

“The Organised Structure of Power” and Economic Crime “FIMI-Media” Case and a View from the Croatian Perspective

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Abstract

During the 1960s, famous German professor Claus Roxin developed a theory about the use of the so-called «organised structure of power» as a form of indirect perpetration. Roxin, however, claimed that his thesis does not apply to cases of economic crime. On the other hand, he modern German judicial practice and some of the authors believe that this concept should be applicable in economic criminal law as well. In the last few years in Croatia there have been several trials for corruption and drawing state money against the former Croatian prime minister and his closest associates, who allegedly used the political organisation in their operations. The aim of this paper is to see does one of these cases (so-called «FIMI-media» case) fulfil the essential elements of the theory of the organised structure of power and can this theory be applicable for those cases despite the fact that they represent economic crime. In the first part of this paper we will show the main characteristics of Roxin’s theory and in the second part we will analyse the Croatian case and then conclude about whether it can be considered in context of the theory of the organised structure of power.

Keywords: indirect perpetration, economic crime, political organisation

1. Introduction

In the post war period during the 1990s, the Republic of Croatia went through the rough process of transition. This was a period during which economic crime and corruption had dug its roots deep into Croatian society. However, criminal procedures for huge economic crime cases have started to open only recently. Unfortunately, the normative framework, which was mostly inherited from former Yugoslavian legislation, was old and inadequate.

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Economic crimes in the Croatian Criminal Code were often described as “leftovers from communism and inappropriate for a new society”.² Partial changes of the Criminal Code, which were made every couple of years, were not enough to address the economic crimes properly. The situation required full reform. That reform occurred in 2013 through the introduction of a new Criminal Code (further: CC) with completely new capital criminal offences against the economy (Capital XXIV. CC) which has been modernised and harmonised with European standards.³

Yet, due to a *nullum crime sine lege praevia* principle, new solutions are not completely applicable to crimes committed before 2013. For these crimes there are still many open issues regarding not only the special, but also the general part of substantive criminal law. One of most important questions is the question of choosing the proper model of participation in a crime in large economic crime cases that involve high political spheres. In this paper we will not deal with all possible models of participation because that would extend the limits of our research too much. Instead, we will focus our attention only on one model which we find to be particularly interesting: a model of indirect perpetration through the organised structure of power.

The indirect perpetration through the organised structure of power is one of the most controversial issues in the general part of criminal law. It is a form of indirect perpetration in which the indirect perpetrator (also known as “a person from behind” or Germ. “*Hintermann*”) has hierarchic organisation at his disposal. Usually, he is at the top of the hierarchy from where he coordinates all the operations of the organisation. He uses his position to give (criminal) orders and he can be certain that the subordinates will execute the orders because otherwise they will be replaced and sanctioned.

In this paper we will try to answer the question whether this concept can be applied on FIMI-media case from Croatian jurisprudence. The FIMI-media case is a typical example of state sponsored economic crime. In the next chapter we will explain the foundation and main criteria of the concept of the organised structure of power. After that, in the following chapter we will present case facts of FIMI-media case and than try to apply these criteria to this case.

² Petar Novoselec, *Uvod u gospodarsko kazneno pravo* (Zagreb: Pravni fakultet, 2009), p. 4.

³ Ksenija Turković et al., *Komentar Kaznenog zakona* (Zagreb: Narodne novine, 2013), p. 317.

Finally, we will give our opinion is the concept of indirect perpetration through the organised structure of power a proper one to be applied in cases of state sponsored economic crime.

2. The Concept of Organised Structure of Power

Indirect perpetration is a form of participation of more persons in the commission of a criminal act, whereby one person (*indirect* perpetrator) uses another person (*direct* perpetrator) for the commission. Indirect perpetration is significantly different from inciting or instigating because the instigator just encourages the direct perpetrator and has no decisive influence on his final decision on whether he will commit the criminal act. The indirect perpetrator, on the contrary, always has control of the direct perpetrator's decision and it is up to the indirect perpetrator whether the criminal act will be committed. In other words, the indirect perpetrator has the power or a hegemony over an act (germ. *Tatherrschaft*) which is why he needs to be qualified as a perpetrator, not just abettor. Indirect perpetration is also very different from a co-perpetration because it is not based on a mutual agreement of the perpetrators, but on the assignment of roles in a vertical direction. German theory differentiates several types of indirect perpetration. In some of them the direct perpetrator is fully criminally liable and in others he is not. The case of the organised structure of power is one of those cases in which the direct perpetrator retains full criminal liability. Yet, despite that fact, the person behind (germ. *Hintermann*) is qualified as the (indirect) perpetrator because he has "a will to control the act".⁴

