

CONCEPT OF NEW CRIMINAL CODE OF THE REPUBLIC OF ARMENIA

(Appendix to RA Government
Protocol Decision N 25 Dated June 4, 2015)

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ISBN 978-99941-0-685-1

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INTRODUCTION

1. Current Status of RA Criminal Code in Force

1.1. RA new Criminal Code came into force on August 1, 2003. Its adoption was conditioned by a range of circumstances. First, the Constitution of independent Republic of Armenia was adopted in 1995 and naturally all the other laws and codes would have to be put in compliance with the provisions of the latter. From this viewpoint the adoption of RA new Criminal Code was even a bit late. Besides, the former Criminal Code was not consistent anymore with the forming and developing economic, social, political and ideological realities in the republic, as well as the existing level of the criminal law science.

1.2. Initially RA Criminal Code performed its mission – being relatively effective means in fight against new forms of criminal behavior emerging and forming as a result of processes taking place in the Republic.

1.3. Having high esteem for the role of the Criminal Code in force in fight against the crime in the Republic – nevertheless, one must mention that the scientific analysis and enforcement practice of its norms came to identify numerous shortcomings of the code. It is not by chance, that around one hundred amendments have been done in the Criminal Code. Moreover, this process is still going on. However, one must mention that very often the amendments made have not rectified the situation, but rather the contrary, they have added to the contradictions and shortcomings of the code. Some of the amendments have been made under the influence of the moment, in regard of a specific case, without taking into account the general logic of the code; the others do not have criminological justification or contradict the modern trends of criminal law theory. A significant part of the amendments made in RA Criminal Code has language inaccuracies, as a result of which the correct application of the norm becomes impossible. However, the most important is that the amendments are not effective.

RA Criminal Code needs also conceptual changes, as in fact it lacks concept in general: our Criminal Code is a synthesis of CIS model Criminal Code and RF Criminal Code, which lacks integrated

structure and is full of contradictions. Naturally the efficiency of the Criminal Code is extremely low.

If we generalize the shortcomings of RA Criminal Code, then we can classify them as by the following types:

- a/ conceptual inaccuracies and ignoring of the criminological reality;
- b/ errors and contradictions and;
- c/ gaps.

1.4. Conceptual inaccuracies and ignorance of the criminological reality

1.4.(1) In envisaging the punishment of this or that crime the legislature must refer not only to the size of the damage incurred, but also to the **criminological reality**, one of the important elements of which is the person that committed the crime. Unfortunately, the legislator almost never takes into account this reality. Based on the “notion of act” RA Criminal Code in envisaging punishment refers to the size of the damage incurred, as a result of which the criminological reality is often ignored and justice is infringed. In particular, RA Criminal Code links the gravity of criminal liability for misappropriation with the size of misappropriation – envisaging large and particularly large amounts as aggravating circumstances of corpus delicti. As a result of this the person that has misappropriated 501 thousand dram, having committed a crime for the first time, by means of theft can be sentenced to 2-5 years of imprisonment; whereas a previously convicted person that has misappropriated 499 thousand dram can be sentenced to up 2 years of imprisonment.

Ignoring the criminological reality entails also disproportion of the punishments envisaged for different types of crimes. In particular, from the standpoint of criminology the murderers represent the largest public danger, whereas the existing Criminal Code envisages the same penalties for murder and banditry. Some other examples can also be quoted.

1.4.(2) One of the fundamental principles of the criminal law is the principle of liability as by guilt. In the theory of the criminal law there are three main concepts about the guilt – dangerous situation, normativistic and psychological. RA criminal legislation is anchored on

the psychological concept, the main provision of which comes to the point that the guilt is the psychological attitude of the person towards his act and its dangerous consequences and is expressed in the forms of intent or negligence. However, the psychological concept often does not allow to ensure the justice and to take into account the criminological realities. In particular, within psychological concept there is intent in case, when the person perceives the factual circumstances of his act and their social significance. Indeed, the legislative definition of the intent does not allow full substantiation of the criminal liability of the crimes committed in the state of affect and heavy alcohol intoxication.

The institution of legal or factual error deals with the principle of liability as by guilt. This matter does not have any legislative solution at this point; whereas in almost all the democratic countries the criminal legislation is regulated with much detail, which contributes to uniform application of the law and ensuring the principle of liability as by guilt.

1.4.(3) Criminal Codes of many countries are based on the "notion of person", according to which the person that committed the crime is punished. Therefore, the punishment must be consistent not only with the crime, but also public danger of the person. This concept has a more pragmatic nature. The main purpose of the punishment is to correct the criminal and his re-socialization. Based on the notion of the act, in many cases, RA Criminal Code does not allow not only ensuring the principle of justice, but also to exercise criminal-legal policy consistent with the modern conditions and criminal law. For example, in RA Criminal Code the crimes are classified according to the gravity of the punishment envisaged. In regard of this the person that committed a grave or particularly grave crime cannot be released, let's say, from criminal liability on the grounds of reconciliation with the victim; vigorous repentance and change of situation. However, the point is that in many cases the person that committed a grave or particularly grave crime can represent less public danger, than the person that committed a medium gravity crime. For example: in a grave crime the person was a supporter or there are many mitigating circumstances, etc. Accordingly, the court must award lenient punishment, which is equal to the punishment envisaged for non-grave or medium gravity crime. However, as the degree of punishment is the basis for the

crime classification, then the act of the person is considered a grave crime with all the entailing circumstances.

From this viewpoint the criteria of releasing from criminal liability and punishment need to be seriously reviewed. For example: currently in case of release from the punishment on parole the mandatory service period of the punishment depends on the type of crime, which is wrong.

1.4.(4) The punishment system has serious drawbacks. Under the existing legislation the court often does not have an alternative to deprivation of liberty. This is the reason that the deprivation of liberty sanction is awarded too often, which has already created problems for penitentiary institutions. Besides, frequent award of deprivation of liberty sanction can contribute to criminalization of the public relations and spread of "thief's laws" in the civil society. The courts often find a way by not awarding the punishment on condition. However, the legislative regulation of this institution with uncertainties, gaps and drawbacks does not contribute to the efficiency of retributive policy. One of the ways to solve this problem is to expand the list of types of sanctions that are real alternatives to deprivation of liberty and introduction of effective and practical mechanisms for their use. Currently the public works, stipulated in RA Criminal Code as alternative to deprivation of liberty, are not effective and for the most part are awarded in case of impossibility to pay the fine. The inefficiency of this type of punishment has several reasons, one of which is too long period (270-2200 hours) and, non-provision in the article of special part of the Criminal Code and freedom of choice given to the convict (the convict himself decides to go for that type of punishment or not).

The punishment arrest in fact is not applied either: one of the reasons is the long period (three months if the shock effect is not justified).

Another way is the improvement of the criminal liability and sanctions release institutions and expansion of application opportunities. In this regard serious improvements need to be done with the institution of reconciling with the victim or in case of practical remorse release from criminal liability; awarding a more lenient punishment than envisaged by the law; on parole release and application of conditional punishment. In particular, it is still unsettled on what needs to be done in case, when

there are several victims, persons that committed several crimes and the victim reconciles with one of them and does not with the others or when the victim is minor or insane or incapable.

Another issue linked with on parole release is its process. In particular, according to the existing Criminal Code, in case of on parole release the court can charge the person with some obligations; however, in reality, as a rule, it does not. Besides, there is not practical mechanism to exert oversight over the released person. The law does not clearly envisage also the criteria, guided by which, the court may release the person on parole sentence.

Concerning the conditional non application of the punishment, then in fact the latter has become an institution contributing to impunity, because no serious restriction is applied in regard of the convict and there is not rehabilitation activity performed with him. Besides, the law does not regulate many issues linked with the application of this institution. In particular, a challenging issue is whether the punishment can be suspended for the crime, which the criminal committed during the probation period awarded for the previous crime. Another issue is that there is no limitation envisaged for the application of this institution.

1.4.(5) The institution of awarding a more lenient punishment than envisaged is not regulated by law. Actually there is no legislative criterion for its enforcement. The law uses an evaluating concept: “exclusive circumstances, which significantly reduce the public danger of the act”. The court must assess on its own whether the circumstances are exclusive or not; have they significantly reduced the public danger or not. It is also wrong to speak only about the public danger of the act, as the exclusive circumstances that the law comes to speak about, are about the motive, purpose of the crime; the role of the criminal and his behavior during the crime or after it. It is obvious that these are first of all features describing the personality of the criminal, but not the danger of the act. This confusion of the concepts does not contribute to the correct perception of the law and its correct enforcement.

1.4.(6) The issues of the punishment award are directly interconnected with the aforementioned. The gaps and shortcomings in this area come to the following:

The existing Criminal Code does not envisage any rule to take

into account the circumstances aggravating or mitigating the criminal liability and punishment. The court itself determines the “value” of this or that mitigating or aggravating circumstance. Accordingly, the issue of certain formulation of the registry of these circumstances and giving the court some guild lines need to be discussed.

Besides, after excluding the institution of crime repeatability there is a gap in fight against the professional criminals. In this regard the issue of necessity of aggravating the punishment in case of precedent needs to be discussed. The existing legislation envisages only the minimal threshold of punishment in case of precedent; however, an order of tightening the maximum punishment needs to be envisaged.

The next question is about the award of the punishment for combination of crimes. Currently the final punishment for combination of crimes is determined by the principle of adding up the crimes – envisaging some limitations. For example, if grave and particularly grave crimes are in the combination of crimes, then the final punishment can be up to 25 years of imprisonment. However, there is a problem here. In particular, grave crime is theft by illegally entering into apartment and swindling in particularly large amounts. Moreover, the combination of thefts is encountered quite often. In case of combination of the crimes, under the circumstances of determining the final punishment, it is possible that the person that committed several thefts or swindling gets a stricter punishment, than the person that committed a murder with aggravating circumstances, which is not fair.

1.4.(7) The protection of the rights and interests of the victim is very important. The punishment system and types of punishments must aim at the compensation of the damage caused by the crime. From this viewpoint one needs to review the attitude towards property seizure and fine; in the first place those must aim at the compensation of the damage. Whereas, under the current legislation such functions are almost never performed.

The regulation of the fine punishment type is another issue. It is envisaged as the main punishment; however, the sizes envisaged by the existing code are very small for the main punishment. Besides, the fine must also be envisaged as additional punishment, as the stipulation of only the main punishment makes the enforcement of

the law impossible. Because of the structure of the sanction the court does not have an alternative, and the convict cannot pay the fine. As a result of this the efficiency of the Criminal Code is heavily decreased.

1.4.(8) A special attention must be paid to the criminal liability and punishment of the minors. In many cases these issues are incompletely regulated in the existing Criminal Code. In particular the punishment system envisaged for the minors needs to be reviewed. Actually there is only deprivation of liberty type of punishment, because the other types of punishment are not effective because of unclear legislative regulation. Besides, one must clearly know that the purpose of liability and punishment of the minors must first of all aim at their upbringing and correction, but not punishment. As a way out the courts award conditional punishment, but this institution does not justify itself. In fact, the institution of coercive measures of education nature does not function.

1.5. Errors and contradictions

Those are expressed in numerous institutions and numerous ways: wrong description of the corpus delicti; language errors; distortion of the meaning of the law because of wrong punctuation; incomplete, wrong settlement of the matter, etc.

1.5.(1) Article 131 of RA Criminal Code envisages liability for abducting a person, where this type of crime is characterized as follows: "Explicit or implicit abduction of a person by means of deception, abuse of trust, violence or by the threat of violence..." As we can see there is an exhaustive list of ways a person can be abducted. It turns out, that if a person is abducted by, let's say, using his helpless state, then there is no corpus delicti.

1.5.(2) Another issue is the aggravating circumstances of corpus delicti. In many cases those are groundless and become a reason of contradictions. For example: we know well the arguments caused by the situation, when in corpus delicti as an aggravating circumstance is the circumstance of combination with another crime. This is well seen linked with aggravating circumstances of murder. There is always a permanent debate of whether the act must be qualified in combination of crimes. If we qualify in combination, then it turns out that the person is punished

twice for the same crime, and if we are done by mere qualification of murder with aggravating circumstances, then seemingly the person is brought to justice for one crime. The solution of this issue is to refrain from envisaging such type of aggravating circumstances, especially, when we take into account that other aggravating circumstances (i.e. with the purpose of hiding or facilitating another crime; with mercenary motives; with the performance of the official or public duties of that person connected with his relative, etc.) settle the matter.

1.5.(3) Another group of errors and contradictions is about the contradictions between RA Criminal Code and International Treaties ratified by RA and RA Constitution. In particular, there is a contradiction between parts 2, 3 and 5 of Article 42 of RA Criminal Code and part 2 of Article 2 of the European Convention on Protection of Human Rights and Fundamental Freedoms, according to which deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force, which is no more than absolutely necessary. Whereas, in case of reading together the parts 2 and 3 of Article 42, it turns out that the existing Criminal Code permits performance of protection by deprivation of life also in case, when it is not conditioned by absolute necessity.

The provisions of international treaties in some corpus delicti are reflected in an error or are not fully reflected.

1.6. Gaps

The review of court practice and analysis of criminal legislation come to show that many issues do not have legislative solution. There are many examples.

Thus, the criminal law theory acknowledges the institution of competition of criminal-legal norms, when the features of the committed act or circumstance exist in more than one articles of the Criminal Code and a question arises, which norm must be applied in regard of the given circumstance. The criminal law theory regulates this issue and it is also regulated in criminal legislation of a range of countries. Whereas, RA Criminal Code does not contain any solution to this issue, which creates practical difficulties: in practice any way of the problem solving can be applied and it will not be possible to ascertain its being wrong or right.

Another example: RA Criminal Code envisages a range of institutions to release from liability or punishment or to mitigate the punishment. Moreover, there can be circumstances combining features of some of them. For example: it is possible to award a more lenient punishment than envisaged by law and conditional punishment. Moreover, there is not competition between these two institutions. A question arises, whether the court can apply these two institutions at the same time. The Criminal Code does not answer this.

1.7. The aforementioned is enough to justify the need of radical reforms of RA Criminal Code. Moreover, it is possible to remove the conceptual mistakes and ignorance of criminological reality only within the framework of a new Criminal Code, because the amendment of a conceptual provision entails logical amendment of numerous criminal-legal norms and the logic of the entire Criminal Code. Even in case of removal of errors and contradictions the matter will have to be only about a new Criminal Code, because the errors and contradictions are so many that deal with almost 90% of the articles of existing code and their correction will entail the changes of the structure and content of the entire Criminal Code.

