director of Directorate, as well as readiness of Head of Penitentiary to propose it. The change would consist of the development of a list of conditions under which the Head of Penitentiary, but as well Director of Directorate brings such a decision. As well it would be of importance to introduce the obligation to require and obtain the opinion from the Penitentiary Treatment Service.

In Article 155 we come across managing discretion competences.

Article 155

Head of Penitentiary discontinues the measure of solitary confinement before its end, should he find that the disciplinary measure achieved its purpose before it expired.

Head of Penitentiary must discontinue the measure of solitary confinement if a medical doctor states in writing that further solitary confinement would endanger prisoner's health.

Discretion competence of Head of Penitentiary in this Article of the Law is reflected in possibility that he, without previous consultation with treatment service, makes estimation whether the disciplinary procedure has reached its goal.

It is not only about a discretion competence given by the law here, but also the principle of share of responsibility is being violated- between the Head and professional service working on re-socialization of prisoners. Namely, head of an institution should take care of the material, technical, organizational and legal aspects of the functioning of the institution, while treatment services need to work on the re-socialization of sentenced citizen. With that in mind, the expertise to assess whether the disciplinary action gave result should be the responsibility of the treatment services, i.e. those implementing the programs of treatment.

Discretion competences of the Head of Penitentiary are not limited only to the rights of prisoners, but they are also related to the rights of employees.

Article 265

When so mandated by exigencies of service, an employee is obliged to work extra hours.

The Director of Directorate or Head of Penitentiary may, when exigencies of service require so, postpone or interrupt and employee's annual leave.

A staff member may, due to increased workload or other requirements of service, be Provisionally seconded without his agreement from one organizational unit of Directorate to another for at most one-year.

The Head of Prison Administration shall issue the decision on secondment. The appeal against the decision on secondment may be lodged to the minister of Justice within 8 days upon the receipt of the decision. The appeal does not postpone the enforcement of the decision.

A staff member seconded to another work position to another organizational unit is entitled to compensation for transport, accommodation and food, in line with general provisions.

As it can be seen in Article 265 the head of penitentiary may limit the law governing the area of work.

The uncertainties of the employment status in institutions contribute to the discretion competence of a Director of Directorate or Head of Penitentiary. From the point of work motivation the principle of collective rewards is discouraging.

Article 268

Director of Directorate brings a decision on awarding staff, at proposal of the Head or at his own initiative, for exceptional work commitment in the amount of 30% of basic salary received for the month before the awarding.

In the introductory section we stressed the importance of punishability as a precondition for the fight against corruption. Article 266 creates a suspended punishment, because of a serious breach of work discipline; an employee may, but does not have to lose his job.

Article 266

Directorate Staff face disciplinary procedures for minor and serious violations of work obligation.

In addition to minor violation of work obligation and duty set forth by law governing employment in government bodies, a minor violation of work obligation and duty shall be deemed any action contrary to regulations setting out performance of tasks in Directorate.

In addition to serious violation of work obligation and duty set forth by law governing employment in government bodies, a serious violation of work obligation and duty shall be deemed also:

....

For minor violation of work obligation related to behavior contrary to the regulations on carrying out activities in Directorate, Director of Directorate, at proposal of the Head or at his own initiative, may impose a fine upon the conducted disciplinary procedure in the amount of 30% of basic salary received for the month before the sentence was imposed.

In addition to the discretionary powers which in the absence of clear criteria and effective mechanisms of control became a source of abuse and corruption, conflicts of interest also represent the potential source of not only corruption, but also an obstacle to the fight against corruption.

Namely, the law stipulated the selection of people for management functions (Director of Directorate, Head of Penitentiary and Head of Service) in a manner that a superior suggests the selection of subordinate, which creates space for conflicts of interest in the evaluation of work and determining responsibility for illegal and unethical conduct.

Here is a concrete example.

Article 114a

If a prisoner thinks that his right was violated by actions of the Head of Penitentiary, he can submit a complaint to Director of Directorate.

If the Director of Directorate or a person authorized by him determines that the complaint was not submitted for the reason given in Paragraph 1, he will submit the complaint to the organ in charge and will inform the prisoner about that.

Director of Directorate or a person authorized by him may investigate the merits of the charges and with direct insight in all the relevant documentation in Penitentiary, talks with the Head and Penitentiary staff, interview with the prisoner who submitted the grievance and other prisoner, without the Penitentiary staff being present.