This idea has its roots in the Stachinsky case, an old verdict of the German Federal Court (*Bundesgerichtshof, BGH*) from 1962 and was developed by the German professor Claus Roxin in 1963. Nowadays, this concept is most widely used in the practice of the Latin American countries and Germany.⁵

⁴ Hans-Heinrich Jescheck/Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, Fünfte Auflage (Berlin: Duncker&Humblot, 1996), p. 141.

⁵ For Latin America see Francisco Muñoz – Conde/Héctor Olásolo, *The Application of the Notion of Indirect Perpetration through Organised Structures of Power in Latin America and Spain*, *Journal of International Criminal Justice*, 9 (2011), p. 113 – 135. For Germany see f. e. Claus Roxin, *Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, (München: Verlag C. H. Beck, 2003), § 25, 110.

Roxin was motivated to find an adequate form of responsibility for cases such as the ones during World War II. He thought of Hitler's, Eichman's or Himmler's orders to their subordinates to commit murders and figured that they could be certain that their orders would be executed because direct perpetrators were very easily replaceable. His main idea was that there are three possible forms by which someone can have power over the conduct of other persons: by exerting force, by mistake of the direct perpetrator or through the organised apparatus of power. This third option is specific because the indirect perpetrator always has the possibility to replace the direct perpetrator(s) with others who will be equally efficient. That is why it is not unusual that an indirect perpetrator does not know the direct perpetrator or perpetrators personally.⁶

Literature usually brings two main criteria of organised structure of power. Those criteria are: the existence of a hierarchical organisation and the replaceability of the direct perpetrator. Below, we will analyse and discuss both criteria and then try to set our own definition of organised structure of power.⁷

2. 1. The Existence of a Hierarchical Organisation

As for the organisation involved, the organised structure of power implies a well-organised and established apparatus of power. The apparatus of power has a strong hierarchy which presumes that one or more persons have the authority and power to give orders for committing criminal acts. It is not necessary that these orders are precise as long as the acts of the subordinate direct perpetrator remain within the context of the objectives of the apparatus.⁸

The indirect perpetrator can be quite certain that the subordinates will follow the instructions and commit those acts because of the specific nature of this organisation.

⁶ Claus Roxin, *Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, (München: Verlag C. H. Beck, 2003), § 25, 105 – 107.

⁷ Some require additional criteria. For instance, the Supreme Court of Peru in its verdict against Alberto Fujimori mentions some additional requirements: the responsible command of indirect perpetrator and the predisposition of direct perpetrator to commit the act. We, however, think that these and other similar criteria are already covered with two main criteria. For details of the verdict against Alberto Fujimori see Kai Ambos, *The Fujimori Judgment*, *Journal of International Criminal Justice*, (2010), p. 1 – 22.

⁸ *Ibid*, p. 14.

Namely, the apparatus functions “almost automatically” and the direct perpetrator is nothing but “a cog in the machine” and he is replaceable at any time.⁹ Since the indirect perpetrator is well aware of that, and is even counting on that, we can say that he is quite certain that the act will be committed. In the Fujimori case, the Supreme Court of Peru concluded that this kind of organisation requires “an organised power structure with different roles assigned to its members that allow the organisation to function autonomously notwithstanding individuals’ complicity”.¹⁰ This was also accepted by the International Criminal Court in Haag (ICC) with regard to the African paramilitary groups in the Decision on the confirmation of charges in the Katanga and Ngudjolo Chui case from 30 September 2008 (*Decision No. ICC-01/04-01/07*). In this decision the Pre-Trial Chamber I emphasises that “the main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders”.¹¹

