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NEW TENDENCIES IN THE PROTECTION OF THE RIGHT TO LIFE IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS[**] - CHALLENGES FOR THE REPUBLIC OF SERBIA

The right to life belongs to the hard core of human rights, which cannot be derogated, guaranteed by Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 24 of the Constitution of the Republic of Serbia. The European Court of Human Rights has built important standards regarding the protection of the right to life. Non-derogability is highlighted by some authors as an important characteristic of absolute rights. However, there are inherent limitations to the right to life, unlike some other rights that belong to the core of human rights, which have no inherent limitations, thus denying it absolute character. If the deprivation of life is allowed in certain situations according to paragraph 2 of Article 2 of the European Convention on Human Rights and Fundamental Freedoms, does this, by its very nature, negate its absolute significance? Through an analysis of some recent decisions of the European Court of Human Rights related to Article 2 and Article 8, concerning the right to life and the right to respect for private and family life, which are linked to Article 23 of the Constitution of the Republic of Serbia, regarding the right to dignity and free development, the author points to a new sensibility, a new "essence" and "nature" of the legal reasoning of the Strasbourg court. It sheds light on the right to life in a different way, increasingly highlighting the right of an individual to self-determination, a dignified life, and personal freedom. In the judgment of the ECtHR in Mortier v. Belgium, where it was examined for the first time whether the

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act of euthanasia was in accordance with the ECHR, the nature and scope of the state's positive obligations (material and procedural) were explained based on Art. 2 in the very specific concrete context of euthanasia requested by a depressed woman. This case was examined also under both Article 2 and Article 8. Furthermore, the decision of the Chamber in Gross v. Switzerland, although it never became legally binding, is significant because of the issues it raised. Namely, the Chamber's decision established a violation of Art. 8 because the Swiss law is not sufficiently clear and specific regarding the permissibility of assisting suicide. As part of dealing with this topic, particular attention has been given to the expert analysis of the decision by the Federal Constitutional Court of Germany, which determined that the criminalization of assistance in suicide under paragraph 117 is unconstitutional. Bearing in mind that these decisions are closely related to the corresponding incriminations in the criminal legislation, the author points to new tendencies in the protection of the right to life in the criminal law. In the direction of challenges for the future work of the Constitutional Court of Serbia, in addition to clarifying the nature and scope of the state's positive obligations (material and procedural) based on Art. 2 in the specific concrete context of the execution of euthanasia, the author referred, related to Article 2, to the analysis of the nature and extent of the state's positive obligations (material and procedural) based on Art. 2 in the specific context of domestic violence in the judgment of the Chamber and Grand Chamber in Kurt v. Austria,[1] bearing in mind the similarity of the legal framework for combating domestic violence between Austria and Serbia. This decision also sets standards, specifying the scope and content of the state's positive obligation, from paragraph 115 of the judgment of the Grand Chamber in Osman v. the United Kingdom, regarding the obligation to take preventive operational measures to protect an individual whose life is threatened by the commission of criminal acts by another individual.

Keywords: *European Court of Human Rights, right to life, right to dignity and free development of individuals, criminal-law protection, assisted suicide, euthanasia, domestic violence.*

[1] *Kurt v. Austria*, 62903/15, 15. 06. 2021.

Introductory notes

The right to life is guaranteed by the Constitution of the Republic of Serbia and a number of international treaties. It belongs to the category of human rights that cannot be derogated. Today, there is no longer any doubt that in the light of the existence of inherent limitations of the right to life, and notwithstanding the existence of non-derogation as one of the characteristics of absolute rights, the right to life is not of an absolute nature. There are numerous decisions of the European Court of Human Rights (hereinafter: ECtHR) made in the last period, which concern the limitation of the right to life, and they no longer open a dilemma regarding the understanding that the right to life is not an absolute right.[2] Also, Protocol No. 13 from 2002 uses the phrase "fundamental value in a democratic society" for the right to life without labeling that right as absolute. In the Preamble of Protocol No. 13 of the Convention it is stated that the right to life is a basic value in a democratic society, and that the abolition of the death penalty is necessary for the protection of this right and the full recognition of the innate dignity of all human beings.

When it comes to general principles, Strasbourg jurisprudence points out that Article 2 protects the right to life, and that it is one of the most fundamental provisions in the entire Convention and one of the most fundamental values of every democratic society in the Council of Europe;[3] that Article 2 of the Convention, which protects the right to life, ranks as one of the most fundamental provisions of the Convention together with Article 3, and that it contains one of the basic values of the democratic societies that make up the Council of Europe;[4] that Article 2 is a fundamental right that contains obligations for states.[5]

In the report, we will analyze recent practice and current tendencies expressed in the ECtHR decisions and their potential impact on the work of the

[2] We single out the most significant: Haas v. Switzerland, 31322/07, 20 January 2011; Gross v. Switzerland, 67810/10, decision of the Chamber of 14 May 2013 and of the Grand Chamber of 30 September 2014; Mortier v. Belgium, 78017/17, October 4, 2022. They are closely related to the topic of substantive criminal law, i.e. with the issue of *de lege ferenda* of possible decriminalization of certain criminal acts.

[3] *Nachova and Others v. Bulgaria*, Application No. 43577/98 i 43579/98, 06 June 2005.

[4] *Kotilainen and Others v. Finland*, 62439/12, 17 September 2020.

[5] *Makuchyan and Minasyan v. Azerbaijan and Hungary*, 17247/13, 26 May 2020.

Constitutional Court of Serbia. At the same time, we emphasize the importance of the doctrine of the state's "margin of appreciation". Namely, the results of the ECtHR jurisprudence have also found a place in the Convention, through Protocol 15. Although it has been a part of jurisprudence for decades, having found its place in many judgments of the ECtHR, it was not until Protocol 15 (Article 1) of the Conventions Preamble that the "margin of appreciation" doctrine was explicitly incorporated. This doctrine enables the human rights standards prescribed in the Convention to be adapted to the different legal systems and social contexts of the States parties to the Convention. First formulated in *Handyside vs UK* decision in 1976, it referred to "[...] the permissible extent of limitation of rights based on criteria which are not entirely precisely defined and depend very much on the environment in which the rights are enjoyed as well as on its culture". Such criteria are for example "public safety", "economic well-being", "public morals", "democracy", i.e. "democratic society". Each country, based on its local context, has a certain freedom in interpreting the standards of the Convention, but it must not interpret these terms completely arbitrarily and depart too far from the practice of the ECtHR. We emphasize that the balance must not be shifted in favour of the state, to the detriment of citizens.

When it comes to euthanasia and assisted suicide, that is the right to end life, there is no consensus among member states of the Council of Europe. The ECtHR often emphasizes that states have a wide field of discretion related to these topics. Nevertheless, as we will see, the ECtHR discussed certain aspects related to these issues.

Selected decisions, illuminated by new perspectives in the legal reasoning method of the ECtHR, pose new challenges to Serbia, which is especially evident in situations where the normative and procedural situation is similar between our country and the country whose cases were discussed. Bearing in mind that the decisions we are analysing are also related to the area of criminal legislation, we will briefly refer to the criminal law protection of the right to life.

1. The right to life and the right to dignity and free development of individuals in the Constitution of the Republic of Serbia and the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Constitution of the Republic of Serbia[6] in Article 24, entitled "Right to Life", states that human life is inviolable. In paragraph 2 of the same article of the Constitution, it is stated that there is no death penalty in the Republic of Serbia, and in paragraph 3 that cloning of human beings is prohibited.

Article 23 of the Constitution entitled "Dignity and free development of individuals" proclaims that human dignity is inviolable and that everyone is obliged to respect and protect it. Also, it is emphasized that everyone has the right to free development of personality if it does not violate the rights of others guaranteed by the Constitution.

Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) [7] guarantees the right to life. Protocol 6 on the abolition of the death penalty in peacetime and Protocol 13 on the abolition of the death penalty in all circumstances are also important. In Article 2, paragraph 1, it is emphasized that the right to life of every person is protected by law. No one can be intentionally deprived of life, except during the execution of the court's verdict by which the person was convicted of a crime for which this punishment is prescribed by law. This provision was amended by Protocol no. 6 and Protocol no. 13 to the ECHR.[8]

According to Article 1 of Protocol no. 6, entitled "Abolition of the Death Penalty", the death penalty is abolished. No one shall be sentenced to death or

[6] Ustav Republike Srbije, *Sl. Glasnik RS*, br. 98/2006, 115/2021.

[7] Zakon o ratifikaciji Evropske Konvencije za zaštitu ljudskih prava i osnovnih sloboda, *Sl. List SCG-Medjunarodni ugovori*, br. 9/2003, 5/2005 i 7/2005-ispr. and *Sl. Glasnik RS-Medjunarodni ugovori*, br. 12/2010 i 10/2015.

[8] The death penalty as a limitation of exercising the right to life is no longer allowed in countries that inherit the democratic values of the Council of Europe. The question of the death penalty is *par excellence* a question of criminal law character, *because it is about a criminal sanction and type of punishment*, first of all. However, considering that it has almost completely disappeared from Europe, we consider the discussion on this topic anachronistic. In our country, the death penalty was deleted from the system of criminal sanctions by the Law on Amendments to the Criminal Code of Serbia in 2002 (Zakon o izmenama i dopunama Krivičnog zakona Srbije, *Sl. Glasnik RS*, broj 10/2002).

executed. According to Art. 2 "Death penalty in time of war", "a state may make provision in its law for the death penalty in time of war or imminent threat of war, such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law".

According to Article 1 of Protocol No. 13, entitled "Abolition of the Death Penalty", the death penalty is abolished. No one can be sentenced to death or executed. Namely, the member states of the Council of Europe, convinced that everyone's right to life is a fundamental value in a democratic society and that the abolition of the death penalty is essential for the protection of this right, as well as for the full recognition of the innate dignity of all human beings, wishing to strengthen the protection of the right to life, guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on November 4, 1950, bearing in mind that Protocol 6 to the Convention, which refers to the abolition of the death penalty, signed in Strasbourg on April 28, 1983, does not exclude the death penalty for acts committed during a state of war or a state of immediate threat of war, resolved to take a decisive step in order to abolish the death penalty in all circumstances and adopted Protocol No. 13.