If it is determined that the charge was founded, the Director of Directorate will order that the violation of prisoner's right shall be removed.

If he thinks that the violation of prisoner's right was caused by staff 's actions, Director of Directorate will inform in writing, the Head of penitentiary or authorized supervisor, or, if he thinks that prisoner's rights were violated due to actions of the Head of Penitentiary, he will inform the authorized supervisor.

A prisoner has the right to file a grievance against the Head of penitentiary to Director of Directorate who proposed the person to be elected for the function Head of

penitentiary. There is justified reason to question the motive of the Director of Directorate to take action and punish the person that he proposed to perform that function. What adds to the fear is that a conflict of interest may be an obstacle to punish eventually committed illegal acts is the formulation: "Director of the Directorate or a person authorized by him may examine the merits of the complaint" that should have imperative meaning- i.e. instead of "may" the word used for the formulation should be "must" .

In this part of the text we will analyze two rulebooks.

Rulebook on treatment, program of acting, classification and additional classification of prisoners published in the "Official gazette of RS" No. 72/2010 from 8.10.2010. Created as a part of normative act stipulating the area of the enforcement of criminal sanctions.

Article 14 of the Rulebook says that the *"Decision on the program of acting, in line with the Law on the enforcement of criminal sanctions (further in text: Law) is brought by the Head of Penitentiary based on the proposal given by the team of experts"*: In the analysis of the Law we have stressed out the existence of domination of normative over re-socialization function. This is exactly what is seen in Article 14 of the Rulebook. Namely, discretion competence is only conditionally reduced bearing in mind that the Head of Penitentiary can, but does not necessarily have to adopt the opinion of the team of experts, without obligation to give explanation for the brought decision and without possibility for the expert team, in case of disagreement, to have the possibility too appeal.

The same applies to **Article 15** which says *"The program of treatment varies according to the evaluation of the behavior of the prisoner, the degree of his cooperation in the program, scoring and circumstances that may arise during the enforcement of the sentence. Person employed in the treatment service- treatment officer starts the initiative for the change of treatment program and submits it to Penitentiary expert team. Head of Penitentiary, at the proposal of the team of experts changes the treatment program"*. Then, **Article 23** *"A prisoner is granted special rights within the group, especially on the basis of good behavior and efforts in achieving the implementation of treatment programs and individual goals. The decision on granting*

special rights, in accordance with the Law, is brought by the Head of Penitentiary, at the explained proposal of the expert team" and Article 37 "The decision on additional classification of the prisoner is made by the Head of Penitentiary, in line with the Law, at the explained proposal of the team of experts. The decision contains explained reasons for the additional classification of a prisoner"

The other Rulebook that will be the subject of the analysis is the *"Rulebook on House order in Penitentiaries and District Prisons"* (Official Gazette of RS, No. 72/2010 from 8.10.2010.).

In Article 51 this Rulebook gives discretion right to the Head of Penitentiary *"to allow visits on other days also if there are justified reasons for that"*. The same applies to Article 56 by which the Head of Penitentiary may approve the *"reception of staff heavier than allowed weight"*

In Article 4 of the *"Rule book on determining affairs that is incompatible with the work in Directorate for the Enforcement of Criminal Sanctions"* there is a group of discretion competences at the approval of the affairs based on the contract on temporary and occasional jobs and Service Contract.

Article 4.

Exclusively from the provision of Article 2, point 4 of this Rulebook, certain actions appointments can be performed based on the approval of the Minister of justice, staff in the headquarters of Directorate based on the approval by Director of Directorate and staff in penitentiaries based on the approval of the Head of penitentiary with the prior consent of Director of Directorate.

Appointed and employed persons can publish the data collected during the work in Directorate only with prior consent of the Director of Directorate.

Problem of discretion competences and non-transparency is characteristic for the *Rulebook on performing security services in institutions for execution of criminal sanctions* (Official Gazette of SRS No 30/78) in Article 31. This Article gives the Head of Penitentiary or Head of Service to, without specified criteria and identifiers, order search. Besides that, the Rulebook does not stipulate who can be witness and how he can be selected.

Rulebook on the manner of implementation of the Witness Protection Program in Criminal Proceedings in Penitentiaries ("Official Gazette of RS" No. 19/2006 from 7.3.2006.) in Article 8 gives discretion competence to the Court in charge and Unit for the protection to decide who can visit the person who enjoys right to protection.