The next question that is related to the existence of hierarchical organisation is about the leadership level of the indirect perpetrator. Arguable is whether only the person on top of the organisation can be considered as an indirect perpetrator, or whether that possibility includes mid rank commanders as well. This issue is also connected with the problem of distinguishing between indirect perpetration and co-perpetration with regard to mid-rank commanders and their subordinates. Roxin thinks that the notion of indirect perpetration through the organised structure of power should be applied to mid-rank commanders who stand between the leadership level commanders on the one side and the direct perpetrators on the other side. Despite the fact that they receive orders from leaders, they also possess a certain level of powers to issue orders to their subordinates. They are not easily replaceable (think of Eichmann for instance!). Roxin rejects co-perpetration between mid-rank officers and their subordinates. Roxin claims that there is neither a jointly agreed plan nor a division of labour between them, but instead a unilateral imposition of orders by the superiors.¹² Ambos opposes.

⁹ See for example Claus Roxin, *Täterschaft und Tatherrschaft*, Siebente Auflage (Berlin - New York: Walter de Gruyter Verlag, 2000), p. 245.

¹⁰ See more in Kai Ambos, *The Fujimori Judgment*, *Journal of International Criminal Justice*, (2010), p. 14.

¹¹ Pre-Trial Chamber I, *Decision on confirmation of charges*, No. ICC-01/04-01/07, § 517.

¹² Claus Roxin, *Probleme von Täterschaft und Teilnahme bei der organisierten Kriminalität* in *Festschrift für Gerald Grünwald* (Baden – Baden: Nomos, 1999), p. 552 – 556.

He thinks that, although this possibility has been recognized in the case of Adolf Eichmann, nobody can deny the fact that absolute control over an organisation is completely possible only at the leadership level because only the leader's power and authority can neither be blocked nor disturbed from above. On the other hand, mid-rank commanders can have control just over their subordinates which means that they do not have control over the organisation, but instead only over some members. In that sense, Ambos claims that the concept of co-perpetration is more appropriate due to three main reasons. First, informal consensus of the persons involved is sufficient for a joint decision. By his belonging to the organisation, the direct perpetrator is clear that he agrees with the organisation's policies. Second, the division of labour in such cases consists of the mid rank officer's ordering, preparing and planning, and the subordinate's execution of the acts. Both are indispensable for the commission. Third, the structural difference between vertical indirect perpetration and horizontal co-perpetration is only valid in cases when the vertical relation is not disturbed. However, in the case of mid rank commanders, that relation is disturbed by the existence of a further relationship of the mid rank officer to his superior at the highest level.¹³

In our opinion, the notion of indirect perpetration through an organised structure of power should be extended also to mid-rank officers. The relationship between them and the direct perpetrators is significantly different from that of the relationship between the co-perpetrators. Firstly, mid-rank officers are in a position to decide which of their subordinates will commit the act, and not the other way around. That way they can choose the ones they trust the most and know for certain that they will obey their orders without any objections and unnecessary questions. While the mid-rank commander is in the position to make certain decisions about the type and scope of actions, the direct perpetrator never has that possibility and only executes the orders, often without knowing their real purpose. He is not there to think but to act. Secondly, the argument that the direct perpetrator makes it clear that he approves the organisation's policy can only be pointed at in general and has actually nothing to do with the direct perpetrator's relationship to either the mid-level or leadership-level of the organisation. Thirdly, the direct perpetrator is always easily replaceable while the mid-rank officer is not. Bearing all mentioned considerations in mind, we can conclude that the relationship between mid-level commanders and their subordinate direct perpetrators has more characteristics of vertical, than horizontal distribution of functions.

¹³ Kai Ambos, The Fujimori Judgment, *Journal of International Criminal Justice*, (2010), p. 14 – 17.

These are the reasons why we think that the concept of indirect perpetration is more appropriate for such cases. This is also compatible with our definition that requires “high” but not necessarily “the highest” position in the apparatus.