The right to life is limited by its very definition. Paragraph 2 of Article 2 states that deprivation of life is not considered contrary to this Article if it results from the use of force that is absolutely necessary (to defend a person from illegal violence; to carry out a lawful arrest or to prevent the escape of a person lawfully deprived of liberty; when lawful measures are taken in order to suppress riots or insurrections). These are the situations in which the use of deadly force would be allowed to the persons entrusted by the state with the performance of certain tasks, such as the protection of public order and peace, the protection of the legal order, and the integrity of the country and similar duties, would be permitted (as a rule, we talk about the members of police, army or special units). In its decisions and judgments, the ECtHR uses the name "state agents" for these persons.[9]

According to the practice of the ECtHR, there are three basic obligations of the state with regard to the protection provided by Article 2. It is the obligation

[9] E. Grdinić, Europski sud za ljudska prava i zaštita prava na život, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, br. 2/2006, Rijeka, str. 1091.

of the state to refrain from taking life (negative obligation), and the obligation to take all reasonable measures to protect the right to life of individuals within its jurisdiction, not only from injuries that come from the state and its officials, but also from private individuals (positive obligation), as well as the obligation of the state, in cases of deprivation of life, to conduct an efficient and effective investigation in order to shed light on the specific event and punish the perpetrators. Conducting an efficient and effective investigation is of particular importance in cases related to enforced disappearances, i.e. persons deprived of liberty by the state, who subsequently disappeared or were found dead. The right to life also protects individuals from deportation or extradition to a country where they are in serious danger of violating the right to life (Grdinić, 2006:1089).

According to the position of the European Court of Human Rights, the right to life belongs to "inviolable, untouchable" human rights that are guaranteed to every person, in all circumstances and in all places and cannot be subject to any derogation. It is one of the rights that establishes freedom and the existence of which implies a positive obligation of the state to take all necessary measures to protect the life of the person under its authority (L.C.B. v. the United Kingdom, dated June 9, 1998, paragraph 36).

This positive obligation of the state includes substantive-law and procedural legal aspects.

From the substantive-law aspect, the positive obligation of the state implies taking all necessary measures so that violent death does not occur, and this presupposes the establishment of a legal framework that should provide effective protection against threats aimed at the right to life (*Osman v. the United Kingdom*, of October 28, 1998, paragraphs 115 and 116). That is why it is necessary to have effective criminal-law and other norms that would deter the commission of criminal acts against the life of a person, as well as procedural mechanisms for preventing, suppressing and punishing violations of those norms (*Streletz, Kessler and Krenz v. Germany* of March 22, 2001, paragraph 86). This obligation also extends to taking preventive measures to protect life, especially in relation to dangerous activities that potentially pose a risk to life (*Oneryildiz v. Turkey*, dated November 30, 2004, paragraph 107).

Observed from the procedural legal aspect, the positive obligation of the state, in the case where a person is deprived of life, consists in conducting an

independent and effective investigation, in order to shed light on the specific event and punish the perpetrators, which implies the existence of an efficient court system within which the procedure will be carried out that does not necessarily have to be criminal in nature (*McKerr v. United Kingdom*, 4 May 2001, paragraph 111).

As in the decisions that we have selected the ECtHR has considered the violation from Article 8 as well, we will also state its content. In fact, the right to dignity and free development of individuals is observed through Article 8 of the ECHR. It guarantees the right to respect for private and family life. It is emphasized that everyone has the right to respect for their private and family life, home and correspondence. It also states that public authorities will not interfere with the exercise of this right unless it is in accordance with the law and necessary in a democratic society in the interest of national security, public safety or economic welfare of the country, for the prevention of disorder or crime, the protection of health or morals, or for protection of the rights and freedoms of others.

Regarding paragraph 2 of Art. 2 of the ECHR, a rich ECtHR[10] practice has developed and a large number of scientific, professional and review papers have been written. Therefore, on this occasion, we will focus on new approaches that can affect changes in criminal legislation. The Parliament in Germany paid attention to the decision of the Federal Constitutional Court of Germany, which declared unconstitutional the incrimination of assisting in suicide, when someone engages in this work as a professional service, only after 14 months. Therefore, we do not expect that the other authorized proposers of laws or legislative bodies will easily face the new tendencies.

Bearing in mind that the selected judgments of the ECtHR are related to the field of criminal legislation, we believe that it is necessary to reconsider the claim that the protection of the right to life in criminal law is independent, com-

[10] The ECtHR practice related to the right to life can be classified into several groups. In one there is the issue of euthanasia, in the second the rights of unborn children-fetuses, which is particularly interesting from the point of view of our Criminal Code, in the third the occurrence of death due to excessive use of force, in the fourth the issue of missing persons, in the fifth group of issues of loss of life outside the territory of the state, deportation. See: D. Kolarić, *Ustavnosudska zaštita u krivičnoj stvari,* u Zborniku: Organizacija pravosudja i efikasnost sudske zaštite (ur. Stanko Bejatović), Zlatibor, 2018, str. 57-58.

prehensive and primary and to point out that it is to call into question the justification and acceptability of certain incriminations, the degree of their social danger as a criterion for the legislator when assessing whether a behaviour should be a criminal offense or not, which all indicates that the right to life is not absolutely protected, but only certain aspects of it.

2. Characteristics of the criminal-law protection of the right to life

Almost all discussions in the field of criminal law point out that when it comes to protecting the right to life, three basic characteristics of criminal law are out of the question, in other words, that it is of an accessory, fragmentary and subsidiary character, thus meaning that the criminal law protection of the right to life is independent, complete and primary.[11] The analysis of the ECtHR practice and the discussions that follow seriously call into question the claim that the protection of the right to life is comprehensive.

We agree with the claim that criminal law protection of life represents the strongest form of legal protection and that it must therefore be adequately set,[12] but that adequacy today implies different limits because human rights are historically conditioned, even the right to life. The boundaries of the right to life have changed throughout history, and are still not indisputable today.[13] Today, the right to life is much more than the right of a person not to be killed. It also includes the right to a certain quality of life. As we have seen, within the mechanism of protection of the right to life in the ECHR there is a framework that directly opposes the right to life, which allows its extinction. Also, the criminal codes show that the right to life is subject to limitations. Thus, the grounds that exclude the existence of a criminal offense set limits to the protection of life under

[11]Z. Stojanović, Nataša Delić, *Krivično pravo-posebni deo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, str. 5.

[12] M. Đorđević, "Život kao objekat krivičnopravne zaštite", *Pravni život*, br. 9, Tom I Beograd, 1995, str. 45.

[13] Z. Stojanović, "Pravo na život kao prirodno pravo čoveka", *Pravni život*, br. 9, Tom I, Beograd, 1997, str. 4.

criminal law. These are: necessary defense, extreme necessity, consent of the person, permissible risk.[14] Today, both the practice of the ECtHR and the highest courts of individual member states of the Council of Europe shows that the protection of the right to life has its limits.

The special part of the Criminal Code of Serbia begins with a group of crimes against life and limb, i.e. with the criminal offense of murder, which belongs to the classic, *mala in se* crimes. The Criminal Code of Serbia protects the right to life primarily through incriminations related to ordinary murder, aggravated (qualified) murder, and privileged murder. The incrimination of unlawful termination of pregnancy, which pertains to the destruction of a fetus, i.e., the beginning of human life, also holds significant importance.

The right to life is also protected through some other criminal acts directed against some general values (criminal acts against constitutional order and security, against humanity and other goods protected by international law, against people's health).

Regarding the protection of the right to life, as a fundamental human right, issues have not frequently arisen in our judicial practice. There are certain incriminations that, admittedly, have not taken root in judicial practice, such as taking life out of mercy. Some issues continue to be contentious, like infanticide during childbirth, and there are also uncertainties regarding certain forms of aggravated murder, but these do not negatively affect the application of the relevant provisions. Of course, some amendments to the Criminal Code *de lege ferenda* are possible, which would enhance the protection of the physical integrity of the unborn child. Therefore, this is not about the right to life of the fetus, but the right to the inviolability of physical integrity.[15] Contemporary criminal law today faces

[14] D. Kolarić, *Krivično delo ubistva*, Beograd, Službeni glasnik, 2008, str. 157.

[15] Art. 2 protects the right to life of every human being. The Convention does not define life or when it begins or ends, i.e. it does not determine what is considered the beginning of life. The question that has been raised in a number of cases is whether the term "everyone" can be applied to the prenatal stage. In the cases of *H v United Kingdom*, Application No. 8416/79; *H v. Norway*, Application No. 17004/90; *Boso v. Italy*, Application No. 50490/99, the ECtHR ruled that giving the fetus the same rights as those already born have would lead to an unjustified restriction of the rights guaranteed by Article 2 to those already born. At the same time, the ECtHR refused to accept that the right to life should extend to the fetus, but recognized the pregnant woman's right to respect for her private life. Her rights, as a person who is primarily affected by the pregnancy and who suffers the consequences during and after the pregnancy, prevailed over the rights of the child's

numerous challenges. Regarding the criminal offenses that may, *de lege ferenda*, be subject to review and consequently cause certain difficulties, we highlight Articles 117 and 119 of the Criminal Code of Serbia.

