

# YEARBOOK

HUMAN RIGHTS PROTECTION

**PROVINCIAL PROTECTOR  
OF CITIZENS - OMBUDSMAN**

## RIGHT TO LIFE



Republic of Serbia  
Autonomous Province of Vojvodina  
Provincial Protector of Citizens - Ombudsman

Institute of Criminological and  
Sociological Research



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# **YEARBOOK**

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## FOREWORD

PhD Vlado Kambovski, retired Professor at the Faculty of Law “Justinianus Primus” in Skopje and member of the Macedonian Academy of Sciences and Arts presented the paper *The right to life in the light of the environmental justice*. Author reminds that human aggression against nature and the environment becomes dramatic, joining the natural climate changes. These destructive tendencies are an expression of the deep dysfunction between the economic, socio-cultural, political and environmental subsystems of the global industrial capitalist society, and the declared universal human rights, including the basic human right to life. To achieve the goal of enhanced protection of the right to life in the face of growing environmental destruction, the movements for environmental sustainability, social justice and economic justice need to come together and realize their common interest in the building of a democratic, eco-social society. It is a basic postulate of the increasingly influential eco(bio)centric philosophy of law, which starts from the right to life of present and future generations and the associated global goal of sustainable and humane social development. The main derivative of this philosophy is the concept of environmental justice, understood as an intergenerational distributive justice. That concept is beginning to permeate a growing number of conventions for environmental protection which provide for the individual right to a healthy environment, the right to information, participation in decision-making and the right to judicial protection of those rights. The concept of environmental justice is incorporated into national constitutional and legal systems, by strengthening environmental constitutionalism and introducing effective legal instruments for judicial protection of the right to a healthy environment. Today, its basic postulates are the main driver of deep reforms of modern law and the justice system.

PhD Dragana Ćorić, Assistant Professor at the The Faculty of Law, University in Novi Sad in the next paper *Right to life, whatsoever life is*, highlights that many international conventions and other important documents, as well as national laws begin with emphasizing the importance of life, and that life is valued as the most important social and legal value. Author presents the important question “What IS truly life?”. Since many major historical figures in philosophy have provided an answer to the question of what, if anything, makes life meaningful, although they typically have not put it in these terms. There are more than 100 definitions of life that lead to rather concise and inclusive

definition, made by Darwin: Life is self-reproduction with variations. In this paper, author reveals some of them and makes them more understandable and claims that no definition at once can contain all those specificities that make life as is. But, only if we study at the same time theoretical and practical dimensions of life, we can be closer to understanding it. In the paper it is assumed that life is more than pure legal notion of right to life, that it has deeper meaning and deeper sense. The legal definition of protection of life, although we do not know for certain what life is, is valuable to us, because it gives one possible direction in which life could be lived and could be more livable. It is the way that unites in its approach, both theoretical and practical vision of life.

Following authors, PhD Aleksandar Stevanović Assistant Professor at the University business academy in Novi Sad - Faculty of Law and PhD Borislav Grozdić, Professor at the University business academy in Novi Sad - Faculty of Law presented the paper *The Right to take Life*. The text analyzes the ethical dimension of taking of life, which is seen as the necessary condition for its legal presumption. The introduction gives a historical analysis of the taking of life as a social phenomenon. In the second part, the division of the phenomenon of socially acceptable taking of life is made, with special attention to human sacrifice, infanticide and geronticide. The question arises as to whether human life can be viewed as a value in itself (intrinsic value). The third part of the paper deals with the meaning of human life in the wider system of social values and indicates its special place in the original Christian point of view. In the final part, the connection between the dominant value system in modern civilization and the new instrumentalization of human life is established and it concludes that, in order to preserve human life as a basic value it is necessary to provide metaphysical assumptions.

In the paper *Right to Life and Use the Force in the Policing of Demonstrations* PhD Božidar Banović, Professor at the Faculty of Security Studies in Belgrade, University of Belgrade and PhD Veljko Turanjanin, Associate Professor at the Faculty of Law, University of Kragujevac have analyzed the use the force in the policing of demonstrations and its relationship with the rights to life. The use of force in the policing of demonstrations may raise issues under the European Convention on Human Rights in certain circumstances. This is particularly true in terms of the right to life, the prohibition of torture and inhuman and degrading treatment, freedom of expression, and freedom of reunion. The Republic of Serbia is no exception. Therefore, the authors have elaborated the points of view of the European Court of Human Rights through the main decisions in this field.

Associate Professor at the West University of Timișoara - Faculty of Law, PhD Laura Maria Stănilă explores the the context of emerging digitalization, increased usage of the Internet, and of human rights in the paper *Living in the Future: The Right to Virtual Life*. Since virtual space is a parallel medium towards human rights have migrated raising new challenges in interpretation. In this context author asks the question: are the human rights we exercise in reality the same rights we enjoy in the virtual space? Do we, as virtual reality actors enjoy a right to virtual life?

In the paper *The Impact of Negligent Supervision of Public Traffic on Roads and the Protection of the Lives of Traffic Participants in Serbia* PhD Dragan Obradović, Judge at the Higher Court in Valjevo underlines that each state, in accordance with its financial possibilities, pays due attention to the improvement of road traffic safety. In this light, during the XXI century, the Republic of Serbia has improved its legislation in this area through the provisions of the Law on Traffic Safety from 2009, ie the Law on Roads from 2018. In both regulations, there were or are provisions related to the obligations of the road manager in the event of a traffic accident. We have pointed out the most important problems from the aspect of legal solutions. Author focuses attention on the inadequately placed traffic signalizations. The impact of negligent supervision of public road traffic on road safety has not yet been adequately recognized. This issue is important for every local community on the territory of our country, but also beyond, because these are the problems that most countries face.

PhD Slađana Jovanović, professor at the Union University Faculty of Law, Belgrade presented the next paper *Criminal Law Protection of Life in Serbia: Necessity or Penal Populism?* In it author deals with actual criminal law protection of the right to life in Serbia, focusing the legal provisions related to criminal offenses against life and body, and the latest legislative changes. The most important question is whether the current situation is based on the necessity and the real need for better protection of the right to life or is it just populist manoeuvring of the creator of legislative penal policy? The author presents available statistical data and research results relevant to the subject, throwing a glance to comparative law, in order to indicate some directions for future legislative intervention.

In the following paper, *The right to life – prohibition of death penalty and right to life in prison*, PhD Marina Matić Bošković, Research Fellow at the Institute of Criminological and Sociological Research and Istvan Laslo Gal pointed out that the right to life is non-derogable right that cannot be denied even in time of war or other public emergency threatening the life of the nation. Also, the right to life is one of the highest social values

without which all other rights and freedoms lose their significance. The European Convention of Human Rights imposes both positive obligation to protect the right to life and a negative obligation not to take life. Negative obligation includes state duty not to take life intentionally or negligently. Furthermore, authors explain that a duty to safeguard life incorporates twofold approach, a duty to provide an effective and impartial investigation in cases of death resulting from the activities of state officials and a duty to safeguard and protect life. The authors analyse both positive and negative state's obligation. The aspect of the state's positive obligation to protect life is assessed through protection of prisoners against killing and violence by other detainees and through the duty to offer prisoners healthcare, while the negative aspect is analyzed through the prohibition of death penalty. The authors elaborate practice of the European Court of Human Rights and how interpretation of right to live progressed over time in these two specific groups of cases.

PhD Zoran S. Pavlović, Full Professor at University of Business Academy, Law Faculty, Novi Sad and MA Nikola Paunović, the Third Secretary at the Ministry of Foreign Affairs of the Republic of Serbia and PhD Candidate at Faculty of Law, University of Belgrade have explored important dilemmas in the next paper *Life Imprisonment in the Comparative Law Framework as Well as in the Jurisprudence of the European Court of Human Rights*. In comparative law frameworks there is no single approach concerning alternatives to the death penalty, meaning that some countries prescribe long-term imprisonment, while others impose life imprisonment. Therefore, the first part of the paper presents chosen comparative law solutions in this area in order to make visible observed differences among these two approaches. Bearing in mind that imposing life imprisonment affects deeply human rights, the second part of the paper analyzes selected cases before the European Court of Human Rights in which this sentence is imposed before domestic courts. According to analyzed comparative law approaches as well as considered case-law, in concluding remarks it is pointed out key universally accepted legal standards for imposing life imprisonment penalty.

In the following paper titled *Right to Life vs. Rule of Law*, PhD Vladimir Medović, Associate Professor at the Faculty of Law for Commerce and Judiciary Novi Sad analyzes important theme of abortion in the example of Polish legislative. The abortion in Poland is now only allowed in two instances: where the pregnancy poses a threat to the life or health of a woman or when the pregnancy resulted from a prohibited act such as rape or incest. This judgment provoked strong reactions within Poland and the European Union. In this paper author is focused on the issue of the legality of the composition of the Polish Constitutional tribunal which rendered such judgment and application of the principle of

the rule of law, as one of the fundamental values on which the European union is founded. On 20 December 2017 European Commission launched infringement procedures against Poland under article 7(1) TEU and made proposal for a Council decision on the determination of a clear risk of a serious breach by Republic of Poland of the rule of law. One of the reasons for activation of the Article 7 TEU was the precomposition of the Polish Constitutional tribunal in 2015 and 2016 which, in European Commission view, undermined the legitimacy, independence and effectiveness of the Constitutional tribunal. According the judgment of the Court of Justice of the EU in *LM* case even the commencement of the procedure under article 7(1) TEU relating to the breach of rule of law principle may have certain legal consequences and result in the suspension of application of the European arrest warrant. Therefore, the main issue of the paper is what effects the Polish Constitutional tribunal judgment will have in the legal system of the European Union, having in mind ongoing procedure for breach of the fundamental values of the EU. Can it be challenged before the Court of Justice of the European Union on the ground of breach of rule of law principle?

Authors PhD Dragan Blagić Associate Professor at the The Faculty of Business Economics and Entrepreneurship and PhD Zdravko Grujić, Associate Professor, Faculty of Law, University of Priština in Kosovska Mitrovica have dealt with the application of the institute of conditional release according to a particularly sensitive category of perpetrators of criminal offenses in the paper titled *The Right of a Minor for Conditional Release*. Namely, the minors as potential perpetrators of criminal acts, where due to a certain expiration of the served sentence of juvenile imprisonment and good behavior, can request a conditional release. Criminal sanctions for juveniles imply the application of only the necessary minimum elements of coercion and restriction of liberty, and are primarily aimed as measures of assistance and protection, in order to establish the best possible cooperation and its unhindered inclusion in the social community. Juvenile criminal law emphasizes in a different way the protective function of criminal law to first apply to juveniles the mildest criminal sanctions that do not have a repressive character, and only then, that in the end, as an *ultima ratio*, a sentence of juvenile imprisonment can be imposed. While serving a sentence of juvenile imprisonment a minor spends a certain period of time in a prison institution, where that time should be fulfilled in terms of content, so that the intended purpose of punishment, as well as tasks in education and professional training, should be achieved. In that case conditional release of a minor can be realized. The right to conditional release of a minor can be consider as crucial in substantiation the right to continue a normal life as a free person outside of prison institution.

In the paper *Challenges of the Legal Recognition of Life Partnership of Same-Sex Persons in Serbia in the Light of Comparative Legal Solutions* MA Dušan Ilić, Research Assistant at the Institute of European Studies explores the issue of the legal recognition of life partnership of same-sex persons in the Republic of Serbia. The recognition of same-sex unions is currently one of the most delicate social and legal challenges and the Republic of Serbia belongs to the group of European countries that do not recognize any form of same-sex unions. For that reason, during the first half of 2021, the law on same-sex unions was proposed, which provoked conflicting reactions from the general public. This article presents the constitutional and legal possibilities of the (non)recognition of same-sex life partnership in Serbia, within the existing positive law of the Republic of Serbia. Secondly, this article presents the comparative legal solutions used by other member states of the Council of Europe regarding the legal recognition of same-sex unions. This part will present the solutions of some European countries that recognize certain forms of life partnership of same-sex persons, as well as those that, like Serbia, do not recognize any form of same-sex unions, but in some way regulate the status of these persons in their legal system. Thirdly, author have presented possible legal solutions to overcome the current challenges faced by people living within these life forms.

PhD Jelena Kostić, Senior Research Fellow at the Institute of Comparative Law, explains that the right to an adequate standard of living was first introduced by the Universal Declaration of Human Rights in the paper titled *Integrity of Public Finances and Control of Public Spending Through the Prism of the Right to an Adequate Standard of Living*. Author claims that its protection in practice largely depends on the level of wealth of a society. Nevertheless, some minimum standards accepted by international documents should be met in practice. The right to an adequate standard of living has great significance for both the individual and the community. Its realization enables individual social integration, because it refers primarily to the most endangered categories of the population. That is why it is necessary to provide sufficient funds in the state budget, in order to enable effective protection of the right to an adequate standard of living for all citizens. The author starts from the assumption that the realization of the right to an adequate standard of living is often endangered due to inadequate budget policy. Through analysis the content of various international and national documents, as well as using the dogmatic legal method, author seeks to make recommendations for the improvement of budget policy in order to more effectively protect the right to an adequate standard of living in the Republic of Serbia.

The paper *Disappeared Persons and the Right to be Considered alive: the Current State of Play in the Western Balkans* by PhD Milica Kolaković-Bojović, Senior Research

Fellow at the Institute of Criminological and Sociological Research, Belgrade emphasises that the search for a disappeared person should be conducted under the presumption that he or she is alive. This golden rule has been recognized and incorporated in the main human rights instruments and the soft law dealing with the combating enforced disappearances, but also in those relevant for the search for persons missing in or in relation to arm conflicts. This principle has a multiple influence and tackles as the right of a missing person to be searched, as an obligation to search for him/her. It also has a significant influence on and constitutes a framework for exercising a various property and a social welfare rights of family members of a disappeared person. Considering this and taking into account a gross number of persons who still missing in or in relation with the armed conflicts in Former Republic of Yugoslavia, author explores on how this principle is incorporated in the relevant legislation of the Western Balkans countries. Triggered by the ongoing processes aimed at development of the Serbian Law on Missing Persons, this paper also analyses how this principle should be incorporated in a new law, based on the identification of the existing legal gaps and the comparative legislation in the Region.

PhD Gordana Nikolić, Research Associate and Criminal Inspector at the Ministry of Internal Affairs of the Republic of Serbia analyzes the criminal offence of extortion in the paper titled *An Attack Against Life and Limb as a Manner of Committing Extortion*. The criminal offence of extortion is a typical property related offence and in many modern legislations, as well as in the national one, this criminal offence is classified in the group of offences against property. This determination assigned to the group of offences is completely justified, having in mind that the offender's ultimate intention is to acquire unlawful property gain. Special gravity of extortion, which differentiates it from other typical property crimes, refers to coercion as a manner of its commission, during which an attack against life and limb of the injured party, as a sphere of the greatest vital importance, results in acquisition of unlawful property gain. In support thereof, there are many solutions offered in the legislation of the countries in the region which have recognised the intensity of coercion - more intense violence in the commission of the offence - as its qualifying circumstance. The author focuses on the attack against life and limb of the injured party during coercion as a means of extortion committed by the perpetrator. The paper also introduces new qualified forms of the offence that would criminalise a more intense attack against life and limb of the injured party during the commission of this offence - that would be taken over from the legislations in the region - as well as the injured party's suicide, as a consequence of coercion as an act of extortion. The aim is to point to the violent character of extortion and more complete criminalisation of more serious forms of this offence.

Assistant Professor at Beijing Normal University, College for Criminal Law Science, China, Yang Chao presented the paper *The Human Right Safeguard for Person Extradited in China*. In it author addresses the legal system of extradition in China from the human rights protection perspective. Since China promulgated extradition law and signed the first bilateral treaty in extradition matter, China has improved the whole legal system in the field of international judicial assistance in criminal matters, and this process is development by greater individual human rights protections. In this paper, the human right protection in extradition process demonstrated by introduce the relevant law and examination process of extradition, the fundamental principles of extradition, and the right protection in the extradition procedure in China.

The next article, *Dangers and Consequences of the Introduction of Risk Technologies in the Practice of Making Criminal-Political and Criminal-Legal Decisions* is devoted to the study of the risks that may arise in the process of implementing risk management technologies in the practice of developing and making criminal-political and criminal-legal decisions. Authors PhD Yuriy Pudovochkin, Professor and Chief Researcher of the Criminal Law Research Department at the Justice Issues Research Centre of the Russian State University of Justice and the PhD Mikhail Babayev, Professor and Senior Researcher at the Criminal Law Research Department of the Justice Issues Research Centre claim that risk technologies are now considered as one of the most promising means of optimizing criminal policy, the introduction of which makes it possible to identify and assess both the positive and negative consequences of making any decision in the field of criminal law. At the same time, risk management itself is fraught with some dangers and risks that need to be taken into account in the process of updating the methodology of criminal policy. These risks are associated both with the selection of experts and the definition of the methodology of risk analysis, and with the results of the risk reformatting of criminal policy. The most significant dangers that may arise are the manipulative use of public opinion to tighten the criminal law, the strengthening of repressive principles of criminal policy, the restriction of the sphere of individual freedom and the development of discriminatory practices. At the same time, these risks and dangers should not block the very idea of introducing risk management technology into criminal policy and criminal law.

PhD Natalya Genrikh, Head of the Criminal Law Department, North Caucasus Branch, Russian State University of Justice devoted the paper *Criminalization as a power resource* to the study of the question of how the practice of criminalization of socially dangerous acts acts as a significant social resource, the possession of which legitimizes and strengthens state power. In order to study this problem, a methodological synthesis



of the cognitive capabilities of a number of well-known theoretical platforms is needed: the Marxist theory of state and law, evolutionary approaches to understanding law, the doctrine of legal policy and legal management, the doctrine of the separation of powers, the theory of judicial law-making, the principles of criminalization of socially dangerous acts, the doctrine of the functions of criminal law. Their combination provides an opportunity for a comprehensive and objective knowledge of the main directions of interaction between the criminal law and the authorities, their results and consequences. Through the prism of the content of the constitutional formula, according to which the criminal legislation is under the exclusive jurisdiction of the federal legislator, the following are revealed: the main directions of concentration of the criminalization resource in the hands of the state, the significance and consequences of securing the right to criminalize the federal government, the problems of competition between the authorities and political forces for the right to promote criminalization aspirations in parliament. It is established that global trends in the development of relations between the government and the criminal law, having objective grounds and civilizational significance, are fraught with some dangers associated, firstly, with the exclusion of regional authorities from the process of creating criminal law norms, and secondly, with the permissible participation of executive and judicial authorities in determining the content of criminal law.

MA Adrian Stan, Teaching and Research Assistant, Faculty of Law, West University of Timișoara presented the paper about the Romanian CCP guarantees of the right to life, regarding the procedural aspects of the length of the investigation, titled *The protection of right to life in Romanian Code of Criminal Procedure: Unreasonable length of the investigation and the effective remedies*. Jurisprudence revealed that investigations regarding car accidents following the death of a person have a length that exceeds the limit that can be considered reasonable from the point of view of the families of the victims. On the other hand, the Romanian legislation only recently provided a remedy for the excessive length of investigations, a special procedure in force after 2014. By a special provision, it was established that this remedy is applicable only to investigations that started after 1. February 2014. But what happens to the older files, which should be able to be urged by the special procedure? Constitutional Court, faced with this question, held that this is an option of the legislator. But we think it is more than that. ECHR held that the procedural side of the right to life also involves investigating within a reasonable time of any violent death. From this point of view a number of judgments have been held, which the author summarizes. The central topic of the paper relates to criticism of

Romanian legislation in terms of procedural protection of the right to life and the need for effective procedural remedies (related to art. 13 ECHR).

Academician PhD Miodrag N. Simović, Judge of the Constitutional Court of Bosnia and Herzegovina, Full Professor of the Faculty of Law of the University of Banja Luka, Active Member of the Academy of Sciences and Arts of Bosnia and Herzegovina and Marina M. Simović, Secretary of the Ombudsman for Children of the Republika Srpska and Associate Professor at the Faculty of Law, University Apeiron Banja Luka presented the paper *Protection of the Right to Life and Constitutional Court of Bosnia and Herzegovina*. Authors underline that violation of the right to life right is considered the most serious violation of the European Convention. This right is protected by the Constitution of Bosnia and Herzegovina and the Constitutional Court of Bosnia and Herzegovina often has the opportunity to consider appeals related to the violation of the right to life. Article 2 of the European Convention stipulates that in the case of a violent death, the competent authorities are obliged to conduct an efficient official investigation. Therefore, the Constitutional Court of Bosnia and Herzegovina will examine in the circumstances of a specific case.

In the paper *Where Shall Capital Punishment Go China: A Realistic Perspective*, PhD Zhenjie Zhou, Professor of Criminal Law at the Anhui Normal University and Beijing Normal University, China explores this important question. Since China saw many constructive and substantial reforms on capital punishment in recent two decades, especially the abolition of 13 and 9 capital offenses respectively in 2011 and 2015. Meanwhile, China stated that it had carried out all these reforms with the final aim to completely abolish capital punishment. Although these reforms deserve positive comments, it is obviously unrealistic in foreseeable future. Furthermore, author explains that China may not be able abolish capital punishment in law or in practice, but to strictly limit its application within the scope of crimes potential to result in death and serious corruption crimes with such circumstances as causing massive social damage and the amount involved being exceptionally large.

PhD Silvia Signorato, Associate Professor in Criminal Procedure at the University of Padua and Lecturer in Criminal Procedure at the University of Innsbruck analyzes right to life from the context of terrorism in the paper titled *Combating Terrorism on the Internet to Protect the Right to Life: The Regulation (EU) 2021/784 on Addressing the Dissemination of Terrorist Content Online*. Author claims that terrorism undermines, among other things, the right to life and often exploits the potential of the Internet. For this reason, it is necessary that States adopt effective counter measures, capable of rapidly

removing terrorist content online. With that in mind, the European Parliament and the Council approved Regulation 2021/784 on addressing the dissemination of terrorist content online. This article analyses this important regulation, highlighting how it can contribute to improving the effectiveness of the fight against terrorism. However, two critical issues are also discussed in the article: the slowness of the instruments of cooperation between States, and the fact that terrorist content, even if removed, can easily be put back online.

In the paper *Right to Life in the Light of Request (Consent) of an Injured Party to Murder*, authors PhD Dragan Jovašević, Full Professor at the Faculty of Law, University of Niš and MA Jelena Radulović Glamočak, PhD student at the Faculty of Law, University of Business Academy Novi Sad begin their analyses by stating that the right to life is a presumption for the enjoyment of all other human rights (freedoms). Still, this right is from the oldest times being threatened by numerous crimes. Murder, as unlawful deprivation, taking the life of another person, occurs in several forms or manifestations such as: ordinary, aggravated (qualified) and privileged (easy) murder. Within privileged forms of murder “deprivation of life on request or consent of an injured party” appears as a specific act. There are different situations, which are known in much European criminal legislation, and about which this paper is about, in which acts of deprivation of life are preceded by consent, consent or even the request of the injured person for self-destruction, for deprivation of his/her own life. In these situations we are talking about the conflict of the human right to freely decide on one's goods, and even such goods as it is his/her own life with the human right to protection of inviolability, inviolability of one's life.

Judit Szabó, Head of Criminal Division at the Budapest-Capital Regional Court and Deputy-coordinator of the criminal law section of European Law Advisor's Network for Judges discussed what changes are expected in the Hungarian jurisdiction and what aspects are particularly important for practitioners in the right use of the Engel-criteria and the CJEU's provisions in the paper *Ne bis in idem – The principle between the branches of law*. Author claims that the freedom of the people's mobility posed a great challenge, inter alia, for the matter of transnational crimes, which made the *ne bis in idem* principle – the double jeopardy clause – essential and relevant. In general, the *ne bis in idem* principle prohibits duplication of proceedings and penalties of a criminal nature for the same acts and against the same person, either within the same Member State or in several Member States if the person has exercised their right to freedom of movement.

In the paper *The Specificity of Article 2 of The ECHR and its Applicability in the Balkans: Case Studies* authors, Full Professors at the Faculty of Law - Goce Delčev University in

Štip, PhD Ivica Josifović and PhD Igor Kambovski present Article 2 of the European Convention on Human Rights (ECHR) and its significance in determining its violation before the European Court of Human Rights (ECtHR). Paper first explains the general features of Article 2, its scope and its application, as it is considered as a right where no deviations can be made. Furthermore, the paper elaborates the application of Article 2 through the analysis of case studies before the ECtHR submitted against some of the Balkan countries. These case studies address violations of Article 2 with regard to the use of excessive police force, death in custody, victims of crime, and in other cases and circumstances. In conclusion, the authors presented their own results regarding compliance with Article 2 and future challenges that the law enforcement authorities may face when applying Article 2 of the ECHR.

PhD Vadim Vladimirovič Khilyuta, Associate Professor of the Department of Criminal Law, Criminal Procedure and Criminalistics, Yanka Kupala State University of Grodno (Republic of Belarus) aims to develop the theory of reforming a concept of theft and formulation provisions of the new theory – criminal legal protection of a turn of objects of the civil rights in the paper *Crimes Against the Circulation of Objects of Civil Rights: Conceptual and Theoretical Basis of Modeling*. The concept of reforming of the penal legislation in the sphere of economy is developed and the doctrine about crimes against objects of the civil law is formulated; the new system of the penal legislation in the property sphere is offered; inefficiency of the existing signs of theft in the penal statute is revealed and the new principles of criminalization of the relations in the sphere of economy are offered.

PhD Alonso Muñoz Pérez, Assistant Professor at the *Francisco de Vitoria University*, Madrid underlines in his paper *Legal Undermining of Human Dignity in Spain through Criminal Law and Law Enforcement Protocols on "Gender Violence": International Trends and Political Causes* that human dignity stresses the equal value of all human beings and, paradoxically, sexual discrimination is enacted in the name of equality. Author furthermore shows how since 2008 in Spain there was passed legislation that states unequal treatment for the same acts depending on the sex of the perpetrator. Substantive and procedural Criminal Law was amended as well as Law enforcement protocols. The causes of these changes are international trends that come from the anglo/western political elites. In this sense, this unequal treatment is in reality a form of political control, dividing populations and naming male individuals' official *enemies of the people/State*. This treatment reinstates the Author Criminal Law and the Criminal Law of the Enemy.

PhD Mario Caterini, Professor at the Faculty of Law, University of Calabria and MA Giulia Rizzo Minelli, PhD Student and Assistant Professor at the Faculty of Law, University of Bologna address the issue of the right to life from a double perspective in the paper *The “Right to Life” of People Convicted in Italy to Life in Prison: Among Recent Jurisprudential Assessments and Perspectives De Iure Condendo*. In detail, the paper examines the recent developments of the jurisprudence of the European Court of Human Rights and of the Constitutional Court on life imprisonment, trying to highlight the illegality not only of the so-called “life imprisonment impediment” (as it was recently affirmed by the ECHR and by the Constitutional Court) but – more generally – also to life imprisonment in all its forms and to propose – *de lege ferenda* – possible alternatives to the perpetual sanction, necessary to protect the right to life and hope of the offender. Authors explain that if the protection of life must induce the legislator to introduce particularly effective sanctions to protect this right from unjustified aggression, on the other hand, the punitive claim of the State cannot exclusively consist, in any case, in the neutralization of the offender for life, since this would constitute an exploitation of the human being for contingent purposes of criminal policy and would be in contrast with the re-educational function of the penalty, as it is provided by the Article 27, par. 3., of the Italian Constitution and with the principle of human dignity.

In the following paper, *Anti-Corruption and Human Rights: an analysis of Japan’s Foreign Public Official Anti-Bribery Act*, PhD Shin Matsuzawa, Professor at the Waseda University, Tokyo gives an introduction about Japan's efforts of preventing world-wide corruption by using the Foreign Public Officials Anti-Bribery Act as the foundation and adding on analyses from the perspective of criminal law theory. In order to protect the rights of citizens, it is necessary to establish a system that does not allow self-serving behavior by public officials. All citizens must be given the rights they deserve, without distinction. The “right to life,” the theme of this book, should not mean “the right to survive,” but “the right to live while receiving the full range of legitimate rights as a human being.” To this end, anti-corruption is a very important issue.

PhD Milana Ljubičić, Associate Professor at Faculty of Philosophy University of Belgrade in the next paper titled *Ageism in Medicine and the Right to Life* deals with the issue of discrimination against the elderly in the field of medicine. Ageism is widespread in contemporary societies. There are several reasons, one of which we should certainly emphasize - dictates the youth with their perception of the old age and the elderly as less valuable members of society. The same narrative, present in the domain of health care and protection of the elderly, justifies the application of discriminatory practices in medicine. Informally, it expresses compassionate ageism, and sometimes discrimination

is openly negative. However, recently the discrimination of the elderly in the field of medicine has received its official confirmation. This is especially visible in the current global moment of the new normality caused by the COVID-19 pandemic. This paper points out such practices that directly threaten the right of the elderly to life, referring to the experience of Italy, Spain, the United States, Switzerland, and Germany. It also discusses the idea of the right to life and the implications of the generally accepted discourse on the elderly in modern societies.

Important question formulated in the title of paper *Euthanasia as a negation of the right to life? Comparative legal analysis* is asked by MA Miljan Lazović, PhD student at the Faculty of Law and Theology, University of Belgrade. In this paper, the author deals with the criminal law analysis of the institute of euthanasia as well as the issue of protection of the human right to life. Euthanasia as an act of taking life is legalized in certain European countries. The states in which it is legalized have been shown to be both a distinct social justification and, consequently, a large number of illegally performed euthanasias. The institute of euthanasia came to the Republic of Serbia together with the Preliminary Draft of the Civil Code, after which a moral-legal debate started on the issue of its legalization. This institute is not only punishable under the Criminal Code PC, but is also unconstitutional as it violates a basic human right - and that is the right to life. Also, the phrase “right to a dignified death” is problematic from the point of view of terminology and axiology, and it cannot emanate from it an unlimited right to dispose of one’s own life, that is, as the patient imagined. Therefore, in this paper, the author points out the specific problems that this institute brings through criminal-legal analysis.

Theme of euthanasia as a multidisciplinary, ethical, legal, medical, social, but also religious issue with numerous sub-questions is analogized by PhD Mirka Lukić-Šarkanović, Assistant Professor at the Faculty of Medicine, University of Belgrade in the paper *Right to Life vs Right to Death*. Author emphasizes that the so-called pro-euthanasia idea is more present than ever which has led to the legalization of euthanasia in many countries primarily because, in addition to the human right to life as a basic human right, the human “right to death” is being increasingly discussed. The development of palliative care and sedation, whose main goal is to alleviate the suffering and pain of the patient in the final weeks and days of his life without the intention to affect the end of life, and their increasing accessibility to a wider circle of patients, has significantly reduced the need and will to legalize euthanasia. In recent decades, the issue of euthanasia has become more of a medical issue.

PhD Ranka Vujović examines the legal aspects of mandatory immunization in the context of the child's right to life and health, on the one hand, and the right to inviolability of bodily integrity, on the other hand, as well as the limits of parental authority and responsibility in the following paper *Mandatory Immunization of Children and Protection of the Right to Life, Health and Bodily Integrity*. Since mandatory immunization is a controversial issue that has occupied the public's attention for many years, and has been especially current after the proclamation of the COVID-19 infectious disease pandemic. It is a medical measure whose ultimate goal is to protect the life and health of citizens. Life is a basic value that a person has, which gives foundation and meaning to all other values. Therefore, all modern legislation proclaims the right to healthcare as a basic human right. The right to health also implies the right to free consent to a medical intervention, medical measure or scientific experiment, because such interventions, as a rule, violate another protected good – bodily integrity. In principle, everyone has the right to freely decide on everything concerning their life and health and bodily integrity. There is disagreement in legal theory as to whether mandatory immunization of children, despite health benefits, is an inadmissible encroachment on the integrity of the human being and where the margins of assessment are, although the case law, both domestically and internationally, has recently conveyed its negative position.

Ralf Thomas Heberling, University lecturer in Social Sciences, University of South-Eastern Norway poses the question *Right To Life – Right To Death?* in the next paper. Author's primary concern is the 'good death' in various forms; the termination of a life in pain at the will of the person dying. This text explores the question if sick persons have the right to die when and how they wish to. And is it permissible to help others put an end to an insufferable life, actively or passively? The debate on euthanasia and assisted suicide intensifies as populations grow older and medical progress enables physicians to prolong the lives of seriously ill patients. This paper also looks at definitions of terms used and at ethical questions surrounding the issue, present common arguments for and against assisted suicide and euthanasia as well as give a short review of medical aspects and an overview of public opinion and policy on the issue.

MA Lazar Stefanović, PhD Student at the Faculty of Law, University of Vienna and Researcher at the Vienna Forum for Human Rights explores *Implications of anti-pandemic measures of Serbian authorities on the right to life for persons with disabilities living in institutions* in following paper. This article examines the actions of the Serbian government, in the circumstances of the Covid-19 pandemic, that had arguably resulted in a failure to protect the right to life of disabled people living in social care institutions. Although derogations of human rights can be imposed under the Constitution of the

Republic of Serbia, the issues of appropriateness, duration and scope are highly questionable in this case. The restrictions imposed on the people in institutions have been longer and more intensive than those imposed on the general population, eventually not succeeding to prevent an outbreak of infection in these institutions. This paper seeks to answer the question: could have the right to life and other human rights of people with disabilities been protected to a higher degree, had the Government complied with international standards of human rights?

In the paper *Vaccination and the Right to life*, PhD Elena Tilovska-Kechedji, Associate Professor at the Faculty of Law, University St. "Kliment Ohridski"- Bitola have offered answers to two principal questions that this paper proposes. First, there is the question of choice, since some people want to be vaccinated others don't, some people want to be vaccinated with one brand others with another, how does this affect the right to life. Secondly, the unequal possibility to all the states and all the people, because there were not enough vaccines to be distributed equally to everyone in the world.

PhD Ana Batrićević, Senior Research Fellow and MA Andrej Kubiček, Research Associate at the Institute of Criminological and Sociological Research have presented the paper *The Right to Life and Quality of Living of Women Suffering and Recovered from Breast Cancer in Serbia*. Authors underline series of legal, social and practical obstacles that affect not only the quality of breast cancers patients lives, but their right to health as the essential aspect of the right to life too. In this paper, the aforementioned issue is addressed from two aspects: by analysing relevant national legal provisions pertinent to this field and by shedding the light on the experiences of women who passed through this struggle, with special focus on their problems and the providers of their support. As the result, suggestions are made regarding potential changes on legislative and practical level, which would improve the extremely vulnerable position of these women and strengthen the protection not only of their right to health but also of their mental and physical well-being.

PhD Zorica Mršević, Professor at Faculty of European Legal and Political Studies, Novi Sad and Svetlana Janković from Center for Encouraging Dialogue and Tolerance, Čačak explain the principle of "build back better" in their paper, *Build Back Better - Principle of Saving Lives*. Principle mentioned in the title means to strengthen the resilience of communities, societies and states against the consequences of extraordinary situations by correcting previous organizational, political, social and physical shortcomings. The goal of resilience in accordance with the "build back better" principle is to improve, rather than repeating a pre-existing condition and thus to contribute to more effective protection



of lives. The principle has been formulated in international documents stipulating that effective recovery and reconstruction globally should be recognized as an imperative for saving lives and further sustainable development. Authors also show that in order to be successful, “*build back better*” programs require a high degree of political will, strong institutional frameworks and intensified international cooperation.

PhD Aleksandar R. Ivanović, Associate Professor at Faculty of Law in Lukavica, University of Business Engineering and Management Banja Luka discusses the right to life from a legal and philosophical aspect, promoting a broader interpretation of the right to life, which implies not only the mere protection of human life from any form of endangering, but also the protection of human dignity and quality of life in the paper *Right to Life in the Context of Quality of Life and the Right to Education with a Special Focus on a Non-Discriminatory Access to Higher Education in Serbia*. Accordingly, the author tries to point out the inseparability of the right to life from the right to human dignity, as well as the relationship of these two rights with the quality of life. The author pays special attention to the right to education, as one of the key segments of quality of life. Within this part, the author deals specifically with the issue of non-discriminatory access to higher education from the aspect of the legal framework of the Republic of Serbia.



## PROLEGOMENON

For the contemporary citizen from the beginning of the XXI st. century who, despite the trends of “disappearance of the public person” in the global flood of trivialization and relativization of political culture and civilizational achievement in general, even today is inspired by the ideals of constitutional charters from the beginning of modern constitutionalism, political grammar of constitutional democracy and still there remains an inspiring arsenal of “*upright orthopedics of human gait*” (Bloch, 1977, Mendieta, 2014, 799). As the resources of once revolutionary-democratic ideology are still not completely polluted by trumpoid philosophy and politics of “alternative facts” and “post-truths” (Swaine, 2017, ; Hendricks, 2018, 49), old ideas on *life, equality, search for happiness, inalienable rights, peace, general well being and justice*, are still a living source of inspiration of new human fights for a better tomorrow. The character and meaning of traditional constitutional values are still a *spiritus movens* to those who do not forget what *equality, freedom and fraternity* mean as a platform for deeper and wider understanding of the institutions of *good governance* and justification of fundamental principles of constitutional democracies on which it is built and develops. In that process, together with constitutional values, the values and skills necessary for participation of every competent and responsible member of society solidify; will for the decisions and conflicts to be resolved using democratic procedures strengthens. In a history where *solitary, poor, nasty, brutish and short* life sequences were not lacking, the fact that the mission that with guarantees human rights are achieved is not extinguished gives hope to the noble and heroic mission of human beings in state and society. It is completely natural and human that such an impulse in people always emerges or is regenerated after hearing about tragic events near or far from them. There are few who are indifferent to reports on refugees drowning in the Mediterranean, unfortunate parents and children injured from destroyed buildings in the towns of Middle East, beaten demonstrators in the streets of Moscow, Minneapolis... and all the other tragic circumstances and facts which continuously remind us how life for many can be *solitary, poor, nasty, brutish and short*.

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Recently in the USA, the life of **George Floyd** had to be lost for the violent protest movement *Black Lives Matter* to gain momentum to force us to be reminded of the pressing importance of the human right to life issues, of its significance and guarantees in the existing circumstances in the life of a sovereign state and society.

The resounding statement by **Thomas Hobbes** in the *Leviathan* (1651) that life without government would be “*solitary, poor, nasty, brutish and short*”, most often is understood as a cynical remark by him, a direct and untwisted description or cliché on the eternal, transcendent truth that real interpersonal relations and their overall limitations heavily burden and limit human *right to life*. Even though Hobbes’ analysis and understanding of the real world and its political structures showed an ugly reality of life, in fact “*life unworthy of living*” (Binding, 1920, 117), his *Leviathan* projected the possibility of another state, namely “security and prosperity” which, *by the book*, can alone ensure organized force of government. So nevertheless, the coincidence with the historical experience of the *Protectorate* under **Oliver Cromwell**, it is difficult that in this dictator task of this *constitutional personae* could point out, contain or justify anything “protective” in government activity which with ruthless and rough methods of coercion raged around England and Ireland in the turbulent and destructive times of the Civil War (1642-1651). In the same way, Hobbes’ message on that tragic rule of violence and hopelessness, summarized in his other tractate *Behemoth, or the Long Parliament* (1688), more harrowingly warns us of the unbearable fragility and helplessness of human life in the face of all kinds of terror and violence (Fukuyama, 2018, 147; Macgillivray, 1970, 179). Is it not understandable that it is precisely then, in the callous and ruthless circumstances of civil war and similar circumstances, that intensive discourse on human rights and their defense particularly valuing the right to life is born and commenced? The narrative of natural rights as human rights becomes not only a universal political *credo* of imminent modernity but a “precursor to and imminent moral foundation and limitation of these policies themselves.” (Golder, 2020, 10; Golder, 2018, 10, Schuppert, 2021, 14).

What we today call right to life had its inception in clause no. 39 of the *Magna Charta* (1215) which several centuries later was taken on in its entirety, built on and finally formulated by the *founding fathers* of american constitutionality in the documents of the American revolution namely the *Declaration of Independence* (1776) and the *Vth. Constitutional Amendment* of 1791.

“No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed..., except by the legal judgment of his peers or by the law of the land...” . (*Magna charta*, 1215., C. 39).

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”. *Fifth Amendment* (1791)

In the tradition of **John Locke** and other *whig* theoreticians of the social contract of the XVII th. century, the first, fundamental right was considered to be to life and not to freedom. For a long time, life had meant more than a simple biological existence. Life encompassed physical integrity, “*health without severe pain*“, therefore, even then a minimum quality of life was defined. In the XVII th and XVIII th century, the concept of natural human rights, including the right to life, was connected to the idea of limiting governmental powers. The crown of such liberal-constitutional understanding of the *right to life* presented itself after the *Declaration of Independence* (1776), *USA Constitution* (1787) *Am. XIV* of the *American Constitution* (1791) which expressly forbade governments to – “deprive anyone of life, freedom or property without due process of law...”

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (Amendment XIV, Section 1)

As a zealous follower of the ideas of **Francis Hutcheson**, Scottish interpreter of J. Locke’s political thought, Thomas **Jefferson** also in his views on the *Declaration of Independence* considered “life” as the first natural right. That right is so “close” to every human being above all thanks to their direct sentiment for moral evil in all those situations of cruel and unnecessary pain, or reduced happiness of our nearest and dearest. Just as F. Hutcheson, so did T. Jefferson also seek the inalienable right “over our lives and extremities”, “perfect rights” by which he meant right of a person to his/her life; reputation; physical integrity and bodily invulnerability; gain from honest work; choice of work within the framework of natural law: the latter right could be called natural freedom. (Sheldon, 1994, 594).