2. CONCEPTUAL DESCRIPTION OF RA NEW CRIMINAL CODE

2.1. The aforementioned enables us to state that we need a new Criminal Code based on the concept, reflecting the criminological reality, ensuring the efficiency of fight against modern challenges, consistent with the modern tendencies of the theory of criminal law and legislation. Indeed, the new Criminal Code must keep the best that is there in the current code and refrain from such revolutionary changes, which in our circumstances can make their application difficult or impossible.

2.2. The new Criminal Code must aim at settling the following issues:

- to secure the security of person, society and state from criminal harassment;
- to the extent possible reduce the social tension conditioned by crime;
- to ensure the consistency of the criminal legislation with the

modern tendencies of crime development and criminal threats;

- to stipulate clear features to demark criminal acts from non-criminal acts, which will exclude spatial interpretation of the law;
- to guarantee the protection of the rights and freedoms of the crime victim, to create maximum conditions to exercise the right to compensation of the damage caused by the crime;
- to improve the system of criminal-legal coercion measures with the purpose to ensure the balance of coercion, prevention and rehabilitation functions and
- to ensure the relevance of the criminal legislation to the norms of the ratified international treaties, principles of international law, as well as RA Constitution.

The main conceptual features of the new Criminal Code must be the following:

2.3. The new Criminal Code must be based on the **criminological reality** and take into account it. From this viewpoint, in structuring the corpus delicti, envisaging the punishments, stipulating the aggravating or mitigating circumstances it is crucial to take into account not only the dogmatics of the criminal law, but also the achievements of medicine, psychology, criminology and other sciences.

Criminal Code must be based not only on the “notion of act”, but also on the “**notion of person**”. It is necessary to understand that the law punishes not the crime, but the perpetrator of the crime. Therefore, the issues of bringing to criminal liability, awarding punishment, releasing from punishment or liability must be regulated based on not only the belonging of the crime to this or that classification group, but also on the personality of the perpetrator of the crime, his public danger, criminological description, and correction and re-socialization opportunities. In this regard it is necessary that in settling the issues of criminal liability and punishment one must take into account the size of the damage caused by crime, but also the way the crime was committed, instruments and means, motive and objective of the crime, etc.

2.4. The principle of liability as by guilt needs to be consistently ensured on the legislative basis. For this it is necessary to regulate on the legislative basis the institutions of legal and factual errors, to settle the issue of form and type of guilt in case of perpetration of a publicly

dangerous act under affect and alcohol intoxication. In regard of this some elements of the guilt's value theory need to be introduced in the Criminal Code.

2.5. We need to review the system of punishment and practical types of punishment alternative to deprivation of liberty; to improve the existing ones; to envisage means that are alternatives to criminal liability that would enable to save the criminal-legal coercion. The saving of the criminal-legal coercion can be done also by envisaging shorter periods for the deprivation of liberty in a range of the articles of Special Part of the Criminal Code (*depenalization*).

2.7. Criminal Code must pay more attention to the protection of the interests of the victim and compensation of the damage caused. From this viewpoint the property sanctions need to be improved. In the criminal legislation of many countries directly or indirectly is reflected the fact that those are aimed at the compensation of the damage caused. Moreover, these sanctions are regulated with much detail.

2.8. It is necessary to do criminalization and decriminalization.

The decriminalization must deal with the acts, the criminalization of which has been done under the influence of the moment and in regard of one specific case without taking into account the need to criminalize the acts. Besides, in decriminalizing one should take into account a range of factors. Among them there are: low degree of public danger of the act; in particular, importance of the damage incurred and the nature thereof. For example, in case of mere property damage the decriminalization can concern those cases of the given crime, when the property damage incurred is minor or significant, taking into account the fact that the damage incurred can be restored; for example by civil means. Indeed, the point is not about the classical crimes that constitute the core of criminality. Hence, in decriminalizing, one should take into account the possibility of fighting against that act not by criminal-legal, but by administrative or civil means.

Another important factor is, for example, the means of crime. In case of crimes inflicting property damage, especially, when those are committed by imprudence, only those cases of that crime can be criminalized, which are committed in violation of rules of dealing with sources of maximum threat and treating the hazardous materials.

The form of guilt is important. One can decriminalize those involuntary crimes, which inflict merely property damages. In these cases not only the crime has low level of public danger, but also the person that committed the crime has the same; hence, the legal constraint would be too severe.

In some cases partial decriminalization can be done by introducing additional attributes to the crime that will contribute to the narrowing the scope of the acts deemed criminal. In particular, as additional attributes to the crime one can include the motive of the crime, the way it was committed; in case of formal crimes – the socially dangerous consequences. These attributes can become indicators, with the help of which one can separate the criminal acts that represent socially dangerous consequences from non-criminal acts.

The prevalence of this or that socially dangerous act and public attitude towards that act or criminal constraint have also an important meaning for decriminalization. If an act inflicting insignificant damage to the legal good is rare, if the given act is not condemned by the majority of the people or perceived as highly dangerous, then the fight against it by legal means becomes pointless; the Criminal Code does not fulfil its preventive function and the law enforcement agencies become unduly overloaded. That is the reason that in decriminalizing one should make a reference on the prevalence of this or that crime and statistics of the size and nature damages inflicted thereof.

Important criteria for decriminalization can be also the international treaties ratified by RA; RA Constitution: if the aforementioned legal acts consider any act admissible or inadmissible criminal liability for that act, then that act should be decriminalized (for example: no criminal liability should be stipulated for not meeting the contractual obligations, if the person did not have a possibility to meet them or not meeting did not chase socially dangerous objectives).

Based on the aforementioned criteria one should analyze the crimes envisaged by the existing RA Criminal Code. In some cases it is possible to do not decriminalization, but depenalization; i.e. significantly mitigating the sanctions envisaged by the law for that crime or individual expressions thereof – taking into account also the judicial practice. Decriminalization will enable to save the legal

constraint, which is a pressing issue in the modern world.

The criminalization should be exercised by taking into account the same factors. The criminalization is conditioned also by the following circumstances: international perpetrations; global processes and technological progress (in particular – cybercrimes; publicly dangerous acts currently spread in the area of genetics and medicine, various expressions of terrorism, etc.). The criminalization is also conditioned by such new expressions of socially dangerous acts or possibilities thereof, which are consequences of processes taking place in the public relations. In particular such new expressions exist or may emerge in economic relations (raiding; insider illegal activities, etc.). Besides, in criminalizing one should take into account already mentioned factors; degree of public danger of the act; its prevalence; obstacle for the development of public relations; efficiency of fight against that act by other non-criminal means; the fact that similar socially dangerous acts are already criminalized, which has proven its efficiency. The judicial practice can also be an important criterion for criminalization. Currently there are cases, when the law implementer does not have a possibility to give a respective legal assessment to a socially highly dangerous act and act that assimilates a lot to any act envisaged by the Criminal Code, because it is not criminalized or the respective crime is not explicitly formulated; i.e. there is lack of legal certainty. Actually, there is legislation gap. In such cases the way to solve the issue is to envisage clear attributes of such acts in the law.

2.9. Criminal liability for repeated criminals needs to be exacerbated – in regard of them envisaging an order of punishment award, which in fact will comply with the degree of danger of those people. One of the settlement ways is exacerbating the maximum punishment in case of recidivism, which exists in criminal legislation of most of the countries.

2.10. The clarity, unambiguity, legal certainty of the formulations of the norms in the Criminal Code need to be ensured, as well as to exclude language errors and contradictions with other legal acts.

Criminal Code must have a list of concepts with explanations of their content, which will significantly facilitate the job of the person that enforces the law, will ensure uniform perception of the concepts, uniform interpretation and enforcement of the law. Besides, it is necessary to establish the rules for classification of the crimes especially in cases of

combining the crimes and complex crimes.

Criminal Code must regulate the issues and the possible situations as detailed as possible; i.e. whatever can be regulated by law must be regulated. From this viewpoint the clear and detailed description of the provisions concerning the award of the punishment, release from the criminal liability and punishment is of crucial importance.

The aforementioned measures can significantly reduce the corruptions risks of the Criminal Code.

2.11. The relevance of the Criminal Code with the ratified international treaties and RA Constitution must be ensured.

GENERAL PART OF THE CRIMINAL CODE

1. Criminal law

1.1. To ensure the ideological basis of the Criminal Code it is important to clarify the **issues**, for the settlement of which the adopted legislative act aims at. The existing Criminal Code identifies the following issues that are stipulated: the protection of human and citizen's rights and freedoms from criminal harassment, rights of the legal persons, property, environment, public order and security, constitutional order, peace and security of humanity; prevention of crimes. In general, the sequence of enumeration of various values in the legislative formulations comes to witness the priority of their importance and protection. From the formulations mentioned in RA Criminal Code it entails that the state ranks the protection of the property higher, than for example the protection of peace and security of humanity, which, however, logically should have conceded in its importance only to the protection of human rights and security. Consequently, this shortcoming must be eliminated from the new Criminal Code.

At the same time the Criminal Code needs to be amended in a way, as to envisage liability proportionate to the crime committed by the person and award of punishment, to ensure his return to the society as a law-abiding citizen and his reintegration in the society.

1.2. The existing Criminal Code enlists the following principles of criminal law – legality; equality before the law; inevitability of liability;

personal responsibility; liability as by guilt; justice and punishment individualization, humanism. Nevertheless, the aforementioned principles need to be clarified in regard of content and scope of activities.

First, the principle of **legality** needs to be reviewed. The existing Criminal Code stipulates that “the criminality, punishability and other criminal-legal consequences shall be determined only by the criminal law”, whereas this formulation does not reflect the real picture in case of ratification of such international conventions, which contain provisions stipulating liability. In such case the already ratified norms of international document, which therefore constitute an integral part of RA legislation, are enforced directly, except for the cases, when the matter is about determining the criminality and specific type of punishment and degree of punishment. Such situation might arise in case of existence of such a provision in an international document ratified by RA, which in case a crime committed by an Armenian citizen overseas will stipulate elimination of requirement of dual criminalization to bring to liability by RA Criminal Code.

Besides, the nature of the legitimacy is that the act committed by the person can be considered a crime, if the law in force at that moment stipulates so. This is to say that the emphasis must be put on the stipulation of time of the act’s criminality, punishability and criminal-legal consequences.

Therefore, the current description of the legality principle needs to be understood – bearing in mind the fact that the provision stipulating the ban to apply the analogy also needs to be clarified. The formulation of the latter must be clear, showing that in regard of stipulating criminal liability the analogy of the law, as well as right shall be prohibited.

The **principle of equality before the law** currently existing in the Criminal Code unduly and in limited manner repeats the constitutional provision and does not have criminal-legal significant meaning. The main approach different from RA Constitution in the aforementioned approach is that the legislature stipulates that the people that committed a crime are equal before the law and bear criminal liability irrespective of gender, race, color of skin...property or other position – not mentioning the age in this list. Nevertheless, this issue is already regulated by another article of the Criminal Code stipulating the age of criminal liability. Whereas the

principle of equality before the law stipulated by RA Constitution enables not only to regulate the equality before the law of the persons having committed a crime, who are subject to criminal liability, but in a holistic manner safeguards the equality of the persons in using the criminal-legal protection and performing individual criminal-legal institutions; necessary defense; cause damage to the person having committed a crime in catching, etc. In such case, envisaging a provision stipulating the equality before the law in the Criminal Code seems pointless.

The envisaging the **principle of inevitability of liability** in the existing Criminal Code also seems unjustified. The exhaustive list of the grounds and conditions of criminal liability, as well as grounds and conditions of releasing from criminal liability and punishment in the Criminal Code together with the principle of equality before the law stipulated by RA Constitution come to ascertain that every person that committed a crime shall be subject to liability and release from liability and punishment is possible only in cases established by RA legislation. Moreover, there is a drawback in the existing Criminal Code formulation of the principle of inevitability from the criminal liability, as the latter stipulates that it is possible to release from the criminal liability and punishment only in case of grounds and conditions envisaged by RA Criminal Code, whereas the release from the criminal liability is possible also in case grounds of conditions envisaged by RA ratified international documents, but not yet stipulated in RA Criminal Code.

The description of the **guilt liability principle** also needs to be amended. The current formulation of this principle stipulates that the person shall bear criminal liability only for such activities dangerous for public or inactivity and dangerous consequences for public, about which the competent court has confirmed his guilt. In fact, the legislature has stipulated the necessity of the guilt’s existence to bring to the criminal liability; however, it has not clarified that the criminal liability is possible only to the extent that the act committed can be incriminated to him. In particular, if the person’s act has caused grave consequences, then he might be subject to criminal liability and punishment only in case if the person’s intent or negligence in regard of those consequences has been proven.

At the same time the existing Criminal Code stipulates that the

objective incrimination is prohibited, i.e. criminal liability without the damage caused by the guilt. Whereas the legislation needs to clearly stipulate that not only criminal liability without the damage caused by the guilt is prohibited, but also criminal liability without committing the guilt's objective part of the act envisaged by the special part of the Criminal Code or committing that crime by negligence, in describing the corpus delicti of which the legislature envisaged the existence of intent form of the guilt.

The **principle of individualization of liability and justice** also needs to be improved. The existing Criminal Code's formulation puts the emphasis on the fairness of the punishment awarded to the person who committed the crime and other means of criminal-legal exposure; whereas it is necessary to clarify also the need to safeguard the fairness of the specific legislative provision applied in regard of that person. At the same time the ban to sentence the person again for the same crime (not for the second time) needs to be clarified.

The provision of the **principle of humanism** needs to be reviewed, as the formulation of the existing Criminal Code is mostly of declarative nature and is not special in criminal-legal meaning. The existing Criminal Code stipulates that "RA Criminal Code shall serve to ensure the physical, psychological, material and other securities of the person". However, with the same success, other branches of legislation, for example the administrative legislation, serve to ensure security and other interests of the person (as well as legal persons, society and state).

Besides, in presenting the principle of humanism, the existing Criminal Code stipulates that no one shall be subject to torture or cruel, inhuman or degrading treatment or punishment. The aforementioned provision is already envisaged by the Article 17 of RA Constitution and consequently its provision in the Criminal Code as an expression of the principle of humanism is an undue and unjustified repetition of the constitutional provision.

At the same time in regard of their content numerous provisions of the Criminal Code are expressions of the principle of humanism, i.e. ban on life time imprisonment of minors, pregnant women; institution of conditional release on parole, etc. In such case the identification of the principle of humanism as an individual criminal-legal principle can

have a rather criminal-legal principle and in practice it is not justified.