When speaking about the *Rulebook on determining, use and keeping of state, administrative and official secret in penal institutions* ("Official Gazette of SRS", No. 49/79.) it is necessary to determine, in cooperation with the Trustee for information of public importance and protection of personal information, whether and to what extent this Rulebook brings into question the principle of transparency as it is defined by law.

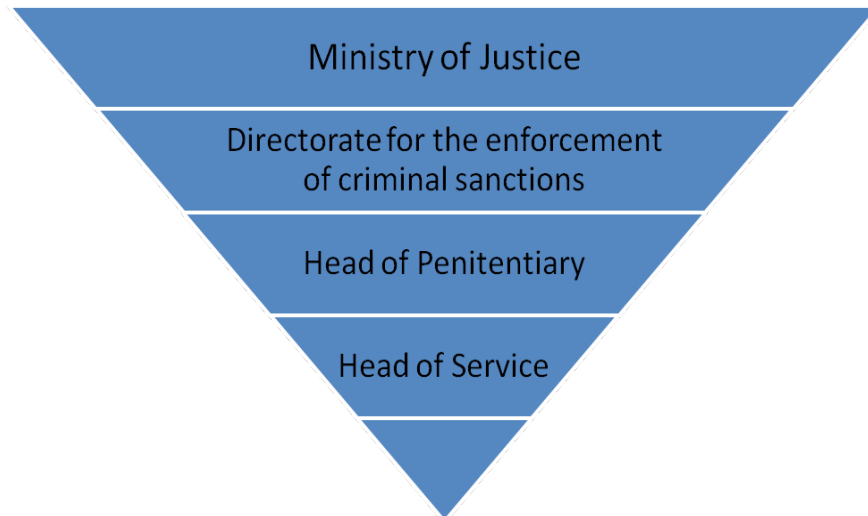
As in the case of the Law and in Article 30 of the *Rulebook on disciplinary procedures, measures and procedure against prisoners*, the Head of Penitentiary has a discretion right to estimate "whether the disciplinary measure served its purpose even before it expired."

4. Conclusion

Having exposed the analyses of legal framework we can conclude that the existing legal framework in the part of the enforcement of criminal sanctions has weak points that can be a source of potential corruption. They are primarily related to the existence of discretion competences, but as well to the distribution of powers that exists within this subsystem.

As we have already pointed out, the Law greatly contributes to the creation of *vertical axis of power*, i.e. power that derives from the provisions of the Law and regulations governing the conduct of the Director of Directorate, Head of Penitentiary and Head of Service on the level of Penitentiary and their punishability for violating laws and / or ethical regulations.

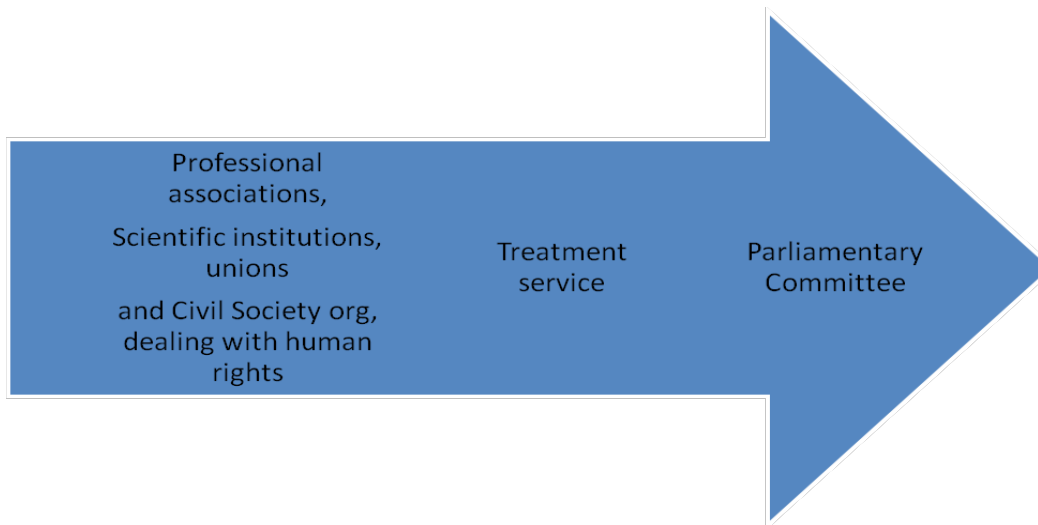
Scheme of vertical axis of power:



In addition to vertical there is also a horizontal axes of power, i.e. power that actors who have the function of re-socialization of prisoners on the level of the Institute have, and the power that institutions dealing with control / audit / monitoring of the functioning of the Directorate and Penitentiary have:

- Competent parliamentary committees
- Civil society organizations operating at national and international level,
- Vocational and Professional Associations
- Unions of penitentiary staff

Scheme of the horizontal axis:



Discretion competences themselves are not a source of abuse and corruption, but the lack of mechanisms to prevent and sanction abuses that may occur as part of the (un) scrupulous conduct of holders of the managing functions at the level of administrative systems for criminal sanctions enforcement may create an environment in which the abuse would be a legitimate choice.

In other words, if there is no counter-power to that power which lies on the vertical axis and "hands" of holders of managing functions, in the form of professional control, increased transparency, democratic control and cooperation with actors who are on the horizontal axis of power, we will get to the power between vertical and horizontal axis where the vertical axis will be able to dominate over the horizontal one, over the discretion competences that the holders of management functions have according to the law. In this way the feasibility of re-socialization function of institutions is directly influenced.

In conditions of lack of necessary financial, technical, organizational and human resources, institutions are able to achieve only function of the spatial exclusion of prisoners from the society, i.e. their imprisonment.

Article 2

The purpose of the enforcement of criminal sanctions is to suppress acts which violate or threaten a person and other basic social values. This purpose is achieved through the enforcement of valid and enforceable court decisions.

By failing to re-socialize spatial exclusion turns into social exclusion that is achieved through the "prison inclusion" Prison inclusion is a way of *latent socialization* of prisoners where while serving sentence the prisoner adopts knowledge, skills and values by which he accepts criminal career as a way of his life. This is supported by the fact of a high degree of recidivism among prisoners.

The condition that we have just described influences the realization of legal obligation:

Article 31

The purpose of the enforcement of prison sanctions is that the prisoner, during sentence serving, by application of appropriate treatment programs, adopts a socially acceptable values in order to facilitate integration into the living conditions after the execution of sentence so that in the future he would not commit crimes.

All the above written things direct us to the conclusion that the main reasons for the corruption in the system for execution of prison sanctions lay in:

- Discretionary powers that holders of management functions have;
- Non-transparency of the procedures for the election of management functions holders;
- The existence of a conflict of interest between the holders of management functions in the evaluation, procedures for determination of violations of laws and ethical principles;
- Non-transparency of the system of rewards and sanctions for both prisoners and staff in penitentiaries;
- Lack of effective mechanisms for sanctioning and rewarding prisoners and staff in penitentiaries.

The existence of discretion competences and non-transparency negatively affect the achievement of re-socialization function, by which corruption indirectly influences recidivism at prisoners as well as the number of prisoners in prisons. Specifically, lack of clear criteria and procedures for exercising the rights of prisoners and a reward for good and responsible behavior reduces the motivation of prisoners for re-socialization.

Existing voluntarism and discretion competences make awards a true "moving target" which results in the development of awareness among the prisoners that realization of the award and rights depend on the will and good relations with the owner of discretion competences.

In a similar position are the employees, who due to weak trade union and professional organization between the struggle for rights and possible problems that include loss of employment and conformism as a reaction to the state of disorganization, in most of the cases choose the latter.

Looking at this through the prism of the potentials for corruption, it is easy to conclude that on the one hand we have a very poor position of employees without effective union protection, and on the other side an arbitrary system of punishments. This leads to the hypothesis about the union function of corruption⁴ because it is the one who "cools" the dissatisfaction of employees in the rigid system in which it is not possible to exercise their rights and where it is not clear how it comes to rewards and sanctions.

However, not all employees are in the same position. A special type of abuse of power and authority comes from the *possession of the right of expertise* which employees whose jobs require university education have and who are directly engaged in work with prisoners. They are in situation to, by giving their opinion on the basis of expertise, abuse their position, and not to be punished for that. On the other hand, employees who work with prisoners, due to the lack of professional autonomy and protection of professional associations, may serve to legalize the illegal actions of the Director of Directorate and Head of Prison or someone else towards whom the owner of expertise is in dependant position.

The law and rulebook did not adequately regulate the area of abuse of rights to expertise, the punishment in legal and ethical sense is low, and when it happens there are no clear procedures and criteria.