In the group of “inalienable rights” which the founding *fathers* built into the *Declaration of independence* (1776,) the words “*life, freedom and pursuit of happiness*” were written. Their mutual interaction and various positions of priority, with accent first on life and then on freedom, their inter twining characterized and still marks movement and development in political philosophy and in constitutional law of the state and rights after the civil revolution of XVIII th century. The famous slogan of “*life, freedom and pursuit of happiness*” over time has changed its meaning. Both “life” and “freedom” each in their own time alternately give a new and decisive direction in the interpretation of constitutional values. Successive and alternate transition from “life” to “freedom”, that is “freedom” to “life” includes much more than simple semantics. It most directly is shown for example by the contemporary discussion on abortion. Contemporary spreading of *right to freedom* is as it has “devoured” the historical *right to life*. It all points to the fact that the *right to life* also exists in various forms and meanings in different and successive groups. It deals with its evolutionary path, maturation and content which in general exists in differences of the first and second generation of human rights.

Possible scientific legal synthesis, demonstrate that during the lengthy duration of the “first generation” *right to life* had three properties. (i) Right to life exists on the same plan as the second fundamental interests (freedom, property). (ii) The approach of this generation starts from that right to life is not absolute. This is obvious in the case when the government narrows the right to achieve certain competitive interests (punishment, war). (iii) Right to life can only be taken under conditions of due process of law. (Hsu, 2020, 2). In most jurisdictions, the right to life has only included procedural guarantees. The second generation of right to life appeared after the World War II and the defeating experiences from the XIXth and XX th century of two significant wars, the socialist revolution, great economic crises which have completely degraded the first generation of right to life. This generation of *right to life* is presented by documents such as *Universal declaration of Human Rights* (1948), *American Declaration of Rights and Duties of Man* (1948), *Basic Law for the FR of Germany* (1949), *European Convention on Human Rights and Fundamental Freedoms* (1950), *International Covenant on Civil and Political Rights* (1966).

In the second generation of *right to life* the following features were shown: (i) a right is considered to be a special right, in so far as it is differentiated from a particularized version of some other rights; (ii) right to life imposes upon governments as many positive as negative obligations; (iii) right to life gains and has an elevated status among human rights. (iv) Fourth, right to life together with the existence of procedural guarantees sets government powerful material limitations.

In the conquering and *affirmative* trend, abolishing capital punishment in a great many countries in the world has been finalized. This “natural” and “inalienable” attribute of every person, this “absolutely” and “undoubtedly the most fundamental of all rights” , “supreme right” , “foundation stone of all other rights”, this “primordial”, “indescribable” and “cardinal human right”, as “irreducible human rights” and “imperative norm of international right” as a “*ius cogens norm*” no government must deny its existence. Nevertheless, the recent development in the application of this right points to the uncertainty in the application of right to life and its values against a range of questions on life and death. In action is the state which in the concepts on life and death demonstrates more and more sensitivity towards the nuances of legitimate engagement in questions of life and death. An ever-increasing number of decisions by government institutions, corporate and individual entities exist out of the fundamental importance for human and organizational activity.

Finally, it must be reiterated that the contributions of colleagues to this valuable conference show again that the legitimate applications of limitations on the right to life and its value depends on the transparency of various decision-making processes and dispersion of information on specific issues on life and death. In this sense, it is easy to agree with the conclusion that any legitimate decision on life or death can only be reached after detailed consideration of recent information which takes into account “cultural variations and plural sentiment” (Yorke, 2010, 4) of a particular society.

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escape of a person lawfully detained;(c)in action lawfully taken for the purpose of quelling a riot or insurrection.”

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**Academician Vlado Kambovski\***

## **THE RIGHT TO LIFE IN THE LIGHT OF THE ENVIRONMENTAL JUSTICE**

*The recent summit of world leaders on climate change sends an SOS signal about the fate of humanity over which the shadow of a global cataclysm hangs. Human aggression against nature and the environment becomes dramatic, joining the natural climate changes. These destructive tendencies are an expression of the deep dysfunction between the economic, socio-cultural, political and environmental subsystems of the global industrial capitalist society, and the declared universal human rights, including the basic human right to life.*

*To achieve the goal of enhanced protection of the right to life in the face of growing environmental destruction, the movements for environmental sustainability, social justice and economic justice need to come together and realize their common interest in the building of a democratic, eco-social society. It is a basic postulate of the increasingly influential eco(bio)centric philosophy of law, which starts from the right to life of present and future generations and the associated global goal of sustainable and humane social development. The main derivative of this philosophy is the concept of environmental justice, understood as an intergenerational distributive justice. That concept is beginning to permeate a growing number of conventions for environmental protection which provide for the individual right to a healthy environment, the right to information, participation in decision-making and the right to judicial protection of those rights.*

*The concept of environmental justice is incorporated into national constitutional and legal systems, by strengthening environmental constitutionalism and introducing effective legal instruments for judicial protection of the right to a healthy environment. Today, its basic postulates are the main driver of deep reforms of modern law and the justice system.*

*Keywords: right to life, environmental justice, ecocentric philosophy, environmental constitutionalism, judicialization*

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## Foreword

The world is entering a dangerous zone of risk posed by climate change and the rapid and uncontrolled destruction of the environment. The environmental crisis and climate changes are two major challenges of our time. Rampant deforestation, uncontrolled expansion of agriculture, intensive farming, mining and infrastructure development, as well as the exploitation of wild species have created a “perfect storm” for the spillover of diseases from wildlife to people, as happened with the pandemic Covid-19. This often occurs in areas where live the communities that are most vulnerable to infectious diseases (*Wienhues, 2020*)).

The inauguration today of the new concept of environmental justice as a center of the struggle for affirmation and respect for fundamental human rights of a healthy environment, life, and quality of life, is becoming one of the leading fields of profound social reforms, in the interest of sustainable and humane development of society. The modern concept of environmental justice is a call to reject the destructive utilitarian and pragmatic model of managing social affairs by the oligarchic structures, particularly characteristic of countries with low levels of democracy and rule of law (“hybrid systems” and “captured states”).

Key preconditions for such a reversal are: the constitutionalization of environmental rights, an effective legal system based on the principle of environmental justice, rule of law and effective judicial protection of the human right to life in a healthy environment.

### **Necessity of a new environmental public policy**

The first requirement for promoting a new concept of the state based on the postulates of environmental justice is the definition of the environmental policy (policies) as “public” policy. This means above all, a fundamental change in the general environmental consciousness and, moreover, the protection of the environment based on a policy created and implemented by all segments of society (citizens, their associations, legal entities and public institutions).

The notion of public policy (policies) is not suitable for rigid definitions. The narrower meaning of this term comes down to the activities of the state that are a response to the needs and interests of the citizens in terms of achieving their needs and exercising their rights. In contrast to this mainly formal and institutional approach, the public policy has a broader dimension related to social values and their allocation (*D. Easton*: authoritative

allocation of values that society considers most important). The value criterion distinguishes the notion of public policy from the policy of the state in decision-making, performing its functions in power (regulatory, repressive, defense, etc.). That distinction, in which (according to *H. Lasvel*) policy is understood as “an activity that deals with questions - who gets something, when and how”, does not place these two notions in terms of mutual exclusion, but points to a higher principle of democratic governance. The government does have the ultimate decision-making and funding power, but there are many other factors that contribute to public policy (*Goodin, Moran*, 2013: 890).

The notion of public policy is related to two categorical concepts: public good and public service. The basic characteristics of the public good, which distinguish it from market goods, are: inexhaustibility and exclusivity (*Samuelson*). The first means the inability of one user to spend the public good by deterring others from using it. The second means that when one person uses the good, it does not prevent others from using it (the problem is “smugglers” or “free riders” who do not pay to use the public good).

The regulation of the legal status of the public goods that enter the complex of the environment has a special significance for the concept of the environmental public policy and the individual right to a healthy environment. There are two views on this issue in legal theory. According to the German theory, the public good, with certain exceptions, is subjected as much as possible to the legal order of civil law that applies to all other things. According to the second, French model, public goods are exempt from the general legal order and are almost equated with the special public legal regime of common goods in general use, which are put out of circulation and under a special legal status (*res extra commercium*). In the legislations of Southeast Europe, the German model is accepted as a basic solution, with a dominant role of government in deciding on the disposal of public goods. The public goods are owned by the state and the disposal of them is mainly in the exclusive competence of the executive power. The weakness of this solution stems from the severed relationship with the Assembly, which should exercise effective control over the Government. In the countries of our region it does not function due to the imposition of the executive over the parliamentary power and because of political and legal irresponsibility of the public officials.

The basic postulate of the new public environmental policy is the institutionalization of citizens' participation in policy-making, decisions-making and control over the implementation of laws, based on the principles of transparency, accountability and responsibility of public institutions. It came to the fore in the last three decades of the 20th century, especially encouraged with the activism of the United Nations, which

opened new strategic directions in this field with the adoption of the Declaration at the United Nations Conference on the Human Environment, held in Stockholm in 1972 (Stockholm Declaration), and with the adoption of the Environmental Protection Program (UNEP). After that conference, a large number of international conventions on climate changes and environmental protection have been adopted and more and more international, regional and other organizations are focused on environmental protection, including the European Union (s. *Lilic, Drenovak-Ivanovic*, 2009: 44). Today, most constitutions guarantee the right of access to public information to citizens, and most member states of the international community have regulated free access to public information (*Ackerman, Sandoval-Ballesteros*, 2006: 86). In European environmental legislation, the right of access to environmental information is regulated with the Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 and the Environmental Information Regulations 2004.

The 1992 Rio de Janeiro Conference on Environment and Development (UNCED) focused on the link that exists between human rights and the environment in terms of procedural rights. Principle 10 of the Declaration adopted during the Rio Conference provides that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, and the opportunity to participate in decision-making processes.

The protection of environmental rights in our systems are below the basic principles of public environmental policy provided by the Aarhus Convention of 1998 (effective from 2001) on Access to Information, Public Participation in Decision-Making and Access to Justice in the Field of the Environment. The structure of the environmental policy model provided for in the Convention consists of three pillars: the right of every citizen to access to the environmental information; public participation in decision-making, including laws and other regulations; and access to justice, ie the right of citizens to court or administrative proceedings in case the state violates or does not adhere to these principles. As a right to judicial protection, the Aarhus Convention distinguishes between the “public”, which is all stakeholders of the state and civil society, and the “concerned public” consisting of individuals or legal entities that are affected by or interested in enacting decisions. Of particular importance is the second term “concerned public”, which should have a significant impact on the environmental decision-making process (s. *Staničić*, 2018: 111). The implementation of this postulate is one of the weakest links in our systems of environmental justice. In the operationalization of the notion of the affected public the autonomous status of the citizen is lost in the evaluation - what is the attitude, initiative, reaction, etc. of the public, especially in the case when in the decision-

making participate the citizens with conflicting interests (typical is the case with “public hearings” for the adoption or amendment of urban plans, where the following decision is justified by the determination of the “majority”).

### **Environmental justice**

In recent decades, environmental policies have come at the very center of philosophical, political, economic and legal thought, which highlights the concept of environmental justice as a symbiosis of natural human rights and the necessary responses of modern society to the challenges of the environmental crisis (the term environmental justice is used by *Low* and *Gleeson*, 1998: 2; in addition to this term, the term “ecological justice” is also used, thereby explaining that “they are really two aspects of the same relationship”).

The debate on environmental justice, which is naturally related to the postulate of sustainable development of modern society, is sharply opposed by the positions of materialism and consumerism, while questioning the concept of globalization unilaterally leaning on the rough economism (*Atkinson*, 2013: 20). Much of the infrastructure and consumption patterns of ‘highly developed’ countries are based on unsustainably high levels of resource use. From a sustainable development perspective, ‘developed countries’ may be viewed not only as unsustainable, but paradoxically also less ‘developed’ than we often portray them (*Haugestad, Wulfforst*, 2004: IX). The developed countries may require some patience from the rest of the world. ‘Limits to growth’ at a global ecology level was framed as a relatively new concept 30-40 years ago. But, more than 30 years after the first UN conference on ‘the human environment’ in Stockholm – which put resource limits to growth high on the agenda – mainstream infrastructural solutions in most wealthy countries are still unnecessarily resource-intensive.

Environmental justice has two rational aspects: equitable distribution of nature between humans and equitable relations between humans and the rest of nature (s. *Lilic, Drenovak-Ivanovic*, 2014: 45; *O’Gorman*, 2017: 435). Above the level of this understanding runs a very lively theoretical discourse on the issue of non-human organisms and parts of nature as recipients of distributive justice. It calls into question the *Kant’s* classical conception on man as an autonomous and moral being, which limits the circle of morality, politics, and the law of relations between people as the sole subjects of rights. In a modernized form this concept is represented today by *Rawls* and other protagonists of the notion of exclusively anthropocentric based “sphere of justice” (s. *Nozick*, 1974: 28).

The concept of environmental justice, in the context of respect for fundamental human rights, is focused on distributive justice among individuals as social beings, who enjoy human rights and enjoy specific social conditions, in interaction with other individuals and the environment around them. Individuals, in their communities, create goods in connection with nature and its change (construction of dams, roads, artificial lakes, land conversion, etc.), which are put into general use and thus become public goods. With regard to all goods that are of general importance to all members of the social community, the key determinant of the sociability of human rights requires the exclusion of any monopoly on them. Prevention of such a monopoly can be achieved if access to common goods becomes the subject of rules of distributive justice for various areas of social life, including the goods that make up the environment (see *Walzer*, 1983: 17).

An important limitation of the reductive approach to distributive justice, as a fair satisfaction of the interests of existing members of the social community, is the introduction of the concept of intergenerational justice, based on the ecocentric philosophical paradigm of humane and sustainable social development. Of paramount importance is the maturation of skepticism towards the economic dogma of growth and development at all costs, mainly by exploiting natural resources under any conditions.

The concept of environmental distributive justice is based on three postulates. First, it is expressed as a demand for an impartial distribution of public goods, based on the social contract of the current generation (*Rawls*, 1973: 302). Second, because of the understanding of environmental justice as an integrative notion, the distribution of public goods should respect the legitimate interests of future generations. And third, the concept of distributive justice implies an equitable relationship between man and the natural resources (living and non-living world) that surround him. Although non-human organisms or the inanimate world are not moral entities, they should be considered to have inherent requirements for proper human behavior (*Baxter*, 2005:4).

The concept of environmental justice encompasses concerns for distributive, corrective and procedural justice (*Ebbesson, Okowa*, 2009:4). It is most commonly divided into two (distributive justice, procedural justice) or three (complementary: justice as recognition) basic patterns. Distributive justice defines the distribution of goods or bads in terms of harms and risks. The evaluation of distributive justice often follows quantitative, statistical approaches, e.g. measuring air quality in the neighbourhood of industrial production facilities and analysing particularly polluted parts of the city while at the same time taking into account the social structure of the affected neighborhood (*Walker* 2012: 10). Procedural justice in the sense of a broad, inclusive and democratic decision-making



procedure is defined as a tool or even a prerequisite for achieving distributive justice (*ibid*: 47). Justice as recognition as a third separate, but closely connected concept focuses in particular on the consideration of potentially affected persons or groups of persons and their claim-making. It was introduced into the debate by *Schlosberg*, defining recognition both as subject and as condition of justice. He has offered a most holistic explanation, defining environmental justice as having four aspects: the fair distribution of environmental goods and harm; the recognition of human and non-human interests in decision-making and distribution; the existence of deliberative and democratic participation; and the building of capabilities among individuals, groups and nonhuman parts of nature. He starts from the thesis that justice is not only—and not even primarily—about securing a fair distribution of goods. Treating others justly also involves recognizing their membership in the moral and political community, promoting the capabilities needed for their functioning and flourishing, and ensuring their inclusion in political decision-making. The theory and practice of environmental justice necessarily includes distributive conceptions of justice, but must also embrace notions of justice based in recognition, capabilities, and participation and relations between human communities and non-human nature (*Schlosberg*, 2007:145).

The concept of environmental justice has been classified as four-fold (*Kopnina*, 2014: 2). The first conception refers to inequitable distribution of environmental burdens such as hazardous and polluting industries to vulnerable groups such as ethnic minorities or the economically disadvantaged populations. The second conception refers to the developed and developing countries' unequal exposure to environmental risks and benefits, such as the consequences of climate change. The third aspect of environmental justice is intergenerational justice, commonly conceived as justice between present and future generations of human beings. This conception is largely based on the *Brundland report's* famous formulation of sustainable development as 'development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs' (Report of the World Commission on Environment and Development: Our Common Future 1987).

Environmental justice is in itself a controversial idea for many philosophers, especially when placed in an intergenerational context, which implies a special relationship between present and future generations in linking their interests (*Hiskes*, 2009: 2). In the philosophical tradition from Aristotle until today, the prevailing view is that justice is characterized by a kind of reciprocity (*do ut des*), which can hardly be defined as reciprocity between present and future generations. In a literal sense, reciprocity would mean that the present generations have the right to use nature for their own purposes, but

also the duty to preserve it for future generations. But future generations? For them we can assume that they will have such a right and duty towards those who come after them, but not towards the existing generations. Is there a moral basis for the request to preserve the whole nature, without any interventions, for future generations and, for that purpose, to deprive the existing generations of any conveniences in its use? It can be considered as presumed or “reflexive reciprocity” in the imagined convergence of the present and the future.

The subject of great debates is the concept of environmental justice, which involves the so-called biospheric egalitarianism, focused on other species independent of their instrumental value for humans and refers to justice between human and non-human species (*Baxter*, 2005, 43). The problem with living and non-living worlds as elements of the environmental justice community is that they cannot be subjects of moral and legal duties and rights. This does not mean that we can directly wrong nonsentient entities or that we have duties to them, but rather that they can give us moral reasons to choose one course of action over others. Their value can count in our considerations and, in some cases, may place constraints on what we can do in the name of justice. Second, entities can be afforded legal protection without those entities being the bearers of moral rights. All of this is to say that dropping justice talk for nonsentient life and ecosystems does not entail denying their value, ignoring them in our moral and political thinking, or leaving them vulnerable to abuse and neglect by humans (*Pepper*, 2018: 17).

### **Eco(bio)centrism as a philosophical basis of environmental justice**

The inauguration of the new environmental constitutionalism on the principles of environmental justice presupposes a turn in the dominant philosophical and legal categories of the subjects of rights, their protection, as well as the principles on which the concept of liability for environmental rights is based. As a counterpoint to the technological dimension of economic development, the main preoccupation of ecocentric philosophy, as a synthetic projection of the future is the maintenance and promotion of the right to life and, on that basis, the humane and sustainable development of society. Unlike the ruling anthropocentric approach, ecocentric philosophical thought develops new social and moral arguments, on which the political and legal paradigm of environmental justice can be based, on the idea of an eco(bio)centric ecumenism in which non-human organisms, ie parts of living and non-living nature, are members of the community of justice and recipients of distributive environmental justice.

Its goal is to promote new values, moral attitudes that meet the requirements of the new post-industrial era. Such knowledge implies a redefinition of the relationship between anthropocentric and biocentric ethics, on which the new ethics of responsibility should be based (terms introduced by the discussions of *Leopold*, *Gallicott* et al. for the so-called “earthly” and “central” philosophy; s. *Marjanović*, 2011: 527). In response to the demands of its time, the new concept of ecocentric (biocentric) philosophy in the whole center sets the postulate of responsibility for the state of humanity, the perspectives of future generations and the whole of nature and life in general as an indispensable condition for human existence. It is a holistic approach, which views life as a whole that constitutes the biological and moral community, and the right to life of all living world - flora and fauna in any form, even the material world which is a condition for life, as an ecocentric axis of politics, law, morality and the overall value system. On this understanding is laid the basic human right to life in dignity, which is much more than the inviolable right to a healthy environment, and includes all components of quality of life in the full sense of the word.

Biocentrism opens up a whole new perspective on basic categories of the law, which are closely related to the status of human rights. Of particular importance is the idea of positioning of prospective responsibility as a new categorical notion of responsibility, different from today's ruling retrospective responsibility. The second is responsibility for what a person has done by violating his duties. It is different from prospective responsibility, which is the responsibility of the individual for what he was obliged to do, for the offspring, for what may appear in the future. *Jonas* (in his 1979 book “The Principle of Responsibility”) starts from the view that only metaphysics can develop the speculative basis of the “transcendental or metaphysical duty of the individual for the existence of people on Earth in the future, embodiments of this human genus under those conditions of existence that still allow the realization of the idea of man” (*Jonas*, 1984: 292). He identifies the idea of man with the idea of freedom, so that the core of the ethics of responsibility is the sense of responsibility and freedom, which should lead the individual to a clear opposition to destructive or totalitarian concepts of the future, developed on any basis (economic, military, political, etc.). In that sense, ethical responsibility is not only about maintaining the human species, but also the entire living and non-living world, which is a condition for maintaining life on earth. It also includes the maintenance of the institutions of the human cultural tradition that are unsurpassed achievements. Just as the continuity of human existence, the common life of young and old generations, expresses the coexistence of members of different ages, so in a broader, cultural sense, cultural tradition signifies the coexistence of past cultural achievements

and traditional ethics and the emergence of new cultural and ethical values (s. *Šarčević*, 2005: 28).

That postulate is the starting point for the claim for individual responsibility as a necessary component of solidarity and obligation to actively participate in the collective activities of humanity, developed as interindividual and international responsibility. Every individual is obliged to anticipate the negative consequences of his actions and is responsible for them, according to the new “environmental imperative” which reads: “act so that the consequences of your actions will be consistent with the permanence of real human life on earth” (*Jonas*). Bioethics does not exclude retrospective responsibility, but only adds new ethical obligations to the existing ones, including the obligation for absolute respect for life, freedom and other human values (*Calicott*, 1999:124).

Ecocentric philosophy as the basis of the legal model of environmental justice implies equal treatment of all participants in distributive justice and impartial resolution of their conflicts over the use of the environment. It is achieved through the harmonious acceptance of the following reasonable rules: everything that endangers vital interests, everything that creates unjust privileges for one in relation to others, as well as everything that endangers public goods or means failing to protect them should be rejected. These rules should be guaranteed by strict constitutional and institutional guarantees (*Barry*, 1999:67).

The responsibility of the individual for the consequences of his actions imposes a requirement for its strict legal regulation, but on different principles, from those on which the retrospective individual responsibility acts - for what the individual according to his social role was obliged to foresee as a consequence of his actions and to prevent it. In the field of environmental justice, which is closest to the concept of prospective responsibility, determining the responsible “roles” of individuals, their rights and duties, as well as the actions they take or miss, should take solid forms and contents through appropriate amendments to the criminal, civil and administrative legislation.

#### **Instruments of environmental justice: environmental constitutionalism and rule of law**

Environmental constitutionalism is today becoming the main postulate of the idea of environmental justice, as a requirement that implies raising the level of basic constitutionally guaranteed right to a healthy environment as an emanation of the right to life, as well as constitutional mechanisms and guarantees for its respect and protection.

With its primary guarantee function, the constitution must not only proclaim the values of an environmentally just society, but also fix the processes and institutions for its realization. The achievement of such a goal can be achieved, in addition to the protection of the right to a healthy environment, primarily by providing constitutionally guaranteed rights to information and participation of citizens in the adoption of laws and constitutionally guaranteed right of citizens to judicial protection of the environmental rights.

Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide (s. *May, Daly*, 2019: 7). It is variable, encompassing substantive rights, procedural rights, directive policies, reciprocal duties, or combinations of these and other qualities. Environmental procedural rights normally involve requirements for environmental assessment, access to information, or rights to petition or participate. Environmental constitutionalism is pervasive and profound: it furthers the possibilities of constitutional reformation, notions of intergenerational equity, legislative responses to environmental challenges, and the need for policy decisions to be made through open and inclusive processes. Environmental constitutionalism also serves as a proxy for social compacts with present and future generations. While imperfect and imprecise, it gives judges additional tools for advancing social and environmental justice under the rule of law.

Since the Stockholm Declaration of 1972 linking human rights and environmental protection, in what has been called an environmental rights “revolution”, most countries have adopted provisions addressing environmental matters in some way in their constitutions, expressly or implicitly recognizing some kind of fundamental right to a quality environment. Some constitutions recognize specific rights concerning water, sustainability, nature, public trust and climate change. About two-thirds (126) of the constitutions in force address natural resources in some fashion, including water (63), land (62), fauna (59), minerals and mining (45), flora (42), biodiversity or ecosystem services (35), soil/sub-soil (34), air (28), nature (27) (*ibid.*, 19). Approximately three dozen countries in the last thirty years have constitutionalized procedural rights in environmental matters as a means of complementing or supplementing other constitutional, legislative, and regulatory norms. An exemplary model for such constitutional solutions is the French Constitution, which incorporates the 2004 Charter of the Environment. The Charter guarantees that “every person has the right, under conditions and limits defined by law, to access information relative to the environment

that is held by government authorities and to participate in the development of public decisions having an impact on the environment.”

It is very important that the biocentric environmental constitutionalism addressing nature appears as constitutionally guaranteed governmental duties or substantive rights of nature. Germany’s constitution, for instance, requires the government to protect “the natural bases of life and the animals within the framework of the constitutional order by legislation, and in accordance with law and justice, by executive and judicial power” (the postulate of environmental sustainability: “we do not inherit the Earth from our ancestors: we borrow it from our children.”). Since the concept was first promoted as a single-sentence principle of international law at the Stockholm Conference in 1972, it is now a common if not ubiquitous feature in legal expressions at the international, national and subnational levels, culminating in 17 Sustainable Development Goals the United Nations (UN) established in 2015, to be achieved by 2030.

The next emanation of the postulate of environmental constitutionalism - rule of law, imposes the integralist understanding of law in general as a synthesis of ideas, values and principles of law, the system of positive legal norms, application of norms and fair court rulings in specific cases relating to environmental protection.

The environmental constitutionalism is alive to the extent that constitutional principles and norms have been translated into legal reality through the consistent application of the rule of law. This is not the case with countries in transition, where the application of this principle is at a very low level. Some of them are already members of the EU and closer to its standards of environmental justice, while others still face the basic problems of the rule of law, overshadowed by the problems of environmental protection due to captured institutions and the imposition of priorities and policies exclusively from the positions of from the position of the struggle for power of political elites (*Stec*, 2009: 173). In these countries, the issue of environmental justice becomes a matter of redefining the relationship between the individual and the government, in which the protection of nature from unrelenting urges for its destruction by uncontrolled government becomes a paradigm of the pursuit of democracy, legitimacy of government and rule of law.

The constitutionalization of the right to a healthy environment, as a complementary element of the protection of the right to life, has already become a regular practice. But its poor implementation is due to disrespect for the rule of law (*Boyd*, 2012:12). This can only be partially offset by greater judicial activism, which from another side in the absence of legislation can grow into judicial arbitrariness. For these reasons, the promotion

of the principle of the rule implies, among other things, passing the legitimate laws enacted for the common good, guided by the idea of justice for all. In light of these requirements, the analysis of environmental legislation in our region points to a number of weaknesses, the most notable of which is the reductionist approach to defining the environment as the physical environment of man, excluding respect for the intergenerational aspect of environmental justice. Not coincidentally, the weakest point in the existing laws is the absence of regulation on strategic medium and long-term planning, with the necessary legal instruments and guarantees that the adopted plans will not remain blank sheets of paper.

The effective prevention of abuses of power and crime in the environmental sphere, as part of the rule of law postulate, is also crucial to the concept of environmental justice. This is highlighted by the fact that there is a widespread prevalence of illegality in environmental protection, which goes almost to the absence of any control over the application and the existing laws.

### **Judicialization of environmental justice**

Environmental constitutionalism is likely to be more effective when it is selfexecuting -- that is, when it does not require interceding legislative action. Provisions are more likely to be held to be self-executing when they appear alongside other constitutional rights, for example, in a constitution's "Bill of Rights," or listing of fundamental rights or when they clearly indicate that the matter is a "right." The constitutions of the majority of nations that have adopted substantive environmental rights seem to classify them as self-executing. Countries in Central and Eastern Europe have led the way in this regard, including the countries in our region, but the

enforceability of the constitutional provisions seems to be conditioned on state action or implementation, rendering such rights unenforceable until executed by the state. There are no effective constitutional mechanisms for the protection of citizens' rights in the event that state bodies fail to perform their duties in relation to environmental protection.

Realistic prospects for the realization of the concept of environmental justice are opened by the growing activism of the constitutional courts which, through a creative interpretation of constitutional principles and provisions on the protection of the environment, expands the space for constitutional control of laws and for the current application of international standards in domestic legislation. The leading independent environmental rights cases come from Central Europe where constitutional courts have

been enthusiastic enforcers of textually explicit environmental provisions, or constitutional provisions that direct the government to protect the environment as a matter of duty or policy. But, constitutional courts in the majority of countries are engaged in the protection of environmental rights episodically, so that many constitutionally guaranteed rights remain in the status of “dormant” environmental rights. The constitutional judiciary in our region remains in such a passive position in preventing severe environmental devastation in the sphere of urbanism and construction, exploitation of water, forests and mineral resources, covered by the adoption of laws, spatial planning plans etc.

Access to justice and judicial protection of the right to a healthy environment before the regular courts are the most neuralgic elements of environmental justice policy. Access to justice means first and foremost the protection of the right to a healthy environment in administrative proceedings, due to the fact that the administration, ie public services, are competent to make decisions and resolve various issues related to obtaining permits, prescribing bans and other actions. The analysis of the formal competencies and practices of public administration in our region point to the conclusion that there are a number of weaknesses, that make the system of administrative and administrative-judicial protection of central rights completely inefficient (for North Macedonia s.*Analiza*, 2021; on the Serbian system of administrative and judicial protection s.*Lilic, Drenovak-Ivanovic*, 2014: 39). The performance of administrative functions, especially the functions of inspections and administrative courts, is far below the Recommendation R (2004) 20 of the Committee of Ministers of the Council of Europe to the Member States on the minimum criteria for its organization and action (procedures, decisions, reports, etc.) and judicial review of administrative acts. Unlike the solution in our laws, according to the Recommendation, both individual and general legal acts of the administrative bodies are considered administrative acts, as well as the physical actions undertaken by the administration during the exercise of its powers, which may affect the legal interests of natural and legal persons. On the other hand, the judicial control of the legality of the administrative acts, according to the Recommendation, also refers to situations when the administrative body, contrary to the legal obligation, refuses or fails to take appropriate action.

The latest trend in the national legal systems of promoting the concept of environmental justice is the recognition of the right of citizens to access justice and submission of effective legal remedies to administrative and judicial bodies for protection of the right to a healthy environment. In that direction are the principles of human rights and environment of the UN from 2018 (s.*Schall*, 2008: 417).



European Convention on human rights and the Charter of Fundamental Rights of the European Union are designed to provide a general protection of the environment as such and do not expressly guarantee a right to a sound, quiet and healthy environment. They indirectly offer a certain degree of protection, as demonstrated by the evolving case-law of the ECtHR. The Court has increasingly examined complaints in which individuals have argued that a breach of one of their Convention rights has resulted from adverse environmental factors (s. *Manual*, 2012:7).. The Court has already identified in its case-law issues related to the environment which could affect the right to life (Article 2), the right to respect for private and family life as well as the home (Article 8), the right to a fair trial and to have access to a court (Article 6), the right to receive and impart information and ideas (Article 10), the right to an effective remedy (Article 13) and the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1).

Our systems of justice are far below these standards. The constitutions prescribe the right of every person to a healthy environment and the obligation of the state to provide conditions for exercising this right, but this proclamation has no decisive reflection in the laws. The laws allow initiating an administrative dispute before the administrative court following a previous administrative procedure on appeal, in case of violation of the rights of information and participation of citizens in decision-making. But in fact, the rights of the citizens remain without effective protection - it is realized before the administrative courts, which are not courts in the real sense, because as a rule they do not decide in contradictory and transparent procedure and do not make meritorious decisions (practice of Macedonian administrative courts), so that none of their judgments would pass the ECtHR test, conducted on the basis of Article 6 of the ECHR (the requirement of an "independent and impartial tribunal" and "a fair and adversarial procedure").

In several countries the environment is protected through the constitution (Bulgarian constitution, the constitution of Poland, the constitution of the Slovak Republic, the Serbian constitution, the Macedonian constitution, the constitution of Slovenia, etc.). Most countries have developed either framework legislation often defining basic principles of environmental protection and/or they have enacted a number of specific legislations in the main environmental sectors (s. *Manual*, 2012: 162). In more and more legislations, various solutions are being adopted regarding access to justice and judicial protection of the right to a healthy environment. For example, in Belgium not only individuals but also NGOs have various possibilities of obtaining access to justice through both judicial and administrative procedures. Generally, to have a standing in the Belgian Courts the applicant needs to prove that he or she has an interest in his or her claim. Similar to Belgium, NGOs in Switzerland are entitled to access justice claiming a

violation of the environmental legislation. The Hungarian Act on the General Rules of Environmental Protection provides that natural and legal persons and unincorporated entities are entitled to participate in non-regulatory procedures concerning the environment. The Act, in addition, contains the idea of *actio popularis* stating that “in the event the environment is being endangered, damaged or polluted, organisations are entitled to intervene in the interest of protecting the environment” which includes filing a lawsuit against the user of the environment.

In the last decade, the right of access to justice and judicial protection of rights has begun to take effect in a number of countries, with the acceptance before the regular courts of lawsuits from citizens or NGOs not only lawsuits based on claims for injury or specific material or non-material damage (damage to health, property damage), but also for causing general danger or creating an opportunity to endanger the environment by taking illegal actions of private persons, actions of competent authorities, or not taking measures to protect the environment.

The precise regulation of the duties of the competent bodies creates an opportunity for wide opening of the doors of the regular judiciary for lawsuits from citizens and non-governmental environmental organizations before the regular courts. The courts face the need for specialization of judges, as well as the establishment of special departments for environmental justice, following the reputation of the Swedish environmental courts, established by the Swedish Environmental Code of 1999 (courts act in a specially regulated procedure, which, according to one Swedish judge, is characterized by the following difference from criminal, civil or administrative court decisions: they make decisions not about what happened, but about what could or would happen in the future). The Environmental Code of Sweden is comprehensive legislation giving environmental courts both civil and administrative jurisdiction and a range of enforcement powers (*Bjällås*, 2010: 178). There are five regional environmental courts which are connected to the five district courts of the civil justice system. There is one superior environmental court, the Environmental Court of Appeal. The regional courts are connected to district (civil) courts and the Environmental Court of Appeal is a division of the Court of Appeal in Stockholm. The courts have power to review and rule on both the legality and the merits of decisions made by regional boards and by local authorities. Beginning in May 2011, the Environmental Courts have become Land and Environment Courts and also decide cases that arise from the application of the Act of Planning and Building, including review of local land use plans and building permits. The courts have more power than do ordinary civil courts to prioritize very urgent cases. (s.*Stec*, 2009:180).

The numbers of environmental courts and tribunals have been increasing tremendously in the twenty-first century in various countries. An analysis concerning the origin and development, standing, the composition of judges, the litigation costs of the Sweden environmental courts will be revealing and beneficial for the bettering of the national environmental courts systems. One of the problems in developing the concept of judicial protection of the right to a healthy environment - the identification of the victim of its violation as a condition for obtaining the status of active party (plaintiff) in administrative-court or court proceedings, begins to be overcome thanks to the recent development of victimology as a science of the victim. That, together with the expansion of the notion of “victim”, which includes collective victim, also expands the notion of “environmental damage” in terms of not only a specific injury or threat, but also the general degradation of the ecological balance, regardless of whether it is a consequence caused by actions envisaged as criminal offenses or civil tort. The consequence of their acceptance is the opening of the value issue for determining normative criteria according to which it can be judged whether any intervention in nature or the ecosystem is “harmful” and constitutes an abuse of power, as well as emphasizing the need for a new conceptualization of the notions of environmental damage.

### **Conclusion**

The introduction of the concept of environmental justice in our legal systems is an imperative of the principle of protection of the right to life as a fundamental, natural and inviolable right. With all its implications - constitutionalisation of the right to life in the healthy environment, embedding environmental rights in the national policy and legal framework, consistent application of the rule of law, establishing citizen control over potentially harmful environmental activities, requiring environmental impact assessments, securing public participation and access to information on environmental matters, making environmental rights judiciable and the environment a public concern - the postulates of ecological justice, and eco(bio)centric philosophies of law must become the initiators of deep legal and institutional reforms.

Their implementation will be paid for by sacrifice of the current system of oligarchic rule of society and of the captured state, but it is the only way in which the right to life will receive its full dignified and humane content.

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**Dragana Ćorić\***

## **RIGHT TO LIFE, WHATSOEVER LIFE IS<sup>1</sup>**

*Many international conventions and other important documents, as well as national laws begin with emphasizing the importance of life. Life is valued as the most important social and legal value. Once you lose it, you can not restore it back. We often plead for life with dignity, for free and accomplished life, for life full of love, compassion, and understanding. We give to life different characteristics but do we ask what is life, on which we demand the highest and the most protected right?*

*The last words written by P.B. Shelley in his unfinished poem *The Triumph of Life* were "Then, what is life? I cried." That cry for defining life is present still. Until the 19th century, the prevalent idea was that life comes from an intangible soul or "vital spark". It has since been superseded by more scientific approaches. The more we now about the world, the less we know about the life, or what is it.*

*Many major historical figures in philosophy have provided an answer to the question of what, if anything, makes life meaningful, although they typically have not put it in these terms. There are more than 100 definitions of life that lead us to rather concise and inclusive definition, made by Darwin: Life is self-reproduction with variations. In this paper, we will reveal some of them and make them more understandable. We can say in advance that no definition at once can contain all those specificities that make life as is. But, only if we study at the same time theoretical and practical dimensions of life, we can be closer to understanding it.*

*But what IS truly life? Is the life we are living now, especially in those pandemic, unusual conditions truly the life from any of those more than 100 definitions, or is it the time to make another one definition, that goes more with "the new normal" ?*

*We will assume that life is more than pure legal notion of right to life, that it has deeper meaning and deeper sense. The legal definition of protection of life, although we do not know for certain what life is, is valuable to us, because it gives one possible direction in which life could be lived and could be more livable. It is the way that unites in its approach, both theoretical and practical vision of life.*

**Keywords:** *Life, definition, historical significance, new normal*

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## 1. Introduction to definitions of life

Wherever we look around, we are surrounded with life and notions of living. Even the material things, though they cannot breathe and think, have their own “life”, which begins with their creation and ends when they are not of use any more, or destroyed. Our anthropocentric view and perception of the world around us gives us the respect only for truly living things, ie beings- those who are known to children in school as *MRS GREEN* and mean seven processes that supposedly define life: movement, respiration, sensitivity, growth, reproduction, excretion and nutrition. On the other side, modern molecular biology explains living beings, as a highly organized material entities composed of cells, that are further composed of molecules and as results of a long process of evolution by ripe with emergent structure. Of course, biology mentions also abovementioned processes, but is much more interested in defining the inner structure of life, thinking that it is the best way to define life itself.

Edward N. Trifonov listed 123 definitions, yet none is that universal and does not consist of everything that should be taken into account (2011: 259-266). After analyzing most of them, Trifonov concluded that “all is life that copies itself and changes.” Carl Sagan said (2011:14) that

*“A great deal is known about life. Anatomists and taxonomists have studied the forms and relations of more than a million separate species of plants and animals. Physiologists have investigated the gross functioning of organisms. Biochemists have probed the biological interactions of the organic molecules that make up life on our planet. Molecular biologists have uncovered the very molecules responsible for reproduction and for the passage of hereditary information from generation to generation, a subject that geneticists had previously studied without going to the molecular level. Ecologists have inquired into the relations between organisms and their environments, ethologists the behavior of animals and plants, embryologists the development of complex organisms from a single cell, evolutionary biologists the emergence of organisms from pre-existing forms over geological time. Yet despite the enormous fund of information that each of these biological specialties has provided, it is a remarkable fact that no general agreement exists on what it is that is being studied. There is no generally accepted definition of life”.*

We absolutely agree with Sagan. Although we have all sorts of definitions of life, every one of them is concentrated only on the specific elements of life , which deals with a specific scientific field. Every definition, whether it is biological, metabolic,



physiological or else, is depicting one aspect of what should make life. Yet, even if we don't have the general definition of life, we are still recognizing the right to life as the highest and the most important human right (Орловић, 2014: 161). There is a general inability of the sciences to cooperate with each other, while fully respecting the understandings of other sciences about the same thing or problem. Each seems to adhere to its own definition as its own hard-earned feud, and considers that same feud to be under constant attacks from the owners of other feuds. Lack of cooperation between sciences, regarding the issue of defining life, and other important things, lead us to lack of definition of life that could be comprehensive and acceptable to all.

Therefore, when lawyers define the right to life, they confuse all other scientists, because we consider alive the one who was not even born, but was just conceived, in order to provide him with hereditary rights that belong to him according to a higher natural law. For lawyers, the cessation of life is not only the cessation of all biological functions of the body, but the death of a person can be announced after a certain period of time in which there are no reliable signs that the person is alive, or by declaring the so-called civil death, after sentencing to life imprisonment. The standard limits of the beginning of life and its end do not have to be respected in law, because there are higher causes for which it is necessary to do so.