Mercy killing constitutes a privileged form of homicide. The Criminal Code of Serbia, in Article 117, regulates the criminal offense of mercy killing with the following words: *"Whoever causes death of an adult from mercy due to serious illness of such person and at such person's serious and explicit request, shall be punished with imprisonment from six months to five years."*

Taking a life out of mercy has all the characteristics of the criminal offense of murder, but with circumstances that are not present in other forms of murder, which is why it can be said to represent a distinct offense in relation to murder. Specifically, while other forms of murder are committed against the victim's will, in this case, there is no such opposition. Not only is there no opposition, but the victim actually requests their own life to be taken. However, such an explicit and serious request does not exclude the unlawfulness of the act but does

father in a number of cases considered by the ECtHR. Strasbourg finally took the position in the *Vaux v. France* judgment that the fetus is not considered a "person" which is directly protected by Article 2 of the Convention. Namely, until this case, the ECtHR refrained from answering the abstract question of whether an unborn child is a person within the meaning of Art. 2 of the ECHR. From a legal point of view, the problem in this case was to determine whether the "absence of a legal remedy in French criminal law to punish the negligent destruction of a fetus represents the state's failure to protect the right to life under Art. 2 of the Convention". The court finally concluded that although unborn persons enjoy protection in terms of inheritance and gifts, this does not mean that they have the same "right to life" as those who are born. An unborn child is not considered a "person" that is directly protected by Art. 2 of the Convention and if the unborn child has the "right to life", it is implicitly limited by the rights and interests of the mother. In this case, the loss of a desired fetus represents harm inflicted on the mother. Therefore, the right to protection that has been violated in this particular case belongs to the applicant, not to the fetus she lost. However, there is room for better defining the boundaries of criminal law protection in cases of harm to a fetus. Namely, it is evident that the traditional linking of the moment of birth to the onset of labour prevents some prenatal actions, such as those taken by a doctor that result in the death of the fetus, from being qualified as homicide (intentional or negligent). But, on the other hand, there seems to be no objection to introducing the offense of harming the fetus into the criminal legislation, *de lege ferenda*, similar to the Spanish penal code. In this way, the legal gap that currently exists would be filled, which refers to the situations where an individual acts upon a fetus in the mother's womb, resulting in the child being born alive but with some physical or mental impairment, thereby strengthening the direct protection of the fetus. Such tendencies are already recognized in some criminal legislations. See: D. Kolarić, *Krivično delo ubistva*, Beograd, Službeni glasnik, 2008, str. 377-383; D. Kolarić, *Rasprava o reformi krivičnog materijalnog prava Republike Srbije,* Dve decenije reforme kaznenog zakonodavstva: iskustva i pouke (ur. Veljko Turanjanin, Dragana Čvorović), Zlatibor, 2023, str. 138-141.

reduce the danger and culpability of the perpetrator. For this reason, the legislator, *by the very name of the offense*, aims to emphasize its privileged nature by referring to it as "taking a life" rather than "murder".

The Criminal Code of Serbia prohibits the taking of life even when there is a person's consent or request, as well as in the case of a request by a person who is terminally ill. But that does not mean that those circumstances are not important. If the conditions for applying the incrimination from Article 117 are not met, the existence of a request may be a factor considered when determining the sentence for the criminal offense of murder. This raises questions regarding why a person, as the holder of the right to life, should not be able to freely dispose of that right. Should, and in which cases can, general societal interests outweigh the individual's right to live, regardless of terminal illness and quality of life? Does the legislator, with such incriminations in the realm of life protection, encroach upon the subjective rights of the individual as outlined in Article 23 of the Constitution of Serbia, which pertains to the dignity and free development of individuals?

Assisting in suicide is criminalized in our legal system under Article 119 of the Criminal Code of Serbia. The incrimination is titled "Incitement to Suicide and Aiding in Suicide". Given the accessory legal nature of complicity and the fact that suicide itself is not a criminal offense, the legislator, considering the social danger of complicity, decided to define these actions as an independent criminal offense. Assisting in suicide is not considered a criminal offense in some member states of the Council of Europe.

The basic form consists of inducing someone to commit suicide or assisting in the act of suicide. If assistance in suicide is provided under the conditions specified in Article 117 of the Criminal Code, it constitutes a privileged form, which has its criminal policy justification considering that it involves a person suffering from an incurable disease.

Aggravated forms exist if the act described in paragraph 1 is committed against a minor or a person in a state of significantly diminished mental capacity, and the most aggravated form is if it is committed against a child or a person who is mentally incapacitated. A special form involves cruel and inhumane treatment

of a person who is in a subordinate or dependent relationship with the perpetrator. In this case, it essentially concerns indirect inducement to suicide.[16]

3. A Review of the Current Practice of the Constitutional Court of Serbia

The Constitutional Court of Serbia has also, in a relatively large number of constitutional proceedings, substantively considered constitutional complaints in which the right to life and certain aspects thereof were exclusively, primarily, or additionally, *inter alia*, highlighted as the violated right of the petitioners. As of the time of writing this text (October 2023), the database of the Constitutional Court's[17] case law publicly lists 49 decisions, including rulings by the Constitutional Court, based on the search criteria of constitutional complaints where a violation of the right to life under Article 24 of the Constitution of the Republic of Serbia was asserted.

It is important to note that, out of all these publicly published decisions of the Constitutional Court, constitutional complaints primarily filed for violations of the right to life or the right to a trial within a reasonable time in connection with the right to life[18] were accepted in only four constitutional cases. In 11 cases, such constitutional complaints were rejected, while in the remaining predominant number of cases, the violation of the right to life was only secondarily highlighted, leading to the dismissal of those parts of the constitutional complaints. An examination of the content of the decisions that have been accepted and publicly published by the Constitutional Court regarding the right to life reveals that the Court, in its recent practice, has identified violations of both the material aspect of the right to life (*Decision Už-739/2015 of April 27, 2023*) and the procedural aspect of the right to life (*Decision Už-4527/2011 of January 31, 2013*). However, the practice of the Constitutional Court also shows numerous cases in

[16] Z. Stojanović, *Komentar Krivičnog zakonika*, Beograd, Službeni glasnik, 2012, str. 418.

[17] http://www.ustavni.sud.rs/page/jurisprudence/35/

[18] These are Decision Už-739/2015 of April 27, 2023 (established violation of the material aspect of the right to life), Decision Už-4527/2011 of January 31, 2013 (established violation of the procedural aspect of the right to life), Decision Už -2423/2016 of November 19, 2020 and Decision Už-523/2017 of November 19, 2016 (both in proceedings due to the so-called "medical error").

which constitutional complaints were rejected both for asserted violations of the material aspect of the right to life (*Decision Už-9918/2016 of December 3, 2020, Decision Už-4473/2014 of March 9, 2017, and Decision Už-356/2015 of December 8, 2016*), as well as for asserted violations of the procedural aspect of the right to life (*Decision Už-5497/2018 of January 27, 2022, Decision Už-1092/2017 of March 4, 2021, Decision Už-11470/2017 of October 1, 2020, Decision Už-6183/2014 of October 26, 2017, and Decision Už-10066/2012 of October 8, 2015*). Finally, among all these cases, three cases primarily involved judicial matters arising from proceedings conducted regarding so-called "medical malpractice" cases (*Decision Už-2423/2016 of November 19, 2020, Decision Už-523/2017 of November 19, 2016, and Decision Už-6183/2014 of October 26, 2017*).

In this regard, it is important to emphasize that a certain difference can be observed in the approach of the Constitutional Court and the European Court of Human Rights (ECtHR) in these cases of so-called "medical malpractice". Specifically, in recent decisions, the ECtHR has taken the position that there is a rebuttable presumption that any of the legal remedies available to affected petitioners in the legal system, particularly civil proceedings in which it is possible to obtain civil compensation, is generally adequate to fulfill the state's obligation under Article 2 of the Convention to ensure an effective judicial system (see the judgment in *Lopes de Sousa Fernandes v. Portugal, application no. 56080/13, of December 19, 2017, paragraph 137*). The ECtHR dismisses applications if it determines that, **first**, the available legal remedy in civil proceedings was effective in theory and practice at the relevant time, meaning that the remedy was accessible, capable of providing compensation related to the petitioners' complaint, and offered reasonable prospects of success; and **second**, that it does not essentially serve the same purpose as the legal remedy used in criminal proceedings, or that the remedy in civil proceedings adds some essential elements that are not available when only using the legal remedy in criminal proceedings (see the judgment in *Dumpe v. Latvia, Application no. 71506/13, of October 16, 2018, paragraph 61*). Finally, according to the ECtHR, an unsuccessful attempt to initiate criminal proceedings by submitting a criminal complaint to the competent authorities and subsequently appealing against the decision not to initiate criminal proceedings cannot be deemed sufficient to consider that domestic legal remedies have been

exhausted, especially when, based on the specific facts, **first**, there are no elements of a criminal offense, and no criminal proceedings have ever been initiated, and **second**, the complainants are immediately informed of this (see the judgment in *V.P. v. Estonia, Application no. 14185/14, of October 10, 2017, paragraph 57*). Even in cases where the petitioners' goal was never to obtain financial compensation by filing a civil claim (lawsuit) against any potentially liable party, the ECtHR has held that, regardless of whether awarding damages is considered the primary goal of a civil lawsuit, civil proceedings inevitably involve the determination of facts in the case, the investigation of the cause of death, and - if justified - the establishment of the liability of those who may be responsible (see the aforementioned judgment in *V.P. v. Estonia, paragraph 59*).

Unlike these recent trends of the ECtHR, the Constitutional Court has not deviated from its established court practice on substantive decision-making in such matters, and it maintains its previous legal position that all legal remedies are exhausted prior to the submission of a constitutional complaint once the decision of the competent public prosecutor's office is issued and the appeal by the injured party is resolved. Therefore, the Court, after determining the timeliness, typically proceeds to a substantive analysis of the claims in the constitutional complaint.

Among those publicly available 49 constitutional court decisions, in a broader sense, there have not been many dilemmas in our constitutional court practice regarding the protection of the right to life as a fundamental human right.

Faced with new trends in the ECtHR's practice related to euthanasia, assisting in suicide, and the right to decide to end one's life, as well as other situations concerning the protection of the right to life, the question arises as to whether and to what extent the practice of the Constitutional Court of Serbia aligns with these ECtHR trends and whether some of these dilemmas are also emerging before our Constitutional Court.

For the purposes of this paper, we will examine two decisions of the Constitutional Court of Serbia that share a common denominator: the significance of the material aspect of the right to life in *a priori* prevention of (potential) suicide by the petitioners. In the first of these decisions, **Už-9918/2016 of December 3, 2020**, the issue of preventive actions taken by state authorities to protect the life of the petitioner was considered. In the second decision, **Už-739/2015 of April**

27, 2023, the focus was on the (omission of) preventive actions for the same purpose, specifically the inaction of state authorities.

