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Professor Nataša Petrović-Tomić, PhD[1]
Professor Ivana Bodrožić, PhD[2]

GENERAL ISSUES OF THE REVERSIBLE RELATIONSHIP BETWEEN CRIMINAL AND INSURANCE LAW

ORIGINAL SCIENTIFIC PAPER

Summary

This paper is based *a priori* on the assumption that, within the complexity of the legal system as such and the desired level of its coherence, there exists a relationship of interconnection between criminal law, as public law, and insurance law, as private law, which is characterized by reversibility.

Although fundamentally distinct legal disciplines, in the contemporary era, and in accordance with their primary functions and orientations, criminal law and insurance law share a number of points of intersection and a relationship based on mutual influence. The paper discusses the nature of this relationship in the context of maintaining a functional and sustainable insurance market, which is a significant component of a modern and efficient financial sector. The central research premise is that criminal law should be viewed as the *ultima ratio societatis* in protecting the rights and interests of policyholders, insurers, and reinsurers, i.e. in the broadest sense, the entire insurance industry.

This predominantly theoretical discussion, grounded mainly in the legal-dogmatic method, represents a pioneering contribution of its kind within the domestic legal theory. It is based on the idea that different legal aspects of insurance must be interconnected in order to to ensure the projected level of security, that is, protection

[1] Full Professor, Faculty of Law, University of Belgrade. E-mail: nataly@ius.bg.ac.rs.
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[2] Associate Professor, University of Criminal Investigation and Police Studies in Belgrade. E-mail: ivana.bodrozic@kpu.edu.rs; ORCID https://orcid.org/0000-0001-5010-7832.
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of the insurance market. The authors emphasize the interdependence between the formation of criminal law norms and the conditions of contemporary economic crime, as well as how crime, *vice versa*, shapes insurance services. In conclusion, the authors highlight the importance of further and continuous research in this area, in order to develop adequate *de lege ferenda* solutions within the national criminal legislation.

Keywords: criminal law, insurance law, reversibility, crime and insurance

I Introductory considerations

The criminal law of a modern democratic state is based on a utilitarian principle, which implies that it functions as a rational system of legal norms whose primary role is protective. The fundamental goal and purpose of criminal law is to protect society from criminal behavior, that is, from socially dangerous patterns of conduct that threaten or violate the most important values of individuals and society as a whole.

Insurance law, on the other hand, encompasses a body of legal rules regulating the entire insurance market, which constitutes a significant segment of the modern and efficient financial sector, including insurance contracts, insurance activities, and claims handling. Insurance law is primarily based on the idea of protecting the interests of the insured against potential insured events, more precisely, the occurrence of damage caused by a covered risk. Ultimately, it also incorporates the protection of insurers, reinsurers, and, in the modern context, even third parties outside the contractual relationship.[3] Its protective function is naturally aligned with its etymological meaning. In all languages, the term *insurance* (English: *insurance*, French: *assurance*, German: *Versicherung*, Spanish: *seguro*) signifies safety, security, the provision of protection, etc.[4] By assuming the consequences of a particular event (the insured risk, whose realization constitutes an insured event), the insurer provides protection to the individual, thereby enabling the uninterrupted continuation of their life.[5] This protective function becomes even more prominent in the case of legal entities and business enterprises, for whom unexpected events can cause significant financial losses. Insurance ensures that such events do not disrupt their operations.

[3] Nataša Petrović Tomić, *Pravo osiguranja, Sistem, Knjiga I*, Službeni glasnik, Belgrade, 2019, 41–43.

[4] Helmut Heiss, "Insurance contracts", *Encyclopedia of Private International Law* (eds. Jürgen Basedow et al.), Vol. 2, Entries I-Z, Edward Edgar Publishing, Northampton, 2017, 954–955

[5] To clarify, the protective function of insurance is triggered *post festum*. The insurer does not possess a magic wand to prevent the insured from experiencing natural disasters, accidental injuries, disability, or liability arising from certain actions. Insurance becomes relevant precisely at the moment the insured event occurs. Instead of facing the consequences of an adverse event alone, the insured, or the beneficiary of the insurance, receives compensation or a sum insured, which facilitates the mitigation of the impact of uncertain events.

Within this protective role lies the fundamental connection between these two seemingly unrelated branches of law. Taking into account the complexity of the legal system and the intended degree of its coherence, the authors of this paper analyze the nature and type of relationship between criminal law, as a branch of public law, and insurance law, as a branch of private law. Their mutual focus toward preventing or minimizing harmful consequences forms the basis of their relationship - a relationship whose reversibility and conditionality are the subject of the central discussion in this paper.

With the ultimate aim of determining the prerogatives of their mutual dependence and harmonization, particularly from the perspective of these branches as integral parts of the legal system, the authors raise several groups of questions and offer answers to complex legal issues: What is the relationship between the fundamental principles of criminal law and insurance law? To what extent are criminal law norms shaped by the development of modern forms of economic crime, within which certain criminal offenses may directly target insurance as an economic activity *per se*? Finally, how does crime shape insurance services?

II On the relationship between the principles of criminal law and insurance law

Insurance, as as a legal institution, has a primarily purpose-driven function, which is reflected in the provision of protection.[6] **The protective function of insurance, especially in the modern context, pertains not only to the insured or beneficiary but also extends to persons outside the insurance contractual relationship.**[7] Similarly, the core function of criminal law is protective. **Criminal law aims to be the strongest instrument of state response to socially harmful behavior by prescribing prohibited forms of conduct and corresponding criminal sanctions for violations that harm or endanger the most fundamental values and goods. It is deeply grounded in the idea of exceptionality, embodying the concept of *ultima ratio societatis*.**[8]

Viewed through the prism of the fundamental functions of these two branches of law, the authors begin with a modified version of a Latin maxim used to assess the level of democracy in a society: *Quis custodiet ipsos custodes?* - which poses the question: **Who will guard the guards themselves?** From this, a modified

[6] Marija Karanikić Mirić, „Forma ugovora o osiguranju", *Tokovi osiguranja*, No. 1/2025, 22–23; N. Petrović (2019a), 41.