## **2. Aristotle about life**

Aristotle argued that life is important, hence it becomes more valuable (2009: §1094 ) if it is properly lived. He said that "living seems to be common to plants as well, while we seek that peculiar only to man" (2009 : §1098); and asked if it is possible for a man to be blessed while living and having life , not to be blessed only after he dies (2009 : §1100)?

Aristotle says that there are three major things that one could devote his life to: pleasure, politics, and knowledge and understanding (1095b 17–19). Man can fill his life with pleasure ( here in meaning of physical pleasure), which could be one of the things done throughout the life, but not always and not as someone's ultimate goal. Amusements of all kinds and as well as other pleasures can make one happy, but for how long? Aristotle thinks that it is good to turn to politics and knowledge, ie. philosophy as to the main subjects and meanings of life, and to use amusements and pleasures as occasional breaks from more serious activities .

After considering life dedicated to politics, Aristotle concludes that the best life is dedicated to learning, acquiring new knowledge and skills. "The happiest life is lived by

someone who has a full understanding of the basic causal principles that govern the operation of the universe, and who has the resources needed for living a life devoted to the exercise of that understanding. Evidently, Aristotle believes that his own life and that of his philosophical friends was the best available to a human being”( Shields, 2020). This variation of life is God life alike, but the trouble is that it is limited. Politician is needed whenever something has gone wrong, or threatens to do so. Yet, the philosopher is needed always, but lacks that courage that enlightens him in some way.

We may say, although Aristotle had to deal with defining what happy life is, he did not defined the life itself. Achieving happiness and contentment in life and the way of life itself seems to be. Aristotle indirectly defined life, but even he was reluctant to define it precisely and directly. Happiness gives meaning to life, direction of movement and way of thinking, but it still does not correspond to the basic, what is life in general.

### **3. More views on defining life**

It seems that philosophers were trying to investigate what makes life good, better, or meaningful (Metz, 2021) but that they were not that interested in defining it. Life seems to be a kind of self-affirming truth: there is something we call life, so there it exists. This was somewhat ironically pointed out by Oparin, who, according to some authors ( Cornish-Bowden, Cardenas , 2019 : 4-7), asked two important questions:

1. Can we study the origin of life without a definition what it is?
2. Can we study the definition of life without any knowledge of its origin?

The origin of life can be well researched and understood only if we define the subject of research well. On the other hand, in order to better define life, it is desirable to know, above all, how it originated, and from where it came, because it is the beginning of every definition. Why is that hard to define something that we all have( or we just assume that we have)? Also, Robert Rosen thinks that the reason that the question “what is life?” is so hard to answer is that we really want to know much more than what it is, we want to know why it is, “we are really asking, in physical terms, why a specific material system is an organism and not something else” (Rosen 2015, 14). To answer this “why” question, we need to understand how life might have arisen, which brings us , again, on the beginning of discussion.

Empedocles thought that everything in the universe is made up of a combination of four eternal elements: earth, water, air, and fire (Campbell, 2005). All that is born or made or

rearranged has some combination of these elements, which Empedocles calls roots of all. On the other side, Democritus argued that *psychê* - the soul is the essence of living things and the only factor that causes their ability to perform their life-functions (Berryman,2016). When body dies, dies also a soul that was its essence.

René Descartes equated life with the human body and automatically assumed that only humans, and also animals, since they have their body as it is, can have life. He further defined the human body as a specific machine, which drives blood in numerous blood vessels within the human body, and that the heart is the main organ that its own heat manages all movements in and outside the body. Digestion, blood circulation, muscle movement and some brain function, all depend on heart heat and blood vessels (Weber,2018).

Modern researchers are focusing more on biological, chemical or metabolical definitions of life. The NASA Astrobiology Institute declares that life is “A self-sustaining chemical system capable of Darwinian evolution.” Daniel E. Koshland, in his *The Seven Pillars of Life* (2002: 2216) offers the definition of life as following:

*“a living organism is an organized unit, which can carry out metabolic reactions, defend itself against injury, respond to stimuli, and has the capacity to be at least a partner in reproduction.”*

Modern philosophers, legal theorists and practitioners, as well as researchers in other social sciences have been more interested in meaning in life, than in defining directly life itself. They are investigating what qualities of life make it worth living ( Stanar,2020 : 519; Jovanović, 2020:533 ; Radaković,2020: 551), what is needed for have a minimum of dignified life ( Ćorić,2020 :31-42) ,what is meaning of life (Metz et alia ,2015) and how to find a purpose in life (Smith,2018). What they all have in common is that they are all on a course of indirect defining of life, occasionally attaching themselves to only one particular aspect of life, which in their view is crucial to the existence of life. It seems safer, but not wiser for the life itself.

#### **4. Legal notion of life**

As for the above mentioned scientist and researchers, defining life is also hard for legal practitioners in certain areas. Some authors noticed differences over the scope of this right, its form and status ; also ,lack of clear boundaries of the right itself ( Orlović,2014:161). The right to life is of “supreme importance” in national and

international legal documents. It is defined through the enumeration of its numerous manifestations, distributed in numerous generations of human rights. Only the full acceptance and practice of all these rights makes life acceptable and even, we would say, existing. The absence of any right or freedom, or its disrespect, reduces the quality of life it is not inviolable nor is it absolute by action (protection). When protected that comprehensively, life should be easy to define. Or not? Even the Universal Declaration of Human Rights mentions indirectly life in its Article 3 stating that

*“Everyone has the right to life, liberty and security of person”,*

without defining it. We can connect this article with article 2 of the same declarations, where it is said that :

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty,*

and to consider it as a list of goods, values and ways of understanding the world around us, that should all together make life.

The European Convention on Human Rights states in Article 2:

*Everyone’s right to life shall be protected by law. This right is one of the most important of the Convention since without the right to life it is impossible to enjoy the other rights. No one shall be condemned to death penalty or executed.*

It is more precisely positioned and connected to other (human)rights, than in the previous documents, but still lacks defining life directly.

The right to life is protected by national and international acts. Human life is the most important legal good and value( Drakić,2013 : 229–244) and should not be taken for granted. Especially when it comes to arguments of whether the certain quality or criteria are fulfilled to live it at all. Although it seems that criminal law is there just to punish the perpetrators of law, we find it possible that criminal law is there also “to protect human life at every stage, regardless of age of a person, of its quality, from any form of attack

on it” (Drakić, 2013: 229). Therefore, in our domestic criminal law ( as well as in criminal laws in other countries) is a whole catalog of criminal offenses which, directly or indirectly, seek to protect life in general and even the life of the unborn fetus . By describing the punishments, for those who endanger someone's life or even take it away, legislators cause fear in potential perpetrators of these crimes and in that way, they preserve life. Some authors here think that life ,as a legal good, exists only if " a person can actually, subjectively possess awareness of himself, his own interests and self-disposition"( Merkle, according to Drakić, 2013:234) , which leaves out of protection the unborn fetus (*nasciturus*) and those who because of the specific stadium of their illness are not capable to handle with themselves or to make reasonable decisions. Proponents of euthanasia justify it by logically deriving the right to a dignified death from the inability to lead a dignified life: But, could those two be equal in any sense? We think that they can't and shouldn't be thought of as equal.

### 5. Concluding remarks

The situation of the covid-19 pandemia, which has been present in the world since 2020, represents a new aggravating obedience in defining life, ie the quality of life. The freedom of movement we are extremely proud of , has long been revoked to us and is still restricted in many countries. The time of 24 hours is spent differently than before and is burdened with worries that we did not have before, with constantly present risks to our health and safety that are still not sufficiently known to us, but are evident, exist and affect some people in our environment. People's behavior as well as the scale of what is important to people has changed significantly. Everything has led to the creation of a new concept of life called the “*new normal*” and it is far from the usual one to which we have been accustomed for decades. This *new normal* implies new preventive protocols that are undertaken in order to preserve health and prevent the spread of the virus, and which have led to the almost complete digitalization of business and schooling and physical and psychological alienation among people.

Life still exists, while there is respiration and other biological and metabolic functions of the organism, and it is evident that it is no longer the same. Some rights and opportunities that we assumed to belong to us, are still limited to us and we realized that in fact nothing is implied but must be deserved, day by day. So it seems that defining life will be much harder in these circumstances of still existing restrictions.

But, as Leo Tolstoy said, *life is a work of art* and we should deal with it with special care, attention, tenderness and protection. It is the best definition that we have today.

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## | “THE RIGHT TO TAKE LIFE”

*The text analyzes the ethical dimension of taking of life, which is seen as the necessary condition for its legal presumption. The introduction gives a historical analysis of the taking of life as a social phenomenon. In the second part, the division of the phenomenon of socially acceptable Taking of life is made, with special attention to human sacrifice, infanticide and geronticide. The question arises as to whether human life can be viewed as a value in itself (intrinsic value). The third part of the paper deals with the meaning of human life in the wider system of social values and indicates its special place in the original Christian point of view. In the final part, the connection between the dominant value system in modern civilization and the new instrumentalization of human life is established and it concludes that, in order to preserve human life as a basic value it is necessary to provide metaphysical assumptions.*

**Keywords:** Life, value, Law, human sacrifice, Christianity

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## **1. Introduction/ Idea of human life as the Social value**

Phenomenon of Human Life can be determined as natural process. It cannot be defined or created by Law itself. On the other hand, it could be legally induced and supported or diminished and destroyed. Capacity for legal taking of life existed in almost every human society for millennia. In this article we will try to explain moral framework for legal life taking. Different aspects of Taking of life will be considered with special attention to the moral assumptions for their legal justification.

At the beginning it will be necessary to examine different aspects for moral grounding of possibility of legal life taking in human societies as such. It will be important to determine position of the individual in the certain society, including social value of his own life. If we try to trace the fundamentals of understanding of the social position of the individual human life in the Ancient times, we could conclude that affirmative position of someone's Personality was closely connected with the fulfillment of his social role. An example – part of Indian Epos “Mahabharata”, widely known as “Bhagavad Gita” proclaims fulfillment of the duty (imposed to someone by destiny to belong to the certain caste) as an utmost purpose of the Human personality.<sup>1</sup> Same context of identifying a man with his purpose we could find in the idea of the “Rectification of Names” of the Confucius.<sup>2</sup> We could conclude that possibility to apply affirmative or negative attributes to one's person in ancient times was directly related to his ability to fulfill its social duty. In his notable definition of the man as “zoon politikon” Aristotle directly connects improving of personal qualities with values and duties of the society.<sup>3</sup> So it seems that utmost aim of the human personality and validation of his worthiness was directly connected with the fulfillment of someone's social role, as participation and improving of “higher good” of the Society.

Relying on Aristotle's definition of human as “zoon politikon” we understand the human being always as a member of the group. Pedagogy, rules, laws, customs and moral values directly influence the development of the personality of the individual. Till our time human beings never existed in some kind of alienated state, and even possibility of human life as such, lied on the existence of certain values and institutions of the society (marriage, communion etc.). Human society without its individual members is

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<sup>1</sup> Bhagavad Gita 1944: 81

<sup>2</sup> Fung Yu-Lan 1977: 55

<sup>3</sup>“The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole.” Aristotel 1991:5

impossible. Is it impossible to have an individual not belonging to any society, seen as coherent system of moral norms, customs, and values too? Answer to this question will become important in understanding of moral basis for legal framework of Taking of life in contemporary moment.

For now, we will take Aristotle's premise that development of human being is substantially dependent on certain human society and its values as proved, to be able to make some important conclusions toward possibilities for legal taking of life. First we must admit, that, historically, capacity for legal taking of life belonged exclusively to the Society (through its institutions of moral, laws and customs) and not the individual. Unauthorized Taking of life (murder) lead to the certain punishment of perpetrator by the social institutions.

It is important to emphasize that social institution of Taking of life transcends exclusive zone of Legality. Some phenomena of the socially approved Taking of life belong to the field of customs or even cultural acceptability of the moral norms, like in the case of Polynesian tabu.<sup>4</sup> Complexity of this phenomenon demand appropriate understanding of division of socially acceptable means of Taking of life as such.

Substantial for our research of phenomenon of Legal Taking of Human life will be rightful understanding of interdependent relations between human individual(s) and the values and demands, customs and laws of the Society. That is the reason why examination of the socially acceptable Taking of life transcends legal framework, seeking further explanation in the field of morality. Institution of legal Taking of life is so interconnected with moral values of the certain society that first, we must understand these values, validity of their obligation and different methods of their implementation to be able to understand legal framework of the phenomenon. Different societies have different justifications for the validity of Taking of Life and we have to find which reasons must be taken into consideration to create proper understanding of this problem. In some societies sole definitions of Taking of life differ in a manner, that acceptable social occurrence in one of them represents unforgivable crime in the other.<sup>5</sup> We will now try

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<sup>4</sup> "*Kapu moe* (Prostrating tabu). Everyone was required to prostrate themselves when he ("ruler" remark A. S.) or any of his personal articles passed, on penalty of death." Seto Levin 1968:410

<sup>5</sup> "Infanticide, *invalidicide*, *senilicide* and suicide are all forms of homicide accepted by Eskimo society. They are all, in whole or in part, responses to the basic principle of Eskimo society that only those may survive who are able (or potentially able) to contribute actively to the subsistence economy of the community." Adamson Hoebel 1941:670

to make wider perception of this phenomenon in an attempt to define socially acceptable sphere (including customs and moral values) of Taking of Human life.

## **2. Division of the phenomenon of socially acceptable Taking of life**

First we have to make certain differentiation of the possibilities for Legal taking of life. Our division will go over the lines of Legality and will include division of forceful Taking of life (from the reasons of Capital punishment, sacrifice etc.) and Taking of life from humanitarian reasons. In the same time we will include perspectives of Taking of life with and without the approval of the Executed. On this chart we have numbered some examples of Legal taking of life divided by its origins and intentions. This table has not exhausted all of the examples for the phenomenon of socially acceptable Taking of life, but is used to explain some basic relations.

Chart 1: List of socially acceptable taking of life

<b>Socially acceptable taking of life</b>	<b>Forceful</b>	<b>Humanitarian reasons</b>
Without approval of the executed	Capital punishment/sacrifice	Infanticide/geronticide
With approval of the executed	Sacrifice	Euthanasia

Moral arguments pro et contra social phenomena of Capital punishment and Euthanasia are widely present and very well explained in our time. Trying to avoid unsolved disputes taking side in a general debate we will try to examine moral arguments for other two of the phenomena (sacrifice and infanticide/geronticide) through human history, noting that in some manner these phenomena could be present even in our time. Intending to understand basic relations of the Society and the individual on the rudimentary level, we will start with the moral examination of seemingly peculiar (now mostly extinct and generally accepted as illegal) phenomenon of human sacrifice (with and without approval of the executed). As second point of our examination we will try to define moral assumptions for legal justifiability of the phenomena of infanticide and geronticide.

### **2.1. Human sacrifice**

Considered today as barbaric and senseless, human sacrifice was present through the most part of human history. Which reasons were given for such phenomenon? It is well known

that certain societies practiced human sacrifice as normal cultural custom. This practice was not only understood as legal, but sometimes as necessary cultural need. For our later investigation, it would be important to emphasize, that phenomenon of human sacrifice was closely connected not with legal, but metaphysical circumstances. Reasons for such act transcend mere legal sphere. In present time, human sacrifice as obsolete, almost extinct phenomenon looks as it is not interesting by itself, but as *example of total domination that Society executes over human individuum*. We must understand that victims of such practice were not only members of outcast social classes (slaves, war prisoners etc.), but even the most distinguished members of the society, including acting rulers as such.<sup>6</sup>

Human sacrifice has deep metaphysical foundation. It is recognized as substantial element of deification of regular human life. In such system of values, life of the individual is fully (and sometimes voluntarily) subjugated to the needs of the society. In the purpose of gaining metaphysical higher good for the society (or sometimes common group) it was fully approved, legal and formally acceptable to sacrifice life of certain individuum. Sometimes that individual voluntarily accepts his social role considering his own sacrificing as the Way of gaining higher metaphysical good for himself.<sup>7</sup>

I hope that we will not find examination of this strange anthropological anachronism irrelevant, because, with this examination we will be able to outline specific dimension of legally approved social influence that society masters over individual. In the case of capital punishment commitment of crime must precede the appliance of formal legal framework. In the case of human sacrifice legally accepted framework of the society applies without any commitment as such, and is caused by the sole needs of the society.

We are now able to give one definition of the human sacrifice: "Human sacrifice represents formally and legally acceptable taking of Human life (forcefully or voluntarily) without any preceding criminal act or moral offence for the sole cause of gaining higher (metaphysical) good for the certain society as such."

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<sup>6</sup> "On the whole the theory and practice of the divine kings of the Shilluk... we see a series of divine kings on whose life the fertility of men, of cattle, and of vegetation is believed to depend, and who are put to death, whether in single combat or otherwise, in order that their divine spirit may be transmitted to their successors in full vigour, uncontaminated by the weakness and decay of sickness or old age, because any such degeneration on the part of the king would, in the opinion of his worshippers, entail a corresponding degeneration on mankind, on cattle, and on the crops." Frejzer 2003: 270

<sup>7</sup> Frejzer 2003: 568

This definition underlines specific power of the Society over individual. Possibility of murdering of the individual from the Social cause explains only one dimension of the human sacrifice. Other one is realization of higher good through that act. Value of the human life is directly subjugated to the interests of the Society. Legal dimension of such phenomenon lies exclusively in its social acceptability. Human sacrifice transcends sphere of Legality by inclusion of metaphysical (or Religious) dimension of higher values. With this dimension, *human life is understood as the secondary value* completely subordinated to the aims of the Society. This total instrumentalization of the Human personality leads us to the important conclusion: If Human life has to be justified as the value, it must be vindicated as the intrinsic (per se) value, not the secondary one.<sup>8</sup> Of utter importance for our examination now, is to explain valid dimension of defining of Human Life as intrinsic value. For better understanding of that dimension we will try to analyze phenomena of infanticide and geronticide.

## ***2.2 Infanticide/geronticide***

Unlike sacrifice, infanticide and geronticide are legally present in our days. Even some developed societies of the 19. And 20. century openly opted for infanticide mostly using utilitarian and eugenic arguments.<sup>9</sup> Infanticide and geronticide present socially acceptable (desirable or tolerated) practice of murdering of infants and elderly people. This practice of Taking of life was widely present throughout human history. In some cultures it was considered as the act of charity, especially when life of the elderly people became intolerably full of suffering, and sometimes it occurred with the approval of the victim.<sup>10</sup>

Unlike the case of sacrifice, in these socially approved phenomena of life taking, reasons were not metaphysical, but strongly connected with everyday life and needs of the society. Surplus of the population and lack of resources (and sometimes even desire of preservation of the social wealth and status) lead to historically widely present practice of taking of life of the infants. The practice of infanticide under the circumstances where

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<sup>8</sup> "Intrinsic values = things that are good in themselves or good because of their own intrinsic properties" Frankena 1973: 82

<sup>9</sup> "Billings and the Carnegie Institution would now mobilize their prestige and the fortune they controlled to help Davenport usher America into an age of a new form of hygiene: racial hygiene. The goal was clear: to eliminate the inadequate and unfit." Black 2012: 81

<sup>10</sup> "A ritual public confession might be made by the elderly person before being placed in a kayak and pushed away from land. Adult children would cooperate in encouraging such an early death. Ethnologists note apparent cooperation by the elderly in such abandonment rituals. Perhaps they themselves had killed their own parents. They felt honoured by the terminal feast (Glascock 1987)." Brogden 2001: 65

infants were born with some anomaly lasts till our days.<sup>11</sup> In some cases, contemporary thinkers justify such practice as fully acceptable arguing that infant although exist as human being is still not a human person and does not have moral capacities that deserve obligations toward it.<sup>12</sup>

We could now make an interesting remark: Analysing the problem of socially acceptable Taking of life through phenomena of infanticide and geronticide, we had found certain indicators, that modern-day societies not only preserved discourse of vindicating such practice but are trying to promote it. Again, like in the case of Human sacrifice social values directly influence reasons for Taking of life. Some could argue that such practices sharply differ from the phenomenon of sacrifice by lacking of “metaphysical reasons” and that contemporary arguments for infanticide are based on the scientifically approvable facts aiming to improve freedom and quality of life according to Human rights of every Human person.<sup>13</sup>

That leads us to the questions: “How is it possible that values of preservation and improvement of human personality and life are directly endangered by values of contemporary societies in their effort to promote and achieve full implementation of Human rights? Could Human life be an intrinsic value?” To answer these questions we must explain perception of human personality in the history of human societies.

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<sup>11</sup>“As Singer points out, treatment for easily remediable defects has often been withheld from infants with Down syndrome, a condition that is certainly compatible with a life that is worth living. It seems, therefore, that the common perception that selective non-treatment is a form of euthanasia is an instance of self-deception. The operative motive in these cases, even if it is sometimes not allowed to rise to the level of consciousness, seems to be to avoid the burden the diseased or disabled child would impose on the parents and the health care system.” McMahan 2007: pp. 5-6

<sup>12</sup> “The wide support for medical infanticide suggests that, instead of trying to find places to draw lines, we should accept that the development of the human being, from embryo to fetus, from fetus to newborn infant, and from newborn infant to older child, is a continuous process that does not offer us neat lines of demarcation between stages. But, we may then add, so too is the development of the moral status of the human being.” Singer 1995: 130

<sup>13</sup> “Very many severely disabled infants, especially those who are judged to have poor prospects of a life of reasonable quality, and who are unwanted by their parents, are deliberately treated in such a way that they die rapidly and without suffering. Perhaps the clearest illustration of the way in which doctors have found themselves unable to work within the framework of the traditional sanctity of life ethic comes from the treatment of babies born with spina bifida” Singer 1995:115

### **3. Could Human life be an intrinsic value?**

#### ***3.1. Perception of the worthiness of personality in Ancient times***

To answer this question we must make certain analysis of perception of Human life through history. At the beginning have to emphasize one important characteristic of the Ancient times. In the Antique, human societies were based on principles which Karl Popper and Emil Durkheim classify as principles of the “organic” or “closed” society”.<sup>14</sup> That means that every member of the Ancient society regardless of his social position was aware of his distinct role and purpose in obtaining of “common good”. Personality was subjugated to the society. Some elements of this tradition could be found in Plato’s “Republic”.<sup>15</sup> We can conclude that fulfillment of prescribed social role and duties was necessary precondition for applying of validation of someone’s personality and worthiness of its life.

Additional important element should be mentioned in this analysis. In the Ancient civilizations social role of the person was directly connected with the metaphysical duty imposed on him by Religion. For example – obligations and duties of a Ruler to his subjects were Heavenly established, and indisputable. So were obligations between craftsmen and merchants, priests, peasants etc. The Legal Codes of these times based their sovereignty on the direct connection with the Will of God(s) because Institution of the sovereign (Emperor, Pharaoh, Ruler) was directly connected with the Representation of the God itself.<sup>16</sup> We could conclude then, that evaluation of worthiness of someone’s personal life was directly connected with its ability to fulfill its social role, imposed on him as the Will of God. It is obvious, that Ancient times bear strong interdependence between fulfillment of social role and expectations based on religion, moral, law, customs and recognition of worthiness of someone’s person.

Even today, in the societies that mostly preserved their original (and less complicated) social structure (South America and North America Natives, Australian Aborigines, Peoples of Papua New Guinea etc.), we could connect category of Worthiness of someone’s person with the obeying the existing moral rules as the rules of Heaven. As in the previous case, we can see direct relation of the moral with the metaphysical instances. One characteristic differs: these societies, till the present day understand human

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<sup>14</sup> “A closed society at its best can be justly compared to an organism.” Popper 1977: 173

<sup>15</sup> Platon (1976): 120

<sup>16</sup> Hamvaš (2012):230



communion not in an exceptional way, as an entity per se, but as a communion with nature also.<sup>17</sup>

It would be unnecessary to give further arguments for this important evidence – Worthiness of the Human life as the category, has its origin in the idea of “proper life” according to the Moral and Heavenly values. Worthiness is not applied to the human person by itself, nor a person as such has some special capacity of Worthiness per se. Even, in some cases (children and human sacrifice, severe punishments etc.) we can see that personality in Ancient civilizations was not an aim as such, but more a mean for fulfillment of some other purpose. It was social purpose, personified through certain Religion and moral values. Human Person gain its Dignity according to his capacity to act according to these values. Such understanding of the Human Person and Human Dignity radically changed with ascending of Christianity.

### ***3.2. Human Person as the Highest Value***

With Christianity, important change came in the understanding of the Dignity of a Human Life. As we were able to see, in pre-Christian period crucial element of gaining social recognition was social congruence, fulfillment of imposed duties and obeying the social values. Society has full capacity of establishing of Worthiness of life as social category. Change, that Christianity brought to the perception of Human personality and Human life was Revolutionary. Assumed metaphysical connection between social values and Superhuman authority, Christianity directly converts to the immediate understanding of the Human Person (Human Soul) as the value by itself – “The kingdom of God is within you”<sup>18</sup>.

As we can see, with Christian conception of values, Human person distinguishes from the Social context by its inner significance and important and unique task – to save its Soul and gain Salvation from the God. This task creates new idea of Society and fundamentally changes position of the Human individuum. In the original Christian conception, regardless of social origin, influence and wealth, Human Person (in his Godlikeness) is the greatest value as such, and his union with the God through Salvation represents utmost aim of every Man regardless of other social connections.<sup>19</sup> Instead of previous Theocracy

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<sup>17</sup> Fraser (2003): 572

<sup>18</sup> Luke 17:21 (<https://www.biblegateway.com>)

<sup>19</sup> “What good will it be for someone to gain the whole world, yet forfeit their soul? Or what can anyone give in exchange for their soul?” Matthew 16:26 (<https://www.biblegateway.com>)

– state, where person of the Ruler represents Will of God itself and idea of state as metaphysically founded society creates straight system of obligations, values and duties toward someone's person, Christianity establishes ecumenical union that transcend state, nation, and social boundaries, called The Church. Establishment of the Church, as non-national, non-state, non-class based union of the Children of the God, created the widest possible base for Community, and introduce a Revolution in establishing of Universal values and perception of the Personality and Human life itself.

One of the key-elements of this Revolution was establishing of the Christian State with separated roles of the political and spiritual power. The Idea of Symphony of State and Church introduced in the Roman Empire after Constantine the Great, with precise obligations and duties one toward another, created an important difference in the perception of the Dignity.<sup>20</sup>

That difference made Dignity of human life, in the Christian way of understanding, dependent not only from temporary social and moral values, but of Eternal Values of the God, relying solely on the possibility of the man to achieve them through Personal effort of someone's Free Will.<sup>21</sup> This autonomy in establishing of utmost value (Union with the God) have been expressed in engaging an additional factor beside social context. That factor represents continual effort of making someone close to God. That exclusive personal responsibility created special ethical situation in Christian ethical system. First time in Human history, the Man came so close to become One with God. From that point of Christian ultimate values, duties and obligations bounded to narrow social and class levels become unsatisfying. The qualitative change of auto perception and aims of the Human life and personality according to Christian values directly influenced the perception its Worthiness (Dignity). Unique criterion of the Holiness, the union of the God and the Man under the communion of the Kingdom of Heaven became pivotal point, criterion for recognition of highest good as such.<sup>22</sup>

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<sup>20</sup> Grozdić (2019): 22

<sup>21</sup> "Then Jesus said to his disciples, "Whoever wants to be my disciple must deny themselves and take up their cross and follow me." Matthew 16:24 (<https://www.biblegateway.com>)

<sup>22</sup> "My prayer is not for them alone. I pray also for those who will believe in me through their message, <sup>21</sup> that all of them may be one, Father, just as you are in me and I am in you. May they also be in us so that the world may believe that you have sent me. <sup>22</sup> I have given them the glory that you gave me, that they may be one as we are one— <sup>23</sup> I in them and you in me—so that they may be brought to complete unity. Then the world will know that you sent me and have loved them even as you have loved me." John 17:20-26 (<https://www.biblegateway.com>)

This personal achievement (through the Blessing of the God) can be obtained in the specific conditions of any social situation and position. Poor and rich, powerful and meek are all called to obtain Holiness as the ultimate aim of their life. This specific understanding of Dignity of a person distinguishes from the perception of any previous historical situation. Any person could be dignified regardless of his origin and social status by fulfilling unique and universal criterion – devoting his life to God. An important innovation in Social life came with this: powers of the State, and the Ruler, powers of society, customs, and common values were restricted by the existence of the new internal, individual, Spiritual purpose.

Under the Christianity, first time, Human individual step out of the shadows of the Social context, gaining ultimate value without fulfilling any bounded role, but as the value itself. Communion of the Church transcending social limitations creates substantially different perception and validation for the Human life. This development of the perception of the Human personality had important influence on the dimension of value of Human life itself.<sup>23</sup>

### ***3.3. Perception of Human life in later history***

It is widely known that ideas of the Exceptional value of the Human Personality were raised in the theories formulated in the Age of Enlightenment (18th Century) but it is not recognized that their roots lie several centuries before. In Western Europe for some time we could follow the same pattern in establishing of common moral, Law and, consequently, category of the Worthiness of the Human life, like in the Orthodox Christian tradition. From the Ancient time and domination of the Society over individual, through Christian exceptional understanding of personal value and conception of symphony between State and the Church till the time of Great Schism (1054).<sup>24</sup>

Great Schism and attempt of Roman Catholic Church to establish political precedent, appropriating prerogatives of the State power from the Emperor, imposing them later on the Western Europe as an absolute political factor substantially changed the idea of Worthiness of the Human personality. By merging of Spiritual and Political power, the Worthiness of human person as immanently internal qualification gain an important attribute: it becomes dependent solely on the will of an impersonal criterion, Institution

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<sup>23</sup> “Anyone who loves their life will lose it, while anyone who hates their life in this world will keep it for eternal life.” John 12:25

<sup>24</sup> Stevanović 2017: 103

of the Church. Spiritual and moral Dignity of the Person based on the possibility of the Communion with the God became arbitrary mediated by the Political institution.

From that moment till today we can draw the line of further decomposition of the perception of the Worthiness of Human life. Opposing the total domination of the social context of the Roman Catholic Church over individual, Protestant concept of “sola scriptura” with affirmation of the Autonomy of the Will created specific domination of the Human Personality over Society. Idea of Autonomy of Will led to the new perception of the Human Personality making emphasis on its proactive and creative role.<sup>25</sup>

Exceptional and privileged position of Roman Catholic Church as criterion of social, cultural and political values in Protestantism has been transferred to the personality and its individual productive effort. Professional success as proof of God’s Grace resulted in rise of Corporative and profit-oriented spirit. Idea of Holiness of the original Christianity preserved in present Orthodox Christian Church, transferred to the political Loyalty in the Roman Catholic tradition, has been transformed in ideal of Profit-oriented business success as the proof of God’s Grace in the Protestant theory of predestination.<sup>26</sup>

According to these transformations, perception of the Human personality and value of its life substantially changed. If the original Christianity, preserved in the present Orthodox Christian tradition, value Human life by its potential for Holiness, and Roman Catholic tradition in life according to the Church commandments, Protestant tradition value its capability of Free Will to produce and create goods and increase wealth as the proof of the God’s Grace and future Salvation. Idea of predestination and professional success as indirect, transcendental proof of future Salvation, led to the fundamental change of perception of the individual and its worthiness in the Protestant tradition.

Need for greater freedom and loosening of traditional social strains in prescribed development of greater wealth as basic criterion, concentrated intrinsic value in the frame of Human personality, but it was not frame of Holiness originally established in Christian tradition, but frame of personal success. Idea of unique society of Holy persons degraded to the social construct of business corporation capable to provide personal professional success as the highest value. Idea of Freedom and Reason capable to provide objective truth available to every person led to competitive and irrational fragmentation of social

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<sup>25</sup> Stevanović 2018: 89

<sup>26</sup> Gidens 2007: 683

groups loosely connected only by Governmental institutions and idea of professional success as higher value.<sup>27</sup>

On the other hand, social influence of the individuum greatly improved, and idea of Godlike Personality from the time of French Revolution and particularly Napoleonic Wars led to deconstruction of the traditional social norms and the end of domination of the traditional Society over individual. Paradoxically, this so called “open” society in its creative and changeable fashion understood social values disclaiming their metaphysical dimension and reducing them to the products of human Free Will approved by social consensus.<sup>28</sup>

Analogous to the idea of merging of Spiritual and Political power performed by Roman Catholic Church in 11th century, in 19th century Hegel’s Theory of Justice arose the idea of merging of the sphere of Protestant Moral and the Law. From that moment fundamental change happens: the norms of the Law in the same time establish moral implications and often, change of the definitions of the Law involve change of moral norms valid till that moment in certain Society.<sup>29</sup>

#### **4. Consequences and possibilities**

Freedom of Will taken as basic value of contemporary Civilization creates prerequisites for constant change of social and moral norms through rising influence of social media aiming to provide social consensus (or its illusion). This possibility of their constant change leads to the fading of the validity of moral norms. In such Social situation Personal self-determination, well-being and professional success are seen as fundamental values to whom all the other values must be subjugated. While on the one hand such moral stance leads to the providing of certain legal measures concerning recognition of value of Human life (prohibition of Death penalty) on the other hand it strengthens potentials for Legal diminishing of life as biological phenomenon (termination of pregnancy, euthanasia etc.).

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<sup>27</sup> Makintajer 2006: 95

<sup>28</sup>“Personal decisions may lead to the alterations of taboos, and even political laws that are no longer taboos. The Great difference is the possibility of rational reflection upon these matters.” Popper (1977): 173

<sup>29</sup> “A legislator who proceeds in this way, who refuse to take popular indignation, intolerance and disgust as the moral conviction of his community, is not guilty of moral elitism... He is doing his best to enforce a distinct, and fundamentally important, part of his community’s morality, a consesnus more essential to the society’s existence in the form we know it...” Dworkin (1978): 255

The most interesting is that we have evidence of legal instrumentalization of Human life similar to the Human sacrifice of the Ancient times in recent history. Using our definition of human sacrifice as total instrumentalization of the individual by the Society in the name of gaining “greater good”, we can mention confirmed facts about totalitarian systems vindicating sacrifice of the individual for the “greater good” of the Society. Extermination of the mentally ill and handicapped people legally justified by the Nuremberg Laws in the Nazi Germany, represents such an example. Legal preconditions for so called “Great Purge” in the USSR are the other terrifying example of such practice.<sup>30</sup> Even more interesting is that in many of these politically fabricated trials there are evidence that people framed and later executed, voluntarily agreed to confess the crimes that they did not commit.

On the other hand, liberal political stances vindicate similar practices. In the theory of contemporary “Moral (or Just) War” sacrifice of innocent lives (“collateral damage”) is justified in the name of imposing moral norms of the certain States and Societies.<sup>31</sup> According to this, we can rightfully argue that Human life in the contemporary Idea of Human rights as the basic, intrinsic value does not exist. What exists is the Idea of using of the Free Will in the aim of providing self-determination, well-being and professional success as the intrinsic value relying predominantly on the moral stance of the Protestant culture. Human life has value only as a mean for providing these aims. Human life, like in the case of euthanasia, infanticide or termination of pregnancy can be destroyed or inhibited by the decision of the Free Will legally and morally undisputed.

In the end of our examination of the position of the Human life as value through Human history and different moral standpoints, we would like to admit that only original Christian moral stance values Human life as the intrinsic value (because of its potential for Holiness), while all the others (including internationally predominant paradigm of Human rights) understand it only as a mean for the achievement of some other aim. We can conclude that question of affirmation of Human life as the intrinsic value recognized by the Law lies in the simple decision: To be able to recognize it as the phenomenon whose value transcend simple use of its biological capabilities, to recognize it as a Metaphysical value.<sup>32</sup>

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<sup>30</sup> Vyshinsky 1941:116

<sup>31</sup> Amstuc (2008): 49

<sup>32</sup> Authors would like to thank Ms. Nataša Dragičević for her support during the work on this paper.

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## **RIGHT TO LIFE AND USE THE FORCE IN THE POLICING OF DEMONSTRATIONS**

*The authors in this work deal with the use the force in the policing of demonstrations and its relationship with the rights to life. The use of force in the policing of demonstrations may raise issues under the European Convention on Human Rights in certain circumstances. This is particularly true in terms of the right to life, the prohibition of torture and inhuman and degrading treatment, freedom of expression, and freedom of reunion. The Republic of Serbia is no exception. Therefore, the authors elaborate the points of view of the European Court of Human Rights through the main decisions in this field.*

**Keywords:** *right to life, demonstrations, human rights, ineffectiveness of the investigation*

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## 1. Introduction

Article 2 of the European Convention on Human Rights and Fundamental Freedoms provides that “Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained and (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

In numerous decisions, the ECHR emphasized that Article 2 ranks as one of the most fundamental provisions in the Convention, one which, in peace time, admits of no derogation under Article 15. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe.<sup>1</sup> This article sets a positive obligation for the state to protect an individual's life against threats that stem from another individual (Larsen, 2015: 3). The exceptions indicate that Article 2 extends to, but is not concerned exclusively with, intentional killing (Vandenhoe, 2016: 49; Turanjanin, Banović, & Čorović, 2018).<sup>2</sup> The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than “absolutely necessary” for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c).<sup>3</sup>

The use of the term “absolutely necessary” indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” (Füglister, 2016: 72). In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. Furthermore, in keeping with the importance of this provision in a democratic society, the ECtHR must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where

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<sup>1</sup> See, for example, *Andronicou and Constantinou v. Cyprus*, § 171; *Solomou and Others v. Turkey*, § 63 and *Giuliani and Gaggio v. Italy*, § 174.

<sup>2</sup> Some authors believe that this article refers only to intentional deprivation of life (see Hessbruegge, 2017: 177).

<sup>3</sup> *McCann and Others v. the United Kingdom*, § 148 and *Solomou and Others*, § 64.

deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.<sup>4</sup> The circumstances in which deprivation of life may be justified must be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also require that Article 2 be interpreted and applied so as to make its safeguards practical and effective.<sup>5</sup> In particular, the ECtHR has held that the opening of fire should, whenever possible, be preceded by warning shots (Neri, 2012: 91).<sup>6</sup>

The term “absolutely necessary” indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society”. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. Furthermore, in keeping with the importance of this provision in a democratic society, the ECtHR must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.<sup>7</sup>

In the case of mass demonstrations, which are becoming more and more frequent in a globalised world, the obligation to protect the right to life safeguarded by the Convention necessarily takes on another dimension, as it is emphasized in joint partly dissenting opinion of judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş in a case *Giuliani and Gaggio v. Italy*. Serbia is not an exception. The mass demonstrations during the pandemic have attracted particular attention with regard to the issue of human rights (Turanjanin, 2021a; Vilić, 2020, Tilovska-Kechedji, 2020). The protection of life in the sphere of demonstrations extends through two dimensions: substantive and procedural. The ECtHR dealt in several cases on lethal force in military and police actions (Chevalier-Watts, 2013; on military command regarding the human dignity see Starčević, 2020). However, before explaining the ECtHR standards, it is

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<sup>4</sup> McCann and Others, §§ 147-150 and Andronicou and Constantinou, § 171; see also Avşar v. Turkey, § 391, Musayev and Others v. Russia, § 142 and *Giuliani and Gaggio v. Italy*, § 176.

<sup>5</sup> Solomou and Others, § 63.

<sup>6</sup> Kallis and Androulla Panayi v. Turkey, § 62.

<sup>7</sup> *Giuliani and Gaggio v. Italy*, § 176.

necessary to stress the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials that are applied in this sphere.

## **2. United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials**

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990. In the first place, it provides that the Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review. Furthermore, governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life (Principle 9). In the mentioned circumstances, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident (Principle 10).

According to Principle 11, rules and regulations on the use of firearms by law enforcement officials should include guidelines that: (a) specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted; (b) ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm; (c) prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk; (d) regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them; (e) provide for warnings to be given, if appropriate, when firearms are to be discharged; (f) provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Important are principles 18-20. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review (Principle 18). Furthermore, governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use (Principle 19). In the training of law enforcement officials, governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents (Principle 20).

### **3. Factual background for ECtHR standards**

In the centre of these considerations will be two cases, *Giuliani and Gaggio v. Italy* and *Ataykaya v. Turkey*. In the first case, Carlo Giuliani was shot and killed during the demonstrations on the fringes of the G8 summit in Genoa in July 2001. On 19, 20 and 21 July 2001 the G8 summit was held in Genoa. Numerous “anti-globalisation” demonstrations were staged in the city and substantial security measures were put in place by the Italian authorities. The prefect of Genoa was authorised to deploy military

personnel to ensure public safety in connection with the summit. In addition, the part of the city where the G8 were meeting (the historic centre) was designated as a “red zone” and cordoned off by means of a metal fence. As a result, only residents and persons working in the area were allowed access. Access to the port was prohibited and the airport was closed to traffic. The red zone was contained within a yellow zone, which in turn was surrounded by a white (normal) zone. Priorities of the law-enforcement agencies as follows: establishing a line of defence within the red zone, with the task of repelling rapidly any attempt to break through; establishing a line of defence within the yellow zone to deal with any incidents, taking account of the position of the demonstrators in various locations and of actions perpetrated by more extremist elements; putting in place public-order measures on the streets concerned by the demonstrations, bearing in mind the risk of violence encouraged by the presence of crowds of people.