In the decision of the Constitutional Court of Serbia **Už-9918/2016 of December 3**, **2020**,[19] the constitutional complaint submitted by petitioner A. R. was rejected as unfounded, *inter alia*, regarding the act of "inhumane and degrading treatment during the petitioner's stay in the Department of Toxicology at the Military Medical Academy in Belgrade". Factually, this case involved a petitioner who, prior to being deprived of liberty, had consumed cocaine, and while fleeing from police officers, swallowed a plastic bag containing a mixture of amphetamines and caffeine. Subsequently, he was urgently and forcibly taken for medical intervention without any specific legal act. The legal assessment of the Constitutional Court of Serbia regarding this factual substrate begins with the observation that, from a material law perspective, the state's positive obligation entails taking all necessary measures to prevent violent death. This requires establishing a legal framework that provides effective protection against threats to the right to life.[20] Therefore, it is essential to have effective criminal law norms and other regulations that deter criminal offenses against the life of individuals, as well as procedural mechanisms to prevent, suppress, and punish violations of these norms.[21] This obligation extends to taking preventive measures to protect life, particularly concerning dangerous activities that potentially pose a risk to life.[22]

From a procedural law perspective, the mentioned decision of the Constitutional Court of Serbia also emphasized that the state's positive obligation, in

[19] The decision was made at the 14th Session of the Second Grand Chamber of the Constitutional Court, composed of the president and seven judges of the Constitutional Court, held on December 3, 2020 and published in the "Official Gazette of the RS", number 1/21

[20] See, *mutatis mutandis*, the judgment of the European Court of Human Rights *Osman v. the United Kingdom*, Application No. 87/1997/871/1083, of 28 October 1998, report 1998-VIII, para. 115. and 116.

[21] See: Judgment of the European Court of Human Rights *Streletz, Kessler and Krenz v. Germany*, Application No. 35532/97, 34044/96 and 44801/98, dated March 22, 2001, paragraph 86.

[22] In this regard, see the judgment of the European Court of Human Rights *Oneryildiz v. Turkey*, Application No. 48939/99, dated November 30, 2004, paragraph 107.

cases where an individual has been deprived of life, involves conducting an independent and effective investigation,[23] which entails the existence of an efficient judicial system within which the proceedings can take place, which do not necessarily have to be criminal in nature. However, this aspect will be discussed in more detail later when addressing the second decision of the Constitutional Court of Serbia on this matter.

In the reasoning of this decision, the Constitutional Court emphasized that it believes Article 2 of the ECHR imposes an obligation on states to protect the lives of detainees, that is, individuals deprived of their liberty, from attacks by other detainees, as well as to take all necessary measures to prevent suicides among persons deprived of liberty. This stance of the Constitutional Court of Serbia is based on long-standing practice of the ECtHR. Specifically, that court established in the case of *Paul and Audrey v. the United Kingdom*, Application no. 46477/99, decision of March 14, 2002, paragraph 57, that states will be held responsible for violations of Article 2 of the ECHR if the competent state authorities:

1) Knew or should have known about the existence of a real and immediate threat to the life of the detainee or prisoner, and
2) Failed to take appropriate measures within their jurisdiction that could be expected to prevent the emergence of a threat to the life of persons deprived of liberty.

Additionally, in the case of *Keenan v. the United Kingdom*, Application no. 27229/95, judgment of April 3, 2001, paras. 91 and 93, the state's obligation was extended to cases of suicide, whereby state responsibility in such cases arises if it is established that the competent state authorities knew or should have known that there was a risk of suicide for a particular detainee or prisoner. The ECtHR emphasized that there are general precautionary measures available to state authorities to reduce the risk of self-harm, and that stricter measures can be applied if the circumstances of the specific case warrant it. The obligation to protect the

[23] See the judgment of the European Court of Human Rights in the case of *McKerr v. United Kingdom*, Application No. 28883/951, dated 4 May 2001, paragraph 111.

life of persons deprived of liberty also extends to various other situations in which an individual's life may be endangered.[24]

In this specific constitutional court case, the Constitutional Court of Serbia assessed that the life of the applicant was undoubtedly endangered and that the competent state authorities acted in accordance with their obligations arising from the rights established by Article 24 of the Constitution and Article 2 of the ECHR. The Constitutional Court emphasized that, in such a specific and life-threatening situation for the applicant, at the moment when the competent state authorities had to decide whether to prioritize the protection of life or to take certain legally prescribed actions against the applicant (such as informing the arrested person of their rights, issuing a detention order, etc.), the authorities acted in a constitutionally acceptable manner from the perspective of the rights under Article 24 of the Constitution, which is a fundamental human right. Through the specific actions of the competent authorities, the applicant was undoubtedly protected from severe consequences for his health, and it is highly likely that his life was saved in these circumstances. The Constitutional Court at that reminds that the right to life is one of the most important constitutional rights, for which the state has corresponding constitutional obligations to protect. The Constitutional Court also noted that it considered relevant decisions of the ECtHR regarding the obligation of states to prevent the suicide of persons deprived of their liberty, in a broader context of preventing self-harm among such individuals. This inherently involves protecting individuals deprived of their liberty from the consequences that could endanger their life and health.[25] Therefore, although in this particular case there was no imminent threat of suicide by the applicant in the sense that he consciously and willingly took his own life while in custody, there was undeniably a real danger that the applicant could lose his life due to the narcotic substance he had swallowed. According to the understanding of the Constitutional Court of Serbia, the duty of the state to protect the life and health of a

[24] Thus, for example, in the judgment of the European Court of Human Rights, *Anguelova v. Bulgaria*, in Application No. 38361/97, dated June 13, 2002, para. 125 to 130, the responsibility of Bulgaria was determined for the violation of the right to life due to the application of inadequate police measures during the arrest.

[25] See *Keenan v. United Kingdom*, Application No. 27229/95, 3 April 2001, para. 91 and 93 and *Mitić v. Serbia*, Application No. 31963/08, dated January 22, 2013, para. 45 to 53.

person deprived of liberty, in the context of this specific situation, relates both to protection against conscious and voluntary self-harm or harm to health, as well as to the consequences and threats that could occur without the awareness and will of the individual deprived of liberty, but as a result of certain actions that objectively jeopardize the life and health of that individual, which was the case here.

The second and significantly newer decision of the Constitutional Court of Serbia that we will address on this occasion is **Decision Už-739/2015 from April 27, 2023,**[26] by which, *inter alia*, the submitted constitutional complaint was accepted and it was established that the applicants' right to life, as guaranteed by Article 24 of the Constitution of the Republic of Serbia, was violated due to the failure of authorized officials of the Army of Serbia and Montenegro to exercise due oversight on August 27, 2004. Factually, in this specific case, it concerned the death of a soldier - the son and brother of the constitutional complaint applicants - which occurred while he was serving his military duty in the Army of Serbia and Montenegro, and as the investigation determined, resulted from a suicide following a night shift and armed guard duty. Legally, in this constitutional court case, the Constitutional Court first examined the ***procedural aspect of the right to life*** and conducted a comprehensive investigation to determine whether the relevant state authorities carried out an effective investigation into the death of the applicants' son and brother, and then addressed the ***material aspect of the right to life***, evaluating whether, under the circumstances of this case, the state fulfilled its obligation to adequately protect his life.

Regarding the procedural aspect of the right to life under Article 24 of the Constitution, in this case as well the Constitutional Court of Serbia also applied the same principles as the ECtHR. These are the following fundamental premises upon which the final assessment of a potential violation of rights depends:

1) The state is obliged to ensure an official investigation from the moment it becomes aware that there is suspicion that an individual's death was violent, whether caused by state officials or private individuals;

[26] The decision was made at the 6th Session of the II Grand Chamber of the Constitutional Court, composed of the president and seven judges of the Constitutional Court, held on April 27, 2023.

2) The investigation must meet the implicit requirement of urgency and reasonable expediency, and although there may be genuine difficulties preventing the progress of a particular investigation, a prompt response from the authorities in situations involving the use of lethal force can generally be considered essential for maintaining public confidence in the rule of law and preventing any occurrence of conspiracy or tolerance of illegal actions;
3) The investigation must be effective in the sense that it can lead to the identification and punishment of those responsible; however, this is not an obligation of the outcome but rather an obligation of means. This means that the relevant state authorities are required to take all reasonable measures available to them to secure evidence related to the event, including, among other things, the cause of death. Furthermore, any deficiency in the investigation that undermines its ability to determine the cause of death or the responsible individual may pose a risk that the stated standard will not be met;
4) The investigation is conducted by individuals who are independent of those involved in the event being investigated and are impartial towards them, which implies both the absence of hierarchical or institutional connections and practical independence.;
5) In order for the investigation to meet the requirement of adequacy, there must be a sufficient element of public oversight of the investigation or its results to ensure accountability both in practice and in theory. The degree of public oversight required may vary from case to case, and close relatives of the victim must be involved in the proceedings in all cases to the extent necessary to protect their legitimate interests.