[7] This refers to the expansion of the protective function of insurance, which arises as a proportional consequence of the continuous development of insurance law. Nataša Petrović Tomić, *Osnovi prava osiguranja,* Faculty of Law, University of Belgrade, Belgrade, 2023, 21–26.

[8] Zoran Stojanović, *Krivično pravo – Opšti deo,* Pravna knjiga, Belgrade, 2019, 3.

and derived research question emerges: who and (how) will guard the guards, i.e. what means and modalities does criminal law, as a branch of law with a protective function, have at its disposal to protect those who provide protection? This involves a dual hypothetical causality intended to answer the question of the place and role of criminal law in the protection of insurance law, or more precisely, the entire insurance market.

Since the systematic study of any branch of law primarily concerns its relationship with other branches within the context of the expected coherence of the legal system, this paper examines these two legal branches, both founded on the idea of fulfilling a protective function, in the context of their mutual relationship. Insurance law, which belongs to the family of civil law, more precisely business law, governs various types of legal relations: property-law relations, status-law relations, and administrative-law relations. In addressing these, it simultaneously applies both private law and public law methods.[9] Criminal law, in contrast, represents a distinct branch of public law.

Both legal branches have their inherent principles that form the foundation and boundaries of their existence as positive legal disciplines. Although, at first glance, questions of principles appear to be predominantly dogmatic-legal, they, *a contrario*, carry significant practical importance. This is because the clarity and direction these principles provide guide the interpretation and application of legal norms, which ultimately represents the most crucial segment of any legal discipline.

The relationship between criminal law and insurance law can be analyzed through the relationship between their fundamental principles. These principles have different objectives but intersect primarily in situations where the behavior of insurance market participants exhibits characteristics of a criminal offense. The fundamental principles of criminal law are: the principle of legality, the principle of legitimacy, the principle of culpability, the principle of humanity, and the principle of proportionality and fairness. The fundamental principles of insurance law are: the principle of good faith and fair dealing, the principle of indemnity, the principle of limited and directed freedom of contract, and the principle of enhanced protection of the weaker party.

1. Brief overview of the principles of criminal law

Starting with the content of the principle of legality, expressed in the Latin maxim *nullum crimen, nulla poena sine lege,* which means that there is no crime and no punishment without a law,[10] it follows that no behavior by participants in

[9] Nataša Petrović Tomić, „O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja: Fenomen 'pokoravanja' ugovora o osiguranju", *Anali Pravnog fakulteta u Beogradu*, No. 1/2020, 100–125.
[10] The formulation of this principle is attributed to the German theorist Anselm Feuerbach and, in the broadest sense, means that "no one can be punished for a certain behavior, nor can a criminal sanction be

the insurance market may be considered a criminal offense unless it is *explicitum* provided for in the Criminal Code (CC).[11] Since the Criminal Code of the Republic of Serbia contains only one criminal offense that explicitly identifies the lawful conduct of insurance activities as its direct object of protection, insurance fraud, Article 223a CC, the principle of legality requires that this offense (like all other offenses in the Special Part of criminal legislation) must be precisely defined.[12]

The principle of legitimacy in criminal law entails that only such criminal law can be considered legitimate whose foundations and limits are deemed socially justified and necessary. Given that insurance is a growing industry and an essential component of the sustainable development of society as a whole,[13] as demonstrated by data from the National Bank of Serbia (NBS), its development[14] emerges as a social value worthy of criminal law protection. With regard to the need to distinguish the criminal offense of insurance fraud as a *lex specialis* provision in relation to the general offense of fraud under Article 208 of the CC, the legitimacy of the incrimination is justified by the significant role the insurance market plays within the broader economic activity of the Republic of Serbia. Since the insurance market is among the fastest growing, and considering that its importance in post-technological society is becoming relevant not only in the context of its primary protective function, but also in its role within the so-called risk society, the existence of a criminal law norm that contributes to strengthening the capital of trust has clear and undeniable social significance.

In the context of the principle of culpability, which in criminal law implies individual and subjective responsibility, meaning that each person is liable solely for their own actions, based on which the state, as the bearer of the *ius puniendi* (right to punish), may impose a socially and ethically appropriate punishment, the sanctioning of perpetrators of insurance fraud, as well as of all other criminalized behaviors that may more broadly apply to the field of insurance as an economic activity *per*

imposed, if at the time the behavior occurred, it was not already prescribed by law as a criminal offense, and if no penalty was prescribed for it." – Z. Stojanović, 20.

[11] The Republic of Serbia adopted a new CC in 2006 (*Official Gazette of the Republic of Serbia*, Nos. 85/2005, 88/2005 – correction, 107/2005 – correction, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019, and 94/2024), which was the result of years of efforts to codify substantive criminal law. Codification serves as a legal mechanism that facilitates legal application by systematizing most relevant provisions within a single legal act. This law has been widely regarded by both scholars and practitioners as a modern, liberally oriented code, firmly grounded in utilitarian principles, and one that establishes an optimal balance between fundamental human and civil rights on the one hand, and necessary state repression on the other. Ivana P. Bodrožić, "Kontinuirani krivičnopravni ekspanzionizam – na raskršću politike i prava", *Srpska politička misao*, No. 2/2020, 384.

[12] The principle of legality consists of four elements: *lex scripta, lex praevia, lex stricta*, and *lex certa*. In this context, the reach of the principle of legality refers to the need for the provision incriminating insurance fraud to be as specific and precise as possible.

[13] Ivana Soković, "Značaj osiguranja i perspektive razvoja u Srbiji", *Tokovi osiguranja,* No. 2/2024, 265.

[14] Which still lags behind the EU average in terms of insurance premium share of GDP and premium per capita. *Ibid*., 274.

se,[15] must be grounded in culpability. More precisely, on its presumed form - intent, and only exceptionally on negligence, in cases where the law *explicitum* prescribes punishment for this milder degree of fault.

The principle of humanity and the principle of proportionality and fairness, as in all other instances of criminal law protection, also apply in cases concretized wrongdoing related to the insurance market. These principles require a humane approach toward the offender and the imposition of a punishment that is appropriate in both type and degree, i.e. proportionate and fair in relation to the specific form of wrongdoing committed.