2. 2. The Replaceability of the Direct Perpetrator

The replaceable function of the direct perpetrator is a core requirement of indirect perpetration through the organised structure of power. We have already pointed out that in this concept the direct perpetrator is fully criminally liable. That, in other words, means that he is always mentally capable of abandoning the commission of the crime simply because he does not want to do it any more (or for any other possible reason). However, if the direct perpetrator is very easily and quickly replaceable than that characteristic compensates his full liability. Therefore, it is essential that the organisation always have enough capable direct perpetrators available so that another perpetrator can fill the gap. That is why some say that the indirect perpetrator “not so much dominates the direct perpetrator but rather the collective of direct perpetrators as part of the criminal organisation”.¹⁴

A good example which helps us to understand the circumstances that indicate such a replaceability is the case against Jose Manuel Conctreras in Chile. The case was tried before the Chilean Supreme Court. In its verdict the court described the surroundings of the direct perpetrator whose name was Mr. Townley. He was part of the hierarchical military structure in the DINA, his family was under the protection and control of the DINA and the sense of loyalty towards the DINA was strongly ingrained in him. He was not in a position to refuse to commit murder, but even if he did so, he would instantly be replaced with other executor who would be equally capable and ready to carry out the killing. The Court concluded that the facts of the case indicate the type of control of the subordinates’ will that superiors of the organised structures of power enjoy.¹⁵

¹⁴ Kai Ambos, The Fujimori Judgment, *Journal of International Criminal Justice*, (2010), p. 19. The Supreme Court of Peru differentiates between positive and negative interchangeability of the direct perpetrator. The positive interchangeability exists when the leaders choose the most qualified from several capable perpetrators in order to exclude failure. The negative interchangeability presumes that any denial or failure can be immediately compensated by another direct perpetrator. For details see *ibid.*

¹⁵ For details of that verdict see Francisco Muñoz – Conde/Héctor Olásolo, The Application of the Notion of Indirect Perpetration through Organised Structures of Power in Latin America and Spain, *Journal of International Criminal Justice*, 9 (2011), p. 121.

There are authors who claim that the requirement of replaceability of the direct perpetrator is not sufficient to compensate the fact that he is fully criminally liable. Ambos is one of these authors. He points out that there are always cases where a direct perpetrator cannot immediately be replaced with another. He gives a hypothetical example of a border guard in East Germany who would refuse to shoot the fugitive and there would not have been other border guards there at that time available to kill this particular fugitive. That is why Ambos believes that the criterion of replaceability cannot explain the concept of the organised structure of power. Instead, it should be explained through a "normative theory which transfers the structure of offences requiring a certain position of duty on the part of the perpetrator to the doctrine of control over the act and operates with a material concept of freedom".¹⁶ Roxin rejects such objections to his concept. He says that such hypothetical thinking only proves that indirect perpetration, the same as any other form of participation, can stay in the phase of an attempt. That was recognized also by the BGH (BGHSt 40), that admits one can never be completely certain that another person will commit the crime as it was planned, not even in situations when the direct perpetrator is acting by mistake or force and is not liable. Roxin concludes that it is not about whether 'automatism' has functioned in each case, but whether it is functioning in the "normal cause of events", which is something one cannot claim for instigation.¹⁷ We agree with Roxin's opinion. This concept should not be about "what happens in a concrete situation" but instead about whether the leader can count on the organised apparatus of power whose members as a whole will be able and ready to act efficiently under his orders.

2. 3. Organised Structure of Power and White- Collar Crime?

Most major cases in which the notion of indirect perpetration through an organised structure of power has been (*expressis verbis* or conclusively) applied are connected to crimes against the highest values of modern society: the values which are protected by numerous international conventions. These values concern universal values of life and human dignity. However, this emphasis should not neglect other values, such as those which are the basis of a sound economy. With its numerous variations, economic crime is one of these forms that represents a great endangerment for every society.

¹⁶ Kai Ambos, The Fujimori Judgment, *Journal of International Criminal Justice*, (2010), p. 22.

¹⁷ Claus Roxin, *Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, (München: Verlag C. H. Beck, 2003), § 25, 114.

Economic stability is one of basic presumptions for the normal functioning of each country. Every major case of economic crime can be a potential disaster for the country's economy.