On the morning of 20 July some groups of particularly aggressive demonstrators, wearing balaclavas and masks (the “Black Bloc”) sparked numerous incidents and clashes with law-enforcement officers. The Tute Bianche march was due to set off from the Carlini stadium. This was a demonstration involving several organisations: representatives of the “No Global” movement and of community centres, and young communists from the Rifondazione comunista party. While they believed in non-violent protest (civil disobedience), they had announced a strategic objective, namely to try to penetrate the red zone. On 19 July 2001 the head of the Genoa police authority (*questore*) had prohibited the Tute Bianche march from entering the red zone or the zone adjacent to it, and had deployed law-enforcement officers to halt the march at Piazza Verdi. Consequently, the demonstrators were able to march from the Carlini stadium and all the way along Via Tolemaide to Piazza Verdi. At around 1.30 p.m. the march set off and headed slowly westwards. Around Via Tolemaide there were signs of earlier disturbances. The march was headed by a contact group made up of politicians and a group of journalists carrying video recorders and cameras. The marchers slowed down and made a number of stops. The march reached the railway tunnel at the junction with Corso Torino. Suddenly, tear gas was fired on the demonstrators by carabinieri. The carabinieri charged forward, making use of their batons. The march was pushed back eastwards as far as the junction with Via Invrea.

The demonstrators split up: some headed towards the seafront, while others sought refuge in Via Invrea and then in the area around Piazza Alimonda. Some demonstrators responded to the attack by throwing hard objects such as glass bottles or rubbish bins at the law-enforcement officers. Armoured vehicles belonging to the carabinieri drove at high speed, knocking down the barriers erected by the demonstrators and forcing the

demonstrators at the scene to leave. At 3.22 p.m. the control room ordered commander to move away and allow the marchers to pass. Some of the demonstrators retaliated with violence and clashes took place with the law-enforcement agencies. At around 3.40 p.m. a group of demonstrators attacked an armoured carabinieri van and set it alight.

At approximately 5 p.m. the presence of a group of demonstrators who appeared very aggressive was observed by the Sicilia battalion, consisting of around fifty carabinieri stationed close to Piazza Alimonda. Two Defender jeeps were parked nearby. Police officer Lauro ordered the carabinieri to charge the demonstrators. The carabinieri charged on foot, followed by the two jeeps. The demonstrators succeeded in pushing back the charge, and the carabinieri were forced to withdraw in disorderly fashion near Piazza Alimonda. Pictures taken from a helicopter at 5.23 p.m. show the demonstrators running along Via Caffa in pursuit of the law-enforcement officers. In view of the withdrawal of the carabinieri the jeeps attempted to reverse away from the scene. One succeeded in moving off while the other found its exit blocked by an overturned refuse container. Suddenly, several demonstrators wielding stones, sticks and iron bars surrounded it. The two side windows at the rear and the rear window of the jeep were smashed. The demonstrators shouted insults and threats at the jeep's occupants and threw stones and a fire extinguisher at the vehicle. There were three carabinieri on board the jeep: F.C., who was driving, M.P. and D.R. M.P., who was suffering from the effects of the tear-gas grenades he had thrown during the day, had been given permission by Captain Cappello, commander of a company of carabinieri, to get into the jeep in order to get away from the scene of the clashes. Crouched down in the back of the jeep, injured and panicking, he was protecting himself on one side with a riot shield. Shouting at the demonstrators to leave "or he would kill them", M.P. drew his Beretta 9 mm pistol, pointed it in the direction of the smashed rear window of the vehicle and, after some tens of seconds, fired two shots.

One of the shots struck Carlo Giuliani, a balaclava-clad demonstrator, in the face under the left eye. He had been close to the rear of the jeep and had just picked an empty fire extinguisher off the ground and raised it up. He fell to the ground near the left-side rear wheel of the vehicle. Shortly afterwards, F.C. managed to restart the engine and in an attempt to move off, reversed, driving over Carlo Giuliani's body in the process. He then engaged first gear and drove over the body a second time as he left the scene. The jeep then drove towards Piazza Tommaseo. After a few metres, carabinieri sergeant-major Amatori got into the jeep and took over at the wheel, "as the driver was in a state of shock". Another carabinieri named Rando also got in. Police forces stationed on the other side of Piazza Alimonda intervened and dispersed the demonstrators. They were joined

by some carabinieri. At 5.27 p.m. a police officer present at the scene called the control room to request an ambulance. A doctor who arrived at the scene subsequently pronounced Carlo Giuliani dead.

According to the Ministry of the Interior (*ministero dell'Interno*), it was impossible to indicate the exact number of carabinieri and police officers at the scene at the moment of Carlo Giuliani's death; there had been approximately fifty carabinieri, some 150 metres from the jeep. In addition, 200 metres away, there had been a group of police officers. Relying, inter alia, on witness evidence given by law-enforcement officers during a parallel set of proceedings, the applicants stated in particular that, while on Piazza Alimonda, the carabinieri had been able to take off their gas masks, eat and rest. With the situation "calm", Captain Cappello had ordered M.P. and D.R. to board one of the two jeeps. He considered the two carabinieri to be mentally exhausted and no longer physically fit for duty. Cappello also considered that M.P. should stop firing tear gas and took away his tear-gas gun and the pouch containing the tear-gas grenades. Referring to the photographs taken shortly before the fatal shot, the applicants stressed that the weapon had been held at a downward angle from the horizontal. They also referred to the statements made by Lieutenant-Colonel Truglio, who said that he had been ten metres or so from Piazza Alimonda and thirty to forty metres away from the jeep. The carabinieri (around a hundred of them) had been some tens of metres from the jeep. The police officers had been at the end of Via Caffa, towards Piazza Tommaseo. The applicants submitted that the photographs in the investigation file clearly showed some carabinieri not far from the jeep.

During the investigation, a spent cartridge was found a few metres from Carlo Giuliani's body. No bullet was found. A fire extinguisher and a bloodstained stone, among other objects, were found beside the body and were seized by the police. It emerges from the file that the public prosecutor's office entrusted thirty-six investigative measures to the police. The jeep in which M.P. had been travelling, and also the weapon and equipment belonging to him, remained in the hands of the carabinieri and were subsequently seized under a court order. A spent cartridge was found inside the jeep. On the night of 20 July 2001 M.P. and F.C. were identified and examined by the Genoa public prosecutor's office on suspicion of intentional homicide. The interviews took place at the headquarters of the Genoa carabinieri. On completion of the domestic investigation the Genoa public prosecutor decided to request that the case against M.P. and F.C. be discontinued. The public prosecutor took the view that M.P. had had no other option and could not have been expected to act differently, since "the jeep was surrounded by demonstrators and the physical aggression against the occupants was patent and virulent". M.P. had been



justified in perceiving his life to be in danger. The pistol had been a tool capable of putting a stop to the attack, and M.P. could not be criticised for the equipment issued to him. He could not be expected to refrain from using his weapon and submit to an attack liable to endanger his physical integrity. These considerations justified a decision to discontinue the case. This decision was supported by investigation judge. Due to his acting in self-defence, no disciplinary proceedings were instituted against M.P (Lang, Qari, & Akhtar, 2011: 244-245).

In *Ataykaya v. Turkey*, following the death of fourteen members of the Kurdistan Workers' Party in an armed clash on 24 March 2006, many illegal demonstrations took place in Diyarbakır between 28 and 31 March 2006, during which a number of demonstrators were killed. According to the Turkish Government, some 2,000 individuals took part in those demonstrations, in which the police headquarters was bombarded with stones, sticks and petrol bombs, with the police and their vehicles coming under attack around the city. On 29 March 2006, on leaving his workplace, Ataykaya found himself in the middle of a demonstration. He had not taken part in the demonstration but had just been passing by, while the police had fired a large number of tear-gas grenades to disperse the demonstrators. Tarik Ataykaya was struck on the head by one of the grenades and died a few minutes later.

#### **4. Substantive aspect**

Under the substantive aspect exists three main issues that have to be followed and examined in order to avoid violation of Article 2: whether the use of lethal force was justified, whether the respondent State took the necessary legislative, administrative and regulatory measures to reduce as far as possible the adverse consequences of the use of force and whether the organisation and planning of the policing operations were compatible with the obligation to protect life arising out of Article 2 of the Convention.

##### ***4.1 Whether the use of lethal force was justified***

The use of force by agents of the state may be justified where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.<sup>8</sup> The ECtHR have to establish not only

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<sup>8</sup> McCann and Others, § 200 and Andronicou and Constantinou, § 192.

whether the use of potentially lethal force against the citizen was legitimate but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to his life<sup>9</sup> and must verify that the authorities did not act negligently in their choice of measures (on lethal force use see Shadowen, 2018: 14-15).<sup>10</sup> When called upon to examine whether the use of lethal force was legitimate, the ECtHR cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life.<sup>11</sup> It is important to say that though the ECtHR is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts.<sup>12</sup>

To assess the factual evidence, the ECtHR adopts the standard of proof “beyond reasonable doubt” (Russell, 2016: 494), but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained may also be taken into account.<sup>13</sup> Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The ECtHR is also attentive to the seriousness that attaches to a ruling that a particular state has violated fundamental rights.<sup>14</sup> The ECtHR must be especially vigilant in cases where violations of Articles 2 and 3 of the Convention are alleged.<sup>15</sup> When there have been criminal proceedings in the domestic courts concerning such allegations, it must be borne in mind that criminal law liability is distinct from the State's responsibility under the Convention. The ECtHR's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted in the light of the object and purpose of the Convention, taking into account any relevant rules or principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents

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<sup>9</sup> *Makaratzis v. Greece*, § 60.

<sup>10</sup> See *Nachova and Others v. Bulgaria*, § 95.

<sup>11</sup> *Bubbins v. the United Kingdom*, § 139 (see more in Martin, 2006 and Foster & Leigh, 2016).

<sup>12</sup> *Avşar*, § 283 and *Barbu Angheliescu v. Romania*, § 52.

<sup>13</sup> *Ireland v. the United Kingdom*, § 161 and *Orhan v. Turkey*, § 264.

<sup>14</sup> *Ribitsch v. Austria*, § 32; *Ilaşcu and Others v. Moldova and Russia*, 2004, § 26; *Nachova and Others v. Bulgaria* § 147 and *Solomou and Others*, § 66.

<sup>15</sup> See, *mutatis mutandis*, *Ribitsch*, § 32.

and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The ECtHR is not concerned with reaching any findings as to guilt or innocence in that sense.<sup>16</sup>

In *Giuliani and Gaggio v. Italy*, the jeep driven by F.C. was attacked and at least partially surrounded by the demonstrators, who launched an unrelenting onslaught on the vehicle and its occupants, tilting it sideways and throwing stones and other hard objects. The jeep's rear window was smashed and a fire extinguisher was thrown into the vehicle, which M.P. managed to fend off. The footage and photographs also show one demonstrator thrusting a wooden beam through the side window, causing shoulder injuries to D.R., the other carabinieri who had been taken off duty. This was quite clearly an unlawful and very violent attack on a vehicle of the law-enforcement agencies which was simply trying to leave the scene and posed no threat to the demonstrators. Whatever may have been the demonstrators' intentions towards the vehicle and/or its occupants, the fact remains that the possibility of a lynching could not be excluded.<sup>17</sup>

The ECtHR reiterated the need to consider the events from the viewpoint of the victims of the attack at the time of the events. Carabinieri were positioned nearby who could have intervened to assist the jeep's occupants had the situation degenerated further. However, this fact could not have been known to M.P., who, injured and panic-stricken, was lying in the rear of the vehicle surrounded by a large number of demonstrators and who therefore could not have had a clear view of the positioning of the troops on the ground or the logistical options available to them. As the footage shows, the jeep was entirely at the mercy of the demonstrators shortly before the fatal shooting. In this light and bearing in mind the extremely violent nature of the attack on the jeep, as seen on the images which it viewed, the ECtHR considered that M.P. acted in the honest belief that his own life and physical integrity, and those of his colleagues, were in danger because of the unlawful attack to which they were being subjected. M.P. was accordingly entitled to use appropriate means to defend himself and the other occupants of the jeep.<sup>18</sup> Furthermore, before firing, M.P. had shown his pistol by stretching out his hand in the direction of the jeep's rear window, and had shouted at the demonstrators to leave unless they wanted to be killed. His actions and words amounted to a clear warning that he was about to open

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<sup>16</sup> *Tanli v. Turkey*, § 111 and *Avşar*, § 284.

<sup>17</sup> *Giuliani and Gaggio v. Italy*, § 187.

<sup>18</sup> *Ibid.*, §§ 188-189.

fire. Moreover, the photographs show at least one demonstrator hurrying away from the scene at that precise moment.<sup>19</sup>

In this extremely tense situation Giuliani decided to pick up a fire extinguisher which was lying on the ground, and raised it to chest height with the apparent intention of throwing it at the occupants of the vehicle. His actions could reasonably be interpreted by M.P. as an indication that, despite the latter's shouted warnings and the fact that he had shown his gun, the attack on the jeep was not about to cease or diminish in intensity. Moreover, the vast majority of the demonstrators appeared to be continuing the assault. M.P.'s honest belief that his life was in danger could only have been strengthened as a result, so this served as justification for recourse to a potentially lethal means of defence such as the firing of shots.<sup>20</sup>

It is further important that the direction of the shots was not established with certainty. According to one theory supported by the prosecuting authorities' experts, M.P. had fired upwards and one of the bullets had hit the victim after being accidentally deflected by one of the numerous stones thrown by the demonstrators. Were it to be proven that the events occurred in this manner, it would have to be concluded that Giuliani's death was the result of a stroke of misfortune, a rare and unforeseeable occurrence having caused him to be struck by a bullet which would have otherwise have disappeared into the air.<sup>21</sup> However, in the instant case the ECtHR did not consider it necessary to examine the well-foundness of the "intermediate object theory". M.P.'s field of vision was restricted by the jeep's spare wheel, since he was half-lying or crouched on the floor of the vehicle. Given that, in spite of his warnings, the demonstrators were persisting in their attack and that the danger he faced – in particular, a likely second attempt to throw a fire extinguisher at him – was imminent, M.P. could only fire, in order to defend himself, into the narrow space between the spare wheel and the roof of the jeep. The fact that a shot fired into that space risked causing injury to one of the assailants, or even killing him, as was sadly the case, does not in itself mean that the defensive action was excessive or disproportionate. In this light, the ECtHR concluded that the use of lethal force was absolutely necessary "in defence of any person from unlawful violence".<sup>22</sup> However, the use of force in defence

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<sup>19</sup> *Ibid.*, § 190.

<sup>20</sup> *Ibid.*, § 191.

<sup>21</sup> *Bakan v. Turkey*, §§ 52-56, in which the Court ruled out any violation of Article 2 of the Convention, finding that the fatal bullet had ricocheted before hitting the applicants' relative.

<sup>22</sup> Judges Tulkens, Zupančič, Gyulumyan and Karakaş did not agree with this reasoning. According to the judges: "establishing the trajectory of the shot fired by M.P. was of decisive importance. While the imminent threat of an object with considerable destructive potential being thrown justifies firing at chest height, an overall

of self or others from unlawful violence evokes the equivalent restrictions to the right to life (Mavronicola, 2013: 374). Consequently, this finding made it unnecessary for the ECtHR to consider whether the use of force was also unavoidable “in action lawfully taken for the purpose of quelling a riot or insurrection” within the meaning of sub-paragraph (c) of paragraph 2 of Article 2<sup>23</sup>.

In *Ataykaya v. Turkey*, the ECtHR elaborated the use of tear-gas grenades. Namely, as it was pointed out in *Abdullah Yaşa and Others v. Turkey*, “firing a tear-gas grenade along a direct, flat trajectory by means of a launcher cannot be regarded as an appropriate police action as it could potentially cause serious, or indeed fatal injuries, whereas a high-angle shot would generally constitute the appropriate approach, since it prevents people from being injured or killed in the event of an impact” (Rietiker, 2014: 155; Shadowen, 2018: 14).<sup>24</sup> Given that during the explained events two individuals, one of whom was Ataykaya, were killed by tear-gas grenades, it was concluded that the police officers were able to act with considerable autonomy and take ill-considered initiatives, as would probably not have been the case if they had been given appropriate training and instructions, so, such a situation is not sufficient to provide the level of protection “by law” of the right to life that is required in present-day democratic societies in Europe.<sup>25</sup>

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state of danger can only justify firing shots into the air... If M.P. did not see anyone targeting him directly and individually, his response should have been aimed at dispersing rather than eliminating the assailants. In other words, only the firing of warning shots would be compatible with the requirements of Article 2 of the Convention in its substantive aspect were it to transpire that M.P.'s “defence” was not justified by the need to halt an attack liable to result in immediate consequences of a serious nature which could not be averted by means of less radical action (the “real danger of an unjust attack” referred to in Article 52 of the CC). This follows from the test of “absolute necessity”, which dictates that the force used must be strictly proportionate to the aims pursued ... If methods less dangerous to human life can reasonably be regarded as sufficient to achieve the aim of “defence of any person from unlawful violence” or “for the purpose of quelling a riot”, then those methods must be deployed. Moreover, the Italian Criminal Code (Article 52 in fine) appears to adopt a similar approach in requiring that the “defensive response [be] proportionate to the attack”. In short, if M.P. was seeking to defend himself against the demonstrators' assault on the jeep rather than against the applicants' son individually, it cannot be concluded that there was a serious threat to his person of such imminence that only shots fired at chest height could have averted it. While it is true that the jeep was surrounded by demonstrators and that various objects were being thrown at it, the fact remains, as shown by the photographs in the file, that when M.P. drew his pistol and opened fire no one with the exception of Carlo Giuliani was attacking him directly, individually and at close range. The firing of shots into the air would probably have been enough to disperse the assailants; if not, M.P. would still have had time to defend himself by means of further shots, this time targeting those individuals who, despite the warning shots, chose to continue the attack. It should be borne in mind in that regard that M.P. had an automatic pistol which was loaded with fifteen rounds of ammunition.”

<sup>23</sup> *Giuliani and Gaggio v. Italy*, §§ 192-196.

<sup>24</sup> *Abdullah Yaşa and Others v. Turkey*, § 48.

<sup>25</sup> *Ataykaya v. Turkey*, § 57.

***4.2 Whether the respondent State took the necessary legislative, administrative and regulatory measures to reduce as far as possible the adverse consequences of the use of force***

Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>26</sup> The primary duty on the State to secure the right to life entails, in particular, putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards (see also Borelli, 2013: 371-372).<sup>27</sup> In line with the principle of strict proportionality, the national legal framework must make recourse to firearms dependent on a careful assessment of the situation (see more in Trykhlil, 2020).<sup>28</sup> Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident.<sup>29</sup>

The legal framework defining the circumstances in which the use of firearms was authorized existed. One of the provisions concerns the ground of justification of self-defence and it refers to the “need” for defensive action and the “real” nature of the danger, and requires the defensive response to be proportionate to the attack, which echoes the wording of Article 2 of the Convention and contains the elements required by the ECtHR’s<sup>30</sup> case-law. As Larsen points out, as long as the act of self-defence is necessary, and proportionate when seen in relation to the threat, deprivation of life is lawful under

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<sup>26</sup> *L.C.B. v. the United Kingdom*, § 36 and *Osman v. the United Kingdom*, § 115. As it is emphasized, since the *Osman* (the *Osman* test has been applied to killing of persons that could directly be attributed to the state (Ebert & Sijniensky, 2015: 350)) the ECtHR has repeatedly stated that positive obligations come into play when the national authorities knew or ought to have known the existence of a real and imminent risk to the life of an identified individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (Sicilianos, 2014: 118-119).

<sup>27</sup> *Makaratzis v. Greece*, §§ 57-59 and *Bakan*, § 49.

<sup>28</sup> See, *mutatis mutandis*, *Nachova and Others*, § 96.

<sup>29</sup> *Makaratzis*, § 58. Applying these principles, the ECtHR has, for instance, characterised as deficient the Bulgarian legal framework which permitted the police to fire on any fugitive member of the armed forces who did not surrender immediately in response to an oral warning and the firing of a warning shot in the air, without containing any clear safeguards to prevent the arbitrary deprivation of life (see *Nachova and Others*, §§ 99-102). The ECtHR also identified deficiencies in the Turkish legal framework, adopted in 1934, which listed a wide range of situations in which a police officer could use firearms without being liable for the consequences (see *Erdoğan and Others v. Turkey*, §§ 77-78). On the other hand, it held that a regulation setting out an exhaustive list of situations in which gendarmes could make use of firearms was compatible with the Convention. The regulation specified that the use of firearms should only be envisaged as a last resort and had to be preceded by warning shots, before shots were fired at the legs or indiscriminately (see *Bakan*, § 51).

<sup>30</sup> *Giuliani and Gaggio v. Italy*, § 212.

the provisions, so, if it was reasonable for him or her at the time to believe that the use of lethal force in self-defence was necessary, the act does not become unlawful just because it is later discovered that there was no genuine threat (Larsen, 2012: 378). What is particularly important is the ECtHR's interpretation of the term "need". In Italian legislation this term refers simply to the existence of a pressing need, whereas "absolute necessity" for the purposes of the Convention requires that, where different means are available to achieve the same aim, the means which entails the least danger to the lives of others must be chosen. However, this is a difference in the wording of the law which can be overcome by the interpretation of the domestic courts. As is clear from the decision to discontinue the case, the Italian courts have interpreted this provision as authorising the use of lethal force only as a last resort where other, less damaging, responses would not suffice to counter the danger.<sup>31</sup> It follows that the differences between the standards laid down and the term "absolutely necessary" in Article 2 § 2 are not sufficient to conclude on this basis alone that no appropriate domestic legal framework existed.<sup>32</sup>

The next interesting issue is the question of whether the law-enforcement agencies should be equipped with non-lethal weapons, for example with guns firing rubber bullets. According to the ECtHR, in general terms, there is room for debate as to whether law-enforcement personnel should also be issued with other equipment of this type, such as water cannons and guns using non-lethal ammunition, but such discussions were not relevant in the case *Giuliani and Gaggio*, in which a death occurred not in the course of an operation to disperse demonstrators and control a crowd of marchers, but during a sudden and violent attack which posed an imminent and serious threat to the lives of three carabinieri. The Convention provides no basis for concluding that law-enforcement officers should not be entitled to have lethal weapons at their disposal to counter such attacks.<sup>33</sup>

#### ***4.3 Whether the organisation and planning of the policing operations were compatible with the obligation to protect life arising out of Article 2 of the Convention***

At the third place, Article 2 may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an

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<sup>31</sup> *Ibid.*, § 214.

<sup>32</sup> *Perk and Others v. Turkey*, § 60, *Bakan*, § 51; see also, conversely, *Nachova and Others*, §§ 96-102.

<sup>33</sup> *Giuliani and Gaggio v. Italy*, § 216.

individual whose life is at risk from the criminal acts of another individual.<sup>34</sup> That does not mean, however, that a positive obligation to prevent every possibility of violence can be derived from this provision. The obligation in question must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.<sup>35</sup> Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. The ECtHR has held that a positive obligation will arise where the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual or individuals and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.<sup>36</sup> Furthermore, for the state's responsibility under the Convention to be engaged, it must be established that the death resulted from a failure on the part of the national authorities to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge.<sup>37</sup>

According to its case-law, the ECtHR must examine the planning and control of a policing operation resulting in the death of one or more individuals in order to assess whether, in the particular circumstances of the case, the authorities took appropriate care to ensure that any risk to life was minimised and were not negligent in their choice of action.<sup>38</sup> The use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant a *carte blanche*. Unregulated and arbitrary action by state agents is incompatible with effective respect for human rights. This means that policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force. Accordingly, the ECtHR must take into consideration not only the actions of the agents of the state who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under

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<sup>34</sup> *Mastromatteo v. Italy*, § 67 in fine, *Branko Tomašić and Others v. Croatia*, § 50 and *Opuz v. Turkey*, § 128.

<sup>35</sup> *Osman*, § 116, and *Maiorano and Others v. Italy*, § 105 and *Giuliani and Gaggio v. Italy*, § 245.

<sup>36</sup> *Bromiley v. the United Kingdom* (dec.); *Paul and Audrey Edwards v. the United Kingdom*, § 55 and *Branko Tomašić*, §§ 50-51. In this connection it should be pointed out that in *Mastromatteo* (§ 69), the ECtHR drew a distinction between cases concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act (*Osman* and *Paul and Audrey Edwards*), and those in which the obligation to afford general protection to society was in issue (*Maiorano and Others*, § 107).

<sup>37</sup> *Osman*, § 116; *Mastromatteo*, § 74 and *Maiorano and Others*, § 109.

<sup>38</sup> *McCann and Others*, §§ 194 and 201 and *Andronicou and Constantinou*, § 181.



examination. Police officers should not be left in a vacuum when performing their duties: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect.<sup>39</sup> In particular, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.<sup>40</sup>

Lastly, a mass demonstration plays a great role here. While it is the duty of states to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.<sup>41</sup> However, it is important that preventive security measures such as, for example, the presence of first-aid services at the site of demonstrations, be taken in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature.<sup>42</sup> Moreover, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.<sup>43</sup> On the other hand, interferences with the right guaranteed by that provision are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence.<sup>44</sup>

In *Giuliani and Gaggio* the intervention of the carabinieri and the attack on the jeep by demonstrators took place at a time of relative calm when, following a long day of clashes, the detachment of carabinieri had taken up position on Piazza Alimonda in order to rest, regroup and allow the injured officers to board the jeeps. The clash between demonstrators and law-enforcement officers occurred suddenly and lasted only a few minutes before the fatal shooting. It could not have been predicted that an attack of such

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<sup>39</sup> *Makaratzis*, §§ 58-59.

<sup>40</sup> *Nachova and Others*, § 97; see also the ECtHR's criticism of the "shoot to kill" instructions given to soldiers in *McCann and Others*, §§ 211-214 (see more Morawska, 2019: 241).

<sup>41</sup> *Plattform "Ärzte für das Leben" v. Austria*, § 34; *Oya Ataman v. Turkey*, § 35 and *Protopapa v. Turkey*, § 108.

<sup>42</sup> *Oya Ataman*, § 39.

<sup>43</sup> *Patyi and Others v. Hungary*, § 43.

<sup>44</sup> *Protopapa*, § 109.

violence would take place in that precise location and in those circumstances. Moreover, the reasons which drove the crowd to act as it did can only be speculated upon. Furthermore, the Government had deployed considerable numbers of personnel to police the event (18,000 officers) and that all the personnel either belonged to specialised units or had received ad hoc training in maintaining order during mass gatherings. In view of the very large numbers of officers deployed on the ground, they could not all be required to have lengthy experience and/or to have been trained over several months or years. To hold otherwise would be to impose a disproportionate and unrealistic obligation on the State. It is very important to make a distinction between cases where the law-enforcement agencies are dealing with a precise and identifiable target<sup>45</sup> and those where the issue is the maintenance of order in the face of possible disturbances spread over an area as wide as an entire city, as in the instant case. Only in the first category of cases can all the officers involved be expected to be highly specialised in dealing with the task assigned to them.<sup>46</sup>

It is important to deal with the issue whether the decisions taken on field were in breach of the obligation to protect life. In this sense, the ECtHR must take account of the information available to the authorities at the time the decisions were taken. There was nothing to indicate that Giuliani, more than any other demonstrator or any of the persons present at the scene, was the potential target of a lethal act. Hence, the authorities were not under an obligation to provide him with personal protection, but were simply obliged to refrain from taking action which, in general terms, was liable to clearly endanger the life and physical integrity of any of the persons concerned.<sup>47</sup> The absence of foreseeability as to the course of the events in this case, as well as the ensuing reduced level of control by the state over the situation, were taken into account in determining whether the organization and the planning of the policing operations were compatible with the obligation to protect life (Stoyanova, 2018: 321-322). Furthermore, it is conceivable, in an emergency situation, that the law-enforcement agencies might have to use non-armoured logistical support vehicles to transport injured officers. Likewise, it does not appear unreasonable not to have required the vehicles concerned to travel to hospital immediately, as this would have placed them at risk of crossing, without protection, a part of the city where further disturbances could have broken out. Additionally, there was nothing in the file to suggest that the physical condition of the carabinieri in the jeep was so serious that they needed to be taken to hospital straightaway as a matter of urgency;

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<sup>45</sup> See, for instance, *McCann and Others and Andronicou and Constantinou*.

<sup>46</sup> *Giuliani and Gaggio v. Italy*, § 255.

<sup>47</sup> *Ibid.*, § 257.

the officers concerned were for the most part suffering from the effects of prolonged exposure to tear gas. The jeeps next followed the detachment of carabinieri when the latter moved off. It may be that the move was made to avoid being cut off, which, as subsequent events demonstrated, could have been extremely dangerous. When the move was made, there was no reason to suppose that the demonstrators would be able to force the carabinieri, as they did, to withdraw rapidly and in disorderly fashion, thereby prompting the jeeps to retreat in reverse gear and leading to one of them becoming hemmed in. The immediate cause of these events was the violent and unlawful attack by the demonstrators. It is quite clear that no operational decision previously taken by the law-enforcement agencies could have taken account of this unforeseeable element. Moreover, the fact that the communications system chosen apparently only allowed information to be exchanged between the police and carabinieri control centres, but not direct radio contact between the police officers and carabinieri themselves, is not in itself sufficient basis for finding that there was no clear chain of command, a factor which is liable to increase the risk of some police officers shooting erratically.<sup>48</sup> M.P. was subject to the orders and instructions of his superior officers, who were present on the ground. In sum, the ECtHR was unable to establish a connection between the death and the alleged failings in the planning and control of the G8 Summit police operations (Skinner, 2011: 570).

Lastly, there was no evidence that the assistance afforded to Giuliani was inadequate or delayed or that the jeep drove over his body intentionally. In any case, the brain injuries sustained as a result of the shot fired by M.P. were so severe that they resulted in death within a few minutes. It follows that the Italian authorities did not fail in their obligation to do all that could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force.<sup>49</sup>

### **5. Procedural aspects**

Articles 2 and 3 of the Convention contain a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb of these provisions.<sup>50</sup> A general legal prohibition of arbitrary killing by the agents of the state would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force or for investigating arbitrary killings and allegations of ill-treatment of persons held

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<sup>48</sup> Makaratzis, § 68.

<sup>49</sup> Giuliani and Gaggio v. Italy, § 259.

<sup>50</sup> Ergi v. Turkey, § 82, Assenov and Others v. Bulgaria, §§ 101-106 and Mastromatteo, § 89.

by them.<sup>51</sup> The obligation to protect the right to life requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.<sup>52</sup> The state must therefore ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.<sup>53</sup> What is particularly important is the fact that the state's obligation to carry out an effective investigation has in the ECtHR's case-law been considered as an obligation inherent in Article 2, which requires, *inter alia*, that the right to life be “protected by law”. Although the failure to comply with such an obligation may have consequences for the right protected under Article 13, the procedural obligation of Article 2 is seen as a distinct obligation.<sup>54</sup> It can give rise to a finding of a separate and independent “interference”. This conclusion derives from the fact that the ECtHR has consistently examined the question of procedural obligations separately from the question of compliance with the substantive obligation (and, where appropriate, has found a separate violation of Article 2 on that account) and the fact that on several occasions a breach of a procedural

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<sup>51</sup> *Al-Skeini and Others v. the United Kingdom*, § 163, *El-Masri v. “the Former Yugoslav Republic of Macedonia”*, § 182 and *Mocanu and others v. Romania*, § 316. In *Mocanu and Others* events are related to the crackdown on Romanian civil society between 13 and 15 June 1990. It was wild and barbaric, leaving many demonstrators, passers-by and residents of Bucharest dead and severely ill-treated, while approximately one hundred persons died during the events and more than one thousand were subjected to severe ill-treatment and the element of mass murder, torture, persecution and inhumane acts against civilian victims is present in the case at hand, as it emphasizes judges Pinto de Albuquerque and Vučinić in their concurring opinion (see Cavanaugh, 2015: 28). Similarly, the case *Şandru and Others v. Romania* concerned the popular uprising in Timișoara of 1989, the first of a series of demonstrations that led to the overthrow of the Romanian communist regime. The first two applicants and the husband of the third applicant, who had taken part in the demonstrations, were seriously injured by gunshots. The brother of the fourth applicant was shot dead. All complained of the ineffectiveness of the investigation into the violent means used to quell the uprising, which had left numerous victims, and of the length of the criminal proceedings. They submitted in particular that the proceedings had not been conducted correctly since, given the positions held by the accused in the new post-1989 regime in Romania, the authorities had been reticent to investigate the case. The ECtHR held that there had been a violation of Article 2 of the European Convention on Human Rights in its procedural aspect (the investigation), finding that the domestic authorities had not acted with the degree of diligence required. It firstly reiterated that the obligation to protect the right to life under Article 2 of the Convention required by implication that there should be some form of effective official investigation when the use of lethal force against an individual had placed the latter's life in danger. In the present case, while recognising the undoubted complexity of the case, the ECtHR considered that the political and social implications could not justify the length of the investigation. On the contrary, its importance for Romanian society ought to have prompted the domestic authorities to deal with the case speedily and without unnecessary delay, in order to prevent any appearance of tolerance of or collusion in unlawful acts. See *Şandru and Others v. Romania*.

<sup>52</sup> *McCann and Others*, § 161.

<sup>53</sup> *Zavoloka v. Latvia*, § 34.

<sup>54</sup> *Ilhan v. Turkey* [GC], §§ 91-92, *Öneryıldız v. Turkey* [GC], § 148 and *Šilih v. Slovenia* [GC], §§ 153-154.

obligation under Article 2 has been alleged in the absence of any complaint as to its substantive aspect.<sup>55</sup>

The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life in cases involving State agents or bodies, and to ensure their accountability for deaths and ill-treatment occurring under their responsibility.<sup>56</sup>

Generally speaking, for an investigation to be effective, the persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of hierarchical or institutional connection but also a practical independence.<sup>57</sup> Whatever mode is employed, the authorities must act of their own motion. In addition, in order to be effective, the investigation must be capable of leading to the identification and punishment of those responsible. It should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly and unlawfully used lethal force, but also all the surrounding circumstances.<sup>58</sup> For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.<sup>59</sup> This means not only a lack of hierarchical or institutional connection but also a practical independence. What is at stake here is nothing less than public confidence in the State's monopoly on the use of force.<sup>60</sup> The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances.<sup>61</sup> This is not an obligation of result, but of means, but any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible will risk falling foul of the required standard of

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<sup>55</sup> *Şilih*, §§ 158-159.

<sup>56</sup> *Nachova and Others*, § 110 and *Ahmet Özkan and Others v. Turkey*, §§ 310 and 358.

<sup>57</sup> *Nachova and Others*, § 110 and *Halat v. Turkey*, § 51.

<sup>58</sup> *Al-Skeini and Others*, § 163.

<sup>59</sup> The requirement of independence, albeit fundamental to effectiveness and the goal of impartiality in investigations, has been held not to be unlimited, so, in *Giuliani and Gaggio* the ECtHR did not find a procedural inadequacy where the carabinieri carried out aspects of the forensic examination even though members of the same force had been involved in the incident itself, nor where one of the ballistics experts had apparently and publicly already formed a view on the incident in question before completing his tests (Skinner, 2019: 114).

<sup>60</sup> *Hugh Jordan v. the United Kingdom*, § 106; *Ramsahai and Others v. the Netherlands* [GC], § 325 and *Kolevi v. Bulgaria*, § 193.

<sup>61</sup> *Kaya v. Turkey*.

effectiveness.<sup>62</sup> The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death.<sup>63</sup> Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.<sup>64</sup>

In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible.<sup>65</sup> Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work.<sup>66</sup> In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case.<sup>67</sup>

Furthermore, in all cases, with regard to the obligations arising under Article 2 of the Convention, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. Equally, the victim should be able to participate effectively in the investigation.<sup>68</sup> However, disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may therefore be provided for in other stages of the procedure.<sup>69</sup> Moreover, Article 2 does not impose a duty on the investigating authorities to satisfy

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<sup>62</sup> *El-Masri*, § 183.

<sup>63</sup> As regards autopsies, see, for example, *Salman v. Turkey* [GC], § 106; on the subject of witnesses *Tanrıkulu v. Turkey* [GC], § 109; as regards forensic examinations *Gül v. Turkey*, § 89.

<sup>64</sup> *Avşar*, §§ 393-395

<sup>65</sup> *Kolevi v. Bulgaria*, § 201

<sup>66</sup> *Velcea and Mazăre v. Romania*, § 105.

<sup>67</sup> *Hugh Jordan*, § 109 and *Varnava and Others v. Turkey* [GC], § 191; see also *Güleç v. Turkey*, § 82, where the victim's father was not informed of the decision not to prosecute and *Oğur v. Turkey*, § 92, where the family of the victim had no access to the investigation or the court documents.

<sup>68</sup> *McKerr v. the United Kingdom*, § 115.

<sup>69</sup> *Ibid.*, § 129.

every request for a particular investigative measure made by a relative in the course of the investigation.<sup>70</sup>

A requirement of promptness and reasonable expedition is implicit in this context.<sup>71</sup> It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. A prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.<sup>72</sup> However, it cannot be inferred from the foregoing that Article 2 may entail the right to have third parties prosecuted or sentenced for a criminal offence<sup>73</sup> or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence.<sup>74</sup> On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. The ECtHR's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.<sup>75</sup>

The investigation in *Giuliani and Gaggio* was sufficiently effective to enable it to be determined whether the use of lethal force had been justified and whether the organisation and planning of the policing operations had been compatible with the obligation to protect life. In the procedural limb, there is a need for determination whether the applicants were afforded access to the investigation to the extent necessary to safeguard their legitimate interests, whether the proceedings satisfied the requirement of promptness arising out of the ECtHR's case-law and whether the persons responsible for and conducting the investigation were independent from those implicated in the events.

In the first place, under Italian law the injured party may not apply to join the proceedings as a civil party until the preliminary hearing, and that no such hearing took place in the present case. Nevertheless, at the stage of the preliminary investigation injured parties

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<sup>70</sup> Ramsahai and Others [GC], § 348 and Velcea and Mazăre, § 113.

<sup>71</sup> Yaşa v. Turkey, §§ 102-104, Tanrıkuş v. Turkey, § 109 and Mahmut Kaya v. Turkey, §§ 106-107.

<sup>72</sup> McKerr, §§ 111 and 114 and Opuz, § 150.

<sup>73</sup> Şilih, § 194; see also, *mutatis mutandis*, Perez v. France [GC], § 70.

<sup>74</sup> Zavoloka, § 34(c).

<sup>75</sup> Öneriyıldız, § 96 and Mojsiejew v. Poland, § 53.

may exercise rights and powers expressly afforded to them by law. These include the power to request the public prosecutor to apply to the investigating judge for the immediate production of evidence and the right to appoint a legal representative. In addition, injured parties may submit pleadings at any stage of the proceedings and, except in cassation proceedings, may request the inclusion of evidence. It is not disputed that the applicants had the option to exercise these rights. In particular, they appointed experts of their own choosing, whom they instructed to prepare expert reports which were submitted to the prosecuting authorities and the investigating judge and their representatives and experts participated in the third set of ballistics tests. Furthermore, they were able to lodge an objection against the request to discontinue the proceedings and to indicate additional investigate measures which they wished to see carried out.

The applicants complained in particular that they had not had enough time to appoint an expert of their choosing ahead of the autopsy. They also complained of the “superficial” nature of the autopsy report and the impossibility of conducting further expert medical examinations because of the cremation of the body. The ECtHR accepted that giving notice of an autopsy scarcely three hours before the beginning of the examination may make it difficult in practice, if not impossible, for injured parties to exercise their power to appoint an expert of their choosing and secure the latter's attendance at the forensic examinations. The fact remains, however, that Article 2 does not require, as such, that the victim's relatives be afforded this possibility. It is further important that, where an expert medical examination is of crucial importance in determining the circumstances of a death, significant shortcomings in the conduct of that examination may amount to serious failings capable of undermining the effectiveness of the domestic investigation. The ECtHR reached that conclusion, in particular, in a case where, following allegations that the death had been the result of torture, the autopsy report, signed by doctors who were not forensic specialists, had failed to answer some fundamental questions.<sup>76</sup> In *Giuliani and Gaggio* the applicants did not provide evidence of any serious failings in the autopsy performed on Giuliani (Listiningrum, 2017: 86).<sup>77</sup> Moreover, the ECtHR stressed that the cremation of Giuliani's body, which made any further expert medical examinations impossible, was authorised at the applicants' request.

Procedural obligations arising out of Article 2 require that an effective “investigation” be carried out and do not require the holding of public hearings. Hence, if the evidence gathered by the authorities is sufficient to rule out any criminal responsibility on the part

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<sup>76</sup> *Tanlı*, §§ 149-154.

<sup>77</sup> *Giuliani and Gaggio*, § 317.



of the State agent who had recourse to force, the Convention does not prohibit the discontinuation of the proceedings at the preliminary investigation stage. In *Giuliani and Gaggio*, the evidence gathered by the prosecuting authorities, and in particular the footage of the attack on the jeep, led to the conclusion, beyond reasonable doubt, that M.P. had acted in self-defence, which constitutes a ground of justification under Italian criminal law. Furthermore, it cannot be said that the prosecuting authorities accepted without question the version supplied by the law-enforcement officers implicated in the events. They not only questioned numerous witnesses, including demonstrators and third parties who had witnessed the events.<sup>78</sup>

Finally, as regards the promptness of the investigation, the Court observes that it was conducted with the requisite diligence and it cannot be said that the investigation was beset by excessive delays or lapses of time.<sup>79</sup>

In *Ataykaya v. Turkey*, domestic authorities deliberately created a situation of impunity which made it impossible to identify members of the security forces who were suspected of inappropriately firing tear-gas grenades and to establish the responsibilities of the senior officers, thus preventing any effective investigation,<sup>80</sup> but it is troubling that no information on the incident which caused Ataykaya's death was mentioned in the records of the security forces.<sup>81</sup>

## 6. Conclusion

The problem of protecting the right to life at mass demonstrations is neither the least simple nor an easy task. In this regard, we should be very careful when assessing the compliance of the action taken by the state with the protection of human rights. For example, Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş in their joint partly dissenting opinion believe that state's positive obligation to protect life under Article 2 of the Convention raised two main questions in *Giuliani and Gaggio*, which are closely linked. Firstly, did the State take the necessary legislative, administrative and regulatory measures to reduce as far as possible the risks and consequences of the use of force? Secondly, were the planning, organisation and management of the policing operations compatible with that obligation to protect life

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<sup>78</sup> *Giuliani and Gaggio*, §§ 320-321.