2. On the principles of insurance law

When it comes to the principles of insurance law, the principle of good faith holds primary importance. According to the Law of Contract and Torts (ZOO), parties to contractual obligations are required to act in accordance with the principle of good faith and fair dealing when establishing and performing obligations arising from such relationships, i.e. to execute contracts *secundum bonam fidem et consuetudinem mercatorum*.[16] Although this principle may be accordingly applied to insurance law, insurance law theorists pay special attention to it, elevating it to the status of the supreme principle of insurance law.[17] The essence of this principle can be briefly expressed as follows: both the policyholder and the insurer are required

[15] Insurance is among the economic activities marked by strong development potential. It may also be viewed as a kind of civilizational phenomenon, having evolved in direct proportion to humanity's growing need for protection and security. This phenomenon has not escaped criminal law. The range of human behaviors deemed criminal and codified in the Special Part of a country's criminal law is known as the dynamics of incrimination. Though criminal law's primary function is protective, the evolution of crime and associated fear, especially the security paranoia of modern times, has led to the assignment of a security function to criminal law. This is a function alien to its original purpose and drives criminal law into a full-blown crisis of legitimacy.
Changes in life conditions and parallel developments in crime have led to increased demand for both insurance and more extensive criminal law protection.
In the context of insurance law and the insurance market, this reflects a positive development trend of a business activity aligned with the traditional stages of economic cycles. However, in criminal law, the tendency toward preventively oriented criminalization and the use of criminal law in the early phases of criminal progression must be viewed as negative criminal policy tendencies, ones that lead criminal law into a crisis of legitimacy and reduced applicability. I. Soković, 278; Đorđe Ignjatović, *Kriminologija*, Faculty of Law, University of Belgrade, 2021, 155; Jelena Radović Stojanović, *Osnovi ekonomije,* University of Criminal Investigation and Police Studies, Belgrade, 2024, 180–181; and Ivana P. Bodrožić, *Terorizam kao kategorija nacionalnog i međunarodnog krivičnog prava,* University of Criminal Investigation and Police Studies, Belgrade, 2022.

[16] ZOO, art.12. For more on the principle of good faith and fair dealing, see: Slobodan Perović, *Obligaciono pravo, Knjiga prva,* 7th Edition, Službeni glasnik SFRJ, Belgrade, 1990, 56–61.

[17] Rebekah Dixon, *A Leap of Good Faith: A Possible Response to Unfair Claims-Handling Practices in Insurance,* Otago, 2012, 3–8.

to act with particular good faith in their dealings with the other contracting party. Specifically, they must disclose to the other party any circumstance (fact) that affects the risk and the amount of the premium prior to the conclusion of the contract.[18] Historically, the principle of good faith emerged as a mechanism to overcome informational asymmetry, which impacted the business performance of insurers.[19] Since the applicant for insurance possessed all relevant information about the risk, the duty to disclose all circumstances relevant for risk assessment was introduced based on this principle. Interestingly, at the time this principle was introduced, the emphasis was placed solely on the insured's duty to disclose all risk-related information to the insurer, while no such corresponding obligation for the insurer was recognized.[20] It was only under the influence of consumerism, grounded in the principle of good faith and fair dealing, that a pre-contractual duty of disclosure by the insurer to the policyholder was introduced.

The principle of good faith and fair dealing "serves to moralize the law, to reinforce its ethical dimension, by limiting freedom of contract and **establishing a standard of conduct toward the other party that must be respected during negotiations, contracting, the exercise of rights, and the fulfillment of obligations**".[21] It is important to emphasize that this principle governs the reciprocal treatment of parties to the obligational relationship, both in its formation and in the execution of rights and obligations. **From this principle arises the duty on each party to consider the interests of the other party, and above all, their legitimate expectation or trust that the other will behave in a loyal, reliable, consistent, and considerate manner**.

The principle of good faith and fair dealing rests upon the concept of causality, specifically, the causal link between damage and the insured risk, in the same way that criminal law requires the establishment of causality between the act and the consequence of the criminal offense in order to assess the degree of culpability. In this broader sense, a potential conflict may arise between the presumption of innocence, *in dubio pro reo - when in doubt, in favor of the accused,* which is a fundamental principle of criminal procedure law, and the principle of good faith and fair dealing. An example would be a case where an insurer refuses to pay out the insured sum due to suspicion of insurance fraud, while the criminal court has not yet determined the perpetrator's guilt in a lawfully conducted criminal proceeding.

[18] John Lowry, Philip Rawlings, *Insurance Law, Doctrines and Principles,* Second Edition, Hart Publishing, Oregon, 2005, 77–78.

[19] Nataša Petrović Tomić, Mirjana Glintić, "The Hybridization of the Regulatory Framework of Insurance Contract Law: Elements of a New Setting", *Annals of the Faculty of Law*, No. 2/2024, 223–250.

[20] Herman Cousy, "Changing Insurance Contract Law: An Age-Old, Slow and Unfinished Story", *Insurance Regulation in the European Union: Solvency II and Beyond* (eds. Pierpaolo Marano, Michele Siri), Springer International Publishing, 2017, 35.

[21] Marija Karanikić Mirić, *Obligaciono pravo*, Službeni glasnik, Belgrade, 2024, 78.

In brief, the principle of indemnity means that insurance may cover the entire damage but no more than the actual damage suffered.[22] The indemnification from insurance cannot exceed the amount of damage the insured suffered due to the insured event.[23] The purpose of insurance is not to improve the insured's financial situation after indemnification, but to restore their previous financial position.[24] The application of the indemnity principle requires that in each specific case, the damage suffered must first be determined. In addition to accurately assessing the damage incurred, it is essential to consider the insured sum, as it represents the upper limit of the insurer's obligation. Furthermore, it significantly influences the amount of the insurance premium. The value of the insured item at the time the damage occurred is also relevant. Insurers cannot calculate compensation in accordance with the principle of indemnity without considering the value of the item at the time the insured event occurred. The burden of proving the value of the item lies with the insured.