Regarding the procedural aspect of the right to life, in the aforementioned decision, the Constitutional Court determined that the actions of the relevant state authorities, despite certain shortcomings, were thorough, urgent, and effective. It assessed that the contested actions did not violate the procedural aspect of the right under Article 24 of the Constitution, especially considering that the effectiveness of the investigation cannot be evaluated solely from the standpoint of

whether the investigation resulted in a conclusion about the existence of a criminal offense, or even the identification of a suspect or suspects for that offense (which, in this specific case, was part of the "version" provided by the complainants and represented their subjective belief). Conversely, the outcome of an effective investigation may also be a well-founded conclusion that the specific act under investigation is not a criminal offense, and therefore, there are no suspects for such an act, which in itself does not have a delictual character.[27]

However, in the same case, the Constitutional Court found that when assessing the validity of the material aspect of the right to life under Article 24 of the Constitution, it was necessary to address the question of whether, considering all relevant circumstances of the specific event, the state can be deemed to have fulfilled its obligation to adequately protect the life of the constitutional complaint applicant by using real and appropriate means while he was serving his mandatory military duty. This obligation includes taking preventive measures regarding the potential loss of a soldier's life, which in this specific case primarily concerns preventing the soldier's suicide during his military service. The Constitutional Court found that only after the critical event, in the conducted psychological and psychiatric autopsy of the soldier's suicide, and based on such expert analysis, it was determined that, through an analysis of the exhibited behaviour, knowledge of the family situation, and heteroanamnestic data regarding the soldier's personality structure, it was concluded that he was a person with a biological-social predisposition for anxious-depressive reactions and a passive-dependent personality structure. This served as the main basis upon which situational frustrating factors were built, which ultimately resulted in the suicidal act at a given moment. The Constitutional Court emphasized that the mentioned analysis should have been conducted significantly earlier, specifically before the late soldier was admitted to regular military service, and in accordance with that analysis it should have been decided whether it was justified to consider postponing his enlistment in the army. Finally, such an expert analysis should have also been conducted after noticeable significant changes in the soldier's behavior, which were indisputably observed not only by those close to him who visited him but

[27] See explanation of Decision Už-739/2015 of April 27, 2023, paragraph 7.2, p. 28 and 29.

also by the authorities in his unit. All of this indicated certain serious problems that the soldier faced during his mandatory military service.[28]

By issuing a series of reasonable proposals aimed at effectively taking preventive measures for the general prevention of suicide in the military only post festum, that is, after the specific death of the soldier due to suicide, the expert military team implicitly, yet unequivocally, acknowledged that a series of serious shortcomings fundamentally led to the soldier's suicide in this specific case. It can be concluded that the relevant military authorities bear responsibility for insufficient attention to suicide prevention during mandatory military service and, more broadly, in general. This ultimately resulted in the specific suicide of the soldier while serving his regular military duty in the Army of Serbia and Montenegro in Leskovac.

Therefore, the Constitutional Court determined in this case that the applicants' material aspect of the right to life under Article 24 of the Constitution was violated, as opposed to the procedural aspect, because the authorized officials of the Army of Serbia and Montenegro did not fulfill their preventive material obligation to protect the soldier from himself, specifically regarding the potential for suicide, while he was under their direct supervision during his mandatory military service.

The presentation of these two recent decisions indicates that the Constitutional Court of Serbia, through a traditional approach, provides protection for certain aspects of the right to life. So far, there have been no challenges or trials related to the chosen practice of the ECtHR that we will outline in the next section, which also pertains to the potential reconsideration of incriminations that

[28] See explanation of Decision Už-739/2015 of April 27, 2023, paragraph 8, p. 30 31: "[…] In the opinion of the Constitutional Court, the fact that soldier D.K. had visibly changed in body weight, his withdrawal and constant desire for isolation, refusal to communicate by phone with his parents, and the circumstance that he reported having a problem (suspecting money theft) were sufficient indicators that the responsible military authorities were obliged to notice in a timely manner, and which clearly indicated the need to provide professional assistance to soldier D.K., which was lacking in this particular case[…]. From the data established during the psychological-psychiatric autopsy of soldier D.K.'s suicide, it can be concluded that at the time he was assigned a very responsible duty requiring the handling of weapons and ammunition, as well as appropriate weapon handling, he was evidently not ready and fully capable for it, and that carrying out guard duty in this particular case posed a great risk to the life of soldier D.K."

have long been part of the criminal legal response in Serbia, such as aiding suicide and mercy killing.

4. Case-law of the European Court of Human Rights

The question from which we began in the selection and analysis of the decisions of the European Court of Human Rights is whether a person's right to self-determination, dignity, and free development of personality includes the right to make decisions about their own death, which is consequently related to the right to life.

In the earlier case of *Haas v. Switzerland*,[29] the ECtHR already recognized that one aspect of private life (Article 8 of the ECHR) is an individual's right to decide on the manner and timing of the end of their life, provided that they are in a position to freely form their judgment and act accordingly.

The judgment of the Chamber in *Gross v. Switzerland*, dated May 14, 2013, established a violation of Article 8 of the ECHR because Swiss law was not sufficiently clear regarding the permissibility of assisted suicide. The case concerned the complaint of an elderly woman who wished to end her life in a situation where there was no terminal illness, and she sought permission from the Swiss authorities to obtain a lethal dose of medication to carry out the suicide. The ECtHR held that Swiss law, which provides the possibility of obtaining a lethal dose of medication by prescription, did not clearly and precisely stipulate the conditions from which the scope of this right arises. This uncertain situation likely caused the applicant significant suffering. The ECtHR considered that the applicant's wish to be provided with a lethal dose of medication, allowing her to end her life, falls within the scope of her right to respect for private life under Article 8 of the ECHR. The Court noted that under the Swiss Penal Code, assisting suicide is punishable only when the person committing such an act has "selfish motives". According to the case law of the Swiss Federal Supreme Court, a doctor has the right to prescribe a lethal medication to enable a patient to commit suicide if certain specific conditions are met, as outlined in the medical ethics guidelines adopted by the Swiss Academy of Medical Sciences. However, these

[29] *Haas v. Switzerland*, 31322/07, 20. januar 2011.

guidelines do not have the force of law. Moreover, since they apply only to patients whose doctor has concluded that their illness will lead to death within a few days or weeks, the applicant fell outside their scope. The Swiss Government did not present any other material providing evidence as to whether and under what circumstances a doctor has the right to issue a prescription for lethal medication to a patient who does not suffer from a terminal illness. The Court considered that the lack of clear legal provisions has a discouraging effect on doctors, who might otherwise be inclined to provide the requested prescription to a person in a situation like the applicant's.

This was confirmed by the fact that the doctors she approached refused her request because they were afraid of potential legal proceedings against them and the possible consequences. The uncertainty regarding the outcome of her request, in a situation that concerns a particularly significant aspect of her life, caused the applicant a considerable degree of distress. This situation need not have occurred if there had been clear regulations defining when doctors are authorized to issue the requested prescription in cases where an individual has made a serious decision, formed by their free will, to end their life, but where death does not necessarily result from a specific illness. Therefore, in this matter, Article 8 of the ECHR was violated.

At the same time, the Court did not take a position on whether the applicant should have been given the opportunity to obtain a lethal dose of medication to end her life. It considered that it is primarily for the national authorities to regulate these matters, particularly taking into account the patient's capacity to make decisions and whether their will was formed without external pressures.

Later, at the request of the Swiss government, the case was referred to the Grand Chamber.[30] Shortly thereafter, the Swiss government informed the ECtHR that it had learned the applicant had died in November 2011 (she had managed to commit suicide with the help of an assisted suicide organization). In its judgment, the Grand Chamber of the ECtHR concluded that the applicant intended to deceive the Court on an issue central to her complaint. Notably, she took specific precautions to prevent the information about her death from reaching her lawyer and, consequently, the Court, in order to prevent the proceedings

[30] *Gross v. Switzerland*, 67810/10, 30 September 2014.

in her case from being discontinued. The Court therefore found that her conduct constituted an abuse of the right to individual petition. As a result of this judgment, the Chamber judgment of May 14, 2013, which had not become final, is no longer legally valid. Several judges expressed a joint dissenting opinion. They believed that the Court should have decided that it was no longer justified to continue examining the case, since the applicant had died without heirs or descendants, without characterizing her conduct as an abuse of rights.

In the direction of changes and new tendencies that may have an impact on criminal substantive law, we would also like to mention the ECtHR's judgment *Mortier v. Belgium*,[31] which became final on January 4, 2023, in which it was examined for the first time whether the act of euthanasia was in accordance with the ECHR and where the nature and scope of the state's positive obligations (material and procedural) based on Article 2 of the ECHR are clarified in a very specific concrete context, where euthanasia was requested by a patient who was experiencing mental rather than physical suffering and whose death would otherwise not have occurred in the short term.

The applicant is a Belgian citizen, born in 1976. The case concerns the death of the applicant's mother by euthanasia, without the applicant or his sister being informed. The applicant's mother suffered from chronic depression for about 40 years and in 2011 she consulted Professor D. and informed him of her intention to resort to euthanasia. Despite repeated advice from doctors, she did not want to inform her children of her request for euthanasia.

The applicant appealed based on Articles 2 and 8 of the ECHR.

The ECtHR first dealt with the question of whether such an act, in certain circumstances, can be carried out without violating Article 2. Referring to its court practice on the end of life, the ECtHR took into account in this context the right to respect for private life, guaranteed by Article 8 and the concept of personal autonomy that it encompasses. The right of an individual to decide how and when to end his life is one of the aspects of the right to respect for private life. The decriminalization of euthanasia was intended to give individuals the free choice to avoid what they consider to be an undignified end of life. Human dignity and human freedom constitute the very essence of the ECHR. The Court

[31] *Mortier v. Belgium*, 78017/17, 4 October 2022.

concluded that, although it was not possible to derive from Article 2 the right to die, the right to life contained therein could not be interpreted as *per se* prohibiting the conditional decriminalization of euthanasia. However, to be compatible with Article 2, that decriminalization had to be accompanied by appropriate and sufficient safeguards to prevent abuse and thereby ensure respect for the right to life.

The ECtHR further determined that any complaint alleging that the act of euthanasia violated Article 2 must be examined in accordance with the state's positive obligations to protect the right to life. Given the complexity of this area and the lack of European consensus, states must be allowed a field of free assessment, which, however, is not unlimited.

Regarding the substantive positive obligations at issue, the ECtHR examined whether *there was a legislative framework for the procedure before euthanasia that meets the requirements of Article 2, as well as whether it was applied in the circumstances of the specific case*. In the Court's opinion, such a legislative framework must ensure that the patient's decision to seek the end of their life is made freely and with "full knowledge".

When the legislator has decided not to provide for an independent prior review of the specific act of euthanasia, the ECtHR considers more carefully the issue of substantive and procedural safeguards.

Moreover, the law must provide enhanced safeguards regarding the decision-making process in cases where a patient requests euthanasia due to mental rather than physical suffering, and where death would not otherwise occur in the near future. For example, in this case, the ECtHR would have placed particular importance on the time that should have been allowed between the written request and the act of euthanasia (under Belgian law, at least one month), the obligation for the attending physician to consult with other doctors (under Belgian law, two other doctors), as well as the requirement that the various consulted doctors must be independent. In the Court's view, the positive obligations arising from Article 2 meant that the requirement of independence of the consulted doctors implies not only the absence of hierarchical or institutional links but also formal and practical independence, both among the consulted doctors and in relation to the patient. In this case, the Court also noted that the relevant law had undergone several thorough reviews, both before its adoption by the Council of State and later by

the Constitutional Court. It concluded that the legal framework in question provided protection for the patients' right to life as required by Article 2, and that the euthanasia was carried out in accordance with this framework.