Seen from the viewpoint of the system and its functions, the system of criminal sanctions in the absence of necessary institutions resources reduced its functionality from re-socialization function to exclusion of convicted citizens and their labeling, which

⁴ More details in S.Grdelj, Z.Gavrilović, N.Šolić (2005) *Profesija (i) korupcije*, (Profession (and) Corruption) Beografika, Belgrade

results in strengthening of prison inclusion. In such a system corruption is functional appearance because it offers a reward for loyalty, possibility to realize the rights and rewards whose realization depends on the will of the administration and treatment officers. The end result of all described is that the existing legal and regulatory by-laws have a negative effect on the re-socialization of prisoners, which directly affects the high degree of recidivism, and thus contributes to the problem of overpopulation in Penitentiary.

What is therefore crucial for the improvement of re-socialization function of Penitentiary is creation of mechanisms that would set the profession and experts in functionally independent position in relation to the management structure i.e. a sector that is in charge of re-socialization of prisoners should become an equal partner, not subordinate to the management structure.

In addition to building a professional organization that would be in function of strengthening professional integrity, one of the measures would be creation of Inter-institutional council that would deal with technical aspects of re-socialization and solution of specific cases, and whose work would be attended as well by organizations dealing with protection of prisoners' rights. It is this kind of professional democratization and supervision that is the way to prevent the abuse of the right of expertise, and on the other hand a larger impact on the normative acts that are in the area of re-socialization of prisoners. Ultimately this solution would only be an upgrade of the existing opportunities provided by the law to engage professional institutions and individuals in supervision.

Article 270

Supervision of the work of Directorate is done by the Ministry in charge of judiciary.

...

Scientific and expert institutions and individuals may be engaged for supervision of expert work.

Framework for anti corruption in the prison system should have the following priorities:

- Reduction and control of discretion competences;
- Increase of transparency of the process of selection of holders of management functions;
- Increase of transparency in the reward and punishment system in part of program of treatment execution;
- Increase of effectiveness of punishability mechanisms;
- Development of mechanisms of external control by experts, professional community, civil society organizations and parliamentary committees, primarily of the Committee on Justice and Administration, Committee for Defense and Security, Committee on Labor, Social Affairs and Veterans, Committee on Health and Family;
- Incorporation of explicit anti-corruption provisions in the Law and rulebooks, and especially the development of ethical standards as a mechanism for fighting corruption.

In addition anti-corruption would be supported by: development of consultation mechanisms in the preparation of normative acts of the Directorate, creation of effective mechanisms of professional and union organizing of employees in institutions, i.e. improving the status of employees in terms of protection of their rights, i.e. certainty of rewards and sanctions.

ANNEX 1

Table 1. Summary overview of normative acts whose articles contribute to the increase of discretion competences, non-transparency and conflict of interests.

Normative act	Damaged groups	Discretion competences	Transparency	Conflict of interest
Law on the enforcement of criminal sanctions.	Prisoners	37, 75, 90, 94, 95, 104, 111, 115, 116, 155	30	26, 27, 28
	Staff	265, 266, 268		
Rulebook on treatment, program of acting, classification and additional classification of prisoners	Prisoners	14, 15,23,37		
	Staff			
Rulebook on house rules in penitentiaries and district prisons	Prisoners	54,56		
	Staff			
Rulebook on determining jobs whose performance is incompatible with the work in Directorate for enforcement of criminal sanctions.	Prisoners			
	Staff			4
Rulebook on performing security services in institutions for the enforcement of criminal sanctions.	Prisoners	31	31	
	Staff			
Rulebook on the manner of implementation of witness protection Program in Institutions for the enforcement of institutional sanctions.	Prisoners	9		
	Staff			
Rulebook on determining	Public		13	

rules, use and keeping of state, administrative and official secret in institutions for sentence serving.	Prisoners		11, 13	
Rulebook on disciplinary offenses, measures and procedures towards prisoners	Prisoners	30		

ANNEX 2. Recommendations for the improvement of normative framework

Article of the Law on the enforcement of criminal sanctions.	Draft amendment
26, 27, 28	<p>To change the Law in the way that the selection of the Director of Directorate is done via open call with the criteria reflecting the need of the state in the area of criminal sanctions.</p> <p>Open call and criteria are defined by the Parliamentary committee consisting of representatives of the Committee for defense and safety, Committee on Labor, Ex-Servicement and Social Issues, Committee for health and family, experts and civil society organizations in the area of human rights protection.</p> <p>When speaking about the selection of Head of Penitentiary and heads of services it would be done based on the criteria defined by the Parliamentary Committee and it would be implemented by the Directorate. The commission for the open call would consist by representatives of Directorate and Parliamentary committees.</p>
30	Under existing rules to define the criteria and procedures based on which Director of Directorate gives approval, which help to prevent the discretionary behavior that is guaranteed by this article of the Law.