The principle of indemnity prescribes that in exercising insurance rights, the insured may claim only actual damages and not pursue any unjust enrichment. This is, following criminal law rules, aligned with the notion that no one may retain property derived from a criminal offense.

Freedom of contract, in insurance contract law, is more limited than in other types of contracts. Due to the nature of this complex contract (which procures a complex and intangible financial service) and the typical consumer position of the party acquiring the insurance service, the legislator intervenes more extensively in the insurance contractual relationship. For this reason, we are inclined to associate the sources of insurance contract law traditionally with the feature of detailed regulation.[25] From the perspective of both the insurer and the insured, freedom of contract is essentially reduced to the freedom to choose the type of insurance contract they wish to conclude. And that only within the domain of voluntary insurance. When dealing with risks that have a pronounced social connotation, even freedom of coverage choice does not exist; instead, the contract is concluded to fulfill a legal obligation. This aligns with the general provisions of the ZOO, which, at the beginning of the

[22] Jasna Pak, *Pravo osiguranja*, Singidunum University, Belgrade 2011, 229.

[23] "In a business relationship based on property insurance, regardless of the insured amount, the amount the insured is entitled to cannot exceed the extent of the damage suffered." (Judgment of the Commercial Appellate Court, Pž 7279/2014(1) of November 24, 2014 – Judicial Practice of Commercial Courts – Bulletin No. 1/2015)

[24] Rafael Illeskas Ortiz, "Principios Fundamenstales del Contrato de Seguro", *Derecho de Seguros y Reaseguros*, Liber Amicorum en homenaje al profesor Arturo Díaz Bravo (ed. Carlos Ignacio Jaramillo), Ibañez, Bogotá, 2015, 17–18.

[25] Nataša Petrović Tomić, „Razvoj ugovora o osiguranju u jugoslovenskom i srpskom pravu", *Razvojne tendence v obligacijskem pravu, Ob 40-letnici Zakona o obligacijskih razmerjih* (ed. Damjan Možina), Inštitut za primerjalno pravo, Pravna fakulteta, Ljubljana, 2019, 389–412.

section on contract conclusion, contains an article titled "Mandatory conclusion and mandatory content of the contract" (Art. 27).

In a branch of law that regulates relationships between parties with unequal familiarity with the subject of the transaction and/or unequal economic power, freedom of contract in its original form cannot be sustained. The extent to which freedom of contract is limited depends primarily on the importance of the issue for the position of the weaker party. If a regulation directly concerns the interests of the weaker party, the legislator will resort to limiting freedom of contract through mandatory norms. If, however, it is sufficient to provide the insurer with guidelines on how to proceed regarding a particular matter, the legislator may opt for directed freedom of contract, achieved by a semi-mandatory method.

In regulating insurance contracts, the legislator has used a general provision to impose limitations on freedom of contract in two primary ways: first, by introducing the obligation to conclude a contract, and second, by partially or fully prescribing its content. Numerous special regulations impose on the insured the obligation to conclude an insurance contract. Correspondingly, insurers engaged in compulsory types of insurance are required to accept offers that do not deviate from the terms under which they typically provide such insurance. Moreover, there are instances where insurers are required to accept an offer for voluntary insurance contracts as well. The best example is voluntary health insurance, which only recently received statutory legitimization.[26] As for the mandatory content of insurance contracts, it is essentially prescribed by the Law of Contract and Torts (ZOO). Given that in the field of insurance, mandatory content dominates, along with the existence of the two aforementioned limitations on freedom of contract, it is evident to what extent freedom of contract has been derogated. It is not merely about the parties being obliged to obtain some form of insurance coverage. Their freedom of contract is even more affected by the legislative imposition of mandatory contract content, coupled with sanctioning mechanisms for any contractual provision contrary to the mandatory legal content, even if such provision was mutually agreed upon by the parties.

The principle of enhanced protection of the weaker party is the first association with modern insurance contract law. However, this principle was already familiar to legal systems that codified insurance law in the early 20th century. In first-rate legal systems (such as German and French law), long before the development of consumer contract law, there existed a multitude of statutory provisions aimed specifically at protecting the weaker party in insurance contracts.[27] In that sense, *insurance*

[26] Voluntary health insurance is not truly voluntary. The Health Insurance Act (ZZO) introduced an obligation for insurers offering this type of insurance to conclude a contract under the terms prescribed by law and secondary legislation, regardless of the risk to which the insured is exposed, including age, gender, and health status. See: N. Petrović Tomić (2019a), 503–505.

[27] Protection of the weaker party is "the guiding idea in the history of insurance". See: Yvonne Lambert-Faivre, Laurent Leveneur, *Droit des assurances*, Dalloz, Paris, 2011, 1; Mandep Lakhan, Helmut Heiss, "Towards

contract law may be seen as a precursor to consumer protection law.[28] The difference lies only in terminology: whereas we explicitly speak of consumer protection in the context of insurance services today, in the early 20th century, the prevailing notion was the protection of the insured, the beneficiary, and, more generally, the party in a weaker position.

The legislative regulation of insurance contracts through mandatory norms has long served as an instrument of protection for the insured against the insurer, predating consumer legislation. Before that legal branch developed, European legislators sought to prevent the use of clauses unfavorable to the insured through the implementation of mandatory rules. The most harmful to the insured were unilaterally drafted clauses on nullity, excluded damages, and loss of insurance rights.[29] Additionally, the "originality" of insurance law lies in the use of so-called *semi-mandatory* or *unilaterally mandatory provisions*, which remain in force today. These norms were the foundation of insurance contract protection mechanisms in earlier times. At the current stage of development, one may speak of the emergence of *consumer insurance contract law* as a sub-branch of (contractual) insurance law.