Regarding procedural obligations in this area, the ECtHR's inquiry focused on whether the *ex post* review mechanism provided all the safeguards required by Article 2.

The ECtHR clarified that the requirement for an effective official investigation also applies in cases where an act of euthanasia was the subject of a criminal complaint filed by a relative of the deceased, convincingly indicating the existence of suspicious circumstances. Regarding the need for a criminal investigation in euthanasia cases, the court considered that it is generally not necessary when death results from euthanasia carried out in accordance with legislation that allows such an act under strict conditions. However, the competent authorities would be required to open an investigation that would allow the determination of the facts and, if necessary, the identification and punishment of those responsible if a criminal complaint is filed by a relative of the deceased, pointing to the existence of suspicious circumstances, as in this case. In the court's view, where there was no prior but only subsequent review of the euthanasia, that review must be conducted in an especially rigorous manner to comply with the obligations established by Article 2 of the Convention. The demand for independence is of the utmost importance. In the specific case, the court analysed the subsequent review by the body responsible for checking compliance with the procedure and conditions prescribed by the Law on Euthanasia. The court noted that the law did not prevent the physician who performed the euthanasia from sitting in that body and voting on whether his actions were compatible with the substantive and procedural requirements of domestic law. The ECtHR held that given the key role played by the review body, the review system did not guarantee its independence, regardless of the actual influence the doctor could have had on his decision in this case.

Therefore, there is no violation of Article 2 of the ECHR in regard to the positive (substantive) obligation because the euthanasia of the applicant's mother, who had suffered from depression for around 40 years, was carried out in accordance with the law that permits euthanasia. The court held that, based on the evidence before it, it could not be said that the act in question, which was conducted

within the established legal framework, violated the requirements of Article 2 of the ECHR. Thus, the existing legal framework can, in principle, provide protection for the right to life of patients regarding the actions and procedures prior to euthanasia.

There is also no violation of Article 8 of the ECHR - the right to respect for private and family life. The court found that the doctors who assisted the applicant's mother did everything reasonable, in accordance with the law, with their duty to maintain confidentiality and medical secrecy, along with ethical guidelines, to ensure that she contacted her children regarding her request for euthanasia.

However, when it comes to the procedural aspect of Article 2 of the ECHR, a violation was found because the doctor who performed the euthanasia was allowed to vote on its legality.

5. The right to life and the right to dignity and free development of individuals - *decision of the Federal Constitutional Court of Germany*

A legal-philosophical discussion on the relationship between two rights guaranteed by the highest legal act, the right to human dignity and the free development of individuals, and the right to life, is provided by a decision of the Federal Constitutional Court of Germany.[32]

Namely, in November 2015, the German Bundestag criminalized an act that could be loosely translated by the author as "assistance in suicide as a profession". A criminal sanction of up to three years or a fine is prescribed for any person engaged in enabling the commission of suicide, who performs an act that provides, procures, or creates the opportunity for a person with the intention that this person commits suicide. This offense involves abstract danger where the act itself is inherently dangerous, and this abstract danger serves as the legislative motive for criminalization. For the offense to exist, it is not necessary for the suicide to be carried out; it is sufficient that the act is undertaken with the intent to facilitate the commission of suicide, for example, by creating the conditions for it. In this context, there is a willingness on the part of the perpetrator to repeat

[32] BverfG, Judgment of the Second Senate of 26 February 2020.

the act, even though the goal may not be to generate income; however, the offense exists even if the act is carried out only once.

This criminalization has sparked numerous conflicting opinions among doctors, particularly palliative care physicians, and organizations that provide counseling related to suicide, as the element of the criminal offense that requires the act to be carried out as a profession is met even when the act is performed only once but with the intent to repeat it. As a result, initiatives have been submitted for its review. The initiative for the constitutional review of this provision was submitted by associations in Germany and Switzerland that offer assisted suicide services to individuals with serious illnesses who wish to end their lives with the help of such an association, doctors, and lawyers who provide advice on issues related to suicide. It is worth noting that in Germany, suicide and assisting in suicide are not criminal offenses. On the other hand, killing upon request is punishable under Paragraph 216.

When it comes to palliative care, this issue can be particularly significant. In recent years, progress has been made in medicine regarding life extension and the improvement of its quality. The possibility of extending human life presents new challenges in the treatment of diseases and pain management. In cases of incurable diseases, palliative care is possible, which aims to reduce the pain and suffering of the dying. Palliative care is intended to provide patients with relief from symptoms of pain, as well as physical and psychological stress due to the presence of an incurable disease. The goal of such therapy is to improve the quality of life for the patient and their family. In many German regions, a lack of such facilities has been identified, which is also noticeable in our country and many others, while the number of elderly people is increasing with demographic changes. Such facilities and consistent palliative care are a necessity in modern society.

In some cases, the issue of palliative care that is unable to prevent the patient's suffering may arise. It is also possible that the patient may not wish to continue palliative care. For this reason, the Federal Constitutional Court of Germany emphasized that human dignity and the free development of individuals include the right of a person to decide about their own death. This right also encompasses the right to take one's own life and, depending on the circumstances, to seek voluntarily provided assistance from a third party for that purpose. When

an individual, exercising this right, decides to end their life, having reached that decision based on a personal assessment of the quality and purpose of existence, the state and society, in principle, must respect that decision as an act of autonomous self-determination. Therefore, the criminalization of assisting in suicide under Paragraph 217 of the German Penal Code (StGB) is unconstitutional.[33]

Of course, this does not mean that the legislator cannot make special rules related to assisted suicide.[34] When regulating this issue, the legislator must leave enough space for the individual to exercise his right to decide on his own death.

The Court's logic was as follows.

First, the general right of individuals guarantees the right to choose, by one's own decision made after being informed, to end one's life. It is emphasized that dignity and the free development of individuals are fundamental human rights, stemming from the understanding of human beings as capable of self-determination and personal responsibility. Rooted in the belief that personal autonomy and the development of individuals are inalienable aspects of human freedom, the guarantee of human dignity particularly includes the protection of one's individuality, identity, and integrity. Self-determination implies that an individual can control their life according to their own wishes and is not forced to live in a way that is incompatible with their self-conception and personal identity. The right to decide on one's own death is not limited to situations involving serious and incurable illnesses, nor is it applied only at certain stages of life or illness. It is guaranteed at all stages of a person's existence.

Second, the right to take one's own life includes the freedom to request and, if offered, to use the assistance offered by a third party for that purpose.

[33] D. Kolarić, *Rasprava o reformi krivičnog materijalnog prava Republike Srbije,* Dve decenije reforme kaznenog zakonodavstva: iskustva i pouke (ur. Veljko Turanjanin, Dragana Čvorović), Zlatibor, 2023, str.128.

[34] It is interesting that for three years three parliamentary groups worked on the project of passing a law on assistance in suicide, and that in July of this year there was a vote on two drafts of a new law and that none of them received the required majority. One draft still regarded the so-called commercial, business-related involvement in suicide as a criminal offense, but legally regulated exceptions for when it would be permitted. The other draft was conceived as a true Law on Assisted Suicide, which regulates the right to assistance in the act and the provision of support to such individuals.

Therefore, paragraph 217 of the Criminal Code interferes with the general right of persons who wish to die, even though the provision does not deal with them directly.

It is interesting to note that the Federal Constitutional Court of Germany highlighted in its decision that the right to suicide is recognized by the Constitution and, therefore, the motives cannot be subject to evaluation (for example, a diagnosis of an incurable illness cannot be required). However, it can be assessed whether the individual's decision to commit suicide is serious and permanent.

In this context, the question arises regarding the justification of criminalizing killing upon request, i.e., ending a life out of compassion. The decision of the Federal Constitutional Court of Germany does not mention killing upon request, which still remains prohibited in Germany. However, when we consider some decisions of the ECtHR and the reasons cited by the German court in explaining why assistance in suicide is allowed - specifically the requirement of a serious and stable intent - it raises the question of why this reasoning is not applicable to killing upon request. In both cases, an appropriate quality of intent is required, with some legislations stipulating an explicit and serious request from the passive subject in cases of killing upon request, while in other instances, such a request or consent may be given by family members. Killing "upon request" or "out of mercy" is essentially a killing motivated by compassion.

The decision emphasized that Paragraph 217 cannot be interpreted in a way that aligns with the Constitution. Why? An interpretation that narrows the scope of application of Paragraph 217 to allow assisted suicide services under certain circumstances would contradict the intention of the law maker and the principle of legality, specifically its segment of *lex certa*. This applies both to situations where individuals exercise their right to self-determination and have free will, as well as to doctors, who also cannot be exempt from punishment under this provision through any interpretation. This is a general provision, applicable to everyone. There are no privileged forms defined in this manner.

The court emphasizes that the legislature does not have to refrain completely from regulating assistance in suicide, but it should do so in a way that protects the personal autonomy of each individual when making decisions about the end of life. Therefore, the law maker protects the right of a person to self-determination. As highlighted in Paragraph 341, sufficient space should be left

for individuals to exercise their constitutionally protected right to end their lives based on free decision and with the assistance of others. In this sense, coherence and alignment of regulations must be ensured, which includes both the Health Care Law[35] and regulations related to controlled psychoactive substances. Possible abuses should be prevented, but it should also be emphasized that no one can ever be obligated to assist in the suicide of another person. A long-term and detailed effort by the legislative body is required, utilizing the experiences of other countries and best practices. Society should be well-informed about providing assistance in suicide.

From a legal-philosophical perspective, the Federal Constitutional Court of Germany holds the view that every person has the right to make significant decisions based on fundamental religious or philosophical beliefs regarding the value of life for themselves.