<sup>79</sup> *Giuliani and Gaggio*, § 325.

<sup>80</sup> See, *mutatis mutandis*, *Dedovski and Others v. Russia*, § 91.

<sup>81</sup> *Ataykaya v. Turkey*, § 54.

(Zupančič, 2011: 47)? Although the ECtHR ruled by a narrow majority that there had been no violation of Article 2 of the Convention, we cannot agree with that. Therefore, we believe that the answers to the questions asked are negative. The Republic of Serbia is not a state that is immune to mass demonstrations, which we have witnessed in recent years. Footage from the demonstrations shows police brutality, and therefore, human rights are certainly not adequately protected, which, unfortunately, is not just the case in the area of mass demonstrations (Turanjanin, 2021b).

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**Laura Maria Stănilă\***

## **| LIVING IN THE FUTURE: THE RIGHT TO VIRTUAL LIFE**

*In the context of emerging digitalization and increased usage of the Internet, the issue of human rights remains more actual than ever. In fact, virtual space is a parallel medium towards human rights have migrated raising new challenges in interpretation. In this context we have to ask ourselves: are the human rights we exercise in reality the same rights we enjoy in the virtual space? Do we, as virtual reality actors enjoy a right to virtual life?*

**Keywords:** human rights, Internet, virtual space, right to life, right to virtual life

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## I. Human rights and the virtual space challenge

The Internet, as an important element of the contemporary human lives and social relations is continually evolving and providing all of us with endless possibilities to access information and services, to connect and to communicate, as well as to share ideas and knowledge worldwide. Whereas the Internet is present in all the domains of social activities, seeking to improve them, to rise their velocity and ensure objectivity, it is obvious that people rights and freedoms exercised in the socializing process in the virtual field are under discussion. In fact, European Court of Human Rights is facing an increasing number of cases which deal with the breach of ECHR provisions while relating to the Internet.

As a matter of fact, the Court has stated in *Cengiz and Others v. Turkey* that “the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest. (...) Moreover, as to the importance of Internet sites in the exercise of freedom of expression, in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general”<sup>1</sup>. In the modern context of the usage of digital technology, determining the legal position of human person against every aspect of the usage of digital technology is a must<sup>2</sup>.

As stated by the *Recommendation CM/Rec(2014)6 and explanatory memorandum of the Committee of Ministers to member States on a Guide to human rights for Internet users*, “The Internet has a public service value. People, communities, public authorities and private entities rely on the Internet for their activities and have a legitimate expectation that its services are accessible, provided without discrimination, affordable, secure, reliable and ongoing. Furthermore, no one should be subjected to unlawful, unnecessary or disproportionate interference with the exercise of their human rights and fundamental freedoms when using the Internet.”<sup>3</sup>

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<sup>1</sup> *Cengiz and Others v. Turkey*, Judgment of 1 December 2015, paras. 49 and 52, [www.echr.coe.int](http://www.echr.coe.int).

<sup>2</sup> J. Stojić Dabetić, Human Dignity in the Face of Usage of Digital Technology, in Z. Pavlović (ed.), Yearbook. Human Rights Protection. The Right to Dignity, No. 3, Novi Sad 2020, p. 159.

<sup>3</sup> Paragraph 3, Council of Europe, Guide to Human Rights for Internet Users, Recommendation CM/Rec(2014)6 and explanatory memorandum of the Committee of Ministers to member States on a Guide to



According to paragraph 14 of the *Comments on Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users* individuals' and communities' access to the Internet and best use of it necessitate efforts to inform and empower them to exercise their rights and freedoms in online environments. This approach had been affirmed by the Committee of Ministers in its Declaration on Internet Governance Principles, of 2011, in which it underlined its vision of a people-centered and human rights based approach to the Internet which empowered Internet users to exercise their rights and freedoms on the Internet as a principle of Internet governance.<sup>4</sup>

The social and legal transformations occurred due to this new "Technology Era" are dramatic. The Internet Governance Strategy 2016-2019 of the Committee of Ministers' Deputies provides new terms and definitions such as<sup>5</sup>:

- *Digital citizens* - persons able to exercise and defend their democratic rights and responsibilities on-line and protect human rights, democracy and the rule of law in cyberspace.
- *Digital citizenship* - exercise and protection/defense of democratic rights and responsibilities in a digital environment/cyberspace.
- *Digital Magna Carta* - a bill of rights for the Internet, the aim of which is, *inter alia*, to develop positive laws that protect and expand the rights of users to an open, free and universal web;
- *Net-citizenship* - The term "Netizen" is a portmanteau of the words "Internet" and "citizen" as in "citizen of the net". It describes a person actively involved in online communities or the Internet in general. The term commonly also implies an interest and active engagement in improving the Internet, making it an intellectual and a social resource, or improving its surrounding political structures, especially with regard to open access, net neutrality and free speech. "Netizens" are also commonly referred to as cybercitizens, which has similar connotations.

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human rights for Internet users, *Adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers' Deputies*.

<sup>4</sup> Comments on Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users, <https://rm.coe.int/16804d5b31>, accessed on 1.09.2021.

<sup>5</sup> Council of Europe, Internet Governance – Council of Europe Strategy 2016-2019 - Democracy, human rights and the rule of law in the digital world, adopted at the 1252th Committee of Ministers' Deputies Meeting on 30 March 2016; Internet Governance Strategy 2016-2019/ Glossary of Terms, p. 17, 21, <https://rm.coe.int/internet-governance-strategy-2016-2019-updated-version-06-mar-2018/1680790ebe>, accessed on 1.09.2021.

All these references contour a parallel identity of the social actors in the virtual space and human beings become virtual beings (or should we say digital beings?) exercising rights and freedoms in virtual field in the same manner they exercise them in the physical reality. Or are they not?

According to Lessig, we should distinguish between the Internet and cyberspace<sup>6</sup>, both of these elements completing the area of virtual space. Internet is a medium of communication, while cyberspace "is not one place. It is many places. And the character of these many places differ in ways that are fundamental. These differences come in part from difference in the people who populate these places, but demographics alone don't explain the variance".<sup>7</sup> Cyberspace is composed of separate chatrooms, intranet gateways, digital envelopes and other systems to limit access, all these components resembling the effects of national borders, physical boundaries and distance.<sup>8</sup> In other words, as the two scholars cited had tried to explain, Internet is the medium while cyberspace is the society.

The existence of a person on the Internet acting in cyberspace is quite different from the existence in the real life.

While a "netizen" aka "citizen of the net" represents a person actively involved in online communities or the Internet, we should ask ourselves how many of his/her characteristics from the real life are taken in the virtual space?

As Lessig emphasized, in cyberspace there are no "abled" or "disabled", there are no "blinds", "deafs" or "ugly"<sup>9</sup>, there are no labels. We are as we speak.

There is a whole digital life ahead thus it is important to understand if this life and the cyberspace ensures rights and freedoms related to our digital identity.

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<sup>6</sup> L.Lessig, *Code. Version 2.0*, Basic Books New York, 2006, p. 83.

<sup>7</sup> L. Lessig, cited, note 5, p. 84.

<sup>8</sup> M. Stefik, *The Internet Edge: Social, Technical and Legal Challenges for a Networked World*, Cambridge: MIT Press, 1999, pp. 14-15.

<sup>9</sup> L. Lessig, cited, notes 5,6, p. 86-87.

## **II. The rise of new human rights.**

### **A new right to life from the virtual point of view**

In the **Guide to Human Rights for Internet Users**<sup>10</sup> adopted on 16 April 2014, by the Committee of Ministers of the Council of Europe, laid down the basic framework of principles to protect the fundamental human rights guaranteed by the European Convention on Human Rights for all internet users. The guide was designed as a tool to:

- be used by individuals and to be relied upon when facing difficulties in exercising their rights online;
- help governments and public institutions to discharge their obligations to protect, respect and remedy human rights;
- be a kick-starter for national discussions on protection and promotion of human rights of internet users and their empowerment in internet environments;
- promote corporate social responsibility by encouraging the private sector to act responsibly and with respect for the human rights of individuals they contract with.

The guide emphasizes that the protection of the right to freedom of expression, access to information, the right to freedom of assembly, protection from cybercrime, the right to a private life, and the protection of personal data are all equally protected online and offline.

According to paragraph 2, “(...)Human rights, which are universal and indivisible, and related standards, prevail over the general terms and conditions imposed on Internet users by any private sector actor.”

The Guide also speaks about the right to access to the Internet as an important means for people to exercise their rights and freedoms and to participate in democracy. People should therefore not be disconnected from the Internet against their will, except when it is decided by a court. In certain cases, contractual arrangements may also lead to discontinuation of service but this should be a measure of last resort.<sup>11</sup>

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<sup>10</sup> Council of Europe, *Guide to Human Rights for Internet Users*, Recommendation CM/Rec(2014)6 and explanatory memorandum of the Committee of Ministers to member States on a Guide to human rights for Internet users, Adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers' Deputies.

<sup>11</sup> Access and non-discrimination, par. 1, Appendix to Recommendation CM/Rec(2014)6. See note 2.

In my opinion the right to virtual life springs out from this new set of digital rights which are recognized by the international community, and especially from the right to access the Internet. As a matter of fact the right to access to Internet is interconnected to the right to virtual life, an *ante* condition in the absence of which the right to virtual life wouldn't have no sense.

Still there is no discussion on the issue of the right to virtual life, since neither of the European Documents, nor of the scholars do not name it or analyze this human right in their studies.

For example, The Internet Rights & Principles Dynamic Coalition<sup>12</sup> – which is an international network of individuals and organizations working to uphold human rights in the online environment and across the spectrum of internet policy-making domains – has drawn the Charter of Human Rights and Principles for the Internet<sup>13</sup> covering the whole gambit of human rights drawing on the Universal Declaration of Human Rights and other covenants that make up the International Bill of Human Rights at the United Nations<sup>14</sup>. In 2011, the coalition launched the Ten Punchy Principles<sup>15</sup>, a distillation of ten key values and principles underlying the Charter.

The Charter states the following rights and principles:

- 1) *Universality and Equality* - All humans are born free and equal in dignity and rights, which must be respected, protected and fulfilled in the online environment.
- 2) *Rights and Social Justice* - The Internet is a space for the promotion, protection and fulfilment of human rights and the advancement of social justice. Everyone has the duty to respect the human rights of all others in the online environment.

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<sup>12</sup> The Internet Rights & Principles Dynamic Coalition (IRPC) is based at the UN Internet Governance Forum, an open “multistakeholder” forum for government, business, and civil society groups to come together to discuss mutual points of concern that fall under the rubric of internet governance. See, <http://www.intgovforum.org>, accessed 1.09.2021.

<sup>13</sup> <http://internetrightsandprinciples.org>, accessed on 1.09.2021.

<sup>14</sup> The Charter is the outcome of work from many people and organizations over the years. See, <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>, accessed on 1.09.2021. At the UNESCO First WSIS +10 Review Meeting in early 2013 the IRPC set out on the second phase of the IRPC Charter, “Charter 2.0”.

<sup>15</sup> <http://internetrightsandprinciples.org/site/campaign>, accessed on 1.09.2021.

- 3) *Accessibility* - Everyone has an equal right to access and use a secure and open Internet.
- 4) *Expression and Association* - Everyone has the right to seek, receive, and impart information freely on the Internet without censorship or other interference. Everyone also has the right to associate freely through and on the Internet, for social, political, cultural or other purposes.
- 5) *Privacy and Data Protection* - Everyone has the right to privacy online. This includes freedom from surveillance, the right to use encryption, and the right to online anonymity. Everyone also has the right to data protection, including control over personal data collection, retention, processing, disposal and disclosure.
- 6) *Life, Liberty and Security* - The rights to life, liberty, and security must be respected, protected and fulfilled online. These rights must not be infringed upon, or used to infringe other rights, in the online environment.
- 7) *Diversity* - Cultural and linguistic diversity on the Internet must be promoted, and technical and policy innovation should be encouraged to facilitate plurality of expression.
- 8) *Network Equality* - Everyone shall have universal and open access to the Internet's content, free from discriminatory prioritization, filtering or traffic control on commercial, political or other grounds.
- 9) *Standards and Regulation* -The Internet's architecture, communication systems, and document and data formats shall be based on open standards that ensure complete interoperability, inclusion and equal opportunity for all.
- 10) *Governance* - Human rights and social justice must form the legal and normative foundations upon which the Internet operates and is governed. This shall happen in a transparent and multilateral manner, based on principles of openness, inclusive participation and accountability.

Even if the right to life is present in the sixth principle - *Life, Liberty and Security* -The Charter stating that "The rights to life, liberty, and security must be respected, protected and fulfilled online" – in the explanations of the Charter there is no direct reference to the right to life.<sup>16</sup> In fact the protection of the right to life on the Internet is inferred from the guarantee for *protection against all forms of crime, and nothing more*.

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<sup>16</sup> Art. 3 IRPC Charter - Right to Liberty and Security on the Internet. As enshrined in Article 3 of the UDHR: "everyone has the right to life, liberty and security of person". All security measures must be consistent with international human rights law and standards. This means that security measures will be illegal where they restrict another human right (for example the right to privacy or the right to freedom of expression) except for

*I cannot help but observe that the authors of the Charter did not make a difference between the right to life of a human being and the right to virtual life, because the charter is obviously protecting the right of physical life when jeopardized by the conducts occurring in cyberspace.*

In my opinion, all the Internet rights identified by the international actors or the doctrine, cannot be understood in the absence of the recognition of a right to virtual life, as a distinct right from the twin right of the physical life. We cannot accept that the virtual life would be an extension of the right to life in cyberspace since in cyberspace not only human beings could interact, as I shall demonstrate in the following subtitle.

### **III The right to life opposed to the right to virtual life. Are there any similarities?**

In the following subtitle I will try to draw a parallel between the right to life (RL) and the right to virtual life (RVL) to emphasize similarities and differences between these two rights and I will make the comparison observing a set of items: provision, environment, entitled actors, exceptions, duration, opposite rights, identity related issues, termination.

#### **A) Provision**

RL is provided by an important number of international, European and national constitutional provisions<sup>17</sup> – just to exemplify: art. 2 of European Convention of the Human Rights (ECHR), art. 1 of the Protocol no. 6 of ECHR, art. 3 of the Universal Declaration of the Human Rights, art. 6 par. 1 of the Protocol on the Civil and Political

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in exceptional circumstances. All restrictions must be precise and narrowly defined. All restrictions must be the minimum necessary to meet a genuine need which is recognized as legal under International law, and proportionate to that need. Restrictions must also meet additional criteria which is specific to each right. No restrictions outside of these strict limits are permitted. On the Internet, the right to life, liberty and security includes:

a) Protection against all forms of crime - Everyone shall be protected against all forms of crime committed on or using the Internet including harassment, cyber-stalking, people trafficking and misuse of one's digital identity and data.

b) Security of the Internet - Everyone has the right to enjoy secure connections to and on the Internet. This includes protection from services and protocols that threaten the technical functioning of the Internet, such as viruses, malware and phishing.

<sup>17</sup> Romanian Constitution provides the right to life by art. 22: "Right to life, to physical and mental integrity. (1) The right to life, as well as the right to physical and mental integrity of person are guaranteed. (2) No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment. (3) The death penalty is prohibited." The text of Romanian Constitution is available in English language at <https://www.presidentcy.ro/en/the-constitution-of-romania>, accessed on 1.09.2021.

Rights. The UN Convention on the Rights of the Child also provides the right to life by art. 6.<sup>18</sup>

RVL is provided only by the Charter of Human Rights and Principles for the Internet which, as I already pointed out, refers to the protection of RL as periled by the online environment. I conclude there is no provision of RVL, *by virtual life understanding the right to exist and act in the virtual environment (cyberspace)*.

### ***B) Environment***

RL is a right to be exercised and protected in the physical reality, being connected to the main feature of the human being – the physical life - and not conditioned by other human features like consciousness.

RVL is a right to be exercised in cyberspace which is a parallel dimension of physical existence, still not conditioned by the characteristic to be human as I shall demonstrate in following pt. C.

### ***C) Entitled actors and digital identity***

RL is guaranteed for human beings<sup>19</sup>, physical survival being a prerequisite for benefiting from various rights and liberties<sup>20</sup>. As shown by the doctrine, "it is by observing the characteristic features of human nature that the content of human rights can be known. Thus, the observation that Man is by nature a - living - social - and spiritual - being makes it possible to deduce that human rights protect the life and physical integrity of the persons (being), then their ability to found a family (living being), then that of associating and expressing oneself (social being) and finally the freedoms of the spirit (spiritual being).

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<sup>18</sup> Z. Pavlović, N. Paunović, Protection of Children from Sexual Abuse and Exploitation in International, European and National Legal Framework, in Z. Pavlović (ed.), Yearbook. Human Rights Protection. The Right to Dignity, No. 3, Novi Sad 2020, p. 318.

<sup>19</sup> Art. 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

<sup>20</sup> S. Reisoğlu, Right to Life, Journal of International Affairs, December 1998 - February 1999, Vol. III, No. 4, <http://sam.gov.tr/pdf/perceptions/Volume-III/december%201998-february%201999/SafaReisoglu.pdf>, accessed 1.09.2021.

The protection of these faculties ultimately aims at reducing the obstacles to the harmonious achievement of the personality, in all dimensions of human nature”<sup>21</sup>.

RVL is expressed by the digital or electronic identity. The digital identity is the electronic manifestation of the virtual life of an entity. Digital identity is defined as the information on an entity used by computer systems to represent an external agent. That agent may be a person, organization, application, or device. ISO/IEC 24760-1 defines identity as “set of attributes related to an entity”. Digitizing personal information is changing our ways of identifying persons and managing relations, e.g. over the Internet. What used to be a “natural” identity, e.g. the personal appearance of an individual at a counter, is now as virtual as a user account at a web portal, an email address, or a mobile phone number.<sup>22</sup> Digital identity may also be referred to as a digital subject or digital entity and is the digital representation of a set of claims made by one party about itself or another person, group, thing or concept.<sup>23</sup>

Digital identity is based on the principles of non-physical – reducing and sometimes eliminates borders at the level of the nation, religion, gender, race and age<sup>24</sup>. The participation in digital space significantly influences the construction of identity and alters the experience of self, creating the possibility of an ideal self, much different from the real one.<sup>25</sup>

But, as I pointed out lately, digital identity refers to an entity, not necessarily a human being. It could also be a legal person, a collective entity without legal personality and, also to an artificial intelligence system, eg. a *Bot*<sup>26</sup>.

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<sup>21</sup> G. Pupinck, The Dignity (and Indignity) of Human Life in International Law, in *Right to Life and Human Dignity, 70th Anniversary of the Universal Declaration of Human Rights*, Geneva 2018, p. 34, [https://christusliberat.org/journal/wp-content/uploads/2018/11/Right-to-Life-3-Dec-18\\_web.pdf](https://christusliberat.org/journal/wp-content/uploads/2018/11/Right-to-Life-3-Dec-18_web.pdf), accessed on 1.09.2021.

<sup>22</sup> K. Rannenberg, D. Royer, A. Deuker, *The Future of Identity in the Information Society*, 2009, DOI: 10.1007/978-3-642-01820-6.

<sup>23</sup> D. Deh, D. Glodović, The Construction of Identity in Digital Space, *AM Journal of Art and Media Studies* 16 (2018): 101–111. doi: 10.25038/am.v0i16.257.

<sup>24</sup> *Idem*, p. 104.

<sup>25</sup> *Idem*, p. 109.

<sup>26</sup> A Bot is a software program that operates on the Internet and performs repetitive tasks. While some bot traffic is from good bots, bad bots can have a huge negative impact on a website or application. Bots are automated, which means they run according to their instructions without a human user needing to manually start them up every time. Bots often imitate or replace a human user's behavior. Bots can be of many types: Chatbots (Bots that simulate human conversation by responding to certain phrases with programmed responses); Web crawlers (or Googlebots which are Bots that scan content on webpages all over the Internet); social bots (Bots



The presence in cyberspace is based on three elements: identity, authentication and credentials and there are, at some point certain similarities with the identity and authentication in real life as Lessig shows. But still, in real life we have id papers, passports, bank accounts, certificates and so on. In cyber space we have IP – Internet protocol address.

An IP address is a unique address that identifies a device on the internet or a local network. IP stands for “Internet Protocol“, which is the set of rules governing the format of data sent via the internet or local network. In essence, IP addresses are the identifier that allows information to be sent between devices on a network: they contain location information and make devices accessible for communication. The internet needs a way to differentiate between different computers, routers, and websites. IP addresses provide a way of doing so and form an essential part of how the internet works. An IP address is a string of numbers separated by periods. IP addresses are expressed as a set of four numbers — an example address might be 192.158.1.38. Each number in the set can range from 0 to 255. So, the full IP addressing range goes from 0.0.0.0 to 255.255.255.255. IP addresses are not random. They are mathematically produced and allocated by the Internet Assigned Numbers Authority (IANA), a division of the Internet corporation for Assigned Names and Numbers(ICANN).<sup>27</sup>

There are certain connections between RL and VL, since data from RL are stored in cyberspace. Still, *virtual existence has nothing to do with physical existence since a death person could continue to “live” online, his/her electronic identity not being erased.*

In fact there a scholars talking about a technospirituality – a sort of life after death in cyberspace.<sup>28</sup> The mass adoption of social network site has also resulted in an increasing number of profiles representing individuals who are no longer alive. However, the death of a user does not result in the elimination of his or her account nor the profile’s place inside a network of digital peers. Instead, the collaborative behavior of friends gives a continued life to the identity these profiles represent. The active use of profile pages of

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that operate on social media platforms); Malicious bots (Bots that scrape content, spread spam content, or carry out credential stuffing attacks). See <https://www.cloudflare.com/learning/bots/what-is-a-bot/>, accessed on 1.09.2021.

<sup>27</sup> ICANN is a non-profit organization that was established in the United States in 1998 to help maintain the security of the internet and allow it to be usable by all. Each time anyone registers a domain on the internet, they go through a domain name registrar, who pays a small fee to ICANN to register the domain. See <https://www.kaspersky.com/resource-center/definitions/what-is-an-ip-address>, accessed on 1.09.2021.

<sup>28</sup> J. R. Brubaker, J. Vertesi, *Death and the Social Network*, <http://www.dgp.toronto.edu/~mikem/hcieol/subs/brubaker.pdf>, accessed on 1.09.2021.

deceased users raises questions about the nature of death in this sociotechnical context. Social network site makes possible a technological “identity persistence”<sup>29</sup>. Researchers at the Oxford Internet Institute *found that, based on global 2018 estimates, the number of deceased people on the world’s largest social site – Facebook - could reach 4.9 billion by the end of the century.*<sup>30</sup>

#### ***D) Exceptions***

RL has limitations (exceptions) provided by Art. 2 ECHR. Human life cannot be intentionally terminated, with the exception of situations art. 2 and art. 15 ECHR refer to: Court Decisions (art. 2 par. 1 ECHR: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Even if Protocol No. 61, concerning the abolition of the death penalty, annexed to the Convention states: “The death penalty shall be abolished. No one shall be condemned to such penalty or executed”, Art. 2 of the Protocol authorizes the death penalty for acts committed during or under the risk of war. Other category of exceptions is provided by Art.2 par. 2 ECHR: “the use force which is no more than absolutely necessary” could result in death of a human being. In this category are included: legitimate defense, detaining and preventing the escape of a detainee, uprisings and quelling rebellions. Another category is that of war actions referred to by Art. 15 par.2 ECHR. Finally, suicidal conducts are also an exception from the RL.

RVL has no apparent limitations, but still those limitations exist. A person acting in cyberspace cannot erase the virtual identity of another cyber actor since the virtual identity is related to some extent to physical identity for human beings. Only “virtual suicide” is possible, a person being able to erase his/her own virtual identity, or at lit do his/her best to try it. Even in case of online social networks the administrators could only block the access of a person to that network, but cannot erase the virtual identity of the person who did not observe the rules on a specific online platform.

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<sup>29</sup> J.R. Brubaker, *I am an ID: Non/persisting our sociotechnical digital identities*. M.A. thesis, Georgetown University, Washington D.C., 2009, cited by J.R. Brubaker and J. Vertesi, p.1.

<sup>30</sup> The WALRUS, What Happens to Your Social Media Accounts after You Die, 4 June 2021, <https://thewalrus.ca/death-what-happens-to-your-social-media-accounts-after-you-die/>, accessed on 2.09.2021.

### ***E) Duration***

RL is guaranteed and protected on the entire duration of human life, from the moment of birth, until the moment of death. Still there is an emerging trend to extend a right to life before birth, and in particular from conception, and therefore to recognize prenatal legal personhood—in a seek to bestow rights on a zygote, embryo, or fetus that would be equal or superior to the rights of women. This trend is rooted in ideological and religious motivations while the discussion is far from being ended.<sup>31</sup>

RVL should be guaranteed on the entire existence in cyberspace from the moment of registering and achieving virtual identity. Is very interesting that the moment of termination of VL is not easy to determine since the erasure of the virtual presence – the virtual account - in cyberspace does not necessary lead to a "virtual death", traces of a virtual existence being identifiable online. For example, through metadata search the numeric identity even if was erased, could be detected due to other information related to the electronic ID.

To exemplify, The Internet Archive, a 501(c)(3) non-profit, is a dynamic and growing digital library of Internet sites and other cultural artifacts in digital form and provides free access to researchers, historians, scholars, the print disabled, and the general public, with the declared purpose to provide Universal Access to All Knowledge. The Archive was started in 1996 by archiving the Internet itself, a medium that was just beginning to grow in use. Like newspapers, the content published on the web was ephemeral - but unlike newspapers, no one was saving it. Today the Archive has 25+ years of web history accessible through the Wayback Machine and works with 750+ library and other partners through an Archive-IT program to identify important web pages. Today the Internet Archive contains: 588 billion web pages, 28 million books and texts, 14 million audio recordings (including 220,000 live concerts), 6 million videos (including 2 million TV news programs), 3.5 million images, 580,000 software programs<sup>32</sup>.

Even if we do our best, we cannot erase all our traces of digital identity, being impossible to obtain a 100% virtual erasure<sup>33</sup>.

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<sup>31</sup> For further information see L.M. Stanila, *Provocările bioeticii și răspunderea penală* [The Challenges of Bioethics and the Criminal Liability], Universul Juridic, București, 2015, pp. 89-114.

<sup>32</sup> <https://archive.org/about/>

<sup>33</sup> A. Ohlheiser, Erasing yourself from the Internet is nearly impossible. But here's how you can try, The Washington Post, 10 February 2017,

***F) Opposite rights and termination***

As regards RL, related to the moment of the termination of life, there is a dramatic debate on the right to death. As shown by the scholars, “the right to life is once again challenged, with judges and legislators introducing new exemptions not provided for in the original texts<sup>34</sup> of international conventions providing RL. For example, the Human Rights Committee, in the new version of its General Comments on the right to life<sup>35</sup>,” affirms the right to end the lives of unborn children and to assisted suicide. Also euthanasia is a hot topic of debate for obvious reasons.<sup>36</sup>

Regarding RVL, the opposite right of virtual death is indebatable since the virtual death occurs after the delete operation is performed. As a matter of fact there are several websites advising how to erase the electronic identity or the electronic footprint.<sup>37</sup> Delete operation<sup>38</sup> leads only to a 99% erasure of a person’s online information and should be performed, among others, by removing data entirely from data-broker services, deleting old email accounts, deleting social media accounts.<sup>39</sup>

In conclusion, if RL ends when human existence stops through death phenomenon, VL ends through the delete operation of the digital identity and digital traces. But, as I tried to explain, there is no perfect death in cyberspace, traces of a electronic existence still remaining hidden in metadata.

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<https://www.washingtonpost.com/news/the-intersect/wp/2017/02/10/erasing-yourself-from-the-internet-is-nearly-impossible-but-heres-how-you-can-try/>, accessed on 1.09.2021.

<sup>34</sup> G. Pupinck, cited, p. 37.

<sup>35</sup> Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 .

<sup>36</sup> See L.M. Stanila, cited, pp. 114-135.

<sup>37</sup> [https://myfuture.edu.au/career-articles/details/5-ways-to-clean-up-your-digital-footprint](https://myfuture.edu.au/career-articles/details/5-ways-to-clean-up-your-digital-footprint;);  
<https://eu.usatoday.com/story/tech/columnist/komando/2017/06/23/how-to-delete-yourself-from-the-internet/102890400/>; <https://www.vox.com/the-highlight/2019/9/11/20859597/internet-privacy-erase-history-google-facebook>; <https://www.inc.com/entrepreneurs-organization/10-ways-to-take-back-your-digital-identity.html>

<sup>38</sup> J. McKinley, How to Delete 99 Percent of Your Digital Footprint, Reader’s Digest, 29 July 2021, <https://www.rd.com/list/how-to-delete-your-digital-footprint/>

<sup>39</sup> For further information see <https://joindeleteme.com/how-we-work/>, accessed 1.09.2021.

#### IV Do we need a convention similar to ECHR for the virtual space?

As demonstrated in the present study, RL is the right to physical existence while RVL is the right to virtual existence. As RL is the right of all rights since we cannot imagine the exercise of the human rights and liberties in the absence of the right to life, so RVL is the right of all virtual rights since we cannot imagine the exercise of the rights and liberties in the virtual space, including the right to access to Internet, in the absence of the recognition of a right to virtual life.

Pope Benedict XVI's in his Encyclical Letter *Caritas in Veritate* has pointed out that humanity crosses a moral, philosophical and legal crisis, humanity struggling to recognize basic human truths: "The current crisis obliges us to re-plan our journey, [...] to discover new forms of commitment, to build on positive experiences and to reject negative ones. The crisis thus becomes an opportunity for discernment, in which to shape a new vision for the future"<sup>40</sup>. In regard with the words of Pope Benedict, scholars have shown that, in the same time, recent decades have witnessed the birth of the category of so-called "new rights", emerging from a theoretical approach that fragments the human being and promotes a selective and often conflicting concept of individual freedom<sup>41</sup>.

These new rights are rising due to dramatic transformations of our society and, part of them due to the movement of social relations in the virtual environment.

Since social actors are performing an important amount of their conducts online, it is obvious that those conducts should be properly regulated and submitted to principles guaranteeing the exercise of human rights and liberties in this new challenging environment – Internet and cyberspace. That is if our traditional human rights and liberties could not be adapted to the virtual space, we need new rights – new virtual rights which could ensure the safety and dignity of our very virtual existence.

In this new futuristic context, the recognition of a right to virtual life becomes necessary and natural.

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<sup>40</sup> Pope Benedict XVI, *Encyclical Letter Caritas in Veritate*, par. 21, [https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate.html](https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html), accessed on 1.09.2021.

<sup>41</sup> I. Jurkovic, *Editorial*, Right to Life and Human Dignity, 70th Anniversary of the Universal Declaration of Human Rights, Geneva 2018, p. 5, [https://christusliberat.org/journal/wp-content/uploads/2018/11/Right-to-Life-3-Dec-18\\_web.pdf](https://christusliberat.org/journal/wp-content/uploads/2018/11/Right-to-Life-3-Dec-18_web.pdf), accessed on 1.09.2021.

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**Dragan Obradović\***

## **THE IMPACT OF NEGLIGENT SUPERVISION OF PUBLIC TRAFFIC ON ROADS AND THE PROTECTION OF THE LIVES OF TRAFFIC PARTICIPANTS IN SERBIA**

*Each state, in accordance with its financial possibilities, pays due attention to the improvement of road traffic safety. During the XXI century, the Republic of Serbia has improved its legislation in this area through the provisions of the Law on Traffic Safety from 2009, ie the Law on Roads from 2018. In both regulations, there were or are provisions related to the obligations of the road manager in the event of a traffic accident. We have pointed out the most important problems from the aspect of legal solutions. We focused our attention on the inadequately placed traffic signalizations. The impact of negligent supervision of public road traffic on road safety has not yet been adequately recognized. The aim of this paper is for experts in practice to recognize this problem. This issue is important for every local community on the territory of our country, but also beyond, because these are the problems that most countries face.*

**Keywords:** public transport, roads, traffic participants, surveillance, traffic signalization.

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## 1. Introduction

Road traffic accidents with fatalities and/or material loss which according to their characteristics are criminal offenses are a reality in the world as well as in Serbia. According to the World Health Organization, 1.24 million people worldwide die in road traffic accidents, which means that every 25 seconds one person dies, while at the same time 20 to 50 million sustain injuries, whereas the costs of the consequences of these accidents amounts to billions of dollars per year (Murray et al., 2012; Jacobs et al., 2012). In its reports, the World Health Organization also confirms that road traffic accidents are one of the leading causes of death - over 1.25 million people die each year (WHO, 2016), incurring great material losses (in underdeveloped and middle-income countries about 5% of the gross national income (GDP), and in the developed nations up to 2% of the GDP). According to the data (WHO, 2013), the number of deaths in road traffic accidents in the world shows an increasing trend, so it is estimated that by 2030 road traffic deaths will become the fifth leading cause of death in the world. Road traffic injury (RTI) is the eighth leading cause of premature death globally, with 90% contributed by the low- and middle-income countries (WHO, 2018).

Road traffic functions within a system that consists of 4 basic elements: a driver – a vehicle – the road – the environment. Most often, an individual or road user is responsible for the occurrence of a road traffic accident, regardless of the capacity in which s/he had participated in the traffic. Of all the above factors in Serbia, little is known about the contribution of the road itself and how it impacts the suffering of a large number of road traffic participants or users. This is also pointed out by some other authors, who state that in the Republic of Serbia the road factor and the environmental factor are generally not recognized by the judiciary as a possible cause of road traffic accidents, and thus a small number of court cases are brought against road builders (Ivanišević, T., Miljanić, Z., 2015). Some authors point out that if roads as a cause of road traffic accidents were analyzed in Sweden and Serbia it would be wrong to conclude that roads in Serbia are much safer. Namely, data on traffic accidents in the Republic of Serbia indicate that in 3% of cases the road is the cause of traffic accidents, while in developed countries such as Sweden, the road is the cause in 36% of traffic accidents (Vujančić et al, 2012). Such “positive” results are mainly a consequence of poor data management on traffic accidents and inadequate classification of the causes of traffic accidents, and not a very high level of road safety in Serbia. Some domestic authors state that the road as one of the four basic factors of the traffic system occurs in 7.7% of cases as a contributing factor to road traffic accidents, according to world research (Grdinić-Rakonjac, Antić, 2020). A quality road with all its elements (hard shoulders, traffic signals, sidewalks, road equipment, central

reservations), is one of the five pillars of management that is recognized by the Global Plan for the Safety of Road Safety 2011-2020 and the Decade of Action for Traffic Safety (A 68/368) (Pešić, Rosić, 2014).

In Serbia there are rare examples of criminal cases being instigated for committing the crime of negligent supervision of public traffic, although the results of expert examinations on the causes of road traffic accidents (especially in accidents with serious injuries or fatalities) advise constantly that there is also the factor of the oversight of other individuals or entities, not only the direct participants in road traffic accidents. This primarily refers to persons in charge of maintaining roads or supervising the work of professional drivers. Therefore, it is reasonable to assume that there is a greater occurrence of the crime of negligent supervision of public traffic, especially in relation to bus and freight traffic and road maintenance.

There are several reasons for this: a lack of resources that objectively affect the quality of maintenance of vehicles, roads and facilities, the privatization of the largest trucking companies and maximized demands of owners who try to earn as much as possible with little investment in vehicles so maintenance services are forced to perform maintenance work superficially in order to prevent a 'minor' technical defect excluding vehicles from the road. For the same reason, professional drivers rarely have enough time to rest between two deliveries, which they agree to in order to keep their jobs but at the cost of deteriorating health and exposure to extreme physical and mental effort. Thus, they drive even when they are tired or under the influence of medication due to illness. In the event that they cause a road traffic accident by improper conduct, criminal proceedings are initiated against them for certain criminal offenses from the group against public traffic safety prescribed in the provisions of the Criminal Code of the Republic of Serbia (hereinafter: CC),<sup>1</sup> depending on the consequences, but as a rule there is no determination of the responsibility of the person who could be responsible for negligent supervision of public traffic. Such situations are not the case only in Serbia and not only within the crimes from the group against public traffic safety. Therefore, some authors rightly ask the following question: **do the police work in the public interest? (Cassan, 2017: 535).**

The impact of negligent supervision of public traffic on road traffic safety has not yet been adequately recognized. This is especially important for victims of road traffic accidents and their family members. This is indicated by some authors - **"The victims were forgotten people. But they are real." (Matsuzawa, 2020: 350). However, the**

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<sup>1</sup>Criminal Code, Off. Gazette of the Republic of Serbia, no. 85/2005 ... 35/2019).

**deficiencies in the provisions of the Code<sup>2</sup>** (the Criminal Procedure Code, which has been applied in relation to regular courts since October 1, 2013, hereinafter: CPC) **in regards to the issue of protecting the human dignity of victims of crime is undoubted. In particular if we are bearing in mind that the injured party is to await two more trials after the final conclusion of the criminal proceedings so that they can eventually collect compensation for the damages resulting from the proceedings (Obradović, 2020: 229).**

The aim of this paper is for experts to primarily recognize this problem, in Serbia as well as in all the countries in the Western Balkans - Southeast Europe, but also to acknowledge it more widely in practice. This issue is of global importance, as it is for every country, but also for every local community on the territory of our country. By properly recognizing and eliminating certain influencing factors - in this case the road, significant savings could be made both locally and globally. We will point out the most important legal regulations that refer to the responsibility of road traffic authorities, i.e. those responsible for road maintenance in Serbia. Having in mind the topicality and the breadth of this problem, we focused our attention on only one aspect of the problem, that being traffic signalization.

## **2. The most important domestic regulations from the aspect of road traffic safety**

The most important legal regulations in the area of road traffic are as follows: the Law on Road Traffic Safety (hereinafter: LRTS)<sup>3</sup> and the Law on Roads (hereinafter: LR).<sup>4</sup> Among the bylaws are the Rulebook on Traffic Signals (hereinafter: RTS)<sup>5</sup> and the Rulebook on the manner of regulating traffic on roads in work zones (hereinafter: the Rulebook).<sup>6</sup>

The most important regulation on public roads is the valid LR, which has been in use since 2018. Among other things, the LR defines **traffic signals and equipment** as

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<sup>2</sup> Criminal Procedure Code, Off. Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/19.

<sup>3</sup> The Law on Road Traffic Safety, Off. Gazette of the Republic of Serbia nos. 41/09, 53/10, 101/11, 32/13, 55/14, 96/15, 9/16, 24/18, 41/18, 87/18, 23/19.

<sup>4</sup> The Law on Roads, Off. Gazette of the Republic of Serbia nos. 41/18, 95/18.

<sup>5</sup> The Rulebook on Traffic Signals, Off. Gazette of the Republic of Serbia nos. 85/17, 14/21.

<sup>6</sup> The Rulebook on the manner of regulating traffic on roads in work zones, Off. Gazette of the Republic of Serbia, nos. 134/14.

follows: “traffic signals and equipment are means and devices for regulating traffic, traffic signs, road signs, traffic lights, bumpers or half-bumpers at railroad crossings, temporary traffic signals, light signs on the roads and other signs (road equipment) in accordance with the regulations governing traffic signals” (Art. 2, item 12). **Traffic signalization is one of the elements of a public road** (Art. 4, para. 1, item 8 of the LR). The Public Company Roads of Serbia is the road traffic authority responsible for the road management for national roads Class I and Class II, while local self-government units (cities, municipalities) are the responsible authority for municipal roads, streets and uncategorized roads.

The current **RTS** prescribes, among other things, the rules for installing traffic signals on public roads (RTS, Art. 1), and the classification of traffic signals: traffic signs; road markings; traffic lights; bumpers, i.e. semi-bumpers at railroad crossings; temporary traffic signals; traffic light signs and other signs (RTS, Art. 3). Also, the appearance and manner of installation of road traffic signs is laid out by this Rulebook, securing that traffic signs on the road are installed and marked on the basis of plans and in accordance with RTS and the regulations governing road traffic.

The **Rulebook** stipulates the direct regulating of traffic on roads with road works, the carrying out of road works, the appearance and manner of signage given by individuals (Rulebook, Art. 1), and installing road traffic signals in the work zone in accordance with valid regulations on traffic signals (Art. 3). The Rulebook prescribes in detail the manner of traffic regulation in work zones (Art. 10 -15), as well as traffic signaling in work zones (Art. 16-21).

### **3. Criminal offense: Negligent supervision of public road traffic**

The criminal offense of negligent supervision of public road traffic under Art. 295 of the CC relates to all types of traffic except for air traffic, considering the co-operation prescribed by the criminal offense of endangering air traffic safety (Art. 291 of the CC). The focus of our interest in the following text is essentially directed towards public road traffic, but the features of this criminal offense are common for all traffic types.