The principle of enhanced protection of the weaker party and the detailed regulation of insurance contracts have gradually led to the retreat of the principle of contractual freedom in this area of contract law. Namely, today we can speak of a principle of limited and directed contractual freedom, which has emerged in response to numerous legislative interventions in insurance contracts.[30]

By combining the fundamental principles of criminal law and the principles of insurance law, two entirely different legal regimes converge. One is public law nature, focused on sanctioning socially harmful behavior, and the other is predominantly private law, regulating contractual relations between insurer and insured. This interaction of principles indicates that **criminal law, consistent with its role in relation to other legal branches, serves as a means of *last resort* in responding to unlawful conduct within the insurance sector**. **It remains profoundly subsidiary, highly fragmented, and accessory to the principles and legal norms of insurance law.**

Subsidiarity is reflected in the fact that **c**riminal law only intervenes when regular mechanisms for regulating the insurance activities prove ineffective. Fragmentation is reflected in the existence of only a single incriminating provision - insurance

a European Insurance Contract Law: Restatement – Common Frame of Reference – Optional Instrument?", *Utrecht Journal of International and European Law*, Vol. 26, No. 71/2010, 1–11.

[28] Nataša Petrović Tomić, *Zaštita potrošača usluga osiguranja*, *Analiza i predlog unapređenja regulatornog okvira,* University of Belgrade Faculty of Law, Belgrade, 2015, 54–55.

[29] The French Insurance Code contained 83 provisions on insurance contracts, 61 of which were mandatory, and the remaining 21 semi-mandatory. Y. Lambert-Faivre, L. Leveneur, 160.

[30] N. Petrović Tomić (2020), 100–125.

fraud, found in *Chapter XXII of the Criminal Code on economic offence.* Accessory character stems from the dependence of criminal law on the primary instruments and sources of insurance law, which define the key concepts that criminal law aims to protect in a reinforced manner.

III The criminal code and the incrimination of socially harmful conduct patterns in the insurance market as a form of modern contemporary crime

In contemporary society, the economic development of a country and the conduct of economic activities have acquired such significance that the state increasingly intervenes in economy to establish and maintain normal relations among economic entities in a manner aligned with national economic interests and the needs of its citizens. Under such circumstances, various new forms of criminal behavior emerge, which, as a social phenomenon, always adapt rapidly to the prevailing societal conditions.

As economic life is always dynamic and subject to change, economic crime likewise evolves quickly in terms of its forms and structure. Accordingly, the criminal law response to this type of crime is gaining increasing importance, resulting in a growing number of legal, and specifically criminal, regulations in this area.[31]

There are significant difficulties in defining the concept of an economic criminal offense. In the proper sense, it refers to socially harmful behavioral patterns whose punishment primarily serves to protect the economic system and its functioning. The primary purpose of criminalizing this category of offenses is to prevent the erosion of trust in the economic system. Among other things, regarding the economic model deemed desirable for protection under criminal law, the dominant view is that it is the market economy model.[32]

Given that the share of economically motivated crime in the Republic of Serbia is relatively high, by aggregating crimes against property and against the economy accounts for 48.6% of all criminal offenses that are economically motivated. Although varied in their legal nature, these offenses share a underlying economic motives and are, thus, registered as such in the annual reports of the Statistical Office of the Republic of Serbia.[33] This data serves as material legitimacy for the existence

[31] Đorđe Đorđević, Ivana Bodrožić, *Krivično pravo – Posebni deo*, University of Criminal Investigation and Police Studies, Belgrade, 2024, 177.

[32] Zoran Stojanović, *Krivično pravo – Posebni deo,* The University of Novi Sad Faculty of Law, Novi Sad, 2022, 176–177.

[33] The high share of economically motivated crime in overall crime means that economic factors have a significant influence on criminal activity and represent one of the more important causes of crime

of offenses against the economy and is one of the legislative motives behind their incrimination. As insurance law has emerged as one of the fastest-growing branches of the economy, its development is paralleled by the emergence of a significant area in which new forms of criminal behavior arise, which have the potential to be addressed as criminal offenses.

In the positive criminal legislation of the Republic of Serbia, the Criminal Code (CC) is considered the principal legal act that defines the vast majority of behaviors deemed criminal offenses. Nevertheless, following the codification of criminal legislation in 2006, certain special provisions, commonly referred to as subsidiary criminal legislation, have remained in force due to specific legislative and technical reasons. These contain individual criminal provisions and distinct criminal offenses.

In the field of insurance, the only criminal offense that directly protects insurance activities is the offense of insurance fraud, as prescribed in Article 223a of the CC. This offense is classified among crimes that collectively aim to protect the economy.[34] This is justified.

In addition to this criminal offense, numerous other incriminations may be used to protect the rights and interests of participants in the insurance market,[35] yet insurance fraud is regarded as the *classical lex specialis* provision in this area.

Alongside this offense, the Insurance Law (ZO),[36] under *Chapter XV* (Penal Provisions), Section 1 (Criminal Offenses**)**, sets forth three specific criminal offenses related to insurance: unauthorized performance of insurance activities (Art. 256 ZO),[37]

in the Republic of Serbia. Jelena Radović Stojanović, *Kriminal i ekonomija Srbije,* University of Criminal Investigation and Police Studies, Belgrade, 2021, 55–57.

[34] As the Serbian criminal law environment is characterized by a dynamic phase of legislative interventionism, this chapter on criminal offenses was among those that underwent significant and thorough changes in 2016, within the framework of no fewer than eight amendments to the CC enacted since 2006 up to the present. At that time, the offenses in this chapter were substantially improved both structurally and substantively; they were systematized by similarity, and as many as seven new incriminations were introduced, an evident example of criminal law expansionism, which, as a criminal-political trend, must be labeled as negative. Additionally, terminological corrections and normative reconfigurations were made, and three offenses were decriminalized. Nataša Delić, *Krivično pravo – Posebni deo*, Faculty of Law, University of Belgrade, Belgrade, 2023, 242–243; I. Bodrožić (2020).

[35] Fraud in the conduct of business activity (Article 223 of the CC); embezzlement in the conduct of business activity (Article 224 of the CC); abuse of trust in the conduct of business activity (Article 224a of the CC); damage to creditors (Article 233 of the CC), among many others.

[36] *Official Gazette of the Republic of Serbia*, Nos. 139/2014 and 44/2021.