37	Under existing rules to define the criteria for "justified reason"
75	<p>Under existing rules to define what are the indicators that must be fulfilled so that the Director of Directorate may declare that order keeping is endangered, as well as safety and security, and increased possibility for the prisoner to commit a new offense</p> <p>To add to this Article of the Law that prisoners have right to correspond with local organizations</p>
90	On the level of rulebooks to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could have right to allow the performance of the activities outside the prison premises. Also, the same Rulebook should define the obligation to seek and obtain the opinion of the treatment services, and the obligation of the Head of Penitentiary to inform the Treatment service about the indicators based on which he approved this type of right to a prisoner.
94	On the level of Rulebook to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could financially reward a prisoner. Also, the same Rulebook should define the obligation to seek and obtain the opinion of the treatment services, and the obligation of the Head of Penitentiary to inform the Treatment service about the indicators based on which he approved this type of rewarding a prisoner.
95	On the level of Rulebook to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could approve spending money from the savings fund. It is of crucial importance for the success of re-socialization to define for which purposes the money could be spent with consultation with the treatment service and with obligation for the Head of Penitentiary to inform the Treatment service about the indicators based on which he approved the spending of mean from the savings account and why was that type of spending chosen for the prisoner of a family.
104.	On the level of Rulebook to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could

	approve specialist's examination even if it was not done by the doctor.
111	On the level of Rulebook to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could approve external or part-time education for the prisoner. As well, with the same Rulebook to define the obligation to seek and obtain the opinion of the treatment services, and the obligation of the Head of Penitentiary to inform the Treatment service about the indicators based on which he approved this type of right to a sentenced citizen.
115	On the level of Rulebook to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could give special rights to a prisoner. As well, with the same Rulebook to define the obligation to seek and obtain the opinion of the treatment services, and the obligation of the Head of Penitentiary to inform the Treatment service about the indicators based on which he approved this type of right to a sentenced citizen.
116	Within the existing rulebooks to define criteria for "justified reason"
155	On the level of Rulebook to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could give a positive assessment that disciplinary measures gave result with the prisoner. As well, with the same Rulebook to define the obligation to seek and obtain the opinion of the treatment services, and the obligation of the Head of Penitentiary to inform the Treatment service about the indicators based on which he made assessment that the disciplinary measures gave positive result with the prisoner.
265	On the level of Rulebook to define in which cases and which indicators should be met so that the Head of Penitentiary could require from the staff to work extra-hours, to postpone or cease their vacation.
268	On the level of Rulebook to clearly specify in which cases and which indicators should be met so that the Head of Penitentiary could financially reward a prisoner. Also, the same Rulebook should define the obligation to seek and obtain the opinion of the treatment services, and the obligation of the Head of Penitentiary to inform the Treatment service about the indicators based on which he approved this type of rewarding a prisoner
266	On the level of Rulebook to define a precise list of offenses that will be sanctioned by dismissal.

114a	Parliamentary committee would receive acts and perform investigations in cooperation with competent organs.
270	Parliamentary control, with participation of civil society organizations and clear criteria for mandatory engagement, defined by Parliamentary control

Rulebook on treatment, program of acting, classification and additional classification of prisoners	
Article 14	Within this or new article the Head of Penitentiary must seek for the opinion of expert team with obligation to deliver the explanation of brought decision to expert team with possibility, that in case of disagreement, the expert team may put forth the disagreement that will be registered in special evidence book for that.
Article 15	Within this or new article the Head of Penitentiary must seek for the opinion of expert team with obligation to deliver the explanation of brought decision to expert team with possibility, that in case of disagreement, the expert team may put forth the disagreement that will be registered in special evidence book for that.
Article 23	Within this or new article the Head of Penitentiary must seek for the opinion of expert team with obligation to deliver the explanation of brought decision to expert team with possibility, that in case of disagreement, the expert team may put forth the disagreement that will be registered in special evidence book for that.
Article 37	Within this or new article the Head of Penitentiary must seek for the opinion of expert team with obligation to deliver the explanation of brought decision to expert team with possibility, that in case of disagreement, the expert team may put forth the disagreement that will be registered in special evidence book for that.
Rulebook on house rules in Penitentiaries and district prisons	
Article 54	To define the term "justified reasons" in this or in new article
Article 56	To define the term "justified reasons" in this or in new article