German authors have been arguing a lot about this subject. It seems that there is a certain discourse between German theory and German practice when it comes to the organised structure of power and white-collar crime. While recent practice of the BGH is quite fond of the idea, some of the authors are strongly against it and show a significant amount of scepticism. Claus Roxin, as *spiritus rector* of the concept, is one of those authors. He claims that such an interpretation of his concept, although obviously favoured in certain decisions of the BGH (BGHSt 40), is too extensive and inadequate. Roxin says that in cases of economic crime of corporations and similar economic organisations one cannot talk about replaceability of the direct perpetrator. These types of organisations are not detached from the law. Just the opposite, their functioning is based on the law. Since that is the case, it is realistic to expect that subordinates will refuse to follow the illegal orders of their superiors. That is why the leaders of economic enterprises can never be certain that their orders will be executed. Instead, Roxin suggests the classical model of co-perpetration between leaders and subordinates in economic entities. The basis of co-perpetration when it comes to leaders would be their obligation to prevent illegal actions of their subordinates. By that concept it would not be decisive whether the leader ordered an illegal action or simply did not prevent it – in both cases he would be equally responsible as co-perpetrator because he had a duty to prevent. In that sense, Roxin talks about a potential new form of indirect perpetration which he calls "the indirect perpetration on the bases of position" ("*mittelbare Täterschaft kraft Pflichtenstellung*").¹⁸

We can notice that it seems that Roxin is not quite consistent in his attitudes. We have already mentioned earlier that he rejects Ambos' objections about the fact that leaders can never be certain about the execution of their orders by saying that "nothing is absolutely certain" and that such hypothetical uncertainty does not change the essence of this concept – whether or not the automatism functions in a normal (typical) case.

¹⁸ Claus Roxin, *Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, (München: Verlag C. H. Beck, 2003)., § 25, 129 – 138.

Roxin's belief that it can be expected that subordinates in economic enterprises will be ready and determined enough to refuse illegal orders of their bosses seems empirically unsustainable if one bears in mind the global crisis and problems with unemployment in the world today. Roxin's arguments are a logical consequence of his opinion that the organisation must be "detached from the law" (Germ. *Rechtsgelöstheit*). This assumption implies that the organisation needs to structurally function unlawfully. Isolated unlawful acts are not enough. It is possible that a certain organisation formally acts in accordance to law but in reality hides its illegal intentions to avoid any law enforcement interference. Only in that kind of organisation leaders have full control over the execution of an act(s). On the contrary, if an organisation functions in accordance with the law the logical presumption is that the subordinates can refuse to execute the criminal order: the law excludes the obligation of executing illegal orders.¹⁹ In the literature, though, there is an opinion that this requirement cannot be considered as *conditio sine qua non* in cases of state sponsored crimes.²⁰ Some other authors even claim that this requirement is not a necessary precondition for the organised structure of power concept at all, because "it is not decisive whether the organisation acts not just in exceptional situations beyond the law, but whether its leaders can control it at their will so that its members look like anonymous and interchangeable cogs in the machinery of a criminal apparatus without the capacity to influence the outcome of the events".²¹ In our opinion, this requirement should not be considered as a *condition sine qua non* of the organised structure of power because it limits this concept only to organisations that function outside the legal system system. However, comparative practice confirms that major organised crime acts are often committed by a state apparatus that obviously does not act "outside the law". We also think that this criteria is not precise and it leaves too many doubts about its meaning.

Despite Roxin's unquestionable authority, there are German authors who support the BGH's recent practice. They claim that it is possible to talk about the replaceability of direct perpetrators even in economic crime cases.

¹⁹ See for example Claus Roxin, *Strafrecht. Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat*, (München: Verlag C. H. Beck, 2003), § 25, 130.

²⁰ Igor Bojanić, *Počiniteljstvo kao vlast nad djelom*, (Zagreb: Kaznenopravno – kriminalistička biblioteka «Vladimir Bayer», Hrvatsko udruženje za kaznene znanosti i praksu i Ministarstvo unutarnjih poslova Republike Hrvatske, 2003), p. 76.

²¹ Kai Ambos, *The Fujimori Judgment*, *Journal of International Criminal Justice*, (2010), p. 18.