1.3. The characterization of RA criminal legislation also needs to be clarified: Article 1 of the existing Criminal Code stipulates that "RA criminal legislation consists of the Criminal Code. New laws envisaging criminal liability shall be included in RA Criminal Code". Whereas, as it was mentioned before, in case of the norms containing blanket disposition it is necessary to refer to other legislative acts, when only in case of interpretation of its provisions it becomes possible to determine the existence or absence of corpus delicti. In such case it becomes obvious that the criminal legislation is not limited only by the Criminal Code.

At the same time it is difficult to agree with the approach that the laws envisaging criminal liability shall be included in RA Criminal Code and enforced only after inclusion in the Criminal Code. With the ratification of international documents they become an integral part of RA legislation; moreover, as compared with the Criminal Code they have a higher legal force. Consequently, if the ratified international document stipulates criminal liability, i.e. if the requirement of double criminalization that is a precondition for the enforcement of the principle of citizenship of the Criminal Code force enacted in territory is to be removed, then it shall be enforced no matter, whether it is included or not in RA Criminal Code. It is a different issue that the norms stipulating the criminality of the act must be included in the Criminal Code and there must be types of the punishments and degrees of punishment for those corpus delicti, as there are not types of punishments and degrees of punishments for the corpus delicti presented in the international documents; therefore, those cannot be enforced without stipulation in the Criminal Code.

Hence, the scope of the criminal legislation must be clarified in the new Criminal Code.

1.4. The enforcement of the Criminal Code during the time also needs to be clarified. In particular, the existing Criminal Code stipulates that the criminality and punishability of the acts shall be determined by the Criminal Code in force at the moment of its perpetration; however, it does not specify which law must be enforced in regard of other criminal-legal consequences of the act. Whereas the legislation must regulate that the criminality, punishability and other criminal-legal

consequences of the act shall be determined by the criminal law in force at the moment of its perpetration.

Considering that there are many debates about the time of the material, ongoing, lasting, committed in combination crimes, the issue of the force of the Criminal Code in case of each of them needs to be clarified by the legislation.

The existing Criminal Code regulates the retroactive force of the criminal law; however, from the viewpoint of ensuring the efficiency of practical enforcement one needs to specify the legal impact and procedure that will exist in case of giving retroactive force to the law. At the same time the legislation must regulate the issue of intermediate criminal law application. The existing Criminal Code did not answer to this question, whereas the legislation must stipulate the intermediate law eliminating the criminality in full or in part, mitigating the punishment or improving the situation of the person shall have retroactive force.

1.5. Clear regulation of the criminal law on the territory has both theoretical and practical importance.

First, the legislation must stipulate, which is the state's territory, where the force of the Criminal Code is applicable. At the same time the regulation of the enforcement of the criminal law in case of the crimes committed on the territories of diplomatic and consular institutions needs to be clarified. Although these issues are regulated by international documents ratified by RA; however, to ensure the effective enforcement of the criminal law in practice, to give coordinated answers to the questions arising from the enforcement of the criminal law on the territory it is appropriate to clarify them in the Criminal Code.

Like in the existing Criminal Code the new law needs to envisage the territorial, citizenship, universal and real principles of the criminal law enforcement on the territory.

The definition of the territorial principle of the criminal law enforcement needs to be specified – paying a special attention to determination of the crime scene in case of crimes committed in formal, material, ongoing and lasting combination.

Clarification is needed for the provision of the principle of citizenship envisaged by the existing Criminal Code, which envisages

the application of the subject matter principle in case, when RA citizen or person without citizenship who permanently resides in RA, who committed a crime outside of RA, have not been convicted in the country, where the crime is committed. Given that in that country the person may not be convicted, but released from the criminal liability, then it would be correct that the legislation does not stipulate the fact of not being convicted in another country, but not being brought to criminal liability. Moreover, the same approach must be adopted also in stipulating the universal principle of the force of the criminal law.

The real principle in force, stipulated by RA existing Criminal Code, also needs to be amended. In particular, according to the current formulation the real principle is applied in case of the perpetration of grave or particularly grave crimes by the foreigners or persons without citizenship that do not permanently reside in RA, which aim against the RA interests or rights and freedoms of RA citizens. The limitation of the real principle by grave or particularly grave crimes does not seem to be justified; hence, this limitation needs to be removed and the enforcement of the real principle must be made possible also in case of non-grave and medium gravity crimes. At the same time the enforcement of the real principle must be accessible not only in case of crimes against RA citizens or RA, but also RA legal persons and public interests.

1.6. There needs to be an individual chapter to present the main concepts used in the Criminal Code; envisage rules to classify the acts.

2. Crime

2.1. The notion of crime is one of the fundamental concepts of the criminal law and legislation, which has not only theoretical, but also practical significance. Traditionally RA Criminal Code gives material-formal notion of the crime, where the public danger is deemed as an objective, material and fundamental feature of the crime. However, in this regard there is a debate in the legal literature: whether the other offences have public danger or not and what is the difference between other offences and crime. Liability can be envisaged for an act only in case, when it causes damage to public goods protected by the law. In the opposite case it is illegitimate to envisage liability. From

this viewpoint it is obvious that both the crime and other offences cause damage or can cause damage to the aforementioned public goods; hence, the other offences also have features of public danger. In determining the notion of a phenomenon one must use features, which are characteristic only for the given phenomenon and enable to differentiate it from other phenomena.

Indeed, the public danger is not the feature that differentiates the criminal act from other offences.

It is often mentioned that the criterion to differentiate the crime from other offences is the degree of public danger. However, one needs to mention that the degree of public danger often does not have clear criteria: often the difference of the degree of the danger of administrative violations and crimes is so insignificant and the boundary between them so versatile that it is almost impossible to clearly demarcate them. Moreover, with the time some administrative violations are transferred to the criminal legislation and become crime and on the contrary – many crimes are decriminalized and become administrative or other violation of law. Actually, the public danger, its degree is not only objective, but also subjective feature, because it is determined on the subjective assessment of the legislature. In some cases whatever might seem dangerous to the legislature in reality may not be so or not be perceived as such by many. From this viewpoint the criminalization of the acts is not always done on the basis of the objective criteria. In some cases the criminalization of the acts cannot be socially justified and entail undesirable consequences (many know the undesirable results of so-called “the Prohibition/dry law” in USA and USSR). Thus the only clear feature differentiation of the crime from other offences is illegality envisaged by the criminal law.

The other issue is connected with the part 2 of Article 18 of the existing Criminal Code. It stems from the formulation of the law that the act envisaged by the criminal law may not be a crime. Moreover, this circumstance is linked with the less importance of the act, as a result of which the act is not a public danger. In theory and in practice the main feature of less importance is the insignificant size of the damage, caused by the act (of course, if the intent of the person is aimed at causing such insignificant damage). Mainly such situations emerge in regard of

misappropriations. A question arises: if AVC (Administrative Violations Code) envisages administrative liability for the theft not exceeding fivefold of minimal salary, then what is the point of the part 2 of Article 18 of the Criminal Code. It is not by chance that in reality the part 2 of Article 18 is not enforced. It is something else that less importance of the act, in cases, when other laws do not envisage liability thereof, shall be considered as ground to release from punishment.

The mentioning of the public danger in the notion of crime is tightly interconnected with the institution of guilt, in particular with the description of intent. If the main feature of the crime is the public danger, then it must exist in the intent of the person that commits it; whereas in many cases we cannot speak about the perception of the act's public danger. Moreover, the person can consider that his act is useful. In fact it will be correct to speak about perception of illegality of the act.

Consequently the mentioning about the public danger needs to be removed from the notion of crime, as well as to remove the part 2 of Article 18.

2.2. It is necessary to stipulate in the law the description of illegal act and its types and the possibility of the criminal liability in case of committing a crime by negligence. Moreover, it must be stipulated that by the criminal law envisaged illegal act's perpetration is considered to be the preparation of that act, attempt to commit it, as well as the perpetration of the completed act. The law needs to stipulate the fact that for committing a crime by inactivity the person can be brought to liability only in case, when he had obligation to act and had an opportunity to fulfill his obligation. Moreover, the law must specify the grounds of those obligations.

2.3. Another important issue is the classification of the crimes. Currently the crime committed by negligence is included in the group of non-grave and medium gravity crimes together with the intentionally committed crimes with more severe penalties, which does not have any logical reasoning. The crimes included in the same group of classification must have the same degree of punishment. Moreover, the crimes committed by negligence must be included also in the group of grave crimes.

Currently a debate is going on about classifying into the crimes and

offences the acts envisaged by the Criminal Code. Such classification exists in many countries. However, in many countries AVC envisages the offences. However, one needs to mention that such classification, apart from criminal-procedural differences, does not have any other practical significance. The concept envisages some decriminalization and envisages the decriminalized acts in AVC.

3. Plurality of crimes

3.1. The institution of the plurality of crimes is one of the crucial institutions of the criminal legislation, which is tightly interconnected with the classification of crimes and awarding punishments for them. It suffices to mention that in the law enforcement practice a significant part of classification of the acts is connected with the classification of the crimes in combination. From this viewpoint this institution is not less important, than the others. Hence, this institution needs to be stipulated by an individual chapter with a legislative description of the plurality of crimes.

3.2. The existing Criminal Code characterizes the idealistic combination of the crimes as an act, which contains features of two or more crimes envisaged only by various articles; whereas the idealistic combination is also possible in situation, when the act contains features of the crimes envisaged by different parts of the same article. This can be in cases, when different parts of the article envisage not the corpus delicti of simple and aggravating circumstances of the same crime, but different crimes. At the same time there is no idealistic combination, when in the same act of the person there are features envisaged by different clauses of the same part of the same article of the Special Part of the Criminal Code. In such situation in one act there are several aggravating circumstances, which must be taken into account only while awarding a punishment. These provisions must be stipulated by law.

3.3. The existing Criminal Code does not regulate the issue of the act qualification in case of competition between the criminal-legal norms; whereas there are practical difficulties in various situation of competition between the criminal-legal norms. Hence, it is necessary to regulate this matter by law. The point is about those cases, when a type of crime is included into the other as one of its structural

elements. In such cases the qualification with the combination of crimes is possible, if for the structural element entering into the whole a more severe punishment is envisaged. In this way the law needs to stipulate the features of the qualification of the act in case of the other forms of competition.

3.4. Currently the recidivism is classified as by types according to the gravity of crime. Moreover, there is no clear basis for classification logic, there is no single standard and the classification is tricky and pointless. In general there is no practical use in classifying the recidivism; hence, the criminal legislation of many countries does not classify the recidivism at all and some other countries' legislation the classification is indirect linked with the features of punishment award. In regard of the aforementioned, the recidivism must be simply envisaged as an aggravating circumstance – envisaging a mandatory exacerbation of the punishment only in case, when the person has served a punishment in the past in the form of imprisonment and without having completed the sentence committed such a deliberate crime, for which the imprisonment is envisaged.

4. Persons subject to criminal liability

4.1. The existing Criminal Code stipulates the feature of the person subject to criminal liability – sanity, being a natural person and having reached the age envisaged by the criminal law. However, many issues concerning the crime subject are unregulated.

4.2. Sanity is a mandatory feature of the person (subject of the crime) subject to criminal responsibility, whereas its description is missing in the law. Hence, the features of sanity need to be stipulated in the law.

4.3. The existing Criminal Code has wrong regulations for the issues of criminal liability of the person having committed a crime under alcohol intoxication. It only mentions that the person having committed a crime under alcohol intoxication is not released from criminal liability and that the alcohol intoxication in given cases can be considered an aggravating circumstance for criminal liability and punishment. However, the alcohol intoxication has several degrees, can be of various reasons, various motives and in various situations. It is not always, that drunkenness can be considered as aggravating circumstance. Finally, disinfection or

pathologic alcohol intoxication is considered temporary malfunction of mental activities and is one of the medical features of insanity. In the Criminal Codes of many countries the alcohol intoxication is not considered as an aggravating circumstance for liability. Moreover, in some cases it is used as an argument for defense. Hence, the law needs to regulate these issues. It is necessary to give a correct legal assessment for the cases of alcohol intoxication. In many cases the alcohol intoxication can be evaluated as a mitigating circumstance for the liability. The point, in particular, is about the cases, when the person gets drunk not against his will, under the influence of coercion and deception.

4.4. The institution of the limited sanity needs to be improved. It must be envisaged that not only the mental malfunctions can cause state of insanity, but also the mental illnesses and the other mental morbid conditions featuring insanity that are envisaged by the part 1 of Article 25 of the Criminal Code.

4.5. In the criminal legislation of most of the countries there is a single age for the criminal liability. Moreover, the criminal liability arrives at an earlier age, than envisaged by RA existing Criminal Code. The existing Criminal Code gives an exhaustive list of the crimes, for which the criminal liability arrives at the age 14. However, actually there are no clear features of such differentiation. Not without reasons, in the countries, where there is such differentiation, from times to times they discuss the issue of changing that exhaustive list. In this regard one needs to stipulate a unified age of the criminal liability without any differentiation. The age of the criminal liability must be 14 taking into account the fact that under the circumstances of modern information technologies and acceleration the child is growing earlier. The differentiation must concern only the features of the criminal liability and punishment. Moreover, it will be correct that the features of the criminal liability and punishment of 14-17 years old in some cases concern also the age group of 18-21.

4.6. The criminal Code must also stipulate the characterization of the special subject of crime and the characteristics of qualification of the act of various cases of participation of the person having no features of the crime's special subject by the crime's special subject need to be stipulated by the law.

4.7 The criminal liability of legal persons is a pressing issue.

The Criminal Code should stipulate the scope of the crimes, based on which the legal persons are subject to criminal liability, as well as the means of criminal liability and the sanctions to be applied to the legal persons. It is necessary to envisage criminal liability for the legal persons because of the following reasons. The international conventions, ratified by RA require that especially in case of the corruption crimes, to have effective liability mechanisms. Although these conventions do not require mandatory stipulation of the criminal liability, but the criminal liability is appropriate for several observations. First, in that case, there is no need to envisage in the Civil or Administrative Violations Codes the corruption crimes and the sanctions thereof in the similar way. The criminal acts should be envisaged by the Criminal Code. Second, the stipulation of the criminal liability enables to envisage and apply respective effective sanctions to what happened. Third, the criminal liability means that the case will be tried in criminal procedures way, which envisages more effective safeguards for the protection of rights. Fourth, in some cases, because of the complex structure it is not possible to identify the really guilty natural person; hence, in such cases, to suspend the criminal activities it is more effective to bring the legal person to the criminal liability.