Now, following the declaration that Paragraph 217 of the Penal Code is unconstitutional, it is necessary to prevent possible abuses related to temporary life crises that anyone can experience. It is important to guard against lucrative intentions and encouragement for the commission of suicide. On the other hand, research shows that people express a strong desire for self-determination in the final stages of life, seeking to enable medically assisted suicide in cases of intense suffering due to incurable and terminal illnesses.

Codes of professional ethics for doctors in most countries are opposed to assistance in dying. Such a situation, combined with limited resources in palliative care, leads to desperate circumstances and conflicting interests in the realization of various rights.

[35] Appropriate regulations in Germany in this area have led to medical associations rejecting assisted suicide and prohibiting it in binding professional codes. Therefore, the question is legitimately asked what this judgment means for the area regulated by medical law. It should be pointed out that doctors can refuse to provide such assistance and this right can be codified, prescribed in the appropriate regulations. However, taking into account all the facts they should have a role in providing such assistance. No other profession can better diagnose, treat or recognize pain and provide more adequate information about treatment options.

6. Violence in the family and certain aspects of the protection of the right to life

In terms of the challenges for the future work of the Constitutional Court of Serbia, in addition to clarifying the nature and scope of the state's positive obligations (both material and procedural) based on Article 2 in the specific context of the implementation of euthanasia, the author also reflected, in relation to Article 2, on the analysis of the nature and scope of the state's positive obligations (both material and procedural) based on Article 2 in the specific context of domestic violence in the judgment of the Chamber and Grand Chamber in *Kurt v. Austria*, considering the similarity of the legal framework for combating domestic violence between Austria and Serbia. This decision sets standards by specifying the scope and content of the state's positive obligations as outlined in paragraph 115 of the judgment in *Osman v. United Kingdom*,[36] regarding the obligation to take preventive operational measures to protect individuals whose lives are at risk from criminal acts by another individual.

The ECtHR is of the opinion that the state is not only obliged to provide an appropriate legal framework for combating domestic violence, but also to ensure its effective implementation. Domestic violence or as it is also called "violence in silence" is not specifically regulated by the ECHR. This issue was often approached from the perspective of Article 8 of the Convention (the right to respect for family life). However, other articles of the ECHR were also the focus of the court, when it came to cases of domestic violence (Article 2 (Right to Life), Article 3 (Prohibition of Torture), Article 4 (Prohibition of Forced Labour), Article 6 (Right to a Fair Trial) or Article 13 (Right to an Effective Remedy) and 14 (Prohibition of Discrimination) of the Convention).

The ECtHR's conclusion that gender-based violence is a form of discrimination is particularly important. In the case of *Opuz v. Turkey*,[37] the ECtHR found a violation of Article 14, in combination with Articles 2 and 3 of the Convention. In this case, the court dealt with gender-based violence (discrimination against

[36] *Osman v. the United Kingdom*, 87/1997/871/1083, 28.10.1998.

[37] *Opuz v. Turkey*, br. 33401/02, dated 09. 06.2009.

women). In this judgment, which can be considered a precedent, Turkey was convicted for violating the right to non-discrimination of a woman who was not protected in the case of domestic violence. Namely, it has been proven that a woman, as a victim of violence, has been treated differently in the exercise or enjoyment of her rights, which was not objectively and reasonably justified, resulting in discrimination based on gender. The ECtHR emphasized that the state's shortcomings in protecting women from domestic violence violate the right to equality, even if these shortcomings were not intentional. Protection under Article 14 does not operate independently but serves as an addition to other substantive rights in the Convention. Its purpose is to protect individuals from discrimination in the enjoyment of other independent rights guaranteed by the provisions of the Convention. In practice, the ECtHR most often finds violations of this right in conjunction with rights under Articles 8 or 6 of the Convention.

On this occasion, we will focus on one aspect of protection under Article 2 of the ECHR, specifically the obligation of states to take preventive operational measures to prevent the loss of life of individuals whose lives are at risk.

In the judgment in *Osman v. United Kingdom*, it was emphasized that Article 2 of the ECHR obliges states not only to refrain from actions by their authorities that may violate someone's right to life but also to take appropriate measures to protect the lives of individuals under their jurisdiction from third parties. This obligation does not only pertain to establishing a criminal law framework in terms of defining crimes and procedures for prosecuting and punishing alleged offenders but also to establishing mechanisms for law enforcement. Therefore, Article 2 of the ECHR requires states to fulfill positive obligations to take preventive measures to protect vulnerable individuals whose lives are at risk. However, these positive obligations are not absolute, and their activation is assessed based on the circumstances of each individual case, taking into account the difficulties associated with managing modern society, the available resources in that regard, and the unpredictability of human behaviour, which makes it impossible to determine every existing risk and danger to someone's life in advance.

In order for it to be considered that the state has failed to fulfill its positive obligations under Article 2 of the ECHR, it must first be established that the competent authorities were indeed aware, or at least should have been aware, at the relevant time of a real and immediate danger to the life of a specific individual

posed by the criminal actions of a third party, and that they did not take reasonable measures that could have prevented the emergence of that danger.

In this ruling, the ECtHR established the principle according to which a positive obligation to protect life exists when an identified person is threatened with real and immediate danger from a third party. In a more recent practice in the case of *Bljakaj et al. v. Croatia*,[38] the ECtHR further expanded this principle in such a way that it was also applied to the situation when an identified person represents a general danger to the environment, i.e. a danger to other persons whose identity does not have to be known in advance. That case refers to an incident in which an alcoholic killed a lawyer who represented his wife in a divorce case, although the competent authorities had no prior knowledge that he could pose a danger to the lawyer.

In that judgment, the court found that the domestic authorities of the defendant state could and should have known from the general behaviour and lifestyle of the perpetrator that he posed a danger to society as a whole, but they did not take all the measures that domestic law provides to prevent that danger from arising. However, regardless of whether the threat existed in relation to a specific individual or to society as a whole, the question of whether the competent domestic authorities were aware of the danger posed by an individual is assessed based on the circumstances of the particular case. Specifically, this means that domestic authorities responsible for law enforcement, primarily the police, are obliged to carefully consider every event they are aware of that potentially indicates the possibility of violence occurring.

In a very significant judgment by the Grand Chamber in *Kurt v. Austria*,[39] the views expressed in the Grand Chamber's judgment in *Osman v. United Kingdom* regarding the occurrence of death were further developed. The case concerns the state's duty to protect the applicant's son from a violent father, following the son's murder by the father, which was preceded by reports of domestic violence. Invoking Article 2 (Right to Life), Article 3 (Prohibition of Inhuman and Degrading Treatment), and Article 8 (Right to Respect for Private and Family Life), the

[38] *Bljakaj and Others v. Croatia*, br. 74448/12, dated 18.09.2014.

[39] *Kurt v. Austria*, 62903/15,15.06.2021

applicant complained that the Austrian authorities had failed to fulfill their positive obligations to protect her and her children from the violent husband, resulting in the murder of their son. She argued that the state did not protect her son's physical integrity from E.'s lethal attack by not detaining E., and that she suffered serious psychological issues due to her son's death, which resulted from the state's inadequate protection. Additionally, the applicant complained that the legal framework in place in 2012 did not allow the police to extend restraining orders beyond residential premises to places like schools, which she argued was a failure and thus a violation of Article 2. She noted that after the events in question, Section 38a of the Security Police Act was amended and supplemented, acknowledging that the Austrian state recognized its failure but still avoided responsibility in her case.

The ECtHR decided that it was appropriate to examine these complaints based on the material aspect of Article 2. The examination of the state's compliance with Article 2 according to the *Osman* test must encompass an analysis of the *adequacy of the risk assessment* carried out by the domestic authorities as well as the *adequacy of the preventive measures taken*, in cases when the risk triggering the obligation to act was or should have been identified. The Grand Chamber then clarified what this means, when the *Osman* test is applied, taking into account the specific context and dynamics of domestic violence.

Regarding the first part of the *Osman* test (risk), the Court reiterated that the authorities' response to all such allegations must be immediate and characterized by special diligence. Relying on the submissions of *GREVIO* (the independent expert body responsible for monitoring the implementation of the Istanbul Convention), the Grand Chamber presented some requirements for risk assessment in this context, in particular the following:

- An autonomous and proactive approach, which requires authorities not to rely solely on the victim's perception of risk but to gather all information and conduct their own assessment;
- Comprehensiveness, which can be facilitated by the use of standardized, internationally recognized checklists that indicate specific risk factors, developed based on criminological research and best practices; relevant

authorities should be regularly trained and made aware, particularly regarding such tools; each risk assessment must be appropriate to systematically identify and highlight all potential direct or indirect victims, taking into account the possibility that the outcome may pose different levels of risk for each of them; the Grand Chamber noted that violence against children belonging to a common household, including lethal violence, can be used by perpetrators as an ultimate form of punishment against their partner;

- Basic documentation of the risk assessment implementation, considering the urgent nature of interventions and the necessity of sharing relevant information among all involved authorities;
- Informing victims about the outcome of the risk assessment and available legal and operational protection measures; and
- Taking into account the special context of cases of domestic violence, their special characteristics and the ways in which they differ from situations based on *Osman*-type events; in particular, the "immediacy" of the risk should be assessed taking into account the common trajectory of escalation of violence in such cases and comprehensive research in this area; the risk of further escalation must be assessed even after the issuance of a restraining order; however, an impossible or disproportionate burden must not be imposed on the authorities.

Regarding the second part of the *Osman* test (measures), the Grand Chamber developed some requirements related to preventive operational measures:

- Such measures must be adequate and proportionate to the level of the assessed risk; this requirement is directed at both the decision-making process and the legal framework, which must provide the authorities involved with a range of sufficient measures to choose from, including treatment programs for offenders and even deprivation of liberty, when special circumstances require it (an aspect of the *Osman* test "measures within their powers");

- Coordination between multiple authorities, including risk management plans, coordinated victim support services and rapid information exchange; if children are involved or are found to be in danger, child protection authorities, as well as schools and/or other childcare institutions, should be notified as soon as possible;
- Careful weighing of conflicting rights in question and other relevant restrictions, both at the general policy level and at the individual level; to the extent that they had an impact on the alleged perpetrator, any measures taken must remain consistent with other states' obligations under the Convention, including the need to ensure that the police exercise their powers in a manner that fully respects due process and other safeguards, in particular guarantees contained in Articles 5 (Right to Liberty and Security) and 8 (Right to Respect for Private and Family Life).