This characteristic exists in such cases because members of the economic enterprise are just a small part of a bigger organisation and they are subordinate to a hierarchy inside the organisation. That hierarchy means that there is a strong and clear system in which the superior is authorised to give instructions and orders to subordinates and they are obliged to follow these instructions and orders. The superior can be pretty certain that his or her orders will be carried out because a subordinate can suffer sanctions and even be dismissed without the possibility to find another job. That is nowadays true even when it comes to the most specialised workers. Besides, every economic corporation or enterprise, even if it is based on the law, can operate against the law and be “detached from the law”.²² That is why it is not possible to reject this concept *a limine* and without critical analysis even in cases of economic crimes committed through economic enterprises (Urban, 2004: 260).²³ A few German authors of very high reputation support this thesis. One of them is Kristian Kühl, also a very well-known German professor and the author of one of the most popular German handbooks of the general part of criminal law. In his handbook he says that the notion of the organised structure of power is only exceptionally applicable to economic enterprises if these are structured in a hierarchical way so that direct perpetrators can be easily replaced with others.²⁴ Bearing all the above mentioned, we may conclude that white-collar crime cases with larger economic consequences have enough gravity and importance to be discussed in context of organised structure of power concept. Only necessary precondition for that is that such cases meet two key criteria: the existence of hierarchical organisation and the replaceability of direct perpetrators.

3. Application of the Concept to «FIMI-Media» Case?

In previous chapter we have defined the requirements and the scope of organised structure of power. In this chapter we will try to put this debate in Croatian context. Croatia, a transitional post-communist country that has gone through the war, is suffering the consequences of bad (and corrupt) governing during the aftermath and global economic crises, with a public debt of almost 26 billion EUR.

²² Joerg Brammsen/Simon Apel, Anstiftung oder Täterschaft? «Organisationsherrschaft» in Wirtschaftsunternehmen, *Zeitschrift für das Juristische Studium*, 3/2008, p. 257 – 258.

²³ See also Caroline Urban, *Mittelbare Täterschaft kraft Organisationsherrschaft, Eine Studie zu Konzeption und Anwendbarkeit, insbesondere im Hinblick auf Wirtschaftsunternehmen*, (Osnabrück: V&R Unipress, 2004), p. 260.

²⁴ Kristian Kühl, *Strafrecht – Allgemeiner Teil*, 6. Auflage, (München: Verlag Vahlen, 1997), § 20, 73b.

Last couple of years were marked by the initiation of several major procedures against former power holders, especially against the former Croatian Prime Minister Dr. Ivo Sanader. All of these procedures are cases of economic crime and extracting state money through misuse of power and authority. One case is especially interesting in the context of our subject. It is the so-called "FIMI-media" case. Below, we will analyse FIMI-media case facts and then we will try to apply two key requirements on these facts.

3. 1. FIMI-Media Case Facts

According to the verdict of County court in Zagreb (*Verdict No. 13 K-US-8/12*, 11 Mar 2014),²⁵ several persons who were holding very powerful positions in the Croatian government joined together with the purpose of achieving a great amount of illegal benefit for themselves and their political party.²⁶ Prime Minister Ivo Sanader is convicted with connecting other accused persons in the period between 2003 - 2009 in an organisation with the intention to extract state money.

Their *modus operandi* was the following: in closed meetings, Prime Minister Ivo Sanader, personally or through his closest associate, the State Secretary Mladen Barišić, periodically gave orders to the directors of state companies to draw up a business contract with a company called FIMI-media. This was a small private marketing company. Some ministers in the government and other heads of state institutions acted likewise. These contracts were made without public contest and by breaching provisions of the Act of Public Bargaining. FIMI media provided services at prices that were higher than regular prices and gave fictive bills for services they did not actually deliver and the directors and leaders approved the payments. After that, the owner of the company would give the money in cash to State Secretary Mladen Barišić and he would bring it to Prime Minister Ivo Sanader who accordingly kept the money for himself and for his political party *Croatian Democratic Community* (Hrvatska demokratska zajednica, further: HDZ).