5. Guilt

5.1. Traditionally RA criminal law theory and legislation are based on the psychological theory of guilt. However, within the framework of this theory, it is often impossible to find a fair solution of many criminal-legal issues. The reason is that the criminal law is value-based and normativistic science. It is connected with giving assessments. Without value-based approach the criminal law will stop being a law.

The criminal legislations of most of the countries are based on the value-based and normativistic theory of the guilt. Of course, no criminal code is based on just one clean theory. In Criminal Codes of all the countries there are elements of value-based, psychological and degree of danger theories. Nevertheless the provision of the psychological theory that the person shall be subject to criminal liability only in case, when all the elements and features of his act

are reflected (could have been reflected) in his perception and will, is beneath criticism. In case of such approach it is even wrong to call such approach psychological, because it contradicts the provision about the unconscious and subconscious psychological phenomena long discovered by psychology. Hence, the guilt, which reflects the anti-social nature, direction and essence of the person and his act, cannot be characterized as mere psychological attitude with the elements like conscientiousness and will. The guilt is such a psychological attitude towards the act and its consequences, in which the negative, anti-social positions of the person; conscious and in many cases subconscious motives. Such attitude towards the essence of the guilt already enables us to justify the criminal liability in cases, when it cannot be done by mere psychological theory of guilt. In particular, the value-based theory of the guilt enables us to justify the criminal liability in case of heavy alcohol intoxication, to ascertain the presence of intent in cases, when the crime has been committed under the physiological affect, allows to stipulate in the law such circumstances excluding the criminal liability, like perpetration of the act in a condition of urgent necessity excluding the guilt, under the direct threat of death, in a condition of affect of fear, etc.

5.2. Traditionally in the notion of intent RA Criminal Code mentions the fact of perceiving the public danger of the act, which is currently just a mere remnant of the Soviet criminal law theory. One of the objectives of mentioning the public danger of the act in the notion of the intent is the enforcement of the principle "ignorance of the law does not release from criminal liability" in practice. However, in the modern world this principle cannot be enforced. It is not by chance that the criminal legislations of all the advanced countries exclude this principle. On the contrary, the criminal legislation of most of the countries stipulates that the ignorance of the law can release from criminal liability or it can be taken into account as a mitigating circumstance or serve as a basis to qualify the act as crime committed by negligence. Hence, in the notion of guilt the emphasis must be put on the anti-criminal perception of the act.

5.3. Apart from the direct and indirect intent the criminal law theory identifies also other types of intent – specified, simple, alternative and

unspecified. In case of these types of intent the qualification of the act generates issues and causes debates. In particular, a matter of debate in the criminal law theory is how to qualify the act as alternative intent in cases, when in the intent of the offender there is none of the included. Some criminologists propose to qualify the act as an attempt of the gravest crime, which is correct. Some criminologists express the same position in regard of similar situations of unspecified intent, when the type, instruments and means of the crime come to witness that the offender had intent of causing large-scale damage. To avoid various interpretations the legislation must stipulate the aforementioned types of the intent and the features of the qualification of the act in their case.

5.4. The institutions of the legal and factual errors are connected with the matter of intent, which are not stipulated by the legislation; whereas, in most of the countries in case of the error the issues of criminal liability and qualification of the act are clearly regulated by the criminal legislation.

The institutions of the legal and factual errors need to be stipulated in the Criminal Code and identify the features of the person's criminal liability in their cases. The approach in case of the legal error must be the following: if the person has not perceived the illegality of his act and in the given situation could not perceive it, then is not subject to criminal liability.

The law needs to stipulate various situations of factual circumstances and features of qualifying the action in that case.

5.5. The law describes the willful feature of the direct intent by the notion "wishes". However, one needs to mention that the wish describes not the will, but the motivation and incentive of the act. Under the conditions of the current legislative formulations it is practically impossible to prove the presence of the direct intent in the person's act, for whom the publicly dangerous consequences were not the goal of the act, were not means to achieve the goal, but were inevitable. Hence, the provision of the inevitability of the publicly dangerous consequences as direct intent must be stipulated separately.

5.6. The legislative description of the criminal self-confidence mentions that without sufficient grounds and with self-confidence the offender hopes that the publicly dangerous consequences will be

prevented. The hope means that the person is not fully confident in regard of the possible outcome, future and consequences. In this case to hope means that the person considers the consequences possible, because he is not fully confident that there will be no consequence. But in that case there is not point to speak about negligence. To hope in fact is characteristic to indirect intent and in case of self-confidence the point must be about being confident. Hence, the legislative description of the criminal self-confidence must mention not to hope, but to be convinced. It is a different matter that the conviction is groundless.

5.7. The existing Criminal Code does not fully regulate the institution of causing damage without guilt. The point is especially about the cases, when the person envisages the possibility of publicly dangerous consequences; however, as a result of discrepancy between the extreme conditions or nervous mental tension and his psychological-physical conditions could not prevent their emergence. The point is that in some cases the person can put himself into nervous mental tension or have an opportunity to stop the act, which could generate publicly dangerous consequences. In such cases there is guilt and person is subject to the criminal liability. The legislation needs to stipulate these situations.

6. Stages of crime

6.1. The current legislative regulation of the stages of the crime has many errors, shortcomings and omissions, which need to be corrected. In particular, the completed crime has a wrong definition. According to the part 1 of Article 33 of Criminal Code “a crime is considered completed, if the action incorporates all the features of corpus delicti envisaged in this Code.” However, an attempt of crime can also incorporate “all the features of corpus delicti envisaged in this Code”. For example: with an objective to kill the person shoots in the direction of the victim, but causes only grave damage to the health. Indeed, in this case in the act of the person there are all the features of corpus delicti of causing grave damage, but the act is not a completed crime, but an attempt of murder. Hence, the characterization of completed murder must also incorporate the mentioning of the criminal intent. Accordingly a completed crime is the act, which contains all the

elements incorporated in the criminal intent.

6.2. The existing Criminal Code decriminalizes the preparation of non-grave and medium gravity crimes and leaves without punishment, which is not correct. It turns out that, for example, there is no liability for the person preparing the perpetration of simple type of human abduction or preparing several non-grave or medium gravity crimes. It will be correct to envisage criminal liability for the preparation of all types of crimes – envisaging a special order of punishment award. Moreover, it is also necessary to envisage, that in case of preparation of non-grave or medium gravity crimes no sanction connected with deprivation of liberty can be assigned.

6.3. The characterization of the attempt of crime in the current legislation does not quite correctly reflect the substance of the attempt of crime. The point is that the action directly aimed at the perpetration of the crime in case of broad interpretation can also be preparation. Hence, the characterization of the attempt of crime one must also mention the fact that in case of the attempt of crime corpus delicti begins.

6.4. There are two types of attempt of crime in the criminal law theory – completed and incomplete. Moreover, this classification has not only theoretical, but also practical significance. The point is that depending on the crime the features of voluntary refusing are types of the attempt of crime. Hence, the notion of the attempt of crime must incorporate the features of completed, as well as incomplete attempts of crime.

6.5. The legislative formulation of the voluntary refusal of the crime also needs correction. The current formulations of the existing code do not clearly reflect that the voluntary refusal of the crime is also possible in cases, when there is a certain period of time passed between the publicly dangerous act and consequences and the offender manages to prevent the consequences. This situation needs to be clearly stipulated in the law.

7. Complicity

7.1. In the existing Criminal Code the complicity is characterized as willful joint participation of two or more persons in a willful crime. By saying two or more persons we need to understand natural and sane

persons of criminal liability age. From this viewpoint complicity cannot be considered the cases of mediated crimes, when the perpetrator uses persons, who by the force of the law are not subject to criminal liability. This fact needs to be stipulated in the law, which will solve the dispute of the criminal law theory and practice of whether the act can be qualified as a crime committed by a group of people, if one of the perpetrators of the crime by the force of the law is not subject to criminal liability.

In regard of the mediated crime cases in the notion of perpetrator it is necessary to mention the situations, when the special subject uses persons, who as a result of not having the features of special subject are subjects to criminal liability for assisting the given crime.

The law needs to stipulate also the mediated cases of organization, inducing and assisting of the crime. There can be situations that the accomplices commit the crime by means of such persons, who are not subject to criminal liability or acted by negligence.

Besides, the law also needs to stipulate the situations of perpetration and causing a crime by negligence. The mentioning of causing is not by chance. The point is that in case of causing the perpetration of the objective part of the given corpus delicti it is not mandatory – it suffices that by his proper unlawful, immoral and unsafe behavior the person contributes to the perpetration of a crime by negligence on behalf of another person and generation of publicly dangerous consequences. For example: the person abets someone else to violate the safety rules and the latter does so and generates publicly dangerous consequences by negligence. In this case the person that abets the violation of publicly dangerous rules shall be held liable as well. Another example: two drivers organize a race and one of them crashes; in this case the other driver must be held liable for the consequences.

In regard of the aforementioned the respective chapter of the Criminal Code must be called not complicity, but joint participation to the crime and complicity – envisaging separate situations of complicity, co-perpetration, and perpetration by negligence and causing.

The tricks, ways and teaching someone else is another issue linked with the complicity, if that is aimed at the inducing someone

to commit a crime. The existing Criminal Code does not envisage punishment for this act, which is quite dangerous. Hence, it is also necessary to envisage criminal liability for this act.

7.2. The characterizations of accomplices need to be specified, in particular connected with the assistance and inducing. For example: currently there is a gap in regard of criminal liability of the person, who agreeing with co-perpetration, in the future, at the moment of the crime perpetration while in the crime scene, although does not commit the objective part of the crime; however, with his presence reinforces the determination of the perpetrator.

7.3. In the existing Criminal Code the types of the complicity are not clearly identified. That is the reason that there are difficulties to differentiate the organized group from criminal cooperation or the cases of crime perpetration by a group of people by a prior agreement. In this regard Criminal Code needs to stipulate various forms of complicity by clear criteria and specify their names and types of activity.

Based on the aforementioned we need to identify the following types of joint crime perpetration: 1) crime perpetration by a group, which could be upon prior agreement or without it. Moreover, in this case by saying a group we need to understand a community made of two or more co-perpetrators; 2) a criminal organization, which is a stable group consisting of three or more persons or a union of groups with single leadership, the members of which joined together to commit more than one crime. Naturally, the special part of the Criminal Code must envisage liability for creating and leading a criminal organization, as well as participation to them.

7.4. The Criminal Code must regulate with much detail the transgression issue of the accomplice. The legislation must stipulate the types of quantitative and qualitative transgression and qualification of the accomplices' acts in their case. Besides, the cases of transgress of the perpetrator and other accomplices must be stipulated.

7.5. The institution of voluntary rejection of the crime by the accomplices and co-perpetrator must be regulated by much detail. In the existing Criminal Code many issues in regard of this institution are not settled. In particular, the code needs to stipulate the conditions of releasing from criminal liability in case of voluntary rejection of

participation to the crime by co-perpetrator, participant to group crime, member of organized crime or criminal community. In particular, the co-perpetrator, abettor, organizer, participation to a group crime, member of an organized group or criminal community can be released from criminal liability only in case, if he managed to prevent the crime. The voluntary rejection of the crime by the helper must be regulated individually. In various cases of assistance it can have various expressions and it is not mandatory that in all the cases the helper must prevent the crime perpetration. For example: the helper providing with a crime instrument or means or the person that gave a prior promise to conceal, must be released from liability in case, if took back the instrument or means or informed the criminal that he was not going to keep the promise. It is another issue that in such cases the person can be subject to liability for knowing and informing. In cases of giving instructions, advice, information or eliminating obstacles for the perpetrator the helper can be released from criminal liability, if he prevented the crime perpetration.

7.6. It is necessary to specify the issues in regard of participation of other persons in crimes with special subject. The provision stipulated by the part 2 of Article 39 of the existing Criminal Code that the person not considered a special subject, who participated to the crime with special subject, can be held liable only as an organizer, abettor or helper, does not fully reflect the possible situations and is correct only for partial cases. The point is that in many cases the person with no features of special subject can participate to the crime with special subject by executing the objective part of that crime or a part of it, but be held liable not as an accomplice, but as the perpetrator of the crime. In particular, a crime with special subject is the murder of a newborn baby by the mother, which is corpus delicti with mitigating circumstances. It is obvious that if another person participates to the deprivation of live of a newborn baby, who executes the objective part of the murder or a part of it, and then he cannot be held liable as an accomplice. In such cases the person is subject to liability for murder with simple or aggravating circumstances. These situations must be stipulated by the law.

7.7. The issues of incriminating to the accomplices the circumstances

aggravating the crime need to be further regulated. In particular, it is necessary to regulate the issue of incriminating the circumstances aggravating the intentional crime, in regard of which the law envisages a careless form of the guilt. The point is that such aggravating circumstances can be incriminated to the accomplices, if they in a specific situation had and could perceive them (i.e. causing serious health damage intentionally, which by negligence caused the victim's death).

Besides, the law does not mention anything about incriminating the mitigating circumstances to the accomplices. This matter also needs to be regulated by law. The general rule must be that the mitigating circumstances of corpus delicti shall not be ascribed to other accomplices.

8. Circumstances excluding the criminality of the act

8.1. The criminal law theory knows many circumstances excluding the criminality of the act. Those are well reflected in Criminal Codes of many countries. Although as compared with the previous one RA Criminal Code has expanded the list of these circumstances, but there are circumstances excluding the criminality of the act, which are not reflected in the existing Criminal Code. Especially the matter is about the performance of the professional duties, execution of the law requirements, prevention of crimes or execution of special detection assignments. These circumstances excluding the criminality of the crime must be stipulated and regulated by the law.

The law should also stipulate various expressions of provocation.

8.2. The legislative regulation of the institution of the necessary protection needs some adjustments and additions. First, the necessary protection can be performed also by inactivity; (for example, the person does not hamper causing damage to perpetrator by the animal that ensures security, when the person, in other cases has such obligations), hence, the provision of the existing code that "there is no crime in the action, which has been performed in the condition of the necessary protection" is not correct. Besides, the existing Criminal Code fairly stipulates: "when protecting a person's life from dangerous violence or real threat of such violence, any damage can be inflicted, including death" (part 2 of Article 42). At the same time it is mentioned

that the person is entitled to the right of the necessary protection, regardless of the possibility to avoid the encroachment or to appeal to other persons or state bodies, as well as, regardless of the person's special training or official position (part 3 of Article 42). In reading these two provisions together it turns out that one can kill the offender even in case, where there were other means of protection. This explicitly contradicts the provisions of the part 2 of Article 2 of European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary in defense of any person from unlawful violence. Hence, although correct is the provision that the right to necessary protection belongs to the person irrespective of the opportunity to avoid the encroachment or refer to the assistance of other persons or public bodies; nevertheless, there must be an exception for the protection cases in depriving of life. In the light of this it is necessary to revise the provision of the part 5 of Article 42, which is about causing damage to the offender in preventing the offender from the intrusion into an apartment or other building.