Considering the provisions of the Austrian Penal Code and the provisions of the Criminal Procedure Code, as well as those arising from Article 5 of the ECHR, the Grand Chamber found no reason to question the findings of the Austrian courts that decided not to impose pretrial detention. In this regard, the ECtHR reiterated that, under Article 5, deprivation of liberty is not permissible unless it is in accordance with domestic law. Regarding the facts of this case, the Grand Chamber did not identify a problem with the domestic assessment, which did not identify a real and immediate lethal risk to the children but only a certain level of non-lethal risk in the context of domestic violence, primarily directed at their mother. It considered that the measures ordered were adequate concerning that risk, and there was no obligation to take further measures, either in private or public spaces, such as issuing a restraining order against their school.

The majority of judges concluded that the authorities adhered to this standard. However, a significant number of judges in a dissenting opinion emphasize, first, that the risk assessment procedures had several significant shortcomings, and second, that the assessment of the risk of death was inadequate because they overestimated the severity of certain factors while neglecting others. They believe that the authorities initially responded promptly, but that their overall response was not adequate or sufficiently comprehensive, and that the authorities did not take into account the specific context of domestic violence.

Therefore, drawing conclusions from this case, we draw attention to the fact that in order for the state to act in this segment in accordance with Article 2 of the ECHR, it requires an analysis of the adequacy of the risk assessment carried out by the domestic authorities. States should determine whether there is a real and immediate risk to the life of one or more identified victims by conducting an autonomous, proactive, and comprehensive risk assessment. They must assess the real and immediate nature of the risk taking into account the specific context of domestic violence, and then if the assessment reveals a real and immediate risk to the life of another, operational preventive measures must be taken.

Domestic violence represents a form of violent crime that has seen an increase over the last decade. After the ratification of the *Council of Europe Convention on preventing and combating violence against women and domestic violence*,[40] various means and measures are available to competent state authorities in all countries to combat domestic violence. In our country, domestic violence was criminalized in the legislation back in 2002. The Family Law from 2005 introduced protective measures against violence that can be applied in civil proceedings and allows the public prosecutor and guardianship authorities to participate in the protection of the victim by filing a lawsuit. Considering that this was done very rarely, the family law protective measures against domestic violence did not yield appropriate results. In 2016, the legislator changed its strategy by enacting the *Law on Prevention of Domestic Violence.* Prevention has become an important strategic direction. This law is based on the *pre-crime* concept,[41] which gives competent state authorities broader powers compared to those they have under the traditional *post-crime* concept. The police have been granted new powers: to apprehend and detain citizens who pose a threat of committing domestic violence in the future within the premises of the relevant police organizational

[40] Law on ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Official Gazette of the RS - international agreements, No. 12/2013. The Council of Europe Convention on preventing and combating violence against women and domestic violence was adopted in Istanbul on May 11, 2011, and the Republic of Serbia signed it in April 2012 and ratified it in the National Assembly in October 2013, while it entered into force on August 1, 2014.

[41] The *pre-crime* concept is a term used in criminology and denotes the trend of modern criminal justice systems to focus more and more on the prevention of specific criminal acts that have not yet been committed and may never be committed.

unit, as well as to issue orders imposing *urgent measures* (*measures for the temporary removal of the perpetrator from the residence and measures for the temporary prohibition of the perpetrator from contacting the victim and approaching them*) against the person who has been apprehended and detained, when a risk assessment indicates an immediate danger of domestic violence. A necessary condition for imposing urgent measures is a completed risk assessment indicating an immediate threat of domestic violence.

However, the number of people killed in domestic violence is still worryingly high. All competent authorities must pay special attention to those cases of domestic violence where a qualified threat is made to the victim. In practice, there are cases in which family members are killed after emergency measures have been imposed. The question is justified then whether the competent institutions took efficient and effective measures to prevent violence and protect the victims even if they had knowledge that the perpetrator threatened to take the life of the victim. It should not be forgotten that emergency measures are only one of a series of measures provided for by law. In cases where a criminal offense with elements of violence is prosecuted *ex officio*, after the issuance of urgent measures, if the conditions for ordering detention are met, the police should arrest the suspect and bring them to the public prosecutor along with the criminal complaint. This is especially true if the suspect has made a qualified threat to the victim. We can never say with certainty that a murder would not have occurred had the police arrested the suspect and the court ordered detention, but there is a possibility that the period of time and actions of the competent state authorities could have influenced the perpetrator to change their decision. In some cases (for example, in Novi Sad in May 2019 and in Pančevo in July 2019), the victims who reported domestic violence to the authorities were killed.

If constitutional appeals were filed, these cases should be examined on the basis of the substantive aspect of Article 2. That examination would have to include an analysis of both the adequacy of the risk assessment carried out by the domestic authorities and, where an imminent risk is identified, the adequacy of the preventive measures taken.

Final Considerations

The right to life is a universal human right incorporated and guaranteed by a series of documents adopted at the regional and international levels. After this analysis, we conclude that the European Convention on Human Rights places this right in the core of human rights that cannot be derogated; however, it is not of an absolute nature, as only certain aspects of the right to life are absolutely protected.

In this report, we dealt with the protection of the right to life in specific concrete contexts. Case law of the ECtHR sets standards related to the clarification of the nature and scope of the state's positive obligations (material and procedural) based on Article 2, which may be of importance for future decisions of the Constitutional Court of Serbia. At the same time, the margin of free assessment of the state related to legal inheritance and cultural, ethical and religious dilemmas should also be taken into account.

The fact that there is an increasing tendency today to view rights of a human being, as an intellectual and moral being, in a different light - as a being with the right to self-determination, dignity, and the free development of individuals - indicates that the state and society should take those measures which are aimed at realizing these rights and providing protection against potential abuses. Whether the scope and field of action of Article 23 of the Constitution of the Republic of Serbia can be applied in decisions concerning the value of one's own life, and under what conditions this might be permitted in Serbia, is a question that the Constitutional Court of Serbia has not addressed yet.

It is interesting that the decision of the Federal Constitutional Court of Germany highlighted that the right to suicide is recognized by the Constitution and that, therefore, the motives cannot be subject to assessment (for example, a diagnosis of an incurable illness cannot be required). Rather, it can be verified whether the individual's decision to commit suicide is serious and permanent. The emphasis here is on the quality of the will of the subject making the decision to end their life. This is a complex issue that requires a multidisciplinary approach.

New tendencies point to different interpretations of human rights when it comes to the relationship between the right to self-determination of citizens and

the state. It is a more liberal approach that prioritizes the decisions of a person who acts with free will, where the right to autonomy of will is respected. It is interesting to mention that the parliament in Germany paid attention to this decision only after 14 months, so we do not expect that the other authorized proposers of the law and legislative bodies will easily face these aspirations.

Regarding palliative care, we emphasize that the main goals are to alleviate suffering, preserve the dignity of the patient, enhance the quality of life, and provide emotional and spiritual support to both the patient and their family members. The World Health Organization defines palliative care as an approach that improves the quality of life for patients and their families who are facing problems associated with life-threatening illnesses by preventing and alleviating suffering through early identification and impeccable assessment and treatment of pain and other physical, psychosocial, and spiritual issues. From these medical definitions, two fundamental legal questions arise related to palliative care. These are the issues of medically assisted suicide and euthanasia. Both of these issues are unambiguously penalized by our positive criminal legislation through the provisions regarding the crime of taking life out of compassion (Article 117 of the Criminal Code) and incitement to suicide and assisting in suicide (Article 119, paragraph 2 of the Criminal Code).

At the international level, these questions open up great debates both throughout Europe and the world. Within the European continent, there is also an international association, based on private and institutional membership, dedicated to the promotion and development of palliative care throughout Europe - *The European Association for Palliative Care* (EAPC).[42] This association for palliative care (EAPC) defines euthanasia as "intentional intervention by a doctor (administration of medicine) undertaken with the intention of ending the patient's life, with the aim of relieving suffering, and at the patient's voluntary and competent request". EAPC does not recommend the use of terms such as active or passive euthanasia and voluntary and involuntary euthanasia, which are often heard when talking about euthanasia. From 2023, the EAPC has promoted June 15 as the European Palliative Care Day to be celebrated in the future.[43]

[42] https://eapcnet.eu/

[43] https://eapcnet.eu/eu-palliative-care-day/

In the Republic of Serbia, in addition to the criminal law penalization of certain acts of execution that, in a broader sense and in international debates as well, can be classified under (ultimate) forms of palliative care, there are currently two legal acts that primarily normatively address specific issues of palliative care.

The first general legal act is the Strategy for Palliative Care,[44] along with an action plan, adopted by the Government of the Republic of Serbia on March 5, 2009. In addition to the aforementioned general strategic act, the Government of the Republic of Serbia also adopted a specific Regulation on the National Program for Palliative Care for Children in the Republic of Serbia.[45] As a particularly significant part of the National Program for Palliative Care for Children in the Republic of Serbia, Section 3.12, Ethical and Legal Standards stipulates that "[...] in the terminal phase, at the end of life, when death is inevitable, everything should be done to alleviate suffering, while refraining from actions that prolong the dying process, and any form of euthanasia for children is unacceptable and not supported" (subpoints 7 and 8).

From all of the above, it remains to be seen whether any future normative activity in the Republic of Serbia will follow contemporary trends in this area as well, and what the future practice of the Constitutional Court of Serbia will depend on.

Regarding the opposition to domestic violence, which is accompanied by the most severe consequences reflected in the death of the passive subject, we emphasize that all prevention and suppression measures must be efficient and effective. Quick and urgent responses mean nothing if the choice of measures is inadequate, and the case ends with the loss of life of the passive subject and often the suicide of the perpetrator.

[44] Strategija za palijativno zbrinjavanje ("Službeni glasnik RS", br. 17/09)

[45] Uredba o nacionalnom programu za palijativno zbrinjavanje dece u Republici Srbiji ("Službeni glasnik RS", br. 22/16).

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