The above mentioned crime has two forms. The essential objective features are the following: the act of execution, the consequence, the perpetrator, while the subjective feature is the degree of guilt - intent or negligence. Item 3 stipulates negligence but only in relation to the basic form of the criminal offense.

The first specific feature of this crime is the fact that it is a *delictum proprium*, i.e. the **executor** may be an official or authorized person entrusted with the supervision. The concept of the official and responsible person or authority is defined by Art. 112 item 3, that is, item 5 of the CC. In court practice, the executors of these crimes mostly include the following categories: managers, conducters, certain railroad workers, etc. (Čejović: 1986: 940).

The CC envisages two forms of negligence, the first being the one when the perpetrator of the crime is both an official and the person responsible, and in the second case it is the person responsible. In regards to the person responsible as the executor, the difference is only in the nature of the obligations of the person responsible in regards to both forms. Having in mind the subject of this paper, our attention is focused only on the first form of the criminal offense.

**The executing of the first form of criminal offense** (para. 1) consists of an unscrupulous execution of supervised public traffic manifested in various forms: in relation to the occurrence and maintenance of traffic signs, transport means or public traffic, and meeting conditions which need to be complied with on the part of the road users or in the case of dangerous driving. The execution is of a **blanket character** as the supervision consisting of the duties and responsibilities of the official is envisaged by the appropriate regulations of public road traffic (bylaws and internal regulations). Therefore, the features of the official and responsible authority as well as the mandate in terms of supervision and omissions will be determined in each specific case. This criminal offense can be carried out in two ways: by omission or intent.

The **consequence** of both forms of offense consists in the occurrence of a specific danger to human life or great material loss.<sup>7</sup>

With regard to the **form of culpability**, the first offense can be committed with intent or by negligence.

#### 4. Responsibility of Serbian road managers - official data

Over the 2015-2019 period, according to the data of the Traffic Safety Agency (hereinafter: TSA), 2,867 people died in road traffic accidents in the Republic of Serbia,

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<sup>7</sup>According to the provisions of the Criminal Department of the Supreme Court of Serbia from April 17, 2006, a property with a larger volume are assets whose value exceeds the amount of 1,200,000 dinars. This legal proviso is still valid.

YEARBOOK  
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RIGHT TO LIFE

16,984 people were seriously injured, and 85,634 people had light injuries.<sup>8</sup> This can be seen from the table given.<sup>9</sup>

**Table 1:** Table 1-1: Basic indicators of traffic safety in the Republic of Serbia, period 2015-2019. Years

Year	TA DEAD	TA INJURIES	TA INJURED	TA MD	In total TA	DEAD	SEVERE INJURIES	MINOR INJURIES	INJURIES IN TOTAL	In total INJURED
2015	548	13107	13655	20513	34168	599	3448	15901	19349	19948
2016	551	13864	14415	21557	35972	607	3362	17308	20670	21277
2017	525	14286	14811	21664	36475	579	3514	17849	21363	21942
2018	491	13744	14235	21583	35818	548	3338	17508	20846	21394
2019	494	13735	14229	21541	35770	534	3322	17068	20390	20924
In total	2609	68736	71345	106858	178203	2867	16984	85634	102618	105485

Although the crime of negligent supervision of public road traffic provides an opportunity to initiate and conduct criminal proceedings against the road manager or the person responsible, this is not sufficiently recognized in everyday life by the competent authorities - primarily the police and public prosecutor's offices, whose decisions have an impact on the relevant courts, which is best shown by the data from the following tables.

**Table 2.** Crimes against public traffic safety: reported persons 2015-2019.

Year	2015.	2016.	2017.	2018.	2019.
In total	7856	7805	7724	8437	8701
Unscrupulous supervision of public transport	17	7	20	9	7

<sup>8</sup>Traffic Safety Agency, statistical-report-on-the-state-of-traffic-security-in-the-Republic-of-Serbia 2019, Jan. 10, 2021.

<sup>9</sup>Traffic Safety Agency, statistical-report-on-the-state-of-traffic-security-in-the-Republic-of-Serbia 2018, p. 11, Jan 10, 2021.

**Table 3.** Crimes against public traffic safety: convicted persons 2015 -2019.

Year	2015.	2016.	2017.	2018.	2019.
In total	2616	2176	2250	1974	2134
Unscrupulous supervision of public transport	9	1	1	0	1

The data from Tables 2 and 3 are the official data given by the Republic Statistical Office.<sup>10</sup> An uninformed observer could conclude that Serbian road authorities at the state or local level carry out an almost perfect road management, including traffic signals on roads, which is the central topic of this paper.

Confirmation of the previous statements are the TSA data regarding the distribution of the most common influencing factors in traffic accidents with fatalities in 2019 in the following group: impact of the road and road environment, where they state, among others, the following factors: *inadequate/unexisting or insufficiently visible traffic signals and/or road equipment* in 7 of 46 cases (TSA, 2019: 46).

### **5. Traffic signalization - a factor impacting road traffic safety**

One of the most common problems on the roads of the Republic of Serbia is inconsistent and incomplete traffic signaling. This has also been recognized by the Strategy of Traffic Safety on the Roads of the Republic of Serbia for the period from 2015 to 2020, which lists 16 main identified problems of road traffic safety in the Republic of Serbia in relation to road safety, including 4 problems directly or indirectly related to traffic signs, namely: unsafe road-rail crossings, a lack of a traffic signal register, the theft and damage of traffic signs and a lack of regulated school zones (Strategy, 2015).

The issues related to traffic signs were pointed out, first of all, by experts in the traffic-technical profession. In 2015, Papić and a group of authors recognized the influence of traffic signs on the occurrence of traffic accidents in an intersection zone. They stated that

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<sup>10</sup>Statistical Office of Serbia, Report 202 dated July 23, 2020. Adult perpetrators of crimes in the Republic of Serbia, 2019; Statistical Office of Serbia, Bulletin, Adult perpetrators of crimes in the Republic of Serbia, 2018; Statistical Office of Serbia, Bulletin, Adult perpetrators of crimes in the Republic of Serbia, 2017; Statistical Office of Serbia, Bulletin, Adult perpetrators of crimes in the Republic of Serbia, 2016; Statistical Office of Serbia, Report 189 dated July 15, 2016. Adult perpetrators of crimes in the Republic of Serbia, 2015; March 10, 2021.



the most common failures of road managers are related to traffic signs in intersections that can lead to conflict situations and result in traffic accidents: incorrectly installed traffic signs, incorrectly placed traffic signs and a lack of maintenance of signs, etc. In 2018, Marković and a group of authors recognized the road as one of the main factors that can have an impact on the occurrence of traffic accidents, while the paper systematically presented road issues that contributed to the occurrence or consequences of traffic accidents (Marković et al., 2018). In 2019, Marković, with a group of authors, analyzed only those traffic accidents where the road factor had an impact on the occurrence or consequences of a traffic accident, placing this factor in the third or fourth place, along with the condition of the road and the lack of traffic signs, both with 15%. This study was based on monitoring and an in-depth analysis of traffic accidents from 2016 on the territory of the Republic of Serbia. The main impact on the occurrence of traffic accidents was a lack of traffic signs highlighting priority to road users at intersections, after a change in priority given to one of the directions previously. In addition to the lack of traffic signs at intersections which regulate the priority of travel, there was often a lack of reinforcement of warning signs after the intersection, as well as a lack of prior warning signs giving the road users notice of the changes at the approaching intersection so that traffic users, especially when higher speeds were being used, were caught off guard at the appearance of vehicles, leading to a number of traffic accidents (Marković et al., 2019). The problems that most often occurred on both wet and dry roads were the lack of traffic signs and no protective fences. On dry roads, the absence of traffic signs was the second most important issue that had an impact on the occurrence or consequences of accidents (Marković et al., 2020). Other authors pointed out the problems and shortcomings that were observed on roads outside built-up areas in regards to horizontal and vertical traffic signs, which include faded signs on the road - most often pedestrian crossings signs in built-up areas or curbs and dividing lines on national roads (Antić et al., 2019). In 2019, Lipovac and a group of authors pointed out the same issues regarding traffic signs in the built-up areas - faded horizontal road signs, that is, old traffic signs not harmonized with the new Rulebook on traffic signals. Also, some traffic signs were hidden by vegetation, especially vertical ones in front of intersections (Lipovac et al., 2019).

Likewise, issues related to traffic signs were pointed out by other authors, especially in connection with traffic signs at road and railway intersections (Obradović et al., 2019). Considering that in the previous period of the validity of the RTS, the traffic **stop sign (II-2)** gave the command to the driver to stop the vehicle and give way to those vehicles moving on the other road, some legal experts pointed out that in this specific case, the

validity of the mentioned road traffic sign in Serbia fails to cover railway traffic but rather, only road traffic (Obradović, 2019:107). At the beginning of 2021, amendments to the Rulebook on traffic signals supplemented the definition of the traffic stop sign (II-2) in accordance with the proposals of the said author, so that now the stop sign (II-2) signifies a mandatory stop for the user who must come to a stop and give priority to the vehicles moving on the other road. This means that the user must stop the vehicle in front of the railway crossing and give priority to the train moving on the railway.<sup>11</sup> In any case, this is one of the positive changes in the aim of reducing the risk of accidents, mostly with fatalities, or in other words, in avoiding the potential responsibility of road managers for their criminal liability due to the absence or inadequately placed traffic signs.

However, one of the key problems in the Republic of Serbia is the lack of a traffic sign register. This problem was also cited by TSA in its review on the impact of roads on road traffic safety from 2019, which stated that expert assessments dealing with traffic accidents in Serbia are in support of the assumption that in the coming years the recognition of the road factor and its elements in the occurrence of road traffic accidents would be higher than it is currently and that it would amount to around 20% of traffic accidents with fatalities. In regards to the road as a factor of road traffic safety, one of the important characteristics which can be singled out and that is vital for traffic safety is road equipment: traffic signs and road markings (TSA - Review, 2019).

For these reasons, it is important for members of the police and especially public prosecutors who, according to the provisions of the CPC, handle the pre-investigation procedure or investigation, as well as for criminal judges, to be aware of the most important road traffic regulations which were pointed out previously.

From the legal aspect, it is important to pay attention to the height of traffic signs and the number of installed traffic signs on one pole, which is stipulated by the provisions of the RTS. If the traffic sign is not placed at the required height but it meets all the other conditions prescribed by the RTS, it is still not a traffic sign and has no legal basis. It is the same case when a greater number of traffic signs are placed on one pole than is allowed by the mentioned RTS.

All these issues, as well as many others that are not mentioned in this paper and which are observed in everyday life and relate to the shortcomings of horizontal or vertical traffic signs in the Republic of Serbia are a possible source of criminal liability of road

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<sup>11</sup> Rulebook on traffic signals, Off. Gazette of the Republic of Serbia, no. 85/17, 14/21.

managers in the case of negligent supervision of public traffic. This is valid not only for an individual natural person as the one responsible for road management, but also for a legal entity - road authority in accordance with the provisions of the Law on Liability of Legal Entities for Criminal Offenses.<sup>12</sup>

## **6. Traffic signalization and the responsibility of road managers**

For national roads Class 1 and 2, the Public Company Roads of Serbia undertakes the role of the road authority regarding the tasks related to guiding, monitoring and replacement of traffic signs. Equally, the road authorities of the local self-government units have the same tasks in each unit of local self-government on the territory of the Republic of Serbia for municipal roads, streets and uncategorized roads in terms of traffic signs. It is necessary to distinguish between oversights in the installation of signalization on roads outside built-up areas and the same oversights in cities or built-up areas.

Road works that must be marked in accordance with the mentioned Rulebook are a special issue.

One of the most drastic cases in real life that happened during November 2017 on the section of the future Corridor 11 under construction in the segment between the municipalities of Lajkovac and Ub, indicates the importance of properly placed traffic signs in the aim of road traffic safety. Namely, two people were killed when the driver of a passenger vehicle with foreign license plates, following traffic signals and signs, turned to the closed-off part of the highway,<sup>13</sup> ran into a concrete barrier on the 12th kilometer of the section where the highway stopped and fell into a hole. Almost all of the major printed and electronic media in the Republic of Serbia wrote or reported about this traffic accident, and this reporting also included images of the traffic signs directing users to that section of the highway towards Belgrade. In connection with this traffic accident, criminal proceedings are underway against the Public Company Roads of Serbia.

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<sup>12</sup>Law on Liability of Legal Entities for Criminal Offenses, Off. Gazette of the Republic of Serbia, no. 97/08.

<sup>13</sup><http://www.blic.rs/vesti/hronika/automobilom-se-zakucao-u-betonsku-barijeru-dve-osobe-poginule-na-neotvorenom-delu/yb3t3b9>, downloaded on Nov. 12, 2017: Two people were killed, while the driver of the car suffered multiple injuries in an accident that happened at around 4 in the morning on the closed-off section of Corridor 11 from Lajkovac to Ub.

Not long after that, in December 2017, another incident took place in the village of Bečmen, where a ten-year old child died due to an inadequate installation of traffic signs at the pedestrian crossing after the completion of some recent road works.<sup>14</sup>

Also, one of the cases that led to the criminal liability of the road manager was incurred by a washed-out road sign on a pedestrian crossing, which, regardless of this particular case, was pointed out by some traffic experts, some of whom we mentioned in the paper. Namely, a traffic accident occurred in Valjevo in which a minor crossing the road at night over a partially visible pedestrian crossing was injured by a vehicle being driven by a driver from Pančevo. A traffic expert stated the following in his written findings and report:

“Based on all the above, I am of the opinion that:

- A dangerous road traffic situation was created by N. (a minor) who, believing that he could cross the road using the pedestrian crossing in a safe manner, given the width of the road (9.8 m) that is made up of three lanes, while over one of these lanes there was no clearly marked pedestrian crossing (the right traffic lane), thus making an oversight causally related to the occurrence of this accident.
- The suspect driver was not warned about the pending pedestrian crossing by a traffic sign nor was he able to see N. in the night driving conditions due to vehicles on the left side and the part of the marked pedestrian crossing in the middle and left traffic lanes from a sufficient distance. Thus, on his part there was an oversight causally related to this accident had the vehicles in the middle and left traffic lane stopped in front of the pedestrian crossing (which would correspond with the statements of N. and witnesses D.B. and D.M.), if in my opinion the suspect could predict the appearance of pedestrians on the road and reduce the speed of his vehicle.
- The lack of a “marked pedestrian crossing” traffic sign (III-6) and an unmarked pedestrian crossing on the part of the road on the right hand lane is a failure of the road manager, in this case the PE Roads of Serbia Belgrade, which is in a causal connection with the occurrence of a dangerous road traffic situation due to the fact that the participants in this accident were misled,

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<sup>14</sup> <https://www.blic.rs/becmen>, 22:45, accessed on 12.8.2018. BOY KILLED AT INADEQUATELY MARKED CROSSING Did little Nikola (8) die due to the FAILURE OF THE ROAD BUILDERS? Dec. 22, 2017.

which in turn led to the defendant crossing the marked pedestrian crossing and the suspect moving on a road with no pedestrian crossing.”<sup>15</sup>

A common problem for all roads in Serbia, and therefore a reason to implement the provisions of the mentioned bylaws are the so-called “accident blackspots” which are inadequately marked by traffic signs in the manner prescribed by the provisions of the LRTS and applicable bylaws. Therein, the LRTS stipulates the following: “Traffic signs must also mark the dangers of a temporary nature, especially those arising from sudden damage or road closure as well as temporary restrictions and traffic bans, and these signs must be removed as soon as the causes are rectified (Art. 132, para. 2).” The failure of the road authorities to act in an adequate manner in situations when a vehicle encounters a blackspot and incurs a traffic accident with consequences or damage to the vehicle is the responsibility of the competent authorities.

Another serious problem on all Serbian roads that can lead to the driver being at fault are vandalized and damaged traffic signs, as well as faded and barely visible horizontal signs, which is especially evident in built-up areas. All this and much more counteracts the provisions of Art. 134 of the LRTS, and may result in such traffic signs not having a legal basis due to not meeting the requirements of the prescribed RTS.

Moreover, the issue of the responsibility of road managers is not only a question of their criminal liability for the said offense; moreover, this issue is also important from the aspect of compensation, which was discussed in other works by some authors (Obradović, Makieka, 2016).

## **7. Conclusion**

The importance of properly placed traffic signs on all roads - in or outside built-up areas and especially on vital national roads is incalculable. Properly placed road traffic signs have a great impact on reducing the number of road traffic accidents, reducing fatalities and damage resulting from the traffic accidents, thus contributing to increasing road traffic safety for all participants.

The swift elimination by the road managers of oversights such as (un)installed or improperly installed traffic signals, as well as the efficient sanctioning of road users’

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<sup>15</sup>The findings and opinion of the traffic technical expert given in the case of OJT Valjevo Kt.no. 612/15 dated April 4, 2016 (excerpt from findings and opinions).

oversights that cause or contribute to the occurrence of road traffic accidents can lead to an overall increase in road traffic safety for all participants.

The oversights of road managers consisting of inadequately installed or (un)installed traffic signs must be not only registered more in the coming period by competent authorities (primarily the police and the public prosecutor, and then by traffic experts who during the investigation usually perform the expertise to determine the road traffic accident causes), but also penalized, thus contributing to the improvement of the overall road traffic safety as well as a reduction in the number of fatalities in Serbia. In effect, this is in line with the goals of the United Nations set during both the previous decade and for the new ten-year period. In addition, investing in traffic infrastructure in general increases the flow of people and goods on all roads and improves the overall position of the Republic of Serbia internationally. Thus, it also contributes to the increase of revenues for the domestic budget.

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**Sladana Jovanović\***

## **CRIMINAL LAW PROTECTION OF LIFE IN SERBIA: NECESSITY OR PENAL POPULISM?**

*The paper deals with actual criminal law protection of the right to life in Serbia, focusing the legal provisions related to criminal offenses against life and body, and the latest legislative changes. The most important question is whether the current situation is based on the necessity and the real need for better protection of the right to life or is it just populist manoeuvring of the creator of legislative penal policy? The author presents available statistical data and research results relevant to the subject, throwing a glance to comparative law, in order to indicate some directions for future legislative intervention.*

**Keywords:** right to life, crimes against life and body, murder, tightening penalties, life imprisonment

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## 1. Introduction

The right to life is undoubtedly the most important human right, the basis for the exercise of all the others, and as such is especially emphasized in the most important international documents, and its protection is provided in various ways by national criminal legislation<sup>1</sup>. The Article 2 of the European Convention on Human Rights ranks it as one of the most fundamental provisions, which in peace time, admits of no derogation under Article 15. Together with Article 3, it enshrines one of the basic values of the democratic societies, and its provisions must be strictly construed. Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions (European Court of Human Rights, 2021: 6).

The inviolability of the right to life is also guaranteed by the Constitution of the Republic of Serbia<sup>2</sup> under Article 24, related with the non-existence of the death penalty, pointed out in paragraph 2 of the same Article. The Criminal Code of Serbia<sup>3</sup> (the CC), on the other hand, envisages numerous criminal offenses protecting the right to life, but in this paper the focus will be on the offenses from the group of criminal offenses against life and body (Chapter XIII of the CC). Namely, in description of different criminal offenses, the primary object of protection is some other right or value, but if an offense results in death of the person against whom it is committed, the offense becomes aggravated one (e.g. rape - Article 178, paragraph 4 of the CC).

As the right to life is the most valuable human right, in the context of current expansive and explosive populism as a suitable technique of governing, penal populism related to demands for harsher punishment of those who endanger or violate another's right to life has flourished. It is not only harsher punishment that is associated with increasing penal populism and moral panic over fear of crime (especially as serious as murder or another offense resulted in death of another human being), but phenomena that should also be viewed in the same light are new incriminations that cannot always be justified by social or criminal justice needs and requirements.

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<sup>1</sup> These offenses known as *mala in se* exist as criminal ones from the earliest times in written legal history, being envisaged as the most serious felonies, in the first place in the special part of national criminal laws (Jovašević, 2017: 11).

<sup>2</sup> Official Gazette RS, No. 98/2006

<sup>3</sup> Criminal Code, Official Gazette RS, No. 85/05, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019

Let's have a look at state of play in Serbian criminal legislation, having in mind that at the global level that homicide rate in Europe is decreasing (in 2017 by 63% compared to 2002 (UNODC, 2019 : 1)) and that Serbia is not mentioned in the UNODC latest report regarding some specific problem related to the homicides.

## **2. Criminal homicide - from Dušan's Code to the Criminal Code 2005**

Before the middle of the 14<sup>th</sup> century and Dušan's Code<sup>4</sup>, murderers were punished with enmity ("vražda")<sup>5</sup>, but Dušan's Code introduced a cruel Byzantine system of corporal and capital punishments, e.g. murder of a father, mother or brother, son or daughter was punished by burning (Article 94 of Dušan's Code). The same Article stipulates that the one who killed the clergyman will be "killed and hanged". Different punishments were envisaged for the murder of a peasant by a landowner and vice versa. In the first case, the penalty was a fine, and in the second one - cutting off both hands and a fine three times lower (Article 91). A distinction is also made as to whether the murder was committed "by force" or not, so the penalties were different (cutting off both hands or paying a fine of 300 perpers - Article 84).

Mateja Nenadović's Code (1804) introduced mutilation on the wheel for a murderer, and in Kradorde's Criminal Code (1807) "half a year in iron" was a punishment for involuntary manslaughter, perpetrator being obliged to pay a compensation to the family of the murdered, while premeditated murder was punishable by death (execution by shooting and hanging). Infanticide was also sanctioned with the death penalty, and the mother who committed this act could not be pardoned. In the case of murder or torture of witch-woman, the perpetrator was treated the same way (Jovašević, 2016: 68-69)

The Criminal Code for the Principality of Serbia (1860) envisaged three forms of aggravated murder (murder with malice aforethought, murder of a relative in the direct blood line, murder for the purpose of committing or concealing another criminal offense), as well as voluntary manslaughter, involuntary manslaughter, and infanticide. Although envisaged in the Draft Code of 1857, mercy killing wasn't enacted. Murder was considered a felony punishable by capital punishment, long term imprisonment or imprisonment with hard labor.

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<sup>4</sup> Dušan's Code, Bistrica transcript, Belgrade: Edition, 2020.

<sup>5</sup> "Vražda" (enmity) was a form of compensation for murder – one half of the sum was paid to the state, the other one to the family of the murdered (Živanović, 1935: 65)

The Criminal Code of the Kingdom of Serbs, Croats and Slovenes (1929) envisaged offences of murder, aggravated murders, and “privileged” criminal homicides. Murder was aggravated one if it is committed with premeditation (“after mature thinking”), if it is committed with poison or in a cruel way, endangering the lives of several people, out of selfishness or to commit or conceal another crime, and as a repeated offense (sentence was a death penalty or life imprisonment). Mercy killing appeared as a new form of criminal homicide.

The Code of the Federal People's Republic of Yugoslavia (1951) recognizes provisions similar to actual ones when it comes to criminal homicide from the group of crimes against life and body: murder - punishable by at least five years of prison; aggravated murders are murders committed in a cruel or insidious manner, or in a way that endangers the lives of other persons, or out of greed, or for the purpose of committing or concealing another crime or from other base motives, or if several persons are murdered (punishable by imprisonment for at least ten years or by death penalty). The same punishment was envisaged for a perpetrator who was previously convicted for murder, but has repeated the offense. The amendments in 1959 introduced new forms of aggravated murder: the murder of an official or a member of the military during discharge of their duties related to keeping up public order, the apprehension of a perpetrator of a criminal offense or the custody of a person deprived of liberty; callous revenge was added to the base motives, and it was specified that the same punishment is prescribed for a person who commits several murders, regardless of whether he has been previously convicted of a murder or is being tried by applying the provisions on joinder of offenses.

The tightening of penal policy in the field of criminal law protection of life was introduced by the amendments in 1973, when Article 135 got a new paragraph envisaging the possibility of punishing a perpetrator with 20 years of rigorous imprisonment for murder if it is accompanied by particularly aggravating circumstances (other than those that constitute envisaged aggravated murders). However, the Criminal Law of the Socialist Republic of Serbia (1977) omitted the previously mentioned provision, introducing two new forms of aggravated murder - murder with callous violent behavior and murder out of blood revenge. Protection was also given to a “person engaged in maintenance of public security in order to achieve goals of social self-protection”.

Assisting a juvenile in aggravated murder and intentionally preparing the crime of murder were also incriminated<sup>6</sup>.

Amendments to the Criminal Law (2002) enacted the abolition of the death penalty and its replacement by a sentence of 40 years for aggravated murder. The above-mentioned forms of aggravated murder remained, except for the modification of the form related to the murder of an official: “who causes death of an official or serviceman during discharge of their duty related to state or public safety, keeping up public order, apprehension of the perpetrator of a crime, or custody of the person deprived of liberty or who causes death of another person who perform these duties on the basis of law or other regulations”. Callous revenge became one of the base motives (alongside blood revenge). Possibility of sentence mitigating was envisaged (in paragraph 3 of Article 47 of the CL 2002) for an accomplice (in murder or aggravated murder) who discovers the crime, the perpetrator or the organizer.

New Criminal Code (2005) “strengthens” the criminal protection of life by adding new forms of aggravated murder: the murder of a child or a pregnant woman, and the murder of a family member who was previously abused (Article 114, paragraph 1, items 7 and 8). Explanations were based on the need for enhanced criminal law protection of children (Stojanović, 2006: 329), while increased pressure, primarily from women's non-governmental organizations and the emphasis on the prevalence and danger of domestic violence brought new form of murder under item 8.

The Code, however, omitted blood revenge as a motive for aggravated murder under item 5 (which was explained by the reduction in the number of such cases, as well as by the possibility that blood revenge could be classified as callous revenge or other base motive (Stojanović, 2006: 327)).

Murder during robbery or grand larceny has been transferred from the group of property crimes to the group of offenses against life and body, thus emphasizing life as the primary object of protection. Also, murder out of mercy has been placed on the list of “privileged” homicides, but now as mercy killing (Art. 117 of the CC), while murder out of negligence has become involuntary manslaughter (Art. 118). Although the characteristics of both offenses remained the same, their names were changed in order to make a distinction in relation to the murder, as an act done with intent, i.e. with motivation that is for (severe)

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<sup>6</sup> On the development of criminal homicide incriminations in Serbia and other former republics of the SFRY: Kolarić, 2008: 36-44.

condemnation. The most severe prison sentence for aggravated murder is now prescribed in the range of 30 to 40 years.

### **3. The Criminal Code (2005) Amendments**

Since the entry into force of the Criminal Code, there have been a number of amendments relevant to the topic of this paper, which generally point out to an upward trajectory in terms of repression, i.e. introduction of new incriminations or changes of existing ones, and tightening penal policy in general. The year 2009 could be highlighted as a year of criminal law expansionism, repression and solutions that might be approved and praised by the lay public (intimidated by sensationalist media reports that fuel the fear of crime and horrific offenses) while in the professional literature such solutions and tendencies were criticized in detail (Stojanović, 2010; Soković, 2011, etc.). The RS Government explained drafted amendments and tightening of the penal policy by emphasizing the passage of time since the CC entered into force and the state of crime in Serbia (without giving details), and by describing the penal policy of courts in Serbia as too mild). Harsher punishments have been prescribed for a third of criminal offenses, in order to “strengthen general prevention and deter potential perpetrators of criminal offenses, as the main goal of the substantive criminal law” (Government of the RS, 2009: 38).

In 2009, two new forms of aggravated murder appeared: the murder of a judge, public prosecutor, deputy public prosecutor or policeman related to discharge of their duty and person who perform work in public interest related to discharge of his duty (Art. 26 of the Act on Amendments to the CC). Although a judge, public prosecutor, etc. are considered officials that have protection under item 6, now the scope of their protection is expanding (but only for them, not for other officials). Now, they are protected not just “during performance of the duties” but “related to the performance of duties”. Also, another new form of aggravated murder protects those who do not have the status of an official, but perform work of public importance. Work of public importance is considered to be performing duties or profession that has an increased risk for the safety of a person who performs it, and refers to occupations that are of importance to public information, health, education, public transport, legal and professional assistance before the court and other state authorities (Article 112, paragraph 32 of the CC). It could be expected this list to be expanded eventually by declaring some other job a work of public importance, especially if a horrible murder of a certain professional happen. Namely, these novelties in the already wide register of aggravated murders are a consequence of the events that



preceded the amendment of the CC<sup>7</sup>, as well as the demands of various professionals who do not feel safe, asking for better protection, or status of an official.

It should be pointed out that there is no explanation of the Government regarding new forms of aggravated murder. It is simply stated that Article 114 of the CC has been amended by new forms of aggravated murder (Government of the RS, 2009: 40). It is also worth mentioning that the protection of life and body of vulnerable categories is not consistently envisaged in other provisions (serious bodily harm, Article 121 of the CC, endangerment, Article 125 of the CC) - protection is provided for pregnant women and juveniles (not just for children, as it is the case with the new form of aggravated murder), and a person performing work of public importance is more protected by the incrimination of serious bodily harm (Article 121, paragraph 6 of the CC), as the relation between the bodily harm and the work performed by the victim is not an element of the offense (as it is in the aggravated murder under Article 114, paragraph 1, item 8 of the CC).

In the same year, the CC was amended once again (after only three months from previous amendments), and it was quite clear that the reason was the “Brice Taton case”<sup>8</sup>. Namely, on August 31, 2009, the first set of amendments was adopted, and on December 29, new ones were introduced, in order to strenghten repression towards sport fans and fan groups. Tragic death of Brice Taton seemed to be a trigger for another intervention in the criminal legislation (but deficient, as expected, given that it was a hasty move that should have shown the state's determination to deal with the sport fans), although even prior to that event there were legislative interventions that obviously did not contribute to solving the problems with sport fans). Undoubtedly, decision makers dare to intervene in the legislation without devising good, functional, comprehensive solutions, but hastily, in relation with individual case, in need to satisfy populist demands driven by fear or appalling crime<sup>9</sup>.

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<sup>7</sup> The murder of the president of the Municipal Court in Knjaževac, Dragiša Cvejić, in 2008, was a famous one (he died in explosion of a bomb attached to the gate of his yard). Prior to that tragedy, the same perpetrator tried to murder another judge in the same way, but his wife was killed instead (Vuković, Božinović, 2015).

<sup>8</sup> Brice Taton, 28, a Toulouse supporter, sustained brain damage after Partizan Belgrade fans attacked French supporters in a bar on September 17. He died on September 29, 2009. France 24, News Wires (2009, September 29<sup>th</sup>) French Fan dies of Injuries after Belgrade hooligan attack, available at: <https://www.france24.com/en/20090929-french-fan-dies-injuries-after-belgrade-hooligan-attack->, accessed on 31. 7. 2021.

<sup>9</sup> The Law on the Prevention of Violence and Misconduct at Sports Events was adopted in 2003 (Official Gazette of the RS, No. 67/2003, 101/2005, 90/2007, 72/2009, 111/2009, 104/2013, 87/2018), but, obviously, having in mind current events in Serbia, it did not have much effect, although it was amended several times). Interesting inconsistency related to the measure of banning attendance at certain sport events is that a similar measure has

In 2012, the circle of persons enjoying protection as officials was expanded, because the interpretation of this term was amended, due to the recommendation of the Council of Europe (GRECO) (Government of the RS, 2012: 9) regarding combating corruption offenses (but the amendments are to be applied to aggravated murder referred to in Article 114, paragraph 1, item 6 of the CC). Thus, officials are: a notary public, a public enforcement officer or arbitrator, as well as a person in an institution, enterprise or other entity who is assigned discharge of public authority, who rules on rights, obligations or interests of natural or legal persons or on public interest (Article 112, paragraph 3, item 3 of the CC)<sup>10</sup>.

The new amendments (relevant for the topic) were adopted following the above mentioned model - hastily, insufficiently well thought out, unexplained - in 2019<sup>11</sup>. They were also on the line of intensifying repression. The legislator has introduced new purpose of punishment – “achieving justice and proportionality between the gravity of the crime and the imposed criminal sanction”, thus emphasizing retribution, but it is unclear why the criminal sanction is mentioned (because the punishment is just one type of criminal sanction). So, we can conclude (again) that has been a bad, hastily done intervention.

The explanation of the Draft Law on Amendments to the Criminal Code stipulates that previously mentioned amendment provides “guidelines for judges to take this reason into account when determining the sentence in order to achieve the purpose of sentencing in each individual case” (Government of the RS, 2019: 2). Obviously, it is an important message to the courts and judges, suggesting that the legislator does not trust them too much, therefore striving for harsher penalties. That is why, since 2009, there has been so many restrictions and directions for judiciary, so many confusing solutions (let's just mention restrictions related to mitigation of penalty<sup>12</sup>, conditional release<sup>13</sup>, inconsistencies in two systems of imposing fines<sup>14</sup> in the field of substantive criminal law, and on the other hand “trade in justice and truth” in the field of criminal procedure law – by giving great importance to the defendant's confession (resulting in speeding up the procedure and benefits for the defendant, but the confession itself doesn't has to be true

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a maximum duration of 8 years for a committed misdemeanour, and less for a committed criminal offense - 5 years, while the minimum is the same in both cases - one year (Jovanović, Marinović, 2016: 186).

<sup>10</sup> Official Gazette RS, No. 121/2012.

<sup>11</sup> Official Gazette RS, No. 35/2019.

<sup>12</sup> See: Delić: 2010.

<sup>13</sup> See: Chapter II (Conditional Release) in: Stevanović, Batričević (eds.) 2016: 363-475.

<sup>14</sup> See: Kolarić, Đorđević, 2016.

necessarily), prosecutorial opportunity, plea agreements and “prosecutorial sentencing”<sup>15</sup>; the most meaningless are the provisions of the Criminal Procedure Code<sup>16</sup> envisaging possibility of imposing a suspended fine sentence (Article 512, paragraph 3, items 1-2 of the CPC), which is an impossible, long-abandoned solution in criminal substantive law, showing clearly the miraculous inconsistency of substantive and procedural law, i.e. ignorance and/or negligence of the creators of the law, which, despite numerous changes in legislation, has not been corrected).

The most important amendment, and the most contested one by legal professionals (but welcomed by the majority of the lay public) was the introduction of life imprisonment (without a possibility for parole) instead of 30 to 40 years of imprisonment, which has been assessed by the Government as an inadequate punishment (but how that conclusion has been reached – has remained unknown) (Government of the RS, 2019: 3). The amendment could be considered a peak of repression, having in mind the existing problems with parole in Serbia<sup>17</sup>. It also shows disregard for recommendations and international law requirements (in the sense that life imprisonment without the right to parole may be viewed in the light of a violation of the Article 3 of the European Convention of Human Rights, as a form of inhumane or degrading punishment)<sup>18</sup>. Thus, for certain serious crimes, such as aggravated murder, it is possible to impose a sentence of life imprisonment (alternatively, a prison sentence ranging from ten to 20 years is prescribed, as before), but for aggravated murder under item 9 - murder of a child or pregnant women - there is no possibility of parole. The same applies to aggravated form of rape (Article 178, paragraph 4 of the CC), sexual intercourse with a helpless person (Article 179, paragraph 3 of the CC) - if the offense results in death of the person against whom it was committed or if committed against a child, and in cases of sexual intercourse with a child (Article 180, paragraph 3 of the CC) and sexual intercourse through abuse of position (Article 181, paragraph 5 of the CC) - if the offense results in death of the child. The legislator, obviously, succumbed to populist demands and arguments that only the harshest sentences provide adequate protection of the most vulnerable victims (children)<sup>19</sup>, while the argumentation related to international law and the historically

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<sup>15</sup> See: Bajović, 2015.

<sup>16</sup> Official Gazette RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021-Decision of the Constitutional Court, 62/2021-Decision of the Constitutional Court.

<sup>17</sup> See: Chapter II (Conditional Release) in: Stevanović, Batričević (eds.) 2016: 363-475.

<sup>18</sup> More about ECtHR jurisprudence: Grujić, 2019: 1115-1116.

<sup>19</sup> Explanation of the RS Government was that the initiative of the Tijana Jurić Foundation, supported by 158,460 RS citizens, has been crucial (p. 2).

proven ineffectiveness of such a concept of (declarative) social defence from crime, was rejected.

Some serious questions have remained unanswered: 1) why such a solution (life imprisonment without a possibility of parole) has not been adopted in relation to other serious crimes (genocide, crimes against humanity, war crimes); 2) why this type of protection has not been provided for children in terms of the Convention on the Rights of the Child<sup>20</sup> - children are all persons under the age of 18, while the term child, in our Criminal Code refers only to persons under the age of 14 (a minor is a person over fourteen years of age but who has not attained eighteen years of age; a juvenile is a person who has not attained eighteen years of age (Article 112, paragraphs 8-10 of the CC). As those amendments were initiated by the Tijana Jurić Foundation, due to one tragic death - the murder of a fifteen-year-old girl Tijana<sup>21</sup>, the question is: have the initiators taken into account that enhanced protection embodied in frighteningly severe punishment that should deter would-be perpetrators or punish adequately has been provided for children - persons under the age of 14, while other juveniles would not have this kind of protection.

Support for life imprisonment (without a possibility of parole) can indeed be linked to the regret and support for the death penalty that has been steadily increasing among Serbian citizens over a four-year period (until 2020). According to a survey conducted by the Serbian Association Against the Death Penalty there was over 60% of respondents favoured the death penalty (since 2014); in 2016, 2018, 2019 – 70%<sup>22</sup>.

There are more novelties related to aggravated murder: (disputed) ban on mitigation of penalty has been extended to aggravated murder (Article 57, paragraph 2 of the CC); its preparation has been incriminated explicitly (Article 114, paragraph 2 of the CC), and no statute of limitation for criminal prosecution and enforcement of penalty for offenses for which a life sentence has been prescribed (i.e., for aggravated murder) has also been envisaged (Article 108 of the CC). Therefore, more interventions were done in order to (declaratively) provide better protection from the most severe offenses against the most important right - the right to life.

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<sup>20</sup> Act on Ratification of the UN Convention on the Rights of the Child, Official Gazette of SFRY, No. 15/1990 and Official Gazette of FRY, No.4/96, 2/97 (Art. 1.)

<sup>21</sup> <https://tijana.rs/kazna-dozivotnog-zatvora/>, accessed on 10. 8. 2021.

<sup>22</sup> <http://www.smrtinakazna.rs/sr-latn-rs/javnomnjenje/ankete.aspx>, accessed on 13. 8. 2021.

The amendments caused an extraordinary public response, so it could be said that they left no one indifferent. Those who remained in the minority (most of them were legal professionals) have been named a false, hypocritical elite, which do not care about children, defending the rights of murderers and „monsters (that was, in short, the rhetoric during the process of adoption of the so-called Tijana's Law<sup>23</sup>). It seems that a state in which there is no common moral paradigm is unstable, unpredictable and insecure, or establishes its security with a pronounced tendency towards coercion and intimidation (Stevanović, 2017: 99).

#### **4. Available Statistical Data and Research Results**

Finally, let's take a look at the statistical indicators related to the topic. Are they on the rise, are they a cause for concern, how new incriminations are being applied and whether new repressive interventions and/or changes in legislation or in court practice should be considered.

Official statistical data on reported adult perpetrators of criminal homicide in the last ten years (2010-2019) indicate stability, and even a certain decline in the number of reported offenses compared to 2010. In the last observed year that number was almost halved. The annual average number of reports in that period is 246, while it was 455 in the (well-known as turbulent) period from 1994 to 2001 (Vuković, 2002: 369). Serbia had no special problems with criminal homicide in 2003-2007 period; in comparison with other European countries in 2006 Serbia had a lower homicide rate compared to all countries in the region, and it was 2 and a half times lower than the average rate in Europe (Ignjatović, 2013: 17).

The share of “privileged” criminal homicides is small (since 2013 the number of the reports is below 10 per year), while the lack of criminal offense reports for mercy killing throughout the observed period is conspicuous. The data that speak more about the topic refer to the participation of the homicides in the total of reported crime and it is also stable - according to the data of the Statistical Office of the Republic of Serbia (SORS) it is 0.3% (over the 2004 – 2017 period)<sup>24</sup>. Only in 2010 the share was slightly higher - 0.5%, and since 2013 it has been declining - 0.2%. The numbers of imposed 40-year sentences are single-digit (except in 2010 when 10 were imposed), and the situation is slightly

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<sup>23</sup> See: Milenković, 2019.

<sup>24</sup> <https://data.stat.gov.rs/Home/Result/140203?languageCode=sr-Cyrl>, accessed on 15. 8. 2021.

different when it comes to imprisonment lasting over 30 years (minimum: 4 - imposed in 2019, and the highest - 16 imposed in 2010)<sup>25</sup>.