The law must regulate the seemingly protection situation, i.e. the situations, when the defender does not perceive the moment of encroachment end, the situations, when the person crosses the necessary protection because of excitement and fear.

Besides, the legislation must settle the possibility of the protection necessary against publicly dangerous acts of insane and persons under the criminal liability age and the issue of its boundaries. The position of the law must be the following: it shall be possible to protect against publicly dangerous encroachments of these persons by means of causing damage to them only in case, when there are no other means of protection.

The legislation also needs to regulate the issue of provocation of the necessary protection.

8.3. The existing Criminal Code does not answer to the question on when is it possible to deprive of life the person that committed a crime. Besides, under the conditions of the current legislative regulations there is a gap in regard of grounds and conditions of detaining insane and

persons under criminal liability age, which needs legislative regulation. From this viewpoint, as a circumstance excluding the criminality of the act, the law needs to stipulate causing damage in detaining the person who committed a socially dangerous act and not a crime.

8.4. There is only one type of legislative regulation of urgent necessity in the existing Criminal Code, which the criminal legislations of other countries call urgent necessity excluding the unlawfulness of the act, whereas the criminal legislation of many countries also regulates the institution of the urgent necessity excluding the guilt. The point is about the situations, when the person, in order to eliminate the imminent danger threatening his life or life of his relatives, causes damage to something good of equal or greater value. It is obvious that, for example, a mother can go for it in order to save the life of her child and nothing can justify bringing her to liability. However, under the conditions of the existing code, within the subject matter institution, the mother is subject to liability.

In this regard the legislation will also have to settle the liability issue of other persons, who in order to save their life or health or of their relatives, cause damage to something good that has greater or equal value; however, by the power of their position, profession, law or sub-legislation or contract they had to protect that something good. The point is about non-performance of the duties by those persons, as a result of which a greater damage is caused, than the damage, which could be caused to them. In such cases the point could be only about mitigating the liability (i.e. a firefighter cannot be released from criminal liability in case, when because of fear of his life abandoned a burning house leaving there a person in need of help, who in the aftermath died).

The legislation needs to regulate also some other issues connected with the urgent necessity. In particular, it is necessary to regulate the liability issue of the person, who by means of damaging the interests protected by law, prevents the threatening danger resulting from his own unlawful acts. Besides, one must stipulate the liability of the person, who caused damage to the interests, protected by law, but failed to prevent the threatening danger.

8.5. The existing Criminal Code regulates the institution of the physical or psychological coercion incompletely. In particular, the

law mentions only inability to manage the act under the influence of physical or psychological coercion; whereas in some cases of coercion the person can also be deprived of the possibility to perceive the acts.

8.6. The legislative regulation of the reasonable risk does not answer the question, of how one must solve the criminal liability question of the person in cases, when one fails to prevent the damage caused to the interests protected by law and there is a greater damage, than the benefit that the person, who ran the risk, aspired for. The risk is one of the crucial factors of scientific and economic progress. In many sectors, in principle, it is not possible to achieve great success without risk. Hence, the criminal legislation must regulate the issues connected with this institution in a manner, as not to immobilize the scientific progress. The law needs to regulate the provision that, if the person, who ran the risk, undertook the necessary measures to prevent the possible damage, but nevertheless the damage was caused, then irrespective of the damage size the person is not subject to criminal liability.

9. Notion, objectives and types of the punishment

9.1. In recent the criminal situation in the Republic of Armenia has significantly exacerbated. Various expressions of criminality hamper the normal process of socio-economic reforms and create tension, alarm and unstable situation. As a result the negative tendencies of the public criminalization are further emphasized. On this background there is stable growth of general criminality in the Republic. Under these circumstances the award of adequate punishment to the persons convicted in crime perpetration becomes more appropriate. In this regard not only the effective enforcement of the awarded punishment becomes significant, but also the presence of the developed and multiple system of punishments.

Today, non-grave and medium gravity crimes are often punished by the same sanctions, as grave and particularly grave crimes. However, the criminality does not decrease as a result of it. Moreover, the atmosphere of impunity is further deepening. In that sense the enforcement of punishments not linked with the deprivation of liberty, indeed, when it is justified, must become a spread legal enforcement practice, the main objective of which is to ensure the criminal liability,

but not excess severity.

Under the current circumstances the need to enforce alternative to deprivation of liberty punishments for certain categories of crimes becomes even more important. The alternatives of isolating from the public for a long while are practical means to avoid criminalization of the society and integration of the convicts with the criminal sub-culture. The alternative punishments must become the most required components of the new system of criminal sanctions.

In regard of the aforementioned, one should specify the goals of the punishment: the goals of punishment should be considered not only restoration of social justice, correction of the criminal and prevention of new crimes, but also the resocialization of the person.

First of all the improvement of the norms of RA criminal legislation's punishment and other means of criminal-legal impact assumes:

- Legislative regulation of the “criminal liability”, “punishment” and “other means of criminal-legal impact” notions’ relation and differentiation based on the agreed, theoretically well-grounded and unequivocal conceptual approach;
- Provision of the optimal balance for the complex enforcement of punitive, rehabilitation and preventive means of the criminal-legal impact;
- Improvement of the punishment system and content of individual types of the punishment and the development of a broader scope of alternative to deprivation of the liberty punishments;
- Provision of the scope of cases for the mandatory compensation of the damage incurred to the victims by the crimes.

9.2. Under the current circumstances the courts often do not have an alternative to deprivation of liberty. As a result of this the deprivation of liberty type of punishment is often applied unreasonably, which not only does not contribute to the efficiency of punitive policy, but also creates many problems for the penitentiary institutions and contributes to the criminalization of the public relations and spread of “thieves in law” in civil society. Although often the courts find way out by enforcing conditional punishment; however, unclear legislative regulation of this institution with gaps and drawbacks does not contribute to the efficiency of criminal-legal impact.

Currently from the types of the punishments, which are alternatives to the deprivation of liberty, envisaged by RA Criminal Code, only the fine is enforced more or less effectively. Almost no public works are awarded. Those are not effective, which is explained by several reasons, the main of which are: too long terms, their non-provision in the special part article of the Criminal Code and leaving them up to the discretion of the convict. As a result of this the public works are mostly awarded in case of impossibility of payment of the fine.

The detention as a type of punishment is almost not enforced, the main reason of which is its long term. The “shock effect” for a period of three months cannot be justified.

One of the main directions to solve the given issue is to expand the list of the punishments that are real alternatives to deprivation of liberty and introduction of practical mechanisms to enforce them (as well as of already envisaged types of punishment). Moreover, by saying alternative types of the punishment one must understand those means of the state criminal-legal impact of the crime, which are of punitive nature; however, are not linked with the isolation of the criminal from the society and breaking his individual social connections. Consequently, apart from the ones stipulated in the existing RA Criminal Code, the following alternative types of the punishment are proposed:

- 1) restraint of freedom;
- 2) limitation of public rights;
- 3) extradition of a foreign national or person without citizenship from the territory of RA;
- 4) stripping of parental rights.

Restraint of freedom of the convict under house conditions is alternative punishment connected with keeping under control without isolating from the society, which can be enforced in regard of clearly stipulated scope of people subject to criminal liability for certain crimes envisaged by the law. The persons convicted to this type of the punishment are not cut from study or production; however, there can be certain restriction in their regard stipulated by law. In particular, they can be prohibited from being absent from the house at certain hours, visit certain institutions (bars, cafes, restaurants, internet clubs, and other entertainment places), use alcohol, etc. They can also be

engaged into public works. If the person convicted to house arrest maliciously avoids the punishment service, then it may be replaced by deprivation of freedom for a certain period of time.

The **limitation of public rights** is also an alternative type of the punishment to deprivation of liberty, which can be enforced in regard of the persons having committed non-grave or medium gravity crimes linked with the exercise of public rights (selective, etc.). It is in the form of depriving from the exercise of certain rights for a specific period of time (i.e. be elected).

Extradition of a foreign national or person without citizenship from the territory of RA is also an alternative type of the punishment to deprivation of liberty, which can be enforced in regard of the foreign nationals or persons without citizenship subject to criminal liability for certain types of punishment envisaged by the law.

Deprivation of parental rights not limited in time can be assigned in conditions envisaged especially by the General part of the Criminal Code both as main and additional punishment. In case of correction of the convict and proper behavior towards the child the court can restore the aforementioned rights.

9.3. Only the types of the punishments connected with the deprivation of liberty must be envisaged as the main type. Those are: short-term deprivation of liberty (currently this is the punishment arrest, the name of which is confusing with regard of the existence of arrest as measure of restraint in RA Criminal Procedures Code), liberty restriction, keeping in disciplinary batallion, deprivation of liberty and imprisonment for life. Additional types of the punishment must be considered stripping of special or military title, rank, degree or qualification class; stripping of parental rights. The rest of the punishment types can be awarded both as main and additional; whereas the main types of the punishment can be awarded in case there is sanction in the respective article of the special part of Criminal Code.

9.4. Legislative formulations are necessary, which will limit the scope of possible options for the award of deprivation of the liberty punishment. The legislation must stipulate that the given type of the punishment can be awarded only in case, when given the gravity of crime and features of the criminal it is not possible to award a more lenient punishment.

The person having committed a non-grave crime for the first time cannot be sentenced to deprivation of liberty, if the act has not been accompanied by violence.

9.5. The system of punishment and individual types of the punishment must aim also at the protection of the rights and legitimate interests of the victims from the crimes and compensation of the damage inflicted by the crime. From this viewpoint the approach of awarding confiscation of the property and fine types of the punishment needs to be revised. In the first place those must aim at the compensation of the damage inflicted on the victim; whereas under the conditions of the existing legislation the given types of the punishment almost do not perform such functions. Besides, confiscation of the property should be envisaged as security measure, because only illegally obtained property, proceeds, crime tools and means and in some cases the crime objects shall be confiscated. Under the conditions of such regulation no property confiscation can be considered as punishment.

9.6. The regulation of the fine is another issue. It is stipulated as main punishment. However, the amounts stipulated by the existing code are too small for the main punishment. The point is obvious, for example, in the sanctions envisaging liability for the economic crimes, in which together with small amount fines the deprivation of liberty is envisaged as an alternative; let's say for a period of 2-5 years. This comes to significantly distort the proportion of sanctions.

The determination of the amount of fine also needs to be reformed. In particular, from the standpoint of justice and efficiency it is more appropriate to make a transition from the fixed amount of fined to determining the amount of the given punishment according to the income of the perpetrator.

The legislation needs to stipulate that the court can award fine only in case, when the person has income or property to confiscate.

Besides, it must be envisaged that, if the fine is awarded as additional punishment together with the deprivation of liberty or in combination of crimes or sentences and the convict cannot pay it immediately, then the payment of the fine is suspended up to the end of the main punishment.

9.7. The punishment system envisaged by new RA Criminal Code will have the following text:

- 1) stripping of special or military title, rank, degree or qualification class;
 - 2) fine;
 - 3) public works;
 - 4) stripping of the right to hold certain positions or to engage in certain activities;
 - 5) limitation of public rights;
 - 6) stripping of parental rights;
 - 7) deportation of a foreign national or person without citizenship from RA territory;
 - 8) restraint of freedom;
 - 9) limitation in regard of military service;
 - 10) deprivation of liberty for short term;
 - 11) keeping in disciplinary battalion;
 - 12) deprivation of liberty;
 - 13) life imprisonment.
- The aforementioned sequence is provisional.

10. Award of punishment

10.1. RA Criminal Code must envisage clear rules to take into account circumstances aggravating and mitigating the criminal liability and punishment. It is not permissible to leave the determination of the "value" of this or that mitigating or aggravating circumstance only up to the court discretion. Hence, the legislation needs to regulate the formulation of the aforementioned circumstances and giving some guidance to the court.

10.2. The issues linked with the award of punishment in case of recidivism need to be revised:

In case of recidivism the existing RA Criminal Code envisages only a requirement to exacerbate the minimal punishment in case of recidivism. It turns out that the maximum amount is the same as in ordinary cases. This approach is not justified. Hence, in case of recidivism there must be also a requirement of exacerbating the maximum punishment.

The specifics of award of punishment for recidivism must come to the following:

"If the person with previous conviction for the intentional crime in the

form of deprivation of liberty for some time or imprisonment for life, who has served the punishment, committed an intentional crime, for which he is sentenced to deprivation of liberty, then the awarded punishment cannot be less than two third of the maximum punishment in the form of deprivation of liberty envisaged by the sanction of the respective article of the Special part of the Criminal Code and can exceed the maximum amount of the punishment in the form of deprivation of liberty envisaged by law for the given crime – in one third of it. In any case, the punishment in the form of deprivation of liberty cannot exceed the maximum period envisaged by law for the given type of punishment.

If the person with previous conviction for the intentional crime in the form of deprivation of liberty for some time or imprisonment for life, who has served the punishment, committed more than one crime, then for each crime included in combination the punishment shall be determined by the same rules. In that case the final punishment in combination of the crimes cannot exceed 25 years of deprivation of liberty”.

The legislation also needs to stipulate that the aforementioned provisions are not obstacles to award a more lenient punishment, than envisaged by law.

10.3. The legislative clarification of the punishment award institution in combination of the crimes is also important. Under the conditions of the existing RA Criminal Code the final punishment in combination of the crimes shall be determined by the principle of adding up the punishments in full or in part – envisaging certain limitation. There is no such limitation for other main types of the punishment. As a result, it turns out, that in awarding a punishment in combination of crimes the fine, public works, keeping in disciplinary battalion, stripping of right to hold certain positions or engaging in certain activities (in case of awarding as the main punishment) can be added up without any limitation and several times exceed the maximum period or amount envisaged for the given type of crime in the special part of the Criminal Code. Hence, this issue needs to be regulated by law.