Rulebook on determining jobs whose performance is incompatible with the work in Directorate for enforcement of criminal sanctions	
Article 4	In this or in new article of the Rulebook to make a list of jobs or clear criteria based on which the decision on permit is brought.
Rulebook on performing security services in institutions for the enforcement of criminal sanctions	
Article 31	In this or in new article of the Rulebook to define conditions under which the search could be made and who, with what kind of rights and obligations, can be a witness.
Rulebook on determining rules, use and keeping of state, administrative and official secret in institutions for sentence serving	
Articles 11 i 13	In cooperation with a Trustee for information of public importance and protection of personal information to make the analysis of these articles.

Rulebook on treatment, program of acting, classification and additional classification of prisoners	
Article 30	Within this or new article the Head of Penitentiary must seek for the opinion of expert team with obligation to deliver the explanation of brought decision to expert team with possibility, that in case of disagreement, the expert team may put forth the disagreement that will be registered in special evidence book for that.

ANNEX 3 – List of rulebooks that were the subject of analysis⁵

Rulebook on the manner and conditions for enforcement of disciplinary measures in institutions for prison sentence serving "Official Gazette SRS", No. 30/78.

⁵ None of analysed Rulebooks is not available on the web page of the Directorate for the enforcement of criminal sanctions intended for legal framework <http://www.uiks.mpravde.gov.rs/lt/articles/zakonska-regulativa/> . Bearing in mind that legal framework, especially in the part of the rulebook is in the phase of tradition, the existence of unique and respectable base of the valid rulebooks on the Web Site of the Directorate is not only the proof of transparency but also an assumption for the realization of prisoners rights.

Rulebook on measures for keeping order and safety in prisons for the enforcement of prison sanctions "Official Gazette RS", No. 105/2006 from 21.11.2006. .

Rulebook on manner on keeping evidence on sentenced treatment measures and sentences of juvenile prisons "Official Gazette RS", No. 63/2006 from 21.7.2006. .

Rulebook on manner of execution of safety measure of compulsory psychiatric treatment and keeping in health organization "Official Gazette SRS", No. 28/80.

Rulebook on manner of implementation of protection of participants in criminal procedure in prisons for the enforcement of criminal sanctions "Official Gazette RS", No. 19/2006 from 7.3.2006. .

Rulebook on program and manner of passing expert exams of security staff in prison-treatment and treatment institutions Official Gazette SRS", No. 44/85.

Rulebook on arms and equipment of security staff in Directorate for enforcement of prison sanctions "Official Gazette RS", No. 105/2006 from 21.11.2006.

Rulebook on determining jobs whose performance is incompatible with the work in Directorate for enforcement of criminal sanctions. "Official Gazette RS", No. 9/2003 from 12.2.2003. .

Rulebook on determining rules, use and keeping of state, administrative and official secret in institutions for sentence serving. "Official Gazette SRS", No. 49/79.

Rulebook on organization, work and treatment of detainees in Special Detention Unit "Official Gazette of RS", No. 81/2005 from 23.9.2005. .

Rulebook on disciplinary offenses, measures and treatment towards sentenced persons "Official Gazette of RS", No. 59/2006

Rulebook on the enforcement of sentence to work in public interest "Official Gazette RS", No. 20 from 19. 2 2008

Rulebook on the enforcement of sanction in the premises where the sentenced person lives "Official Gazette RS No 64/2010)

Rulebook on enforcement of probation sentence with protection supervision "Official Gazette RS", No. 20 from 19.2. 2008

Rulebook on House rules in Penitentiaries and district prisons Official Gazette RS", No. 72/2010 from 8.10.2010. .

Rulebook on manner and conditions of use of coercive measures in Institutions for prison sentences serving "Off. Gazette SRS", No. 30/78

Rulebook on treatment, program of acting, classification and additional classification of prisoners Official Gazette RS", No. 72/2010 from 8.10.2010. .

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