Table 1. Criminal homicide reports 2010-2019 (adult perpetrators)<sup>26</sup>

Criminal Offense	2010.	2011.	2012.	2013.	2014.	2015.	2016.	2017.	2018.	2019.
Art. 113.	208	173	181	141	122	144	101	107	121	116
Art. 114.	117	96	111	79	67	100	90	80	93	60
Art. 115.	3	1	2	0	4	2	1	1	2	3
Art. 116.	4	2	5	0	4	3	4	1	2	2
Art. 117.	0	0	0	0	0	0	0	0	1	0
Art. 118.	3	9	3	0	1	3	0	3	1	3
Total	335	281	302	299	198	252	196	192	220	184

Data on certain forms of aggravated murder are conspicuously missing (because the SORS does not offer them), though some conclusions about them could be reached indirectly, based on available (fragmentary) court practice research (Simeunović-Patić, 2003; Kolarić: 2008; Simeunović-Patić, Jovanović: 2013 Jovašević: 2017; Turanjanin, Voštinić, Đorđević: 2017). Thus, e.g. the murder of a family member who was previously abused is very rare, although domestic violence is widespread in Serbia. There are no official data on such form of femicide, despite the fact they should exist due to international law requirements. According to data of the Network Women Against Violence<sup>27</sup>, as well as research results on murders of women in intimate partner relationships (1999-2011) - there was no one case qualified as the murder of a previously abused family member, although it seemed that have been grounds for that (Simeunović-Patić, Jovanović, 2013: 166-169). All cases were qualified most often as murders (or attempted murders), and few of them as murder in a cruel manner or murder of several persons. Just two cases of murder of a previously abused family member in Serbia were mentioned by Turanjanin et al. (2017) in the period 2006-2016. The noted problem is related to the incrimination itself is the interpretation of the notion of a family member, and the interpretation of the notion of previous abuse (Simeunović-Patić, Jovanović, 2013: 167; Đorđević, 2005). Thus, one who left his/her abusive partner after many years

<sup>25</sup> <https://www.stat.gov.rs/oblasti/pravosudje/>, accessed on 14. 8. 2021

<sup>26</sup> <https://www.stat.gov.rs/oblasti/pravosudje/>, accessed on 14. 8. 2021.

<sup>27</sup> Annual reports of the Network Women against Violence 2010-2020 (according to which about 30 women are killed annually in the context of partner violence, and the most common violence was committed over a period of several years and was reported to the authorities); available at: <https://zeneprotivnasilja.net/femicid-u-srbiji>, accessed on 15. 8. 2021.

of severe abuse cannot be (according to the provisions of Article 112, paragraph 28 of the CC) considered a family member (e.g. she/he was not married to abuser and they haven't a common child), and could not be a victim of that crime, even if the perpetrator abused her/him immediately before the murder. However, this form of aggravated murder is supposed to enhance the protection of women and other family members from (lethal) domestic violence. Let's conclude: that incrimination "does not work" properly; it has no application in practice, and judging by the data on domestic violence and stability of the rate of femicide - something else is crucial. So, incriminations as declarations promising severe punishment obviously have no effect. The same outcome is related to special circumstance that should be considered as an aggravated circumstance by courts in determining a punishment for a criminal offense committed in hatred<sup>28</sup> (it would be base motive included in the context of aggravated murder under Article 114, paragraph 1, item 5 of the CC) – there are no cases in court practice, although threats, street violence, intimidation, attacks and inappropriate comments regarding LGBTI individuals are still a big part of everyday life in Serbia (Mršević, 2017: 202).

When it comes to mercy killing - the entire time of its existence in the Criminal Code was marked by only one criminal report (in 2018) (RZS, 2019: 14-15). Introduction of this incrimination could be considered a hypocritical attempt to make a compensation for the absence of the euthanasia (as legal procedure). Thus, the legislator shows understanding and mercy for those who kill somebody out of mercy (under certain conditions), but also the respect for human life as the greatest value (although it lost its value for a dying person) (Jovanović, 2020: 542-543).

On a similar line (of the hypocrisy) is the incrimination of infanticide, which privileges a mother who in a specific condition caused by childbirth, during or after childbirth, deprives her newborn of life, due to such condition. The medical professionals don't consider such state a cause of infanticide. They point out that this element of the incrimination is just a legal construction without medical explanation (Marić, Lukić, 2002: 274-276). The motivation of a mother is usually clearly identifiable, and the issues of real, medical disorders should be solved by applying other criminal law provisions. So, either the incrimination should be regulated in a different, more honest manner (Kolarić, 2008: 304) or it should be omitted, because judging by some court cases in which the duration of childbirth disorder is widely interpreted, up to a month (Mrvić-Petrović, 2011:

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<sup>28</sup> Article 54a of the CC: "If a criminal offense is committed by hatred due to race or religion, national or ethnic origin, gender, sexual orientation or gender identity of another person, this circumstance will be judged by the court as an aggravating circumstance, unless it is prescribed as a feature of a criminal offense."

46) it is obvious that the incrimination is a poor legal solution. It would be worth considering amendments to the Act on the Procedure of Abortion in Health Care Institution<sup>29</sup> and allowing abortion after 10 weeks for the non-medical reasons (as they are predominant in cases of infanticide), which might have preventive effects (Jovanović, Simeunović-Patić, 2007: 156-157).

When it comes to other forms of (aggravated) murder that occur less frequently in court practice - the question is whether their existence on the list of aggravated murders is justified or their number could be reduced (having in mind that the list of aggravated murders has been expanding since 2005, and only the “blood revenge” as a base motive was omitted). Research from the period 1985-1993 (conducted in Belgrade) showed that the dominant form of criminal homicide is so-called ordinary murder (Article 113 of the CC), while on the top of the list of aggravated murders are murder committed in a cruel or insidious manner and murder out of base motives (just one murder was committed to commit or conceal another crime) (Simeunović-Patić, 2003: 70). The legislator should avoid tendencies of prescribing new criminal offenses (in general) in order to stop moving towards a casuistic normative approach in the field of criminal law (not only when it comes to the criminal offenses of homicide, it is a general trend) and confusion in practice, without beneficial effects (except for those related to collecting political points and the illusion of performing serious action against crime). Serbia, along with Russia and Ukraine, has the highest number of aggravated murders (Jovašević, 2017).

Prescribing punishment for preparing aggravated murder should not be left without criticism. This intervention also emphasizes the importance of life and its protection in the phase of preparation of the criminal offense (as in the case of the protection of the constitutional order and security of the RS), but it unnecessarily burdens the already complicated Article 114 of the CC. The same effects can be achieved by existing incriminations of different preparatory actions. If there had been a need to envisage more severe punishments, it also could be done within existing legal solutions.

## 5. Concluding Remarks

Frequent changes of criminal legislation, tightening of repression triggered by individual cases, without good thinking and respect of the lessons learned through history (that severe punishment is not an effective remedy and that criminal law should be *ultima ratio*), without respect of the criminal law principles and the reasonable needs of judicial

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<sup>29</sup> Official Gazette RS, No. 16/95, 101/2005.



practice, are clear indicators of weaknesses of the legal system and the creators of legal solutions (that are drafted and adopted hastily, often without public debate, and with the primary goal - meeting populist demands). The same happens to adoption of EU recommendations and requirements – adoption is superficial, without reflection, harmonization, even translations of the adopted solutions are problematic, and numerous technical omissions are present (such is the case, for example, with descriptions of criminal offenses envisaged in the Istanbul Convention) (Jovanović, 2017: 230-236).

The number of murders cannot be reduced by insisting on repressive responses, and as already has been mentioned – regarding available statistical and research data, Serbia does not have many problems with this form of crime (except those resulting from poor legal solutions and their interpretations) and the proponents of the amendments have never offered convincing explanations for them. The latest UNODC study clearly points to the importance of a governance model centred on the rule of law, control of corruption and organized crime, and investment in socioeconomic development, including in education, as critical in bringing down the rate of violent crime. Firearms and drugs and alcohol are further facilitators of homicide that need to be addressed, as well as dispute-resolution mechanisms that discourage recourse to violence, and reassure citizens that individual rights will be protected (UNODC, 2019: 31).

Undoubtedly, manipulation with the fear of crime and bloodthirstiness of people who believe that severe punishment is the ultimate solution proved to be an effective technique of governing. Thus, criminal legislation has been (mis)used to send populist/political messages and empty proclamations instead of representing a solid system of clear and applicable norms that is used as the last resort in protection against crime and does not change on a monthly or annual basis. Current “hammurabization” of criminal law is just an indicator of weakness, inability and/or unwillingness to invest more efforts in preventive activities, as well as in harmonious, sustainable and effective legislative reform.

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## **THE RIGHT TO LIFE – PROHIBITION OF DEATH PENALTY AND RIGHT TO LIFE IN PRISON**

*The right to life is non-derogable right that cannot be denied even in time of war or other public emergency threatening the life of the nation. The right to life is one of the highest social values without which all other rights and freedoms lose their significance. The European Convention of Human Rights imposes both positive obligation to protect the right to life and a negative obligation not to take life. Negative obligation includes state duty not to take life intentionally or negligently. A duty to safeguard life incorporates twofold approach, a duty to provide an effective and impartial investigation in cases of death resulting from the activities of state officials and a duty to safeguard and protect life. The author analyses both positive and negative state's obligation. The aspect of the state's positive obligation to protect life is assessed through protection of prisoners against killing and violence by other detainees and through the duty to offer prisoners healthcare, while the negative aspect is analyzed through the prohibition of death penalty. The author elaborates practice of the European Court of Human Rights and how interpretation of right to live progressed over time in these two specific groups of cases.*

**Keywords:** death penalty, right to life, capital punishment, duty to safeguard life, European Convention on Human Rights

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## **1. Right to life in the criminal justice**

The right to life was gradually developed from a religious belief in the sanctity of human life, through philosophical considerations of human life value to the right to life in international law (Wicks, 2010, p. 22). In international law, the right to life finds its most general recognition in article 3 of the Universal Declaration of Human Rights, article 6 of the International Covenant on Civil and Political Rights and article 2 of the European Convention on Human Rights (ECHR).

The right to life stands at the heart of human rights protection, since individuals cannot enjoy any of the rights guaranteed to them unless their physical existence is ensured (Tomuschat, Lagrange, Oeter, 2010, p. iii). In other words, the right to life is an inherent principle, because all other rights depend on the right to life (Mathieu, 2006, p. 15).

Although it is centrally placed, there are challenges to identify parameters of this right, because what starts as the least problematic of rights becomes distinctly problematic (Griffin, 2008, p. 213).

In accordance with article 2 of the Universal declaration of Human Rights and articles 2 and 26 of the International Covenant on Civil and Political Rights, everyone is entitled to the protection of the right to life without distinction or discrimination of any kind, and all persons shall be guaranteed equal and effective access to remedies for the violation of this right. Article 6 of the International Covenant on Civil and Political Rights recognizes the inherent right of every person to life, and it is supreme right from which no derogation is permitted even in situations of armed conflicts.<sup>1</sup>

Article 2 of the ECHR, present compromise agreed by the Committee of Ministers that includes definition of right and narrowly listed exceptions (Wicks, p. 44). Article 2 (1) lays down the general principle that everyone's right to life shall be protected by law.

Article 2 (2) lists the conditions under which deprivation of life is not regarded as being in violation of the ECHR. An exception of Article 2 in the deprivation of life can be established only when the use of force is no more than absolutely necessary. In addition, the conditions are set in an exhaustive list, covering three situations: defence, prevention of escape, and quelling a riot or insurrection. The exceptions included the death penalty

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<sup>1</sup> General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Human Rights Committee, 2018.

and lethal force in some circumstances of law enforcement. The death penalty was abolished with Protocol No. 6 specifically on the abolition of the death penalty, on 28 March 1983, and with Protocol No. 13 on the abolition of the death penalty in all circumstances, on 3 May 2002. Protocol No. 6 to the European Convention on Human Rights abolishes the death penalty in peacetime. It came into force on 1 March 1985. With Protocol No. 6, Europe's position changed from tolerating to prohibiting statutory killing. Protocol No. 13, which entered into force on 1 July 2003, bans the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war.

The enforcement of the ECHR will be elaborated in depth, especially in relation to death penalty and protecting life of persons deprived of liberty. Special focus will be on the interpretation of the right within the jurisprudence of the European Court of Human Rights.

## **2. Prohibition of death penalty**

The right to life in criminal law also influenced sentencing policy. This influence is especially elaborated in relation to death penalty. The right to life under the ECHR expressly permits the death penalty, but optional protocols to the Treaty have prohibited it and the position of states has evolved since adoption of the ECHR (Schabas, 2002, p. 260). From the beginnings of the Council of Europe there were parliamentarians who were advocating that the human rights organisation cannot reject the anti-death penalty sentiments (Yorke, 2010, p. 233). It took over the 30 years of debates against the death penalty and the regional restriction of the punishment occurred in 1983 when Protocol No. 6 was adopted on the removal of the death penalty in times of peace. This was result of the new dynamic following the Second World War that was to erupt in the 1980s (Hood, Hoyle, 2009, p. 6). The Explanatory Report on Protocol No. 6 states that Protocol affirms the principle of abolition of the death penalty and presents a centralised affirmation of an already existent state practice.<sup>2</sup> The Protocol No. 6 established obligation of the Member States to delete where appropriate, the death penalty from its law to become Party to the Protocol. More debates were required for the removal of death penalty in the wartime and only in 2003, Protocol No. 13 was adopted.

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<sup>2</sup> Explanatory Report to the Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, Strasbourg, 28.IV.1983, p. 2.

Every Council of Europe member state has signed and ratified Protocol No. 6, except Russia, which has signed but not ratified.<sup>3</sup> In relation to Protocol No. 13, which provides for the total abolition of death penalty, all Council of Europe member states but three have ratified Protocol No. 13. Armenia has signed but not ratified the Protocol, while Azerbaijan and Russia have not signed it.<sup>4</sup> Following acceptance of the Protocols No. 6 the Council of Europe member states strongly committed themselves to abolition, not only in their states but also called for universal abolition and insisted on the maintenance in the meantime of existing moratoria on execution in Europe.<sup>5</sup> Armenia was the last member state which abolished death penalty in peacetime in 2003, while Latvia was the last member state that abolished death penalty in wartime in 2012. However, the debates concerning the death penalty continue to arise. In many European countries leading politicians argue in favour of reinstatement of the death penalty (Toth, 2020, p. 3). Consequently, the public support to the re-introduction of death penalty is increasing in some European countries due to strengthening of populism.<sup>6</sup>

Due to the ECHR wording and lack of precise language in Protocols No. 6 and No. 13 that say that article 2 is amended, the European Court of Human Rights is forced to implement a Convention that expressly permits the death penalty, although there is now widespread acceptance of Protocol No. 6 and Protocol No. 13 that prohibit the imposition of the penalty.<sup>7</sup> The European Court of Human Rights adopted position that the normal method of Convention amendment is through the state practice in signing and ratifying optional protocols and asked for state unanimity to enable it to present an interpretation that article 2 had been amended.<sup>8</sup> This decision outlines the fact that the development of abolition of death penalty in member states does not necessarily signaling amending interpretation of article 2 (Mowbray, 2005, p. 65).

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<sup>3</sup> Chart of signatures and ratifications of Protocol 6 available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=114>

<sup>4</sup> Chart of signatures and ratifications of Protocol 13 available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=187>

<sup>5</sup> 2<sup>nd</sup> Summit of the Heads of State and Government of the Council of Europe, 1997.

<sup>6</sup> In 2017 in Hungary 52% would accept it in certain cases of life-threatening offences, available at: <https://dailynewshungary.com/hungary-stands-beside-death-penalty/>

In 2020, in France survey showed that 55% of the French people support reintroduction of the death penalty, available at: <https://www.rfi.fr/en/france/20200917-new-poll-shows-jump-in-number-of-french-people-in-favour-of-the-death-penalty>

<sup>7</sup> Only Russia has not ratified Protocol 6.

<sup>8</sup> *Öcalan v. Turkey*, Application No. 46221/99, judgement of 12 May 2005, para. 162.



However, the right's coherence is seriously damaged by an interpretation that permits executions in many states but prohibits extradition to those states for individuals who were arrested in an abolitionist state. To overcome the problem to interpretate that extradition to the country where person may face the death penalty is contrary to the right to life, the European Court of Human Rights created concept of the death row phenomenon and took position that death penalty could present inhuman and degrading punishment and treatment due to conditions facing an individual on death row, including very often long wait for execution (Matić Bošković, 2020, 69). In the case *Soering v. the United Kingdom*<sup>9</sup> the Court found that extradition to the United States would represent violation of article 3, particular because of the death row phenomenon where people spent several years in extreme stress and psychological trauma awaiting to be executed.<sup>10</sup>

The method of execution of death penalty was also subject of the Court assessment. The Court declared that exposure of a women to a risk of being stoned to death give rise to a violation of article 3 of the Convention.<sup>11</sup>

In November 2005 the Court modified its approach and interpretation of the deportation of a suspect with possibility of facing the death penalty. In the case *Bader and others v. Sweden*<sup>12</sup> the Court considered that article 2 may be implicated if a member state deports an alien who has suffered a denial of fair trial in the receiving state, the outcome of which is likely to be the death penalty.<sup>13</sup> The Court took position that only the risk of an execution is required and the determining factor in this case was the unfair trial.

### **3. Protecting life of persons deprived of their liberty in the practice of the European Court of Human Rights**

The principle that prisoners retain all rights apart from the right to liberty is recognized in several international and regional legal instruments (Kempen, 2008, p. 23). Specifically, rule 2 of the 2006 European Prison Rules states that “*persons deprived of*

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<sup>9</sup> Application no. 14038/88, judgement of 7 July 1989.

<sup>10</sup> See: case *Poltoratski v. Ukraine*, application no. 38812/97, *Kouznetsov v. Ukraine*, application no. 39042/97, *Nazarenko v. Ukraine*, application no. 39483/98, *Dankevitch v. Ukraine*, application no. 40679/98, *Aliev v. Ukraine*, application no. 41220/98 and *Khokhlitch v. Ukraine*, application no. 41707/98, judgments of 29 April 2003; *G.B. v. Bulgaria*, application no. 42346/98 and *Iorgov v. Bulgaria*, judgments of 11 March 2004.

<sup>11</sup> Case *Jabari v. Turkey*, Application no. 40035/98, judgement of 11 October 2000.

<sup>12</sup> Application No. 13284/04, judgement of 8 November 2005.

<sup>13</sup> Para. 42-48.

*their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody”.*

The right to life of detainees remains an issue which is often neglected in the academic discussions (Fournet, 2010, p. 177). The indiscriminate scope of application of article 2 undoubtedly covers all individuals, including detainees, therefore states must take the necessary steps to protect the life of those detained in prison. The vulnerability of detainees, any possible influence of the deprivation of liberty and the state’s obligation to protect them must bring along extra attention in handling and approach to each individual case (Thoonen, 2017, p. 167). The situation is a bit more complicated regarding the suicide prevention in prisons (Thoonen, Duijst, 2014, p. 121)

As recognized in the jurisprudence of the European Court of Human Rights, the states need to take appropriate steps to safeguard the lives of those within their jurisdiction. In 2006 the Court found that there had been a violation of Article 2 in the *Renolde v. France* case,<sup>14</sup> since French authorities had not taken the necessary measures to protect the life of detainee, who hanged himself in July 2000 in the prison cell, where he was in pre-trial detention. The Court also observed that prisoners known to be suffering from a serious mental disturbance and to pose a suicide risk. The important detail of this case was that in the same month he had already tried to commit suicide and that he had had issues with his mental health. For the Court, the state was obviously dealing with a prisoner known to be suffering from serious mental disturbance and posing a risk of suicide and, hence, someone who would have needed special attention. In addition, the Court noted that mentally ill persons are considered vulnerable and call for special protection. Another problem pointed out was the handing out of medication without any checking of whether the person is actually taking it. Based on those facts, the European Court of Human Rights held that the suicide of a mentally ill prisoner was attributable to the authorities’ failure to take adequate measures.<sup>15</sup>

In the case *Mitic v. Serbia*,<sup>16</sup> the Court emphasized again that authorities are responsible only if they knew or ought to have known about the real and immediate risk of suicide and, if so, did all that could reasonably have been expected of them to prevent that risk. In this case, the lack of any suicidal tendencies and normal behavior were sufficient for

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<sup>14</sup> Application No. 5608/05, Judgement of 16 October 2008.

<sup>15</sup> Similar position was taken in the case *Çoşelav v. Turkey*, application no. 1413/07, judgement of 9 October 2012; *Ketreb v. France*, application no. 38447/09, judgement of 19 July 2012.

<sup>16</sup> Application No. 31963/08, judgement of 22 January 2013.

the Court not to criticize authorities for not taking special measures to prevent suicide. In the absence of any specific cause for caution regarding a detainee's mental state, standard precautionary measures to prevent suicide and supervise prisoners are considered sufficient<sup>17</sup> and the suicide was not found to be the responsibility of the state.

The European Court of Human Rights has also used the right to life under article 2 as a mechanism to engage the right to health of prisoners, including the right to medical treatment (Lines, 2008, p. 17). The role of health service in prison is very complex due to frequency of self-injures, suicide, prevention of transmission of infectious diseases, and the identification, recording and reporting of all those indicators that imply action that do not comply with legal norms (Pavlović, 2019, p. 54).

The state's obligation to protect health and provide medical care necessary to safeguard life of detainees is related to making available general medical services in prison and providing medical assistance after use of force (Milenkovska, 2012, p. 142). Failing to provide required medical treatment violates the right to life.

In the case *Makharadze and Sikharulidze v. Georgia*<sup>18</sup> the European Court of Human Rights confirmed as a general principle the obligation of the national authorities to protect the health and well-being of persons who have been deprived of their liberty (para 71). Furthermore, the Court recognized the obligation of the authorities to provide individuals in the custody with the medical care necessary to safeguard their life. Such interpretation of the Court is based on the understanding that persons in custody are in a vulnerable position, since they cannot protect their rights and satisfying their needs on the own initiative. Hence the authorities are under a duty to protect them and provide adequate healthcare and necessary resources to work (Mitrović, 2018, p. 230).

The European Court of Human Right jurisprudence highlighted that medical care has to be provided timely. In the case *Anguelova v. Bulgaria*<sup>19</sup>, the Court identified violation of article 2 due to failure to provide timely medical assistance. The person died after having spent several hours in police custody after his arrest for attempted theft. When seeing the condition of the person deteriorating, police delayed contact between Mr. Zabchikov and a doctor and failed to call an ambulance. Consequently, where an individual is taken into

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<sup>17</sup> More information available in The State's positive obligations under Article 2 of the Convention to protect an individual from self-harm, (2017) European Court of Human Rights, p. 12.

<sup>18</sup> Application No. 35254/07, judgement of 22 November 2011.

<sup>19</sup> Application No. 38361/97, judgement of 13 June 2002.

police custody in good health but later dies, it is incumbent on the state to provide a plausible explanation of the events leading to this death (para 110).<sup>20</sup>

Furthermore, the Court stressed the positive obligation of the states to make regulations compelling hospitals to adopt appropriate measures for the protection of patients' lives. This position is presented in the case *Tarariyeva v. Russia*<sup>21</sup> where a prisoner died from post-surgical complications, although for more than two years preceding his death Mr. Tarariyev had been in detention and custodial authorities had been fully aware of his health problems. The Court found that the decisive element for the assessment of the adequacy of medical care at the prison hospital is whether it possessed the necessary facilities to perform surgical interventions successfully and deal with post-operative complications. In the *Tarariyeva* case the adequate facilities were conspicuously lacking, since the prison hospital was not adequately equipped for dealing with massive blood loss.<sup>22</sup> In addition, the prison hospital staff treated him as an ordinary post-operative patient rather than an emergency case with the consequence that surgery was performed too late.

Medical care also needs to be provided properly by administering the necessary medical treatment. In the case *Gagiu v. Romania*<sup>23</sup>, the prisoner's medical file mentioned chronic hepatitis but he did not receive proper treatment. In consequence, his chronic disease was aggravated. Instead of receiving the treatment prescribed by the surgeons and specialists following the tests carried out at the municipal hospital, Mr. Gagiu was not admitted to the prison hospital but placed in an ordinary cell until the day before he died. The Court found that the prison authorities had not acted with due diligence in providing the applicant with the necessary medical care and that there had been a serious failure on their part to protect the health of a person in their custody.

The Court also took position on state obligation when it comes to the prevention of spreading of contagious diseases. In the case *Shelley v. United Kingdom*<sup>24</sup> the Court clarified that matters of health care policy, in particularly as regards general preventive measures, are in principle within the margin of appreciation of the domestic authorities

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<sup>20</sup> See also *Selmouni v. France*, application no. 25803/94, para 87; *Salman v. Turkey*, application no. 21986/93, para 97; and *Velikova v. Bulgaria*, application no. 41488/98.

<sup>21</sup> Application No. 4353/03, judgment of 14 December 2006.

<sup>22</sup> Paras 87 and 88.

<sup>23</sup> Application No. 63258/00, judgement of 24 February 2009.

<sup>24</sup> Application 23800/06, decision on admissibility of 4 January 2008.

who are the best placed to assess priorities, use of resources and social needs. In this concrete case, the decision of the authorities not to implement a needle-exchange programme for drug users in prisons was not found in violation of the convention (Coggon, 2009, p. 130). However, in the case *Poghosyan v. Georgia*<sup>25</sup> in considering the systemic problems of medical care in Georgian prisons, the Court held that state authorities are required to take the necessary legislative and administrative measures to prevent the spreading of contagious diseases, to introduce a screening system for prisoners upon admission and to guarantee prompt and effective treatment (para 70).

In relation of a murder in prison, the Court has considered the state to have an obligation to take preventive operational measures to protect individuals identifiable in advance as potential target of a lethal act. In the case *Paul and Audrey Edwards v. UK*<sup>26</sup>, Mr. Edwards had been arrested and taken to a police station, where he was placed in a cell with another inmate who had a history of violence and assault and had been diagnosed as schizophrenic. Some time later, Edwards was found to have been stamped and kicked to death. The violation of article 2 was found because of failure of those acting earlier in the case, namely doctors, police and court to pass on to the prison authorities information relevant to the murderer's condition and of the inadequate nature of screening process when he was admitted to prison (Harris, O'Boyle, Bates, Buckley, 2014, p. 211). In assessing alleged violation, the Court stressed that it is important to focus not only on what authorities knew as a subjective approach, but on what authorities ought to know as an objective approach (para 55). The Court found that the possible risks from inmate had been identified and noted that the medical information ought to have been brought to the attention of the prison authorities. However, in this case there was a series of shortcomings in the transmission of information to the prison admissions staff, and the screening examination on arrival was brief.

#### **4. The state's procedural obligations**

A procedural obligation under article 2 is not explicitly mentioned in the Convention. However, the development of a duty to investigate human rights violations of international law appeared in the early 1980s (Ariav, 2012, 856). The early development of the duty was promoted through the case law of the Inter-American Court of Human Rights and the Human Rights Committee. The duty to investigate first receive wide attention and greater status only when it was made legally binding for the parties to the

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<sup>25</sup> Application no. 9870/07, judgement of 24 February 2009.

<sup>26</sup> Application no. 46477/99, judgement of 14 March 2002.

European Convention on Human Rights in the case *McCann and others v. the United Kingdom* in 1995.<sup>27</sup> The procedural obligations of the state was first formulated in the context of the use of lethal force by state agents where the court held that a general legal prohibition of arbitrary killing by the state agents would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities (para 161). Following the *McCann* case, the Court's jurisprudence has evolved and extended to the circumstances in which investigations may be undertaken (Chevalier-Watts, 2010, p. 703). The duty to investigate was defined narrowly in *McCann* case. The Court qualified restricted obligation to cases of death and refused to comment on the exact procedure of investigation, but rather require some form of effective investigation.

However, the Court jurisprudence has developed over time and restrictions have been reduced. In relation to cases that give rise to the duty to investigate, the Court expanded the obligation to investigate to cases of severe injury that do not result in death and cases of disappearances. When it comes to the requirements for an investigation, the Court deviate from initial interpretation and established requirements for the effective investigation that state have to fulfill. Building on previous jurisprudence, the Court established criteria in the case *Hugh Jordan v. the United Kingdom*<sup>28</sup> (Curtice, Sandford, 2009, p. 446). The Court determined that an investigation must be independent, prompt, adequate, allow public scrutiny and involve the next of kin of the victim (para 133).

For an investigation to be independent it is necessary for the persons responsible for investigation to be independent from those implicated in the events. The Court defined means of independence in the case *Armani Da Silva v. the United Kingdom*<sup>29</sup> as not only a lack of hierarchical or institutional connection but also a practical independence (para 232). It is not required to have absolute independence, but rather a sufficient independence of the persons and structures whose responsibility is likely to be engaged (para 223).

The Court also required in the case *Armani Da Silva v. the United Kingdom* that investigations should be prompt, while in the case *Giuliani and Gaggio v. Italy*<sup>30</sup> to proceed with reasonable expedition. The Court accepts that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, but a

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<sup>27</sup> Application no. 18984/91, judgement of 27 September 1995.

<sup>28</sup> Application no. 24746/94, judgement of 4 May 2001.

<sup>29</sup> Application no. 5878/08, judgement of 30 March 2016.

<sup>30</sup> Application no. 23458/02, judgement of 24 March 2011.

prompt response by the authorities in investigating use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law (*Giuliani and Gaggio v. Italy*, para 305)

Furthermore, in *Armani Da Silva* case the Court provided interpretation of the adequate investigation as investigation capable of leading to a determination of whether the force used was or was not justified in the circumstances (para 243). The authorities must take whatever reasonable actions to secure the evidence concerning the incident (para 233). The investigation's conclusions must be based on a thorough, objective, and impartial analysis of all relevant elements (Olesk, 2015, p. 120).

The Court also require a sufficient element of public scrutiny of the investigation. This requirement does not go so far as to require all aspects of the proceedings to be disclosed since it may involve sensitive issues, thus the Court stated in *Giuliani and Gaggio v. Italy* that degree of public scrutiny may vary from case to case (para 304).

Related to the involvement of the next of kin, the Court took position in the case *Al-Skeini and Others v. the United Kingdom*<sup>31</sup> that they should be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

In the case *Slimani v. France*<sup>32</sup>, the Court concluded that the state must investigate of their own motion, and it cannot be left to the initiative of representatives of the deceased to lodge a formal complaint (para 47-50).

The reversed burden of proof has been explained in the case *Salman v. Turkey*<sup>33</sup> wherein the Court stressed that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within state control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. The burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (para 100).

In the case *Trubnikov v. Russia*<sup>34</sup> the Court noted that the obligation to set up an effective judicial system does not necessarily require criminal proceedings to be brought in every

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<sup>31</sup> Application no. 55721/07, judgement of 7 July 2011.

<sup>32</sup> Application no. 57671/00, judgement of 27 July 2004.

<sup>33</sup> Application no. 21986/93, judgement of 27 June 2000.

<sup>34</sup> Application no. 63638/09, judgement of 5 July 2005.

case if civil, administrative, or disciplinary remedies would be available for the victims (para 79).

### **Conclusions**

Through the history, the protection of life evolved and developed, from death penalty to modern doctrine which requires from states not only to refrain from taking the life of citizens but also have to be active in protecting lives.

Especially, after Second World War, the right to life became part of the several international and regional legal instruments. For European states the most relevant one is the European Convention on Human Rights and article 2, accompanying by Protocols No. 6 and 13. However, the jurisprudence of the European Court of Human Rights is significant for better understanding, interpretation, and application of the ECHR wording. The evolving approach of the European Court of Human Rights influenced on development of standards and indicators relevant for the member states and their authorities to be used as a guide on complying with the ECHR.

The ECHR and the Court jurisprudence influenced on the sentencing policy and abolition of death penalty as punishment. The Court case law is also relevant in cases of extradition to countries where death penalty is still allowed, and the Court established doctrine of death row to reject extradition. In addition, the possible lack of fair trial also was used by the Court to reject extradition to countries with the death penalty.

The protection of lives of persons deprived of their liberty pose positive obligation to states to ensure health services of satisfactory quality and to screen and monitor physical and mental health of prisoners for determining whether person pose a danger to himself or to third person. The Court took objective approach in the case law and in their assessment test if the prison authorities knew or ought to know about the existence of risk or threat to life.

In many countries deaths in prisons is long-standing issue. Although it is not explicitly set in the ECHR, the Court through its jurisprudence developed procedural obligation of the state to effectively investigate deaths and injuries in the prison. When it comes to the death in the prison, the Court analyzed different situations, from those in which agents of the state caused the death to situations in which the state has allowed the death of citizen in prison (suicide, homicide, misadventure). However, in all cases the Court stated a clear



expectation that authorities will conduct effective investigation. Furthermore, the Court specified elements of effective investigation, such as independent, prompt, adequate.

The article presented various obligation of state authorities in relation to right to life of persons deprived of their liberty and prohibition of death penalty. Purpose is to systemize requirements related to the protection of right to life of persons deprived of their liberty and ensure informed decision making by relevant authorities.

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**LIFE IMPRISONMENT IN THE COMPARATIVE LAW  
FRAMEWORK AS WELL AS IN THE JURISPRUDENCE  
OF THE EUROPEAN COURT OF HUMAN RIGHTS**

*Life imprisonment represents criminal law alternative to the death penalty, which mostly has been abolished in comparative law frameworks and is imposed exclusively for the most severe criminal offences or the most severe forms of severe criminal offences. However, it should be noted that in comparative law frameworks there is no single approach concerning alternatives to the death penalty, meaning that some countries prescribe long-term imprisonment, while others impose life imprisonment. Therefore, the first part of the paper presents chosen comparative law solutions in this area in order to make visible observed differences among these two approaches. Bearing in mind that imposing life imprisonment affects deeply human rights, the second part of the paper analyzes selected cases before the European Court of Human Rights in which this sentence is imposed before domestic courts. According to analyzed comparative law approaches as well as considered case-law, in concluding remarks it is pointed out key universally accepted legal standards for imposing life imprisonment penalty.*

**Keywords:** *life imprisonment, long-term imprisonment, comparative law framework, European Court of Human Rights*

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## 1. INTRODUCTORY REMARKS

Historically observed criminal law rules testify that, in terms of the penalties provided for the most severe crimes, for a long time the death penalty has been the main pronounced punishment. This penalty was considered to be the most adequate sanction for combating the most severe forms of crime. In that sense, it is worthwhile noting that the death penalty was provided by not only the Criminal Code for the Principality of Serbia from 1860 in Article 12 (Niketić, 1911: 13), the Criminal Code of the Kingdom of Yugoslavia from 1929 in Article 35 (Čubinski, 1930: 119-121), but also the Criminal Code of the Federal People's Republic of Yugoslavia (FPRY) from 1951 in Article 27<sup>1</sup>, and the Criminal Code of Socialist Republic of Serbia (SRS) from 1976<sup>2</sup> as well as the Criminal Code of Republic of Serbia from 1990 in Article 2a until 2002, when this sentence was abolished.<sup>3</sup>

However, even in those periods of time when the death penalty has existed in the criminal law system, its exceptional character always was taken into account. In that regard, it is worthwhile mentioning provision 71 of the Criminal Code of the Kingdom of Yugoslavia from 1929, which allowed the court to replace the death penalty with ten years imprisonment when it finds that there are at least one or more circumstances due to which the sentence should be reduced (Čubinski, 1930: 177). Recognizing the severity of the death penalty, the Criminal Code of the FPRY in Article 29 allowed the court to impose severe imprisonment. Finally, according to Article 2a of the Criminal Code of the Republic of Serbia from 1990 it was prescribed that for criminal offenses punishable by death, the court may impose a prison sentence of 20 years long.

By the influence of various objections to the death penalty in the punishment system, it was gradually abandoned in criminal law frameworks. Among many different attitudes toward the abolishment of the death penalty, the prevailing opinion was that this sentence is inhumane, unjust and irreparable (Stojanović, 2015: 283). These currents of thought as well as Serbia's accession to the Council of Europe in 2003 and its commitment to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) made contribution for the abolition of the death penalty in Serbia.<sup>4</sup> Precisely, in the context of the Council of Europe framework, Protocols 6 and 13 to the

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<sup>1</sup> Criminal Code of FPRY, Official Gazette FPRY No. 13/51.

<sup>2</sup> Criminal Code of SRS, Official Gazette SRS Nos.26/77-1341, 28/77-1566, 43/77-2213, 20/79-1059, 24/84-1233, 39/86-2739, 51/87-2421, 6/89-406, 42/89-1401, 21/90-888 as well as Official Gazette RS Nos. 16/90-468, 49/92-1664, 23/93-817, 67/93-3110, 47/94-1465 i 17/95-529, 44/98, 10/02).

<sup>3</sup> Criminal Code of SRY, Official Gazette RS, No. 35/92.

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

Convention prescribed required provisions for the abolishment of the death penalty (Matić Bošković, 2020:69; Obradović, 2020: 225). Although Protocol 6 left the possibility for the Contracting States to exceptionally provide the death penalty for acts committed in time of war or imminent threat of war<sup>5</sup>, Protocol 13 abolished the death penalty in all cases.<sup>6</sup> Therefore, an adequate replacement for the death penalty was sought. Following these achievements, in 2002 Serbia deleted the death penalty from the punishment system<sup>7</sup>, replacing this sentence with a prison sentence of forty years (Ilić, 2016:120). Thus, an alternative to the death penalty in the national criminal law system was found in long-term imprisonment (Stanila, 2021: 160).

The advantage of imprisonment versus the death penalty is recognized in giving the convicted person the opportunity to change and improve his or her behavior while serving the sentence, which later on creates the basis for taking into account the fulfillment of conditions for granting release. Nevertheless, this is not always the case, since, in the context of life imprisonment, there is a distinction between life imprisonment with and without the possibility for release (United Nations Office at Vienna, 1994:3).

In the case of life imprisonment with the possibility for release the convicted person must serve the minimum required time of imposed life imprisonment sentence in order to be considered eligible for release. After the expiration of that period, the convicted person may be released, if the court assesses that he/she behaved well while serving the sentence. Additionally, if he or she commits a new crime meanwhile, this person will be reinstated (Penal Reform International, 2007:2).

On the other hand, life imprisonment without the possibility of parole means that the convicted person shall not have the right to get release. In other words, the convict sentenced to this punishment will spend the rest of his or her life serving sentence without the possibility of reducing imposed sentence on the basis of a pardon, amnesty, or similar criminal law institutes (Willis, Zaitzow, 2015:560).

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<sup>5</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg, 28.IV.1983.

<sup>6</sup> Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius, 3.V.2002

<sup>7</sup> Criminal Code of RS No. 10/2002.

## 2. COMPARATIVE-LAW SOLUTIONS ON THE ISSUE OF LIFE SENTENCE

The following analysis of comparative criminal law systems includes the consideration of: 1) criminal codes of the countries of the former Yugoslavia; and 2) criminal law codes of the most important European criminal law systems. Observing the Criminal Codes of the countries of the former Yugoslavia, it is noticed that some of them standardize long-term prison sentences, while others prescribe life imprisonment. Below will be discussed the following criminal codes of the countries of the former Yugoslavia: a) Montenegro; c) Croatia; d) Slovenia; and e) North Macedonia.

The Criminal Code of Montenegro in Article 35 prescribes long-term prison sentences for the most serious criminal offences, provided that it shall not be imposed as the only penalty for a specific criminal offence. This sentence shall not be shorter than thirty years or longer than forty years. There are three restrictions on the imposition of this sentence. Firstly, it cannot be imposed on a person who did not reach the age of twenty-one at the time of the commission of the criminal offense. Secondly, it may not be imposed on a person whose mental capacity was significantly reduced at the time of the commission of the criminal offense. Thirdly, it cannot be imposed on a person who attempted to commit a criminal offence.<sup>8</sup>

The Croatian Criminal Code in Article 46 introduces the long-term imprisonment penalty. It shall not be shorter than twenty-one years or longer than forty years. This punishment shall not be imposed on a perpetrator who was under eighteen years of age at the time of the commission of the criminal offense. However, exceptionally, for criminal offenses committed in concurrence, an aggregate punishment of long-term imprisonment for a term of fifty years may be imposed.<sup>9</sup>

The Criminal Code of Slovenia in Article 46 standardizes life imprisonment for the most serious crimes such as genocide, crimes against humanity, aggression and war crimes. Additionally, in the case of the criminal act of terrorism, murder, criminal acts against the constitutional order and other gravest forms of criminal offences, such as the murder of the president of the state, endangering persons under international protection and taking of hostages, it is required that two or more criminal offenses have been committed in

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<sup>8</sup> Criminal Code of Montenegro, Official Gazette Nos. 70/03, 13/04, 47/06, 40/08, 25/10, 32/11, 64/2011, 40/13, 56/13, 14/15 42/15, 58/15, 44/17, 49/18 and 3/20.

<sup>9</sup> Criminal Code of Croatia, Official Gazette Nos. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19 and 84/21.

order to be imposed life imprisonment. In concordance with Article 88, it is envisaged that a person sentenced to life imprisonment may be released on parole after 25 years of serving the sentence.<sup>10</sup>

Finally, the Criminal Code of North Macedonia in Article 35 and 36 provides for the possibility of imposing life imprisonment, except for perpetrators who did not reach the age of twenty-one at the time of the commission of the crime. However, it is prescribed that for crimes for which a sentence of life imprisonment is prescribed, a sentence of 40 years of imprisonment may be imposed. Anyway, the person sentenced to life imprisonment may not be conditionally released before serving at least 25 years in prison if he or she has corrected himself so that it is justifiably expected for the offender to behave well in freedom and particularly that he would not commit crimes.<sup>11</sup>

The analysis of criminal law codes of the most important European criminal law systems includes consideration of national criminal law system of: 1) the UK; 2) Russian Federation; 3) Germany; 4) France; 5) Italy; and 6) Switzerland. Criminal codes of these countries envisage the life imprisonment penalty for the most severe criminal offences. In some considered countries there are several solutions to this penalty. Furthermore, among these states, there are differences in the length of time a convicted person must serve in order to obtain release.