[37] **Unauthorized conduct of insurance activities:** A responsible person within an insurance company, reinsurance company, insurance brokerage company, insurance agency, or among insurance agents, who engages in insurance activities without obtaining authorization from the National Bank of Serbia, shall be punished for a criminal offense with a prison sentence ranging from three to six years. A responsible person of a legal entity who, in the capacity of a service provider, enters into insurance contracts, or contracts that, by their legal nature, constitute insurance contracts, with other persons, shall be punished for a criminal offense with a prison sentence ranging from three to six years.

issuing false opinions and reports (Art. 257 ZO),[38] and issuing false assessments (Art. 258 ZO).[39]

The criminal offense of insurance fraud was introduced into the CC in 2009. In its original version, it was classified under *Chapter XXI Criminal Offenses Against Property*, as Article 208a, and represented a specific form of the general offense of fraud. Thus, insurance fraud represented a specific legal norm, standing in a *lex specialis derogat legi generali* relationship to the general offense of fraud under Article 208. The act of insurance fraud in this original 2009 version involved inducing another person, in connection with insurance, to act to the detriment of their own or another's property, either by commission or omission. The law, in that version of the offense, specified typical forms of conduct such as falsely presenting facts, concealing facts, submitting false documentation, or otherwise misleading or maintaining a state of deception. The elements of crime, as a subjective characteristic, included the intent to unlawfully obtain material gain for oneself or another. The aforementioned activities had to be undertaken in relation to insurance, without specifying the type of insurance involved. The offense included two aggravated forms, involving more severe consequences, and one basic form.[40]

As a special type of fraud related to the insurance industry, the elements of crime of insurance fraud corresponded to, or overlapped with, those of the general offense of fraud, as a classic property crime.[41]

[38] **Providing false opinions and reports:** An authorized actuary or auditor who, contrary to the provisions of this law, prepares a false opinion or report shall be punished for a criminal offense with a prison sentence of one to three years.

[39] **Providing a false assessment:** A responsible person within an insurance company, reinsurance company, insurance brokerage company, insurance agency, or among insurance agents, who prepares false assessments or statements when determining and evaluating risks and damages, shall be punished for a criminal offense with a fine or a prison sentence of up to three years.

[40] Ljubiša Lazarević, *Komentar Krivičnog zakonika*, Second Revised and Expanded Edition, Faculty of Law, Union University, Belgrade, 2011, 704.

[41] **Insurance fraud**, in its original version from **Article 208a** of the 2009 CC, read as follows:
(1) Whoever, with the intent to obtain unlawful material gain for themselves or another, misleads someone, by misrepresenting or concealing facts, providing false opinions or reports, submitting false assessments, presenting false documentation, or by otherwise deceiving or maintaining a state of deception, in connection with insurance, and thereby induces that person to act or refrain from acting to the detriment of their own or another's property, shall be punished with a prison sentence of six months to five years and a fine. (2) Whoever commits the act referred to in paragraph 1 of this Article solely with the intent to cause harm to another, shall be punished with a prison sentence of up to six months and a fine. (3) If the offense referred to in paragraphs 1 and 2 of this Article results in material gain or damage exceeding 450,000 dinars, the offender shall be punished with a prison sentence of one to eight years and a fine. (4) If the offense referred to in paragraphs 1 and 2 of this Article results in material gain or damage exceeding 1,500,000 dinars, the offender shall be punished with a prison sentence of two to ten years and a fine. Dragoljub Simonović, *Krivična dela u srpskoj legislativi,* Službeni glasnik, Belgrade, 2010, 414.

However, the 2016 amendments to the CC, through which the legislator significantly intervened in the area of criminal offenses against the economy, had a notable impact on the incrimination of insurance fraud. The offense was reclassified**,** moving from the chapter on criminal offenses against property to the chapter on criminal offenses against the economy. This is considered desirable, as the protected legal interest under the new criminal offense, though it retained the same name but modified legal elements, is now insurance as an economic activity.

The reasons justifying this major legislative intervention include, first, the primary protected object**,** namely, what the analyzed criminal offense seeks to protect in the first place. Secondly, they relate to the necessity of effectively safeguarding against so-called insurance fraud[42] in a manner consistent with the approaches adopted by most comparative criminal law systems.

As the Republic of Serbia is a candidate for European Union (EU) membership, it is undergoing comprehensive legal reforms**,** including efforts to harmonize criminal law provisions as well. The criminal offense of **insurance fraud,** as regulated since 2016, remains in effect under the 2024 version of the CC**,** in **Article 223a**:

(1) Whoever, with the intent to collect the agreed sum from an insurance company, destroys, damages, or conceals the insured item and then reports the loss, shall be punished by imprisonment from three months to three years.

(2) The same punishment as in paragraph 1 shall apply to anyone who, with the intent to collect the agreed sum from an insurance company for bodily harm, injury, or health impairment, causes such harm, injury, or impairment to themselves and then submits a claim to the insurance company.

(3) If the acts referred to in paragraphs 1 and 2 result in financial gain or cause damage exceeding four hundred and fifty thousand dinars, the perpetrator shall be punished by imprisonment from one to eight years.

(4) If the acts referred to in paragraphs 1 and 2 result in financial gain or cause damage exceeding one million five hundred thousand dinars, the perpetrator shall be punished by imprisonment from two to ten years.

[42] Through the amendments and supplements, the criminal offense of insurance fraud was more precisely defined, as the offense of insurance fraud (Article 208a of the CC) had previously been practically encompassed entirely by the existing offense of fraud. Insurance fraud constitutes a form of so-called policyholder fraud, which significantly differs from the general offense of fraud. For this reason, it is introduced as a separate criminal offense in many criminal law systems, in line with comparative legal practice. This justifies its introduction as a distinct offense, since, unlike the general offense of fraud, the criminal domain in insurance fraud is defined more broadly, and there is no requirement for inducing or maintaining a misconception on the part of the passive subject.

The criminal offense has a basic form and two aggravated forms. The conduct constituting the basic form is defined alternatively and may consist either of the destruction, damage, or concealment of the insured item or of the reporting of a loss, which itself comprises two acts – causing harm, injury, or health impairment to oneself and submitting a claim to the insurance company.

The object of the act may be either the insured item or the perpetrator.