The next issue is about the term of the final punishment in the form of deprivation of liberty. Thus, if grave and particularly grave crimes are in the combination, then the final punishment cannot exceed 25 years of deprivation of liberty. However, the grave crimes

are, for example, theft by unlawful intrusion into house or swindling in particularly large amounts. It turns out that in the case of crime combination under the conditions of the existing rule of awarding the punishment the person committing several thefts or swindling can get a more severe punishment, than the perpetrator of the murder with the aggravating circumstances. Such situation cannot be considered justified either. For this purpose the issue needs to be settled as follows: if the combination of the crimes incorporates only non-grave crimes, then the final punishment cannot exceed deprivation of liberty for five years; if the combination includes medium gravity or non-grave and grave crimes, then deprivation of liberty for ten years; if grave crime, then deprivation of liberty for fifteen years; if particularly grave crime, then deprivation of liberty for twenty years and if the combination incorporates such particularly grave crime, where deprivation of life is a feature of corpus delicti, then deprivation of liberty for twenty-five years. In regard of the last moment the law must give the exhaustive list of the particularly grave crimes, in case of which the final punishment can be up to twenty five years of deprivation of liberty.

In particular: genocide, terrorism against a foreign country or representative of an international organization, etc.

10.4. There are drawbacks and mistakes in the legislative regulation of preparation of crime and punishability of crime attempt. According to the existing legislation the maximum punishment for preparation of crime cannot exceed the half of the maximum period punishment envisaged in the form of deprivation of liberty envisaged by the respective article or part of article of the special part of the Criminal Code. There is no doubt that the punishment for the preparation must be lenient. However, the legislative settlement of this matter needs to be improved. First, there can be cases, when the punishment for preparation can be equal, in some cases more, than similar completed crime, which is inadmissible. Besides, the law does not clearly regulate the issue of whether the court is entitled to award a punishment of fewer periods than envisaged by the sanction, if the half of the maximum period of the punishment envisaged in the form of deprivation of liberty is less than the minimal period envisaged by the sanction. The following procedure is recommended to settle this issue: “The maximum period

for the preparation of crime in the form of deprivation of liberty cannot be more, than one third of the maximum period envisaged for the given crime in form of deprivation of liberty. If one third of the minimal period is less than three months of deprivation of liberty, then it means three months of deprivation of liberty". Besides, it is necessary to stipulate that in case of preparation of non-grave or medium gravity crimes no punishment of deprivation of liberty can be assigned.

The crime attempt in the existing Criminal Code is also mitigated and an explicit maximum period envisaged. This approach is not justified. First, very often the difference between a crime attempt (especially completed crime attempt) and completed crime is insignificant. Moreover, in case of crime attempt publicly dangerous consequences may emerge – often very grave. One must also remember that in case of crime attempt the crime is completed by consequences independent of the criminal's will. Moreover, in case of the completed crime attempt it might seem to the person that he achieved his objective (for example: deprive the victim of life). Based on the concept of the act our legislation, merely on the reasoning, that the damage was not as much as it was included in the intent of the criminal, envisages a mandatory mitigation of the punishment. Besides, in case of such approach, the criminal with a stable anti-social position and high public danger can have a more lenient punishment, than casual or situational criminal. Hence, there should not be a mandatory mitigation of crime attempt. Moreover, the ban of life imprisonment for crime attempt must also be lifted.

10.5. In regard of ensuring the efficiency of the punishment award we put a special importance to ensure the proportion of sanctions envisaged by the special part of the Criminal Code. The existing RA Criminal Code envisages deprivation of liberty for robbery the same period, as for the ordinary murder. The maximum term of the punishment for trafficking with the aggravating circumstances is only one year less than the term for murder is more, than the punishment envisaged for causing grave damage to health with aggravating circumstances. There are many such cases, which is unacceptable. To ensure the aforementioned proportions it is necessary to develop clear criteria.

11. Releasing from criminal liability

11.1. One of the priority issues of economic and practical importance in the Criminal Code is the exhaustive and detailed regulation of the grounds and conditions of releasing from the criminal liability. In particular, as a ground to release from criminal liability there must be envisaged, in the cases of private charges, the lack of claim from the victim or his legitimate representative and in individual cases of juvenile victims the lack of claim from guardianship and trustship bodies. Moreover, the Criminal Code must list the acts, which are deemed as the cases of private prosecution. Currently this issue is regulated only by the Criminal Procedure Code, which is not consistent with the requirement of the liability inevitability principle stipulated by the existing Criminal Code; i.e. the person committed a crime can be released from criminal liability and punishment only in case of grounds and conditions envisaged by the Criminal Code.

11.2. The institution of releasing from the criminal liability on the grounds of real repentance needs to be specified. The grounds and conditions to release from criminal liability on this basis must be penned down as exhaustive as possible to reduce the discretionary approach of the court. The legislation needs to stipulate whether this institution can be applied in case of combination of the crimes; in particular in cases, when we deal with real or ideal combination, which include, for example, not only non-grave crimes.

Another issue is how justified is the application of the aforementioned institution in regard of the person, who committed a crime in the past; however, released from criminal liability on this or other grounds envisaged by the Criminal Code. In such cases, the person is again considered as having committed the crime for the first time. In this regard the legislation must stipulate such a provision, which will ban the release from the criminal liability on the grounds of real repentance the person, who has been released from criminal liability in the past on this or other grounds.

11.3. Serious amendments need to be done in the institution of releasing from criminal liability in case of reconciliation with the victim. In fact, this is an expression of mediation institution stipulated in the European countries.

In introducing the mediation institute in RA criminal legislation system it is necessary to take into account the experience of other countries, as well as the international criteria. In particular the point is about the instructions of the Committee of Ministers of the Council of Europe about the mediation, UN guidelines, etc.

The review of the international experience and other documents come to state that the mediation is one of the key programs of restorative justice, through the conflict resolution. Through mediation the requirements of the victims are met from one hand and from the other hand the criminal is nevertheless subjected to liability. The purpose of the mediation should be to help and support the crime victim, to meet his requirements, as well as to contribute that the perpetrator understands the consequences of his act, to feel his guilt and need to bear responsibility thereof.

Actually the mediation solves several important issues: identify the requirements of the victim, take them into account and compensate the damage thereof; increase the role of the victim in the criminal procedure, as well as to save the criminal compulsion – limiting the liability of the perpetrator by compensating the damages incurred to the victim.

The scopes of enforcement of this institution in the existing Criminal Code are extremely narrow connected only with the perpetration of non-grave crime. In this case it becomes practically inapplicable – given also the fact that a significant part of non-grave crimes are the cases of private charges and the mere absence of the victim's complaint, even if there has been no reconciliation between the criminal and the victim and the damage inflicted on the victim is not compensated or settled in any other way, is already a condition to release from criminal liability. An option to settle this matter is to enable the enforcement of this institution in case of medium gravity crimes; especially that there are medium gravity crimes among the cases of private charges.

Besides, this institute should not be applied in case, when the crime has been committed by the person, who committed a crime in the past and was released from the criminal liability on non-justifying grounds envisaged by the Criminal Code. In such cases the application of this institute essentially will contribute to the development of impunity. In case of the proposed legislative regulation one should clearly stipulate that in

case of reconciliation between the victim and criminal, it is not that the court can release the criminal, but shall release from the criminal liability. This approach stems from the requirements of international practice.

To ensure the effective enforcement of the aforementioned institution it is necessary to regulate that, if the person that committed the crime or the victim are minors, then this matter shall be settled on the basis of expressing the wish of their legal representatives. In case of crime committed in combination, if the victim reconciled with one of the accomplices, whereas no such reconciliation concluded with the other, then only the accomplice that the victim reconciled with can be released from the criminal liability. Also the cases need to be regulated, when the victim or criminal are mentally ill or the victim died; however, his heirs expressed their will to reconcile or the criminal committed several crimes. An option to settle the issue can be the following regulation: if from the non-grave or medium gravity crime committed for the first time the victim, as a result of derangement, mental despair or personal detour, is deprived from the opportunity to perceive the nature and consequences of the crime committed against him or manage the proper behavior, then the person having committed a crime against him shall be released from criminal liability, if there the mutual agreement based on the independent and free will of the legitimate representative of the victim or custody or guardianship body about the reconciliation.

In case, when the victim is dead, the person that committed a non-grave or medium gravity crime for the first time shall be released from criminal liability, if there is mutual agreement about reconciliation of the successors in title of the victim and perpetrator based on the independent and free expression of the will.

11.4. The institution of releasing from criminal liability on the grounds of laps of time (expiry of period of limitation) needs to be revised. First, the legislation needs to specify from which moment the periods of limitation must be counted – linked with the crimes of formal and material corpus delicti; lasting, continuing or committed in combination crimes. Although the existing legislation made an attempt to settle this matter, however, it is only of partial nature. For example, the issues of calculating the periods of limitation in case of crimes committed in combination or incomplete crimes. At the same time we

need to discuss to what extent is it justified to link the end of period of limitation with the entering into legal force the judgment, like it is done in the existing Criminal Code. It turns out that the investigation body must process the case, spend resources, even in case of being convinced, that anyway before sending the case to the court or final solution the periods of limitation will be over and the person will be released from criminal liability. The solution of this matter shall be considered that the period of limitation must be counted from the moment the person is charged with.

The periods of limitation need to be amended. They must be expanded, otherwise, under the circumstances of the current legislative regulation it turns out that the period of limitation can be shorter, than the period of punishment, in particular the maximum length of deprivation of liberty, envisaged by the legislation for the given type of crime. For example, in case of medium gravity crimes the period of limitation is five years, whereas for the crimes committed by negligence envisaged in this group the deprivation of liberty can be up to ten years. Logically, the periods of limitation must be more than the maximum punishment periods of deprivation of liberty envisaged by the sanction for the acts included in this specific group of crime classification. At the same time the legislation needs to regulate the period of limitation of those acts, for which the legislation envisages life imprisonment and not to leave it up to the court's discretion.

The settlement of termination or suspension of period of limitation also needs to be specified. The existing Criminal Code stipulates a possibility to terminate the period of limitation in case of medium gravity, grave or particularly grave crime perpetrations. This approach is not justified: the settlement of this issue is to consider the perpetration of any crime as basis to terminate.

The regulation of the termination of the period of limitation by the current legislation is a challenging issue, according to which the period of limitation shall be suspended, if the person avoids the examination or trial. Moreover, the person is not subject to criminal liability, if more than ten years passed from the day a non-grave or medium gravity crime is completed and twenty years from the day a grave or particularly grave crime is completed. These periods of limitation also need to be revised.

Besides, in case of such regulation of the suspension of the period of limitation the calculation of the period of limitation for the acts committed by the persons enjoying immunity is an autonomous issue. From one hand it turns out that the person enjoying immunity cannot be subject to criminal liability, unless there is, for example, a relevant decision of the Parliament and from the other hand there is no ground to suspend the period of limitation, which actually means impossibility of liability. An option to settle this matter is the stipulation in the law the fact that in case the crime committed by the person enjoying immunity is known the period of limitation shall be suspended up to stripping that person of immunity or termination of that right.

In case of enforcement of this institution it is necessary to regulate also the compensation of the damage inflicted on the victim by the crime. Otherwise, the protection of the victims' rights will be undermined. Hence, the legislation needs to stipulate that the enforcement of this institution does not release the person committed that act from the obligation to compensate the damage inflicted on the victim.

11.5. The current regulation of the institution to release from criminal liability in case of situation change is also problematic. The current Criminal Code stipulates that the person committed a non-grave or medium gravity crime for the first time can be released from criminal liability, if as a result of situation change that person or his act is not publicly dangerous anymore.

This institution needs to be redefined, as it is not clear in which cases, apart from decriminalization, the act ceases being publicly dangerous. However, in such case the point cannot be about the release from criminal liability. Hence, it would be correct not to stipulate this institute in the Criminal Code or to specify it.

12. Releasing from punishment

12.1. One of the preconditions to ensure the goals of the punishment and to fulfill the objectives of the criminal law is effective enforcement of institution of punishment release. The latter is possible only in case of clear regulation of the individual types of releasing from punishment. In this regard the existing criminal legislation needs serious amendments.

More problematic is the regulation of such expressions of releasing

from punishment, like conditional sentence. The existing Criminal Code deals with it during the regulation of the punishment award, whereas the enforcement of the conditional release is nothing, but postponement of the judgment enforcement and consequently it is correct to include it in the chapter of releasing from the punishment.

This institution needs serious legislative regulation. First, need to specify the cases it can be enforced. The existing Criminal Code does not stipulate any limitation; it only envisages probation period 1-5 years. Logically in case of stipulating such a probation period one must assume that the conditional punishment is possible, if the punishment awarded is more lenient. Hence, the legislation must stipulate that if the punishment awarded by the court is not more than the period determined by the legislation for this institution (which seems more justified in case of three years of imprisonment), then the conditional sentence might be awarded.

At the same time the legislation must stipulate that the enforcement of this institution is possible only in case of committing a crime for the first time.

During the award of the conditional sentence the court must pay attention not only to the nature, degree of danger of the committed act, personality of the criminal, circumstances of the case, but must also consider the obligation of compensating the damage inflicted on the victim or settling it anyway and readiness to get involved in public works. Moreover, it must be mentioned that the award of the conditional sentence does not release the criminal from the obligation to compensate the damage inflicted on the victim.

Regulation is also needed for the issue of whether it is possible to enforce this institution in cases of private charges. In such case it will be more justified to enforce this institution in case there is no objection from the victim.

Currently it is problematic, that the conditional sentencing is often equal to impunity for the person, as during the probation there are almost no obligations for the person; whereas it would be more effective to oblige the person to do public works during the probation period. The obligations of the person during the probation period need to be clarified – by amending them, for example, with a ban to approach the

victim, his family members or persons under his care; obligation to get involved into education, cultural projects; monetary contribution to the foundations or organizations supporting the victims; ban to deal with the convicted persons, etc.

The legal consequences of violation of the probation period conditions or perpetration of a crime by the sentenced person during the probation also need to be clarified. The regulation presented in the existing Criminal Code is not successful. First, there must be a possibility to extend the probation period for malevolent failure to fulfill the proper obligations by the sentenced person during the probation period, no matter if it is non-grave or not, intentional or careless. The institution of the conditional sentence must be removed and punishment must be awarded in combination of judgments.

There must be legislative regulation of the cases, when during the enforcement of the conditional sentence and probation period it turns out that before sentencing the person had committed another crime, for which he was not subjected to liability and not released from criminal liability. As not enforcing the conditional sentence according to the concept can be applied only in case of the person that committed the crime for the first time, then in those cases the enforcement of this institution in regard of the person must be terminated and the punishment must be awarded by the rules of combination.

During the application of this type of releasing from the punishment the court can assign security measures.

12.2. The institution of releasing from the punishment as a result of expiry of period of limitation of the judgment also needs to be clarified. Like in case of releasing from criminal liability as a result of expiry of period of limitation, the periods of limitation need to be extended. At the same time the mechanism to terminate the period of limitation needs to be regulated, the basis of which must be considered the perpetration of not mere intentional crime, but any new crime.