²⁵ This verdict is available on <https://sudovi.pravosudje.hr/zszg/img/File/presuda%20sanader%20fimimedia.pdf>; 18 Aug 2014.

²⁶ These persons are: former Prime Minister Ivo Sanader, former State Secretary and head of custom Mladen Barišić, former spokesman of the government and head of election headquarters of their political party Hrvatska demokratska zajednica (HDZ) Ratko Maček, chief accountant of HDZ Branka Pavošević and director of FIMI-media Nevenka Jurak. Besides them the Court also convicted two legal entities: HDZ and FIMI-media.

These funds were never recorded in the administrative records of HDZ. Convicted persons have acquired around 31 million HRK (about 4 million EUR) of taxpayers' money. County court in Zagreb found them guilty as co-perpetrators (Sanader, Pavošević, Jurak) and as abettors (Barišić and Maček) for joining to commit the crimes and misuse of their position. Ivo Sanader is sentenced to nine years in prison.²⁷

Although Sanader did get the highest sentence, one could raise a question whether legal qualification of him as a co-perpetrator is a proper one to express the real nature of his position. If one bears in mind that Ivo Sanader was a PM and a president of HDZ with huge authority, it could be argued that the relationship between him and other involved persons was more of vertical than of horizontal manner. If that is the case, than it would be logical to consider other possible models of participation. In that context we will try to use the above described key requirements of indirect perpetration through organised structure of power to these case facts and than conclude whether this model could also be applied in this situation.

3. 2. The Existence of a Hierarchical Organisation?

As we pointed earlier, the first requirement is that the organisation involved is of such kind that it has clearly established hierarchy. The person (or persons) at the top of the organisation is aware of this circumstance and he or she is using it to achieve illegal purposes. In this case the organisation is political party HDZ.

HDZ was and still is Croatian largest political party with over 200.000 members. It was founded by Croatian first president Franjo Tuđman in 1989. and in it enjoys a reputation of the party which is most meritorious for the independence of Croatia. During the incriminated period HDZ was a ruling party in Croatia and it had control over majority in Parliament.

²⁷ The rest of sentences were as follows:

Mladen Barišić – three years in prison; Branka Pavošević – one year and six months in prison; Nevenka Jurak – two years in prison and Ratko Maček – sentenced for parole. FIMI-media was banned from further existence and HDZ was convicted to pay a fine of 5 million HRK (about 650.000 EUR). At the moment, Ivo Sanader is in custody waiting for Supreme Court to decide on his appeal. Others are not in custody.

If one takes a closer look to the Statute of HDZ, it is obvious that party has a strong hierarchy. The most important bodies are presidency and president, who is also a head of presidency. Presidency is authorised to make all important operational decisions and president is responsible for execution of these decisions. In the execution of this task the president is given very broad authorities to take “all necessary measures” (art. 35/2 of the Statute).²⁸

It seems that County court is well aware of this specific structure of HDZ. In its verdict the Court claims that “HDZ, as the leading party in Croatia, presents concentration of powers of decision-making and authority in every segment of social life”. Further, the Court explains that “criminal system did not consist of only five accused people, but also of all those who knew everything and yet kept silent”.²⁹ From this argumentation it is quite obvious that Court recognises HDZ as firmly established hierarchical organization. This brings us to the conclusion that first requirement of organised structure of power has been fulfilled.

3. 3. The Replaceability of the Direct Perpetrator?

County court in Zagreb marked Branka Pavošević and Nevenka Jurak as Sanader`s co-perpetrators in misuse of position. In the reasoning of the verdict Court stated that Pavošević, as a chief accountant, was responsible for finance in HDZ. She has neglected her duty and forged financial books. In Court`s opinion her contribute was substantial to the commission of the crime. Jurak was the director of FIMI-media and was responsible for the company`s operations. She misused her position because she gave fictive and overcharged bills. In other words, her contribute was also substantial to the commission of the crime.³⁰

One could raise a question whether this qualification is a proper one. Namelly, it seems obvious that Pavošević and Jurak were not in equal position with Ivo Sanader. Despite the fact that Pavošević was chief accountant in HDZ, it is unquestionable that she was not equal with Sanader. Sanader was parties president and her boss. As a head of presidency, he was in a position to make final decisions about parties finance.³¹

²⁸ Statute is available on <http://www.hdz.hr/sites/default/files/statut2014.pdf>; 29.09.2014.