The offense is committed with intent, and the perpetrator may be any person.

The aggravated and the most severe forms are linked to obtaining financial gain or causing damage exceeding certain monetary thresholds.

This structuring of the criminal offense of insurance fraud, in relation to the offenses specified in Articles 257 and 258 of the Insurance Law, could potentially pose challenges in delineation.

However, the statutory descriptions of these offenses differ sufficiently regarding the definition of the act of the crime of insurance fraud, so that they do not conflict with each other, and there is justification for their parallel existence in these two legal provisions.[43]

IV The role of criminal law in shaping insurance services

Criminal law has traditionally been founded on the principle of its evolutionary nature, encapsulated in the maxim *Ius criminale semper reformandum est* - criminal law is in a state of continual development. It evolves in response to the emergence of new forms of criminal behavior and develops norms aimed at preventing and suppressing new manifestations of criminality. In this process, criminal law remains rooted in its own principles (while also being constrained by them), and it must retain its character of exceptional application. Contemporary European criminal law systems are characterized not only by this evolutionary capacity but also by certain negative criminal policy tendencies, to which the legislator in the Republic of Serbia has not remained immune.[44] Although issues such as legal interventionism, the expansion

[43] Zoran Stojanović, *Komentar Krivičnog zakonika, Tenth revised edition,* Official Gazette, Belgrade, 2020, 748–749.

[44] As criminal law became one of the components of the Union's objectives, the EU acquired explicit competence in the field of substantive criminal law. Minimum rules on substantive criminal law facilitate the principle of mutual recognition, enable the approximation of criminal policies of member states and candidate countries for full membership, and lay the foundation for common definitions of criminal offenses. This, in turn, allows for an effective response to global criminal flows. Therefore, the EU legislator should exercise caution when influencing the shaping of criminal law responses in the process of approximating the substantive criminal law of its member states.
The principles of criminalization provide the legislator with an argumentative framework that can be used to determine whether criminalization is legitimate and justified. At the same time, attention must

of incriminations, and the limitations of such hypertrophied criminal law have been addressed in earlier parts of this paper, particularly where the drawbacks of these tendencies are highlighted, this should not be interpreted as an argument in favor of preserving only the existing form and structure of incriminations.[45]

The development of the insurance market,[46] the influence of new business models and services, and the imperative of ensuring the sustainable development of this sector[47] necessarily lead to the adjustment of criminal law norms. This is a bidirectional process and, from the standpoint of potential legal solutions, it can be examined through several examples.

Criminal law significantly influences the structuring of insurance services by establishing a legal framework that insurance companies must adhere to when designing policies, assessing risks, and processing claims.[48] The key ways in which criminal law shapes insurance services include:

always be paid to the particularities of legal heritage and legal tradition. For a more detailed discussion of the principles of criminalization, negative tendencies, and the future of EU substantive criminal law as a guiding framework for the harmonization of national criminal laws, see: Sanne Buisman, "The Future of EU Substantive Criminal Law", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 30, No. 2/2022, 161–162.

[45] See fn. 15.

[46] At the celebration of the anniversary of the journal *Tokovi osiguranja*, Deputy Governor of the National Bank of Serbia, Željko Jović, presented the following data, which support the development of the insurance market and its role within the overall financial sector: "In the financial sector supervised by the National Bank of Serbia, insurance ranks second in terms of total assets, capital, and number of employees. Insurance premiums per capita amount to 216 US dollars, representing 1.9 percent of the gross domestic product (GDP). For comparison, the premium per capita in developing countries of Europe and Central Asia is 207 US dollars, with a GDP share of 2.3 percent. Data for the first half of this year indicate growth in all parameters within the insurance industry, with total premiums increasing by 13.2 percent compared to the same period last year, technical reserves rising by 12.3 percent, and capital adequacy reaching 212.9 percent, exceeding the statutory requirement. Alongside a profitability ratio of 92.2 percent and a positive interim result of 6.5 billion dinars, these indicators testify to the stability of the insurance sector". "*Četrdeseti rođendan časopisa Tokovi osiguranja*", https://www.dunav.com/cetrdeseti-rodjendan-casopisa-tokovi-osiguranja/, accessed on June 1, 2025.

[47] On the sustainability of development as a *conditio sine qua non* for the entire insurance market, as well as the regulatory framework that accompanies it, illustrated by the example of the initial underregulation of the legislative framework and, consequently, the desired regulatory progress in the field of supplementary health insurance in the Republic of Serbia, see in detail: Nataša Petrović Tomić, "Dopunsko zdravstveno osiguranje u funkciji doprinosa razvoju održivog sistema zdravstvene zaštite u Republici Srbiji", *Tokovi osiguranja*, No. 1/2024, 7–70.

[48] Regarding the ways in which crime influences the demand for insurance, as well as the impact of offered insurance services on the emergence of new forms of criminality within the insurance sector, Tom Baker and Anja Shortland examine five case studies (car theft, art theft, kidnapping and ransom, and credit card fraud). They highlight a co-evolutionary process through which insurers collaborate with policyholders, governments, and both formal and informal third parties to mitigate losses, particularly when criminal innovations destabilize the insurance market.

1. **Definition of criminal offenses and insurance coverage**: criminal law defines what constitutes unlawful conduct (e.g. theft, embezzlement, fraud, destruction of property). Insurers rely on these definitions when drafting policies, such as those covering theft or damage to third-party property. However, insurance policies typically exclude coverage for damages resulting from intentional criminal acts committed by the insured, as criminal law prohibits profiting from criminal conduct.[49]
2. **Impact on risk assessment**: criminal law influences actuarial models used by insurers to evaluate risk. For instance, in areas with high crime rates (e.g. frequent car theft), insurance premiums are typically higher because criminal law indirectly signals an increased likelihood of insured events.
3. **Protection against insurance fraud**: criminal law, particularly provisions addressing fraud, helps shape mechanisms for preventing false claims. Insurers develop services with strict conditions and verification procedures to protect against criminal acts such as fraudulent claims. For example, property insurance policies may require proof of ownership or a police report as part of the claim process.
4. **Liability insurance**: criminal law affects services related to civil and professional liability insurance. For instance, in cases where a criminal offense (such as an intentional traffic safety violation) causes damage, liability coverage may be limited if the insured committed the offense with intent.[50]
5. **Mandatory insurance**: criminal law can require specific types of insurance. In Serbia, for example, the Law on Compulsory Traffic Insurance (which includes criminal law elements in the event of non-compliance) mandates that vehicle owners carry third-party liability insurance, directly shaping this segment of the insurance market.[51]

The phrase *Insurance as crime governance* reflects a concept that the authors of this paper also seek to express in a broader, potentially *de lege ferenda* context. For further reading, see: Tom Baker, Anja Shortland, "How Crime Shapes Insurance and Insurance Shapes Crime," *Journal of Legal Analysis*, Vol. 15, No. 1/2023, 185–196.