12.3. The institution to replace the non-served part of the crime by a more lenient punishment also needs to be revised and improved. The existing Criminal Code envisages such a possibility only for non-grave and medium gravity crimes. Moreover, the legislation mentions that there is such possibility after the convict serves no less than

one third of the punishment. In regard of this one should first clearly identify the institution of parole from the punishment from the institution of replacing the punishment by a softer punishment. In particular, to apply the institution of replacing the punishment by a softer punishment there can be shorter periods for mandatory serving of the punishment. Besides, this institute can also be applied in cases, when they reject the application of parole. Finally, the application of this institution can also be envisaged not only for non-grave and medium gravity crimes, but also from grave and particularly grave crimes. In case of such regulation it is not clear, on which criteria the court must decide that it is necessary to enforce exactly this and not the conditional punishment institution, given that in case of non-grave and medium gravity crimes to enforce the institution of conditional punishment the legislation considers it necessary to serve no less than one third of the punishment.

It is also necessary that the legislation must envisage a replacement of non-served part of the punishment by another punishment in cases, when there are obstacles to serve the punishment awarded by the court, for example, the person serving the punishment in the disciplinary battalion has become unfit for military service or the person convicted to public works has become disabled, etc. In case such situations emerge under the current Criminal Code, the person shall be released from the punishment, which, however, is not justified from the viewpoint to ensure the goals of the punishment.

12.4. The regulation of the enforcement of the institution to release from the punishment as a result of emergency circumstances also needs clarification. The existing Criminal Code stipulates the possibility to enforce this institution in regard of the person convicted for not grave or medium-gravity crime can be released from punishment, if the further serving of the punishment can cause severe consequences for the convict or his family, as a result of fire, man-made or natural disaster, the severe illness or death of the only capable member of the family, or other extraordinary circumstances. During the enforcement of this institution of the punishment also one needs to be guided not by the group of crime classification of the act, but by the punishment awarded by the court. Such regulation of the matter would enable to answer also the question of whether it is possible to enforce this institution in

regard of several times convicted person, as well as it would extend its force over the persons, in regard of whom, in case of exclusive circumstances, a more lenient punishment has been awarded.

Besides, the legislative regulation must be clear to be obvious for the user that the enforcement of this institution is possible in case of having served half of the punishment, as well as in case of not having served the punishment. In fact, the latter is considered as a special expression of postponing the punishment.

The release of the person from the punishment without measures to reintegrate him in the society does not seem justified. An option to settle this issue is to consider the non-served period as probation, during which the court will put some obligations on the person and the probation service will perform some activities with that person.

In this case it will be also necessary to regulate the legal consequences for malicious non-performance of the obligations stipulated by the court or perpetration of a new crime.

12.5. The institution of release from the punishment as a result of the grave illness also needs to be clarified in the legislation. According to the existing Criminal Code the enforcement of the discussed institution is possible in case of two grounds. The legislature connects one of those grounds with the mental disorder disease emerged during the punishment, which deprived the person of the possibility to perceive and manage the actual nature and significance of his acts. In such case the legislation entitles the court to award coercion measure of medical nature.

Such formulation needs to be amended – the person may have a mental disease also before the perpetration of the crime and service of the punishment, but it is a different matter that it is expressed after the perpetration of the crime. Besides, it is unclear why the legislation envisages possibility to release from the punishment only in case of mental disorder during the service of the punishment, as such situation might emerge after the perpetration of the crime, but before the sentence. At the same time the release of the person in such situation will be justified only in case, when that mental disorder lasted for a short while, hence, there is no necessity to enforce coercion of medical nature, but there is no way to keep that person

in penitentiary institution because of the mental disorder. However, in such case it is not clear why the legislation envisages enforcement of coercion of medical nature not as a mandatory measure, but leaves its enforcement up to the discretion of the court.

As a second ground to enforce this institution the legislation considers such a severe disease of the person after the perpetration of the crime or making the judgment, which will hamper the service of the punishment. This provision needs to be revised. It would be more reasoned to stipulate in the law not just the mere severe disease, but manifestation of incurable severe disease. At the same time, just like in the previous case, in case of release from the punishment on this ground the non-served part of the punishment must be considered as probation period, in case of perpetration of the crime during which a punishment must be awarded to the person in combination of the sentences. In case of malicious evasion from the fulfillment of the duties put on him during the probation period the probation period may be extended upon the court decision and in case of repetition of such violation this ground to release from the punishment can be removed and person sent to actual service of the punishment. Besides, the person released from the punishment during the probation period must be under control of the probation services and if needed, the relevant activities need to be done with that person.

12.6. Another interesting issue is the postponement or release from punishment of pregnant women or women with children under 3 years of age. The legislation envisages such opportunity only for pregnant women or women with children under 3 years of age, whereas such limitation does not seem justified. First, the enforcement of the aforementioned institution will be appropriate in case of convictions of other types of the punishment, for example, detention, public works, etc. Besides, it would be correct to expand the scope of institution of postponement of enforcing the judgment and not limit it only by pregnant women or women with children less than 3 years of age. Equally successful this institution can be enforced, for example, for persons above 70 years of age or with disabilities. Consequently, it will be correct to revise this institution – stipulating that it can be applied in regard of the persons, the court sentence in regard of whom

does not exceed the deprivation of liberty for five years. The actually non-served part of the punishment must be deemed as probation period, during which the court can put some obligations on the person and the probation service staff must do some activities to integrate that person into the society. In case of releasing from the punishment on the aforementioned grounds, if a new crime is committed during the probation period this measure of releasing the person from the punishment will be removed and a punishment is awarded in combination of the sentences and in case of malicious evasion from the obligations put on him during the probation – the probation period shall be extended upon the court decision and in case of repeating this ground of releasing from the punishment shall be removed and the person shall be sent to serve the punishment.

12.7. Among the institutions of releasing from punishment the release from punishment on parole has a special importance. The existing Criminal Code regulates it; however, this regulation has many shortcomings, which hamper effective enforcement of this institution. First, this shortcoming is about the ground to calculate the period of releasing from the punishment. The existing Criminal Code calculates them guided by the belonging of the crime committed to the specific group of crime classification, which, however, does not enable to exercise individual approach in case of releasing from the punishment as well. It seems more justified the calculation in order established by the law – based on the type and amount of the punishment awarded by the court to the specific person. This kind of settlement of the matter will enable to regulate the cases, when the punishment is awarded in combination of crimes or sentences or a more lenient punishment, than envisaged by law, has been enforced.

The legislation must clarify how they must calculate this term in case the convict commits new crimes during the punishment service. An option to solve this issue must be termination of this period by the fact of perpetration of a new crime and its recalculation by the court from the moment the judgment in combination of the sentences enters into legal force.

The issue of releasing on parole a life-server also needs legislative clarification. The existing Criminal Code stipulates that a life-server

can be released on parole, if the court finds that the person does not need to serve the punishment any longer and has in fact served no less than 20 years of imprisonment. However, it would be clearer to stipulate that the perpetration of a new crime shall terminate this period and the calculation restarts from the moment the judgment for newly committed crime enters into legal force. The existing Criminal Code envisages an opportunity not to terminate, but to suspend this period in case of a new intentional crime, if deprivation of liberty is to be awarded for it. According to the current regulation this period shall restart after the period of the new crime is over. However, such approach does not seem justified, as it is unclear how shall this provision be enforced, in case, when the punishment awarded for the perpetrated act is life imprisonment.

At the same time we need to clarify the period, which in case of releasing on parole a life-server must be considered as a probation period.

The scope of obligations put on the person during the release of punishment also needs to be clarified. It must be explicitly stipulated that in case of release from the punishment on parole the non-served part of the punishment must be considered as a probation period, during which the court must put obligations on the person and the probation service must perform activities aimed at the reintegration of the person in the society. In fact their nature and significance are the same as in case of conditional punishment.

The legal consequences of the malicious violation of the obligations put on the person by the court or probation service during the probation period also need to be explicitly regulated; entitling the court to extend the probation period, if necessary.

12.8. In releasing from the punishment, based on the considerations to ensure the objectives of the punishment, the court can assign security measures in regard of the person. At the same time one must stipulate that the release from the punishment does not release the criminal from the obligation to compensate the damage inflicted on the victim.

13. Amnesty, pardon, criminal record (conviction)

13.1. The institutions of amnesty and pardon need to be clarified. First, it is arguable to what extent is the justified to expunge the person's

criminal record by amnesty or pardon. It would be more reasonable to stipulate that by an amnesty the person can be expunged from criminal liability or in full or in part be released from the punishment and in case of pardon the convict can in full or in part be released from the punishment or it may be replaced by a more lenient punishment. Moreover, the legislation must stipulate that the release of the person or convict, who committed a crime on this ground, is not released from the obligation to compensate the damage inflicted on the victim.

The legislation must also stipulate, who can refer to RA President with a request to pardon a convict. Although theoretically this issue is regulated; however, it would be more correct to clarify this issue on the legislative level, in particular a solution of this matter is direct stipulation in the Criminal Code that the convict and his legal representative can submit with such a request. Moreover, the opportunity to submit another pardon request in case of pardon request refusal must be regulated; however, after a certain period of time established by the law.

The legislation needs to stipulate that the person can be pardoned only in case of his agreement.

13.2. The issues concerning the criminal record are also of interest. Like in the existing Criminal Code, grounds to expunge the criminal record must be deemed the quashing or removing of the criminal record, as well as decriminalization of the act. At the same time the legislation must stipulate that the certification of not having criminal record on this ground cannot be a basis to claim compensation from the date. The legislation stipulate the moment of calculating the quashing the criminal record in cases of release from the punishment, especially release from the punishment on parole.

The terms to quash the punishment need to be revised. It will be correct, in case of sentencing to a more lenient punishment than the punishments connected with the deprivation of liberty, to consider the criminal record quashed after serving that punishment. At the same time, the decision about the quashing the criminal record must not be linked with the type of crime, but with the punishment periods awarded by the court. Such solution is more correct from the both theoretical and practical viewpoint, especially in cases, when a more lenient punishment is awarded, than envisaged by law or vice versa; a punishment is

awarded in combination of the crimes or sentences. At the same time this approach will be more justified from the viewpoint of calculating the criminal record quashing period in case of terminating the conviction.

The legislation also needs to regulate the issues of quashing the criminal records of life prisoners and released from the punishment on the basis of pardon or other grounds stipulated by the law.

The regulation of the quashing the criminal record institution also needs to be revised. According to the regulation stipulated by the existing Criminal Code the court can quash his conviction in case of impeccable behavior and having served at least half of the conviction period. Indeed, it is difficult to determine "impeccable behavior" concept and actually it can be applied arbitrarily. A correct solution might be the stipulation in the law that the institution of quashing the criminal record will be enforced in exclusive cases, in cases of providing the society or state with the exclusive services.

14. Peculiarities of the criminal liability and punishment of minors

14.1. A special attention must be paid to the issue of the criminal liability and punishment of minors. The main types of the criminal and legal measures in regard of the persons of this category, as by priorities, must be considered coercion measures of disciplinary nature, conditional sentencing and punishment. Moreover, in the basis of this or that type of influence one must first of all put the moral-psychological, physiological, social-role features describing the personality of the criminal, but not the objective circumstances (type of the crime, amount of the damage inflicted, etc.).

The aforementioned circumstances are first of all conditioned by the peculiarities of the juvenile crime (as an integral part of the crime), which in their turn greatly depend on the social-psychological development features of the minors. These are exactly the features that make the explicit regulation of the criminal liability of the minors necessary.

The existing RA Criminal Code envisages special conditions of the minors' criminal liability, punishment award and stipulation of its types, as well as releasing them from the criminal liability and punishment, calculating the periods of limitation and quashing the criminal record,

which in many cases are different from the general rules of stipulating the criminal liability and punishment award, releasing from them. This fact stems from "The Beijing Rules" approved by resolution 40/33 of UN General Assembly dated November 29, 1985 ("United Nations Standard Minimum Rules for the Administration of Juvenile Justice), according to paragraph 2.2 "a" a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult. As it is mentioned in the interpretation of this paragraph "...the age limits will depend on the provisions of each legal system, taking into account the economic, social, cultural and legal systems of the member states". At the same time according to the paragraph 4.1 of "The Beijing Rules" "In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity". I.e. the limits of the minimal age of the criminal liability, depending on the historical and cultural, as well as social-psychological development features of the child, are absolutely different. Consequently, if the age limit of the criminal liability is too low or not stipulated at all, then the idea of liability will become completely pointless. For this very reason it is necessary to put serious efforts to determine the minimal age limit for the criminal liability in a reasonable and prudent manner.

According to the existing RA criminal legislation the peculiarities of the criminal liability of the minors are about:

1) awarding of such punishments, which can be enforced in regard of the minors – taking into account the conditions of life and upbringing of each minor, degree of psychological development, state of health, other peculiarities of the person, as well as influence of other persons;

2) enforcement of coercion measure of education nature instead of the criminal liability and punishment;

3) releasing the minor having committed a crime from the punishment;

4) releasing from the punishment on parole;

5) releasing from the criminal liability or punishment because of

expire of period of limitation and

6) quashing the criminal record (conviction).

However, the existing RA Criminal Code incompletely regulates the aforementioned issues in many cases. In particular:

14.2. The punishment system envisaged for the minors needs serious revision. In law-enforcement practice, in fact, only deprivation of liberty of certain period of time is enforced. The point is that the other types of punishments (fine, public works, and detention) are not effective because of unclear legislative regulation. In this regard it is necessary not only to clarify the legislative formulations of the aforementioned norms, but also to expand the scope of the punishments enforced in regard of the minors. In regard of the person of the given category they can effectively enforce types of punishments, like limitation of the freedom and stripping of the right to engage in certain type of activity.

14.3. The punishment system envisaged for minors by the new RA Criminal Code will have the following:

- 1) fine;
- 2) public works;
- 3) stripping of the right to engage in certain type of activity;
- 4) stripping of parental rights
- 5) limitation of freedom;
- 6) deprivation of liberty for short period;
- 7) deprivation of liberty.

The aforementioned sequence is conditional.

14.4. It is necessary to expand the practice of enforcing the coercion measures of education nature in regard of minor criminals. Taking into account the social-psychological peculiarities of the minors – the criminal and legal coercion measures in regard of the persons of this category must first of all be aimed at their education and correction; protection from the negative influence of the adults and not the punishment. Hence, it is necessary such legislative formulations, which will exclude the enforcement of the punishment in regard of the minors in all those cases, when it is possible to achieve their correction and prevention of commission of new crimes by them by means of coercion measures of education nature.