²⁹ See *supra* note 24, p. 1 – 5.

³⁰ For Court`s reasoning see *ibid*.

³¹ According to the Statute (art. 37/1/c), presidency runs financial operations of the party.

He is able to give orders to everyone else in the party and that also includes chief accountant. That is why we think that is not adequate to mark Pavošević as Sanader's co-perpetrator. That implies horizontal distribution of roles and that was not the case in this situation. As for Jurak, she was the director of her own private company. However, she got contracts with the state because she was close to Barišić. Besides, the existence of her company was based on these contracts, which is clear from the fact that FIMI-media had no other contracts. Jurak and her company were basically depending on HDZ and Sanader. That makes it inadequate to claim that Sanader and Jurak were in horizontal position.

Beside Pavošević and Jurak there were many others who weren't accused but instead they were witnesses. These others are directors of state companies who acted according to Sanader's orders and signed contracts with FIMI-media. Their relation to Sanader and his associates Barišić and Maček was also more of a vertical than horizontal nature.

With all this in mind, we can conclude that co-perpetration is not an adequate model in this situation. The relationship between Sanader and others involved requires different approach and model of participation that will adequately express the contribution of each of them. In our opinion the most adequate model in this situation is the notion of indirect perpetration through organised structure of power. We think of this case as of typical example in which a person from behind knows that his subordinates will do almost anything he orders. We dare to say that all direct perpetrators are very easily replaceable. Namely, the directors and leaders of state institutions in Croatia are very compliant and dependent of politics. They normally do not have any special qualifications (besides a university degree) or knowledge for their positions. That makes them quickly replaceable if necessary, especially if one bears in mind the large number of unemployed people in Croatia (according to the newest available data 16,3% of population in Croatia is unemployed) and difficulties with finding a job in a destroyed and corrupted economy. The direct perpetrators are well aware of those facts and they are prepared to follow orders without any argument, which, in the normal cause of events, is what the leaders are counting on.. In such a system, any disobedience from subordinates is a rare exception, certainly not something that one would normally expect.

This brings us to the conclusion that the second key requirement of organised structure of power concept has also been fulfilled. Having that in mind we can conclude that it would not be inadequate if FIMI-media case was discussed by Court in context of the notion of organised structure of power. It is possible that this concept would be the better one to express the gravity of each perpetrators contribute to the commission of crimes.

4. Conclusion

In this paper we have shown the basic characteristics of Roxin's theory of the organised structure of power. As we mentioned, that concept is very well accepted in the recent practice of Latin American and German courts and also in the newest practice of the International Criminal Court. This concept is also well-known and accepted in theory, especially by German authors who are giving it a lot of attention. There is a consensus that the organised structure of power is the most adequate model for cases of most serious breaches of human rights and state sponsored violence.

The German authors, however, disagree about the scope of this legal concept: is the organised structure of power a proper solution for economic crime cases and can it be applied to economic enterprises in conditions of democracy and the free market? It seems that most of the German authors do not yet have the courage to extend this notion to the area of economic crime. That is probably influenced by widespread scepticism towards this possibility shown by the creator of this concept Claus Roxin. Despite that, there are authors who think the opposite and German BGH in its newest practice shows a tendency towards such interpretation as well.

Croatian theory has not dealt with this specific problem until now, although it is a very important issue not only from a theoretical, but also from a practical point of view. Adequate models of responsibility are necessary in the current social conditions in Croatia. Only these types of models can satisfy the proclaimed purpose of punishment and regain the trust of the public in institutions and the functioning of the justice system. Given these considerations, we recommend to the Croatian judicial practice not to be afraid to use the notion of indirect perpetration through the organised structure of power in cases of economic crime that involve highly positioned powerful individuals who use their organisations to achieve illegal goals and benefits.

We believe that the following years will show that there are many such potential cases. The continuous quest for proper models of responsibility is a task of theory and practice. In this context, this paper is a small contribution to future debates.

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