[49] Criminal law explicitly stipulates in Article 91 of the CC that: "(1) No one may retain property benefits obtained through the commission of a criminal offense. (2) The benefit referred to in paragraph 1 of this article shall be confiscated under the conditions prescribed by this Code and by a court decision establishing the commission of the criminal offense." Criminal Code, Article 91.

[50] For a detailed discussion on proceedings involving insurers' recourse claims against the insured, as well as issues concerning the determination of liability for causing accidents, see: Milica Goravica, "Utvrđivanje odgovornosti za prouzrokovanje udesa u postupcima po regresnoj tužbi osiguravača protiv osiguranika", *Tokovi osiguranja*, No. 1/2025, 201–206.

[51] For a detailed discussion on the distinction between so-called moral hazard and criminal hazard, i.e. situations in which an individual exhibits a higher tolerance for increasing their exposure to potential risk due to the awareness of limited costs associated with such behavior as a result of having insurance

6. **Compliance with anti-money laundering and counter-terrorism financing laws**:[52] criminal law, particularly in the area of economic crime, imposes obligations on insurers to verify client identities and the sources of their funds. This affects the structure of services, as insurers must implement procedures for identity checks and legal compliance, which may increase operational costs and complicate business processes.
7. **Policy exclusions**: criminal offenses often result in exclusions from coverage. For example, if damage is caused by a terrorist act (a criminal offense under the Criminal Code), standard property insurance policies typically do not cover such events. This has led to the development of specialized products for terrorism risk coverage.

In conclusion, criminal law shapes insurance services by regulating risk, defining coverage conditions, preventing abuse, and ensuring compliance with legal obligations. Insurers must strike a careful balance between client protection and adherence to criminal law standards in order to provide sustainable and legally compliant services.

V Concluding considerations

The characteristics of the legal system, as a set of norms regulating public and private legal relations, determine the mutual relationship between different branches of law. Criminal law and insurance law, within this framework, have a specific-reversible, as confirmed in this paper-relationship.

Primarily, these are branches of law whose fundamental function is protective in nature. Therefore, a connection is established between them based on a shared orientation, i.e. a goal-oriented linkage. In this relationship, criminal law acts as a more forceful and exclusive instrument for protecting legal relations that have not been successfully safeguarded by insurance law norms.

Criminal law protects to the lawful operation of insurance as an activity within the financial sector and, in doing so, directly protects economic activity, es-

coverage, as well as on the requirement that at least two conditions be met for moral hazard to escalate into criminal hazard and imply criminal liability, see: Per-Johan Horgby, Annette Wittkau-Horgby, "Beyond Moral Hazard - Some Thoughts on Criminal Hazard and Insurance," *Nordic Insurance Quarterly (NFT)*, No. 2/2008, 147–153.

[52] The specific features of the new approach to defining terrorist offenses, nomotechnical revisions, and the harmonization with European criminal law standards have led not only to changes within the substantive criminal legislation of the Republic of Serbia but also to amendments in related regulations, such as the Law on the Prevention of Money Laundering and the Financing of Terrorism (*Official Gazette of the Republic of Serbia*, Nos. 113/2017, 91/2019, 153/2020, 92/2023, 94/2024, and 19/2025). For further details, see: I. Bodrožić (2022).

pecially in relation to the collective legal interest protected by the criminal offense of insurance fraud, as regulated in the Special Part of the CC.

Criminal law norms are also contained within the Insurance Law (ZO), demonstrating that this regulation, within the domain of criminal protection falls under the category of subsidiary legislation. However, as confirmed in this paper, such criminal provisions are legitimate and do not create unnecessary overlaps in incriminations.

Respecting its nature as *ultima ratio* and its subsidiarity in relation to other branches of law, criminal law rationally encompasses only one criminal offense, through which direct protection is provided against insurance fraud. Within the framework of positive law, this offense has undergone a notable evolution: not has it only been reshaped but also resystematized in a manner aligned with both European and national criminal law standards. As Elena Maculan and Alicia Gil Gil argue, it is important to maintain the status of criminal law as *ius puniendi* and as an instrument of the state, but not as the only available instrument or an absolute obligation. Rather, it should function as a complementary and subsidiary tool.[53]

The relationship between criminal law and insurance law, observed through this prism, has been illustrated through seven key ways in which criminal law can influence the shaping of insurance services, to ensure sustainability and the desired level of protection across the insurance market.

As a pioneering work in the theoretical analysis of the relationship between criminal law and insurance law, the authors hope that the proposed methods and options for mutual, reciprocal, or reversible, influence will serve as a foundation and *teaser* for further research in this field. Each of these aspects could, on its own, become the subject of a dedicated scholarly article by a specialist in substantive criminal law or insurance law, particularly in direct connection with the practical aspects of their application.

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[53] This allows for the use of criminal law only when it is both useful and necessary. When other mechanisms exist that can provide such protection in a satisfactory manner, or when criminal law, if applied, risks becoming a threat to the very legal interests it is intended to protect, particularly if it ultimately destabilizes the legal system entrusted with that protection, then prosecution and punishment must take a step back and be adapted and limited according to the specific circumstances of each case. Elena Maculan, Alicia Gil Gil, "The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts," *Oxford Journal of Legal Studies*, Vol. 40, No. 1/2020, 157.

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Prevela: ***Tijana Đekić***