14.5. At the same time Criminal Code must envisage that in case of malicious evasion from meeting the requirements of the aforementioned measures the minor can be brought to criminal liability and punishment.

14.6. Warning is an explanation to the minor about the damage inflicted by his act and about the consequences of repeated committal of crimes envisaged in the Criminal Code; cannot be considered as an autonomous coercion measure of education nature. In this case there are no elements of coercion, as there is no obligation put on the minor that committed a criminal act. It is a different question, whether the warning must be enforced in awarding any coercion measure of education nature.

14.7. The issue of handing over for supervision to the parents, persons replacing the parents, competent bodies supervising the convict's behavior or local bodies of self-government charged with the duty to exert disciplinary influence and monitor the minor's behavior is also to be revised. Under the existing RA Criminal Code handing over for supervision does not imply coercion, as in this case as well there is no obligation put on the minor that committed a crime. In particular, it is expressed in putting the obligation of educational influence over the minor on the parents of the persons replacing the parents or competent bodies supervising the convict's behavior or local bodies of self-government charged with the duty to exert disciplinary influence or for supervision of the minor's behavior. Whereas there must be some obligations and responsibilities for the persons charged with the supervision. Besides, the provision of handing over for supervision to the parents and persons replacing the parents must be removed, as the commission of the crime by the minor already bespeaks about the drawbacks of that supervision.

14.8. The list envisaged by the existing Criminal Code about the coercion measures of educational nature in regard of the minors must be reviewed with the purpose to expand and further clarify it. For example, special educational, cultural and other programs can be envisaged.

14.9. It is necessary to stipulate an exhaustive list of the coercion measures of educational nature awarded to the minors with the purpose to exclude the possibility of spacious interpretation of it. According

to the part 3 of Article 91 of RA Criminal Code – upon the motion of the authorized body the court can award other coercion measures of educational nature. However, the prohibition of enforcing the Criminal Code by analogy assumes not only inadmissibility to fill in the gap of the law by another provision of the same law, but the necessity to formulate the criminal-legal consequences by a known degree of certainty.

14.10. One must review the terms stipulated by the Criminal Code about the award of the aforementioned measures. The minor's correction process in each specific case must be characterized by certain peculiarities and demands individual approach. Some persons need months to correct and some – years. However, it is mandatory to stipulate terms to enforce the measures discussed here. In the opposite case it is not clear, when the given criminal-legal relation is over. At the same time those terms cannot exceed the periods of limitation to release from the criminal liability for the given crime. Otherwise it turns out that the period of limitation is over; however, the measures of criminal and legal coercion continue to be enforced in regard of that person.

14.11. The stipulation of the terms for the enforcement of coercion measures of education nature cannot be left up to the discretion of the law-enforcer. Those terms must be explicitly stipulated in the Criminal Code.

14.12. It is necessary to limit the possibility to award the punishment in the form of deprivation of liberty in regard of minors that committed a crime. In particular, the minor that committed a non-grave or medium gravity crime for the first time, irrespective of age, as a rule, must not be deprived of liberty. The deprivation of the liberty of the minor must be deemed as an extreme measure, which can be applied only in the cases, when no other measure can yield a positive outcome.

14.13. RA Criminal Code needs to identify an autonomous institution of the conditional punishment of minors. The social-psychological features characterizing the minor shall be the basis for their conditional punishment, which will bespeak about the possibility of the convict's correction without serving the punishment, which will enable to maximize the individualization of the punitive-educational influence over the juvenile convict.

This type of the criminal liability must be aimed at the enforcing of the juvenile criminal to behave in such a way that will contribute to his correction and socialization, which will enable to exclude the commission of a new

crime by him. In this regard, while enforcing a conditional punishment, as a mandatory condition, they should put such obligations on the minor that will contribute to the formation of socially favorable features (i.e. continuation of the education, employment, medical treatment, etc.)

Within the conditional punishment institution they must envisage norms that contain not only coercion elements, but also encouraging the positive behavior, which will foster the correction process of juvenile criminals and implementation of the criminal liability objectives.

14.14. The criminal law must envisage that in some cases the minors' criminal liability and punishment features must be enforced in regard of 18-21 y.o. young criminal. The analysis of the criminal legislation of a range of foreign countries shows that 18-21 y.o. young people represent a social group that is not less important for the criminal law, than the minors.

15. Security measures

15.1. The existing Criminal Code does not envisage an opportunity to apply security measures, which, however, are currently effectively used in many European Countries and in US. Unlike punishment, the purpose of these measures is not to correct the criminal or to restore the social justice, but neutralization of "dangerous situation" of the criminal; to prevent possible criminal acts and re-socialize the person. Among such measures are: measures of the medical enforcement; the measures applied in regard of persons under the criminal liability age, who committed an act envisaged by the special part of the Criminal Code; ban to visit certain places; obligations to visit institutions providing with psychological assistance; special supervision over the behavior, etc. The security measures can be applied in parallel with the punishment, as well as means of autonomous influence in case of releasing the person from criminal liability.

15.2. Measures of medical enforcement

The grounds to enforce medical measures need to be clarified. The existing Criminal Code stipulates the scope of the persons, in regard of whom the court can award measures of the medical enforcement; i.e. persons that were in the state of insanity or limited insanity at the moment of crime commission; persons in need of treatment from alcoholism or

drug addiction, as person, who committed the crime in sane condition; however, after the commission of the crime they developed mental disorder making the award or service of the punishment impossible. The scope of the aforementioned people needs to be clarified: first, currently it does not envisage persons that need treatment of toxicomania. Besides, it would be correct to envisage measures of the medical enforcement not only for the persons, who at the moment of the crime commission were sane, who, however, after the commission of the crime they developed mental disorder making the award or service of the punishment impossible, but also expand the list of those persons – including also the persons, who at the moment of the crime commission were sane; however, after it developed mental disorder, who are not able in full or in part to perceive or control their acts. In case of this category of persons the emphasis must not be put only on the impossibility of the punishment award or service, as there can be situations, when during the punishment service the person develops mental disorder, which although do not make it impossible to award or serve the punishment, but significantly hinder the achievement of the punishment objectives or can lead to the commission of new crimes in violation of the order established in the penitentiary institutions. In such case, it would be correct to envisage an opportunity to award and enforce measures of the medical enforcement in parallel with the punishment.

The grounds to appoint specific measures of the medical enforcement also need to be clarified. In the first place it is difficult to agree with the current regulation of the Criminal Code that stipulates that in parallel with the punishment the court can assign in addition to punishment an outpatient supervision by psychiatrist and enforced treatment for those convicted for committal a crime in the state of the mental disorder not ruling out sanity, but who need treatment against alcohol, drugs or mental disorder not ruling out sanity. In some cases it is possible that the aforementioned persons need not outpatient supervision by psychiatrist, but in-bed treatment of psychological hospital. Such situations may especially emerge in case of awarding punishments not related to deprivation of liberty, when the criminal is dangerous for himself or someone else. Consequently, such limitation of the Criminal Code seems to be unjustified.

Amendments are needed also for the provisions concerning the

award, change and termination of measures of medical enforcement. The existing criminal legislation stipulates that in awarding a measure of medical enforcement the court shall take into account the mental disease of the person, the nature of the act and degree of danger for the public, whereas in awarding a measure of medical enforcement one must take into account also the personality of the person, the possibility of repeated crime commission by him, violations of other person's rights and public order.

There must be unified approach also in regulating the changes or termination of the measures of medical enforcement. The existing Criminal Code stipulates that in case of using a measure of medical enforcement in case the person recuperates or change of the nature of his disease, when there is no more need of a measures of medical enforcement, on the basis of the medical institution conclusion the court shall make a decision to terminate their enforcement, whereas in terminating the measure of medical enforcement joined with the punishment the court must refer to the conclusion of the psychological commission. It would be probably correct in both of the cases to consider as a basis to terminate the measures of medical enforcement the conclusion of the psychological commission.

The legislation also needs to clarify the issue, if the duration of the measures of medical nature implemented in the psychological hospital be more than the period of deprivation of liberty, which was awarded or could be awarded for the committed act. At the same time one needs to regulate also the maximum permissible period of the duration combined with the punishment not related with the deprivation of liberty or outpatient supervision or treatment of the psychologist.

15.3. ***The ban to visit certain places*** is also an effective measure, which can be expressed, for example, by a ban to visit restaurants, cafes, night clubs and casinos. The court must determine the duration of the aforementioned security measure within the timeframe established by the law. The most effective is the ban for a period from three months up to two years.

In case of violation of the requirements of this security measures on purpose they must envisage criminal liability.

This security measures shall be applied taking into account the

need to prevent the new possible crimes by the person of criminal behavior. In particular, those can be expressed by banning the person that committed hooliganism to visit night clubs, dance floors, restaurants, cafes or for example, banning the person that committed a theft to repay the debt as a result of gambling to visit casinos, etc.

15.4. The obligation to visit the psychological centers is mostly applied in regard of the persons that committed acts paralleled with the violence envisaged by the special part of the Criminal Code. It is expressed by visiting centers providing with the relevant assistances of psychological nature within timeframe determined by the court. It will be effective to use that ban for a period from three months up to two years.

In case of violating the requirements of this security measure criminal liability must be envisaged.

This security measure must be applied, when the court comes to a conclusion that the reason of offence of the person or factors contributing to such behavior are psychological complexes and strays and the appointed security measure is necessary to prevent the possible new criminal behavior of that person.

15.5. ***The special supervision over the behavior*** is a security measure enforced in the period determined by the court within the timeframe established by the law for the person that has not served his punishment in full, which is enforced, if there is a real threat that the person having served his punishment will commit a new crime. The duration of the supervision over the behavior must be stipulated by the law; in particular it is proposed to have it for a period of 1-5 years. In case of supervision over the behavior the probation staff must regulate the enforcement of this measure that must help the person that served the punishment to reintegrate into the society. Meantime the same requirements can be put forward for this person, as in case of conditional punishment. The court can change the duration of the supervision over the behavior – based on the motion submitted by the probation staff. Moreover, the grounds and conditions to change and terminate this measure need to be regulated by the law.

15.6 ***The confiscation of property*** should be envisaged in two forms: confiscation of proceeds or property obtained in illegitimate way and confiscation of instruments and means of crime.

15.7. Among the security measures the Criminal Code must also envisage such measures, which can be enforced in regard of the minor under the age of criminal liability, how committed an act envisaged by the special part of Criminal Code. Those must be aimed at the formation of the law-abiding behavior by those children in the society and prevention of commission of new crimes by them. Among such measures are, for example, giving him a to foster family; placement in a special educational institution; engagement in the educational, cultural, sports and other programs, etc.

Special Part of the Criminal Code

The special part of the Criminal Code must be based on the following principal provisions:

16. The mitigation of the criminal-legal influence must be balanced and legally reasoned and justified. It should not cause undue weakening of the criminal law protection and regulatory functions.

16.1. The rehabilitation justice cannot definitely assume a mitigation of criminal sanctions. At the same time it is necessary to ensure the proportionality and justification of the respective sanctions – based on the types and amounts of the punishment envisaged for the most dangerous crimes (murder in aggravating circumstances).

16.2. The decriminalization of the criminal acts only because of lack of law-enforcement practice on some corpus delicti is inadmissible, as also the presence of such law-enforcement norms contributes to the fulfillment of the crime prevention objectives.

16.3. The criminal law meeting the modern requirements must be based on the requirements of the law-enforcement practice as much as possible. In this sense one must envisage clear criteria of the crimes and civil offences, as well as demarcation between the crimes and administrative violations.

16.4. To ensure the efficiency of the criminal law enforcement it is necessary to except all those cases, when the crimes of general nature are envisaged as feature or aggravating circumstance of corpus delicti of the crimes against special persons (i.e. the murder of

public, political or state figure is rated among the crimes against the public security). The commission of the act, which is a crime against a special person, must be envisaged as an aggravating circumstance of the general crime, if necessary.

16.5. The current situation in the existing Criminal Code is unacceptable, when another crime is envisaged as an aggravating circumstance of *corpus delicti* (i.e. murder coupled with abduction or robbery, etc.). In such cases, there are many issues linked not only with the qualification of the act, but also the principle of inadmissibility of double sentencing for the same act is violated. Consequently, it is not correct to envisage aggravating circumstances.

16.6. The structure of the special part of the Criminal Code needs to be further specified and simplified. It must be as follows:

Section ... Crimes against the peace and human security

Chapter ... Crimes against the peace

Chapter ... War crimes

Chapter ... Crimes against the human security

Section ... Crimes against man

Chapter ... Crimes against life

Chapter ... Crimes against health

Chapter ... Crimes putting at risk life and health

Chapter ... Crimes against freedom, honor and dignity

Chapter ... Crimes against sexual immunity and sexual freedom

Chapter ... Crimes against constitutional rights and freedoms

Chapter ... Crimes against the interest of family and child

Section ... Crimes against property and economic activities

Chapter ... Misappropriation

Chapter ... Other crimes against property

Chapter ... Crimes against economic activities

Section ... Crimes against public security and computer data security

Chapter ... Crimes of general nature against public security

Chapter ... Crimes against the treatment of publicly dangerous materials and objects

Chapter ... Crimes against the established order of special security rules of works and activities

Chapter ... Crimes against computer data security

Section ... Crimes against public order and morality

Chapter ... Crimes against public order

Chapter ... Crimes against morality

Section ... Crimes against the health of the population

Chapter ... Crimes against the lawful circulation, keeping and use of drugs, psychotropic materials, their precursor, severely affecting or toxic substances

Chapter ... Other crimes against the health of population

Section ... Crimes against the environmental safety

Chapter ... Crimes against the flora and fauna and specially protected zones of nature

Chapter ... Other crimes against the environmental safety

Section ... Crimes against state power

Chapter ... Crimes against foundations of constitutional order or against state security

Chapter ... Crimes against state service

Chapter ... Crimes against procedure of governance

Chapter ... Crimes against justice

Section ... Crimes against the established order of the military service

Chapter ... Crimes against the military subordination and relations, prescribed by field manuals

Chapter ... Crimes against military service order

Chapter ... Crimes against the use, maintenance of military property and maintenance of military equipment

Chapter ... Crimes against the rules for handling weapons,
ammunition and items and materials dangerous for others
Chapter ... Crimes against the order of holding special services
and fulfilling the military duty in special circumstances
Chapter ... Military official crimes