For example, there are two types of life imprisonment in the UK: 1) mandatory life imprisonment and 2) discretionary life imprisonment. In cases when the court imposes a sentence of life imprisonment, it is necessary to determine the minimum time that the convict should spend serving the sentence, in order to obtain the possibility to request conditional release later on. However, the stated rule does not apply if the court issues a full life order, which means that the convict in such a case is not entitled to submit the request for release. The perpetrator will be released if two following conditions are met. The first concerns the fact that he or she has served at least the minimum required time from the outset of imposed sentence and the second is related to the conclusion of the Parole Board that further detention of the perpetrator is no longer necessary. If released, the perpetrator who was sentenced to life imprisonment will remain conditionally released for the rest of his life. However, he or she might be returned to prison regardless of

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<sup>10</sup> Criminal Code of Slovenia, Official Gazette Nos. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20 and 95/21.

<sup>11</sup> Criminal Code of North Macedonia, Official Gazette Nos. 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 115/14 and 132/14.

whether he or she has committed a new crime, if it is determined that this person poses a risk to the public. When it comes to the sentence of life imprisonment with a whole life order, it should be noted that it is imposed for the most serious cases, when the committed crime was so serious, meaning that the perpetrator of that crime shall not be released from prison until the end of his or her life. Finally, the discretionary sentence of life imprisonment bears that name since it shall be imposed only in the case of certain crimes such as rape or robbery. In other words, milder punishments are prescribed for these acts, while a life sentence will be imposed in the case of perpetrators who are considered dangerous or who have already been convicted of another very serious crime. Even in the case of this type of life imprisonment, the judge determines the minimum time that the perpetrator must serve in prison when imposing the sentence. At the end of that period, the convict may request release on parole, but the parole board will only release him or her if considers that there is no risk to the public. Otherwise, if, after release, it is determined that the convict poses a danger to the public, the perpetrator will be returned to prison.<sup>12</sup>

In the Russian Federation, life imprisonment is imposed by article 57 in cases of particularly grave crimes of attack on human life, as well as for committing especially grave crimes against the health of the population and public morals, public safety and sexual integrity of minors under fourteen years. However, there are also restrictions on the imposition of this sentence. Namely, this sentence shall not be imposed upon women, nor upon persons who have committed crimes at ages below 18 years, nor upon men who have reached 65 years of age by the time of adjudication. In concordance with article 79 a person who is deprived of liberty for life may be released conditionally if the court finds that there is no need to serve that sentence further and if the convict has served not less than 25 years of his or her sentence. The conditional release will be applied only when there is no malicious violation of the established procedure for serving the sentence within the previous three years. Additionally, the conditional release shall not be applied to a person who has committed, while serving life imprisonment, a new grave or especially grave crime.<sup>13</sup>

In Germany, according to article 38 of the Criminal Code imprisonment shall be for a fixed term unless the law provides for life imprisonment. Under Article 57 and 57a the

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<sup>12</sup> Life sentences, <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/life-sentences/> accessed on 15.8.2021.

<sup>13</sup> Criminal Code of Russian Federation, No, 13/96, <http://www.legislationline.org/documents/section/criminal-codes>, accessed on 15.8.2021.



court shall approve a conditional early release from serving a life sentence, within the supervision period, under the following conditions. First, if fifteen years of the sentence has been served. Secondly, if the special seriousness of the convict's guilt does not require the further serving of the sentence. Thirdly, if the release is appropriate considering public security interests and the convicted person provide the consent for conditional release. The supervision period shall be five years, although the court may set deadlines that do not exceed two years for the submission of the convict's application for early release. In making decisions, special attention will be paid to the convict's personality, his previous life, the circumstances of the offense, the importance of the legal interest that may be jeopardized by re-offending, the convict's conduct while serving his sentence, and the effects an early release are to be expected to have on the convict.<sup>14</sup>

In France, in Article 131-1 a life sentence is prescribed for the most serious crimes. However, it should be underlined that in the case of conviction for a life sentence in concordance with article 132-43 there is no right for the convict to request conditional release until he or she has not been served life imprisonment at least eighteen years. However, the Trial Chamber may, by special decision, either extend this period to twenty-two years or may decide to shorten it.<sup>15</sup>

In Italy, Article 22 of the Criminal Code envisages the sentence of life imprisonment. A person sentenced to life imprisonment, who during the serving of the sentence behaved in such a way as to create a belief in his repentance, may be released on parole, provided that he has served at least twenty-six years of the sentence.<sup>16</sup> In Article 682 of the Criminal Procedure Act, it is provided that the Supervisory Court decides on granting and revoking conditional release. If the release is not granted due to the lack of the requisite of repentance, the request cannot be submitted before six months have elapsed from the day on which the rejection provision became irrevocable.<sup>17</sup>

In Switzerland, Article 64 1bis the Court may impose a life sentence if the perpetrator has committed any of the following: murder, intentional homicide, serious assault, robbery, rape, indecent assault, false imprisonment or abduction, hostage-taking, enforced

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<sup>14</sup> Criminal Code of Germany, Strafgesetzbuch (StGB) 1998 (BGBl I S. 3322), <http://www.legislationline.org/documents/section/criminal-codes> , accessed on 15.8.2021.

<sup>15</sup> Code pénal promulgué le 22 juillet 1992, <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>, accessed on 15.8.2021.

<sup>16</sup> Codice penale, 1930, <http://www.diritto.it/codici/2>, accessed on 15.8.2021.

<sup>17</sup> Codice di procedura penale, <http://www.legislationline.org/documents/section/criminal-codes>, accessed on 15.8.2021.

disappearance of persons, trafficking in human beings, genocide, or a felony under the heading of crimes against humanity or war crimes provided that the following conditions are met. Firstly, it is necessary that the perpetrator, by committing a criminal offense, caused or intended to cause serious harm to the physical, mental or sexual integrity of another person. Secondly, there must be a high probability that the perpetrator will repeat some of the stated criminal acts. Thirdly, the perpetrator should be assessed as permanently untreatable, in the sense that even long-term treatment shall not provide prospects for success.<sup>18</sup>

### **3. LIFE IMPRISONMENT CASES IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

The *Vinter and Others v. The United Kingdom* case is particular since in this matter the European Court of Human Rights (hereinafter: the Court) has found that a sentence of life imprisonment might be in accordance with Article 3 of the Convention (Pavlović, 2020:49), if there was a possibility for review and if a convict was informed about it before the outset of his sentence. At the same time, the Court emphasised that the form of such a review, as well as the question of how long the convict would have to serve from the outset of his sentence, are issues that fall within the field of free assessment of contracting states. Furthermore, the Court stated that in the context of life imprisonment, Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment must be interpreted as requiring reducibility of the sentence, in terms of a review that allows the domestic authorities to consider whether any changes in the life of prisoner are so significant and whether such progress towards rehabilitation has been made in the course of a sentence indicating that further detention can no longer be justified on legitimate penological grounds. Therefore, the Court found that, where domestic law does not provide for the possibility of such a review, imposing life sentence will not be in concordance with the standards of Article 3 of the Convention. In addition, a person sentenced to life imprisonment has the right to know, at the beginning of serving his sentence, what he or she must do to be considered for release and under what conditions, including when a review of his sentence will take place. Accordingly, from the Court perspective, where domestic law does not provide any

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<sup>18</sup> Swiss Criminal Code of 21 December 1937, <http://www.legislationline.org/documents/section/criminal-codes> accessed on 15.8.2021.

mechanism or possibility for review of life sentence, the incompatibility with Article 3 arises at the time of its imposition, and not at a later stage of imprisonment.<sup>19</sup>

The case *Murray v. the Netherlands* concerned the complaint lodged by a man convicted of murder in 1980, who was serving a life sentence without any realistic prospect of release on the islands of Curacao and Aruba (part of the Kingdom of the Netherlands), until he was pardoned in 2014 due to deteriorating of his health. The applicant, who had died in the meantime, claimed that he had not been provided with a special detention regime for prisoners with psychiatric problems. Although a legal mechanism for reviewing life imprisonment was introduced shortly after he submitted his application to the Court, he argued that, *de facto*, he had no perspective of being released since he had never been provided with psychiatric treatment due to the risk of his reoffending would continue to be considered too high to be eligible for release. The Court considered that there had been a *violation* of Article 3 of the Convention. The Court specifically pointed out that states within their practice have a large field of free assessment in determining what measures are necessary to enable the rehabilitation of persons sentenced to life imprisonment. However, although it was assessed that the applicant needed treatment before he was sentenced to life imprisonment, no further assessments were made regarding the type of required treatment. Therefore, at the time he lodged his application to the Court, any of his requests for pardon were in practice incapable of leading to his release. Therefore, his life sentence had not *de facto* been reducible, in accordance with the Court's case-law under Article 3 of the Convention.<sup>20</sup>

The case of *Bodein v. France* concerns a life sentence imposed on the applicant without the possibility of a reduction of his sentence. Namely, the applicant stated that his sentence was contrary to Article 3 of the Convention as from his point of view, he had been offered no possibility of any review of the sentence or any form of release from serving the sentence. In this case, the Court held that there had been *no violation* of Article 3 of the Convention, holding that French law provided a facility for reviewing life sentence which was sufficient, in the light of margin of appreciation left to States to conclude that the sentence imposed on the applicant was reducible in accordance with Article 3 of the Convention. Moreover, the Court observed that French law provided for

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<sup>19</sup> *Vinter and Others v. the United Kingdom*, (applications nos. 66069/09, 130/10 and 3896/10), Grand Chamber judgment of 9 July 2013, §§ 119-122, [http://www.echr.coe.int/Documents/FS\\_Life\\_sentences\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Life_sentences_ENG.pdf), accessed on 15. 8. 2021.

<sup>20</sup> *Murray v. the Netherlands* (application no. 10511/10) Grand Chamber – judgment of 26 april 2016 [http://www.echr.coe.int/Documents/FS\\_Life\\_sentences\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Life_sentences_ENG.pdf), accessed on 15. 8. 2021.

a judicial review of the convict's situation as well as the possibility of reviewing the sentence after 30 years' incarceration. The court took the position that the review provided by the French law aimed to assess the prisoner's dangerousness and to consider whether and how his behavior changed while he served the sentence, thus not leaving uncertainty regarding the existence of prospect of release from the sentence.<sup>21</sup>

In the case of *Čačko v. Slovakia*, the applicant stated that his sentence to life imprisonment, without the possibility of parole, amounted to inhuman and degrading punishment, since from his perspective, there was no prospect of obtaining a pardon or commuted sentence. The applicant also claimed that he had not been able to obtain an effective judicial review of his life sentence under national law and practice. The Court considered that there had been *no violation* of Article 3 of the Convention. It noted in particular that according to the national judicial review mechanism, it was possible to request conditional release, after 25 years of service of his sentence, since this rule was introduced in January 2010, a relatively short time after the applicant's complaint had been submitted before the Court in October 2008.<sup>22</sup>

The case of *Garagin v. Italy* is particular since the applicant was sentenced by two different Italian courts in 1995 and 1997 to twenty-eight and thirty years in prison. He could have expected to be released in March 2021, or earlier if he granted remission of sentence. However, in 2006, the Roman Court of Appeals, referring to the relevant case-law of the Court of Cassation, stated that the applicant should serve a life sentence. The Court declared the application *inadmissible* as manifestly ill-founded. The court noted that in the Italian legal system, a person sentenced to life imprisonment might be granted more lenient conditions of detention or early release. By analysing the Italian legal system the Court found that in Italy there were possibilities for reducing the sentence of life imprisonment both *de jure* and *de facto*. It cannot, therefore, be said that the applicant had no prospect of release or that his detention in itself, although lengthy, led to inhuman or degrading treatment. Accordingly, the mere fact that the applicant had been sentenced to life imprisonment had not reached the required level of seriousness to be brought under the scope of Article 3 of the Convention.<sup>23</sup>

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<sup>21</sup> Bodein v. France (application no. 40014/10), judgement of 13 November 2014, [http://www.echr.coe.int/Documents/FS\\_Life\\_sentences\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Life_sentences_ENG.pdf), accessed on 15. 8. 2021.

<sup>22</sup> Čačko v. Slovakia (application no. 49905/08), judgement of 22 July 2014, [http://www.echr.coe.int/Documents/FS\\_Life\\_sentences\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Life_sentences_ENG.pdf), accessed on 15. 8. 2021.

<sup>23</sup> Garagin v. Italy (application no. 33290/07) 29 April 2008,

The case of *Törköly v. Hungary* referred to life imprisonment without eligibility to be released on parole before 40 years from the outset of the imposed sentence. The Court declared application in this case *inadmissible* on the basis that the applicant's complaint that the sentence in question led to inhuman and degrading treatment was manifestly ill-founded. Although the applicant would be eligible for parole in 2044, when he would be 75 years old, the Court considered that the judgment handed down to the applicant guaranteed a long- distant but realistic possibility of his release. In addition, the Court found that the applicant might be pardoned even earlier by the presidential decision, at any time after his conviction. It, therefore, concluded that the sentence of life imprisonment was reducible both *de jure* and *de facto*.<sup>24</sup>

#### 4. CONCLUDING REMARKS

Bearing in mind that life imprisonment drastically encroaches on human rights, the key standard in criminal comparative legislation is that it can be prescribed only for the most severe crimes and the most severe forms of severe criminal offences and always alternatively to imprisonment sentence. The following standard agreed at the comparative law level is related to the prohibition of imposing life imprisonment on persons who have not reached the age of twenty-one at the time of the commission of the criminal offense. Also, it is forbidden to impose a sentence of life imprisonment in cases when there are some of the legal grounds for mitigation of punishment or for release from punishment, such as cases of exceeding the limit of self-defense, attempted criminal offence, substantially reduced competence and voluntary abandonment. In addition, this sentence cannot be prescribed and imposed without the convict's right to be released on a certain basis, for example on the basis of parole, pardon, amnesty or other grounds. Finally, in the comparative law framework, the generally accepted standard is that the time after which a person sentenced to life imprisonment acquires the right for the conditional release shall not be longer than 25 years.

The advantage of standardization and sentencing to life imprisonment in relation to the death penalty is recognized not only through the principle of humanity, but also through the possibility of resocialization. This is why a person sentenced to life imprisonment is

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[http://www.echr.coe.int/Documents/FS\\_Life\\_sentences\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Life_sentences_ENG.pdf), accessed on 15. 8. 2021.

<sup>24</sup> *Törköly v. Hungary* , (Application no. 4413/06), 5 April 2011,

[http://www.echr.coe.int/Documents/FS\\_Life\\_sentences\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Life_sentences_ENG.pdf), accessed on 15. 8. 2021.

given the opportunity to request release, which allows him or her new possibilities for reintegration into society.

Furthermore, comparing to the long-term imprisonment penalty, imposing the life imprisonment penalty takes into account both the severity of the punishment and the degree of culpability of the perpetrator in more effective and adequate manner. This sentence in that way also justifies the expectations of the public who believe that a long-term imprisonment sentence does not correspond to the severity of a committed crime. In addition, this punishment is in accordance with the general preventive purpose of punishment since it deters others from the commission of criminal offences for which it is prescribed. Finally, the fact that this punishment is imposing only for the most severe criminal offences indicates an exceptional character of this penalty, meaning that it shall be pronounced only in cases in which the purpose of punishment in the given case could not be achieved by the application of other criminal penalties.

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Vladimir Medović\*

## | RIGHT TO LIFE VS. RULE OF LAW

*On 22 October 2020 the Polish Constitutional tribunal declared medically-assisted abortion in cases where prenatal tests or other medical considerations indicate a high probability of a severe and irreversible abnormality or an incurable disease in the fetus unconstitutional. The abortion in Poland is now only allowed in two instances: where the pregnancy poses a threat to the life or health of a woman or when the pregnancy resulted from a prohibited act such as rape or incest. This judgment provoked strong reactions within Poland and the European Union. In this paper we will not discuss the legality of this ruling in the context of relevant international human rights conventions. Instead, we will focused on the issue of the legality of the composition of the Polish Constitutional tribunal which rendered such judgment and application of the principle of the rule of law, as one of the fundamental values on which the European union is founded. On 20 December 2017 European Commission launched infringement procedures against Poland under article 7(1) TEU and made proposal for a Council decision on the determination of a clear risk of a serious breach by Republic of Poland of the rule of law. One of the reasons for activation of the Article 7 TEU was the precompositon of the Polish Constitutional tribunal in 2015 and 2016 which, in European Commission view, undermined the legitimacy, independence and effectiveness of the Constitutional tribunal. According the judgment of the Court of Justice of the EU in LM case even the commencement of the procedure under article 7(1) TEU relating to the breach of rule of law principle may have certain legal consequences and result in the suspension of application of the European arrest warrant. Therefore, the main issue here is what effects the Polish Constitutional tribunal judgment will have in the legal system of the European Union, having in mind ongoing procedure for breach of the fundamental values of the EU. Can it be challenged before the Court of Justice of the European Union on the ground of breach of rule of law principle? These are just some of the questions we will try to answer in this paper.*

**Keywords:** right to life, abortion, Poland, rule of law, values of the European Union

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## Introduction

The right to life is the most important human right. The protection of human rights, including the right to life, is inextricably linked to the observance of the rule of law. The protection of human rights may be realised only through respect for the rule of law: a strong regime of the rule of law is vital to the protection of human rights.<sup>1</sup> The rule of law means that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts” (Bingham, 2010). According to Kambovski, rule of law is essentially a mechanism for implementing natural law standards on human rights in international law and national legislation, (Kambovski, 2018: 37). However, the rule of law requires the judicial independence. Judicial independence means that courts must be able to exercise their functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. Accordingly, the judicial independence is dependent on the existence of democracy and separation of powers. The problem arises in situations where one of the parts of the equation is lacking or is seriously undermined, which may compromise the protection of human rights, including the right to life.

Such a situation occurred in Poland where the Constitutional Tribunal further restricted access to abortion. In its ruling of 22<sup>nd</sup> October 2020, the Constitutional Tribunal declared medically-assisted abortion in cases where prenatal tests or other medical considerations indicate a high probability of a severe and irreversible abnormality or an incurable disease in the fetus unconstitutional. The ruling declaring the abortion in these cases unconstitutional was based on the right to life. The Constitutional Court's ruling further inflamed the ongoing debate in the European Union over the issue of the rule of law in Poland. In 2017 the European Commission launched proceedings against Poland under Article 7 TEU for breaching fundamental values of the European Union, namely the rule of law. One of the reasons for launching the proceedings was the recomposition of the Polish Constitutional Tribunal outside the normal constitutional process for the appointment of judges. For this reason, the European Commission considers that the independence and legitimacy of the Constitutional Tribunal are seriously undermined and that, consequently, the constitutionality of Polish laws can no longer be effectively guaranteed. In addition, judicial reform in Poland led to the factual recomposition of the Supreme

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<sup>1</sup> Venice Commission of the Council of Europe, *The Rule of Law Checklist*, Council of Europe, Strasbourg, 2016, p. 3.

Court, ordinary courts and the National Council of Judiciary which undermined the independence of the judiciary and violated separation of power, which are key components of the rule of law. Finally, the EU Court of Justice has ruled in several cases that Poland's reform of the judiciary has violated the principle of effective legal protection, prescribed by Article 19 TEU. In this paper we will discuss the possible legal effects of the ruling of Polish Constitutional tribunal within the legal system of the European Union and particularly in the context of the ongoing proceeding against Poland under article 7 TEU for breaching the principle of the rule of law.

On the other hand, there is also a deeper political or ideological context of the dispute between Poland and the European Union regarding the observance of the fundamental values, which is reflected in the ruling of Polish Constitutional tribunal. What we have here is conflict between two mutually opposing concepts of democracy: illiberal and liberal democracy. Therefore, we will also consider the essence of this ideological conflict to help us understand the nature of the dispute between the European Union and Poland, and the context in which the Constitutional tribunal rendered its ruling.

### **1. Ruling of the Polish Constitutional tribunal**

On 22 October 2020 Constitutional tribunal considered the application, by the group of the *Sejm* (Polish parliament) deputies belonging to the ruling party *Law and Justice* (PiS), with the Tribunal for it to examine the conformity of Article 4a(1)(2) and Article 4a(2) of the Act of 7 January 1993 on Family Planning, the protection of fetuses, and grounds for permitting the termination of pregnancy to the Constitution of the Republic of Poland.<sup>2</sup> Pursuant to the Article 4a(1)(2) medical practitioner may terminate pregnancy where, “on the basis of prenatal tests and/or other medical grounds, there is high probability of the fetuses severe and irreversible impairment or of the fetuses life-threatening incurable illness”. Article 4a(2) additionally specifies that in such circumstances pregnancy may be terminated only until the fetus is able to live outside the body of the pregnant woman.

Applicants claimed that said articles of the Family Planning Act legalized eugenic practices with regard to right to life of an unborn child as well as they correlate the protection of the unborn child's right to life with the child's state of health, which constituted the prohibited direct discrimination. The said provisions also denied those children respect for human dignity.

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<sup>2</sup> The application for constitutional review was lodged on 19. November 2019.

The Constitutional tribunal noted that the “applicants’ constitutional doubts could be summed up as the essential question of constitutional guarantees for the life of a child during the prenatal period in the event of a conflict of interests”.

In order to resolve this constitutional issue the Constitutional tribunal was required: “firstly, to determine the legal status of a child at the prenatal stage, i.e. to determine whether such a child is recognized as a subject of rights and obligations under law; and secondly, to examine the permissibility of terminating a pregnancy and the limits related thereto, i.e. to analyze actions in the event of the conflict of values and the weighing of interests”. In answering the first question the Tribunal recalled its earlier ruling of 28 May 1997 in case K-26/96, namely that human life constitutes a value at every stage of its development and, as a value arising from the provisions of the Constitution, it should be protected by the legislator. “Moreover, the Tribunal held that an unborn child – as a human being, entitled to the inherent and inalienable dignity of the person – is recognized under law as a subject of rights and obligations who enjoys the right to life; the legal system must provide due protection for the unborn child’s dignity, which constitutes a central value without which being recognized as a subject of rights and obligations would be ruled out. On the basis of those findings, the Tribunal deemed that it is possible to have a situation where one of constitutional interests in the conflict of interests concerns an unborn child. The termination of a pregnancy entails depriving the child of his/her life. Although the said child is not refused the right to life, the legal protection thereof becomes restricted. Therefore, the Tribunal examined Article 4a(1)(2) of the Family Planning Act in the light of the principle of proportionality”...”

The Tribunal also pointed out that every instance of restricting the legal protection of human life must be “absolutely necessary”, and must be treated as an *ultima ratio* measure. Therefore, “taking into account the fundamental character of the right to life, not every interest may justify solutions undermining the said right. There is the requirement of a symmetry between values: the sacrificed one and the safeguarded one”.

In the Tribunal’s view, “the mere fact of an impairment and/or incurable illness of a child at the prenatal stage – which is linked with eugenic considerations, as well as with potential discomfort in the ill child’s life – may not, alone, weigh in favor of the permissibility of terminating the pregnancy”. That would be the case only in situations where the high probability exists that fetus’s severe and irreversible impairment or incurable illness may pose a threat to the life and health of the mother. However, the

Tribunal noticed that such situations constituted separate ground for the termination of a pregnancy provided by Article 4a(1)(2) of the Family Planning Act and was not the subject of the constitutional review in the present case.

On the basis of the said considerations, the Tribunal concluded that the “legalization of the procedure of terminating a pregnancy – where, on the basis of prenatal tests and/or on other medical grounds, there is a high probability of the fetus’s severe and irreversible impairment or of the fetus’s life-threatening incurable illness – is not constitutionally justified”.

Finally, the Tribunal considered the possible effects of its ruling. The Tribunal stated that the “legislator has the right, as well as the obligation, to adjust the legal situation to the issued ruling, which entails analyzing whether the existing legal solutions within the scope of a mother’s right to special assistance from public authorities before and after birth”... “suffice in the case where Article 4a(1)(2) of the Family Planning Act has been eliminated from the legal system”. “Within the meaning of Article 1 of the Constitution, the Republic of Poland, as the common good of all its citizens, should facilitate the development of individuals and their communities, especially the family. The legislator may not shift solely onto the mother the burden of raising her child who is severely and irreversibly impaired or incurably ill, since the obligation to take care of persons in the most difficult circumstances primarily lies with public authorities and society as a whole.”

Consequently, abortion in Poland is now only available in two situations provided for by the Family Planning Act: where the pregnancy poses a threat to the life or health of a woman or when the pregnancy resulted from a criminal act such as rape or incest. Although these grounds for abortion were not challenged by the applicants and considered by the Tribunal, the wording of the ruling may indicate that the latter one may be subject of constitutional review in foreseeable future. If the absolute protection of the life of a fetus is the overriding consideration, it would mean that termination of pregnancy resulting from a criminal act should also be considered contrary to the Polish constitution. There is no logical justification for leaving this ground for abortion. In this respect the ruling of the Tribunal may be seen as a first step towards the absolute ban of the abortion. The ruling entered in force on 27 January 2021 upon its publication in Official Journal.

## **2. International legal context: European Union and Council of Europe**

The ruling of the Tribunal came in the specific political moment when the Poland was under pressure to execute three judgments of the European Court of Human Rights

(ECtHR) relating to the right to abortion.<sup>3</sup> In those judgments ECtHR declared that Poland violated articles 3 and 8 of the European Convention on Human Rights and Fundamental Freedoms. The violations were established on account that of the lack of an effective mechanism to enable women to effectively access lawful abortion on grounds of maternal or fetal health where the doctor disagrees that such grounds exist or that prenatal tests are necessary to assess this or make other decisions (cases of *Tysi*ac and *R.R.*) and the authorities' failure to provide access to reliable information on the conditions and procedures enabling pregnant women and girls, including victims of rape, to effectively access lawful abortion (in the case of *P. and S.*). In this respect the ruling of the Polish Constitutional Tribunal may be considered as the reaction to the judgments of ECtHR and attempt to effectively "kill these cases". Therefore it was not surprise when Committee of Minister of the Council of Europe, which supervise the execution of the judgments of ECtHR, passed the resolution calling on the execution of the above mentioned judgments.<sup>4</sup> In its resolution Committee of Ministers also noted the the ruling of the Constitutional tribunal of 22 October 2020, invalidating the ground for lawful abortion related to the fetus health and its potential impact on the provision of prenatal tests which allow taking decisions unrelated to lawful abortion. Among others, Committee of Ministers urged Polish authorities:

- to adopt clear and effective procedures on the steps women need to take to access lawful abortion, including in the event of a refusal of abortion on grounds of conscience, and to ensure that they are provided with adequate information on these procedures and that no additional unnecessary requirements are imposed on them by hospitals beforehand;
- to ensure that lawful abortion and pre-natal examination is effectively accessible across the country without substantial regional disparities and without delay caused by the refusal to perform it due to the use of the conscience clause;
- to adopt the necessary reforms of the objection procedure without further delay and to include in the legislation an obligation for hospitals to refer a patient to an alternative healthcare facility if a medical service is refused on

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<sup>3</sup> Case 5410/03, *Tysi*ac, judgment of 20.3.2007; Case 27617/04, *R.R.*, judgment of 26.5.2011; Case 57375/08, *P. and S.*, judgment of 30.10.2012.

<sup>4</sup> Council of Europe, Committee of Ministers, Interim Resolution CM/ResDH(2021)44, Execution of the judgments of the European Court of Human Rights, *Tysi*ac, *R.R.* and *P. and S.* against Poland, 11 March 2021.

the grounds of conscience and to monitor effectively its observance in practice;

Committee of Ministers also called Polish authorities to present their assessment of the impact of the Constitutional Court's ruling of 22 October 2020 on the availability of pre-natal examination, in particular as it is not strictly linked to the access to lawful abortion but also helps to make informed decisions during pregnancy related to pre-natal treatment or preparation for birth, and to ensure that it is not limited.

Committee of Ministers will again review the execution of the judgments of ECtHR in December 2021.

However, the Council of Europe was not only organization which reacted on the ruling of the Constitutional tribunal. The ruling of Tribunal further brought new dimension and inflamed the existing dispute between Poland and the European Union (EU) over the observance of the fundamental values of the EU, namely the rule of law. So far only European Parliament officially reacted to the ruling of Polish Constitutional tribunal. On 26 November 2020 European Parliament passed the resolution in which it strongly condemned the Constitutional tribunal's ruling as contrary to the European convention on human rights and fundamental freedoms as well as to Charter of fundamental rights of the European Union.<sup>5</sup> It also noted that Poland did not execute above mentioned three judgments of the ECtHR related to the right to abortion. Additionally, European Parliament noted that the European Commission launched infringement procedure under Article 7 TEU in relation to the judicial reform in Poland and recomposition of Polish Constitutional tribunal and made proposal for Councils decision on a determination of clear risk of serious breach of the rule of law. In that respect European Parliament urged the European Commission to carry out thorough assessment of the composition of the Constitutional tribunal, the unlawfulness of which constitute grounds for challenging of its rulings and thus its ability to uphold the Polish Constitution. It underlined that its ruling was yet another example of political takeover of judiciary and the systemic collapse of the rule of law in Poland. To this end the European Commission was called to ensure that everyone has equal and strong legal protection on all grounds included in Article 19 TFEU.

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<sup>5</sup> European Parliament resolution of 26 November 2020 on de facto ban on the right of abortion in Poland (2020/2876(RSP)), P9 TA (2020) 0336.

European Parliament also called on the Council of the EU to address this matter and other allegations of violations of fundamental rights in Poland in accordance with Article 7 TEU.

Finally, European Parliament welcomed the legislation establishing the mechanism that would allow the suspension of budget payments to Member State violating the rule of law and urged the European Commission to use this mechanism.

The ruling of the Constitutional tribunal is therefore just a tip of a iceberg in much more fundamental dispute between Poland and the European Union over the observance of the fundamental values of the EU, particularly the rule of law. In the next chapters we will consider the allegations of illegal recomposition of the Polish Constitutional tribunal and the possible effects of such act on the existence of the rule of law. We will also try to establish whether the recomposition of the Constitutional tribunal influenced in any way its ruling on abortion.

### **3. Recomposition of Polish Constitutional tribunal**

The problems with Constitutional tribunal started in 2015. In the eve of the parliamentary elections of 25 October 2015, on 8 October 2015 the outgoing *Sejm* nominated five persons to be appointed as judges of the Constitutional tribunal by the President of the Republic. Three judges would have take seats vacated during the mandate of the outgoing *Sejm*, while remaining two judged would take seats vacated during that of the incoming *Sejm* which commenced on 12 November 2015. After the parliamentary elections, on 19 November 2015 the new *Sejm*, led by PiS majority, amended the law on the Constitutional tribunal introducing the possibility to annul the nominations made by previous legislature and to nominate five new judges. Six days latter the *Sejm* passed the motion annulling the five nominations made by previous legislature and on 2 December nominated five new judges. Both acts of the new *Sejm* were contested before the Constitutional tribunal. In its ruling of the 3 December 2015 the Constitutional tribunal decided that previous legislature was entitled to nominate three judges replacing those whose terms expired on 6 November 2015.<sup>6</sup> The Tribunal also ruled that the previous legislature was not entitled to nominate the judges whose terms expired in December 2015. The ruling specified the obligation of the President of Republic to immediately take the oath of the judges nominated by the *Sejm*. In the second ruling of 9 December 2015. Tribunal invalidated the legal basis for the nomination by the new legislature of three judges for the vacancies

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<sup>6</sup> Case K 34/15.



opened on 6 November for which the previous legislature had already nominated judges.<sup>7</sup> Despite the rulings of the Tribunal the three judges nominated by the previous legislature have never take up their function of judge in the Tribunal. The President of the Republic Andrzej Duda (PiS) refused to take their oath. However he accepted the oath of three “December” judges nominated by new legislature, who according to the ruling of the Tribunal were elected in violation of the Constitution.

On 9 March 2016 the Constitutional tribunal declared the amendments on the law on the Constitutional tribunal adopted on 22 December 2015 were unconstitutional. However the Polish Government refused to publish that ruling in the Official Journal, with consequence that it does not have legal effect. According to Constitution the rulings of Constitutional tribunal take the legal effect upon their publication in the Official Journal. Following the ruling of 9 March 2016 Tribunal resumed the adjudication of cases. The Polish Government refused to participate in the proceedings and refused to publish the rulings of the Tribunal.

On 22 July 2016 *Sejm* adopted new law on the Constitutional tribunal. The new law required the President of the Tribunal to assign the cases to the three judges nominated in December 2015 by new *Sejm*, contrary to the ruling of the Constitutional tribunal. The new law also regulated the appointment of the President and Vice-President of the Tribunal. According to the new law the President of Republic appoints the President of the Constitutional Tribunal from among three candidates presented by General Assembly of the Tribunal. Both European Commission and Venice Commission criticized the new law. In the its opinion Venice Commission expressed the view that the new law “would considerably delay and obstruct the work of Constitutional tribunal, possibly make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning”.<sup>8</sup> On 11 August 2016 Constitutional tribunal declared number of the provisions of the law of 22 July 2016 as unconstitutional.<sup>9</sup> That include provision which required the President of the Tribunal to assign the cases to the three “December” judges. Polish Government again refused to recognize and to publish the ruling of the Tribunal. On 7 November 2016 Constitutional tribunal rendered a ruling on the constitutionality of the provisions of the law of 22 July 2016 regarding the

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<sup>7</sup> Case K 35/15.

<sup>8</sup> European Commission for Democracy through Law (Venice Commission), Opinion 860/2016, Poland – Opinion on the Act on the Constitutional Tribunal, 108<sup>th</sup> Plenary session, Venice, 14-15 October 2016, CDL-AD (2016) 026, point 123, p. 23.

<sup>9</sup> Case K 39/16.

selection of the President and Vice-President of the Tribunal.<sup>10</sup> The Tribunal ruled that the constitution must be interpreted to the effect that the President of the Tribunal shall be appointed by the President of the Republic among the candidates who have obtained a majority votes in the General Assembly of the Tribunal.

During the December 2016 Polish Senate adopted three laws which significantly changed the proceedings for appointment of the President of the Tribunal: Law on legal status of judges of the Constitutional tribunal, Law on organization and proceedings before the Constitutional tribunal and Law implementing the law on organization and proceedings and law on the status of judges. According to the former law the President of the Tribunal would be replaced by the Vice-President. However, the new laws established a specific transitory regime by establishing the new function of the Acting President of the Tribunal who could operate until a new President of the Tribunal was appointed. Those laws were adopted in view of expiration of mandate of the former President of the Tribunal in December 2016. The role of Vice-President of the Tribunal which the Constitution explicitly recognized was significantly reduced by the new laws.

Following the expiration of the term of the former President of the Tribunal, on 19 December 2016 President of the Republic Andrzej Duda signed three laws governing the functioning of the Tribunal and on the same day he appointed judge Julia Przylebska, a judge elected by the new *Sejm*, to the position of acting President of Tribunal. The next day judge Przylebska admitted the three “December” judges to take their function to the Tribunal, contrary to its earlier ruling. Only a day later, on 20 December, she convened the General Assembly of the Tribunal to elect candidates for post of the President of the Tribunal. Recomposed General Assembly of the Tribunal elected the two candidates for post of the President of the Tribunal, one of them was Julia Przylebska. Out of 14 judges who were present on the meeting, only three “December” judges and other three judges nominated by the new *Sejm* cast their votes. On 21 December 2016 President of the Republic appointed Julia Przylebska to the post of the President of the Constitutional Tribunal in spite of the Tribunal’s ruling of 7 November 2016 according to which Constitution requires that President of Tribunal shall be appointed among the candidates which have obtained a *majority* vote in General Assembly of the Tribunal. One of the first decisions of the newly elected President of the Tribunal was to force the existing Vice-President of the Tribunal to use his remaining leave until the end of his mandate.

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<sup>10</sup> Case K 44/16.

This act marked the end of the process of recomposition of the Polish Constitutional tribunal.

In its reaction to these developments the European Commission considered that the independence and legitimacy of the Constitutional tribunal was seriously undermined and that the constitutionality of Polish laws could no longer be effectively guaranteed.<sup>11</sup>

The issue of the legitimacy of the Constitutional tribunal was also raised before the European Court of Human Rights in case *Xero Flor w Polsce SP z.o.o. v. Poland*. On 7 May 2021 the European Court of Human Rights ruled that a bench (of the Constitutional tribunal) including a judge appointed to a judicial post that had already been filled in by legislature of 2011-2105 did not constitute a tribunal established by law.<sup>12</sup> This judgment is not final yet. In response to this judgment, on 16 June 2021 Polish Constitutional tribunal ruled that the judgment of the ECtHR is non-existent since the European Court of Human Rights lacks competences to issue such judgment and that judgment concerned shall not have legal effect in Polish justice system. According to Constitutional tribunal, the judgment constitutes an unlawful interference with the national legal order in matters which remain outside of the ECtHR competence.

The Polish Constitutional tribunal was not the only institution which was affected by the acts of Polish legislature. From 2017 to 2019 Polish Parliament passed several laws: Law on Supreme court, Law on ordinary courts organization, Law on National Judicial Council in order to implement judicial reform. Adoption of these laws raised grave concerns as regards the principle of the independence of the courts and separation of powers. Implemented reforms are generally assessed not only as “a major step backwards, but as very seriously endangerment of the rule of law” in Poland (Pajčić M, 2020: 97). The main goal of the judicial reform was recomposition of the Supreme court and ordinary courts. The reform aimed at appointing the more loyal staff in to the highest ranks of the courts (Drinoczi and Bien-Kacala, 2019: 1160). Under the new law on Supreme court the retirement age of the judges of Supreme court was lowered from 70 to 65. The new age limit applied as from the date of entry in force of that law and included the judges appointed before that date. Judges who attained 65 years of age or would attain that age within three months from entry into force of law would be retired. The law

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<sup>11</sup> European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, Proposal for Council decision on the determination of a clear risk of a serious breach by Republic of Poland of the rule of law, COM (2017) 835 final, Brussels 20.12.2017, p. 19.

<sup>12</sup> European Court of Human Rights, judgment of 7 May 2021, application no. 4907/18.

affected significant number of Supreme court judges 31 of the 83. Judges affected by the lowered retirement age and wishing to prolong their active mandate could make request to the President of the Republic. In granting that authorization the President of Republic would not be bound by any criteria and time limit and his decision would not be subject to any form of judicial review. The similar provisions were contained in the new law on ordinary courts organization. The law lowered the retirement age for judges and public prosecutors from 67 to 60 for female judges and from 67 to 65 for male judges. The Minister of justice was granted power to prolong their judicial mandate until the age of 70 on the basis of vague and unverifiable criteria. For all these reasons on 20.12.2017. the European Commission commenced the infringement procedure under Article 7 of the Treaty on European Union and made proposal for Council Decision on determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (Drinoczi and Bien-Kacala, 2019: 1160). The European Commission considered that the new laws on Constitutional tribunal and the new judicial laws affected the “entire structure of the justice system in Poland”. In view of the Commission, those laws enabled the executive and legislative powers to interfere significantly with the composition, the powers, the administration and the functioning of the Constitutional tribunal, Supreme court, ordinary courts and public prosecutor offices. Therefore, they put “at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of rule of law” (Drinoczi and Bien-Kacala, 2019: 1160). The infringement procedure is still pending. In the meantime the Court of Justice of the EU rendered two judgments regarding the judicial reform in Poland. In case C-619/18, *Commission v. Poland*, the Court of Justice ruled that by lowering of the retirement age of Supreme court judges and by granting the President of Republic to extend the period of judicial activities of judges of that court beyond the newly fixed retirement age the Republic of Poland has failed to fulfill its obligation under Article 19(1) of the Treaty on EU to provide remedies sufficient to ensure effective legal protection in the fields covered by the Union law. In that respect the Court of Justice considered that those provisions of the Law on Supreme Court breached the principle of irremovability of judges and judicial independence.<sup>13</sup> Similarly, in the second case, C-192/18, the Court of Justice declared that the law lowering of the retirement age of the judges of ordinary courts and public prosecutors was for the same reasons contrary to the Union law.<sup>14</sup>

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<sup>13</sup> Case C-619/18, *Commission v. Poland*, judgment of 24 June 2019.

<sup>14</sup> Case C-192/18, *Commission v. Poland*, judgment of 5 November 2019.

#### 4. Ideological and political context

In this chapter we will consider whether the recomposition of the Constitutional tribunal influenced its decision to further restrict abortion, and, if it was the case, in which way. In order to answer this question we have to discuss the political context in which the recomposition of the Constitutional tribunal took place. Current Polish Constitution is rather liberal democratic constitution, enacted by Democratic Left Alliance (former communists) and liberal Civil Platform in 1997. Problems started when conservative PiS party won the election in October 2015. The platform of this party “emphasizes human dignity, personal and communal freedom, but also the nation, morality and the universal Catholic Church”(Korycki in Daly, 2018: 5). When it came in power PiS had a plan to adopt entirely new constitution in accordance with its own values. However PiS abandoned this plan because it could not secure a needed majority in the Parliament to change the constitution. Instead PiS started with a process of adopting new laws aimed at *de facto* constitutional change. However, before that it had to capture the Constitutional tribunal as a guardian of the constitution (Daly, 2018: 6-7). After it managed to recompose the Constitutional tribunal ruling PiS applied similar recipe to Supreme and ordinary courts. This has put Poland in direct conflict with European Commission which initiated proceedings for violations of the European values, i.e. the principle of rule of law. But the dispute between Poland and European Commission goes much deeper than dispute over the principle of rule of law.

According to Article 2 TEU, the Union is founded on the values for respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Although these principles are generally accepted, the next sentence of the same article is particularly problematic for Poland: “these values are common to the Member States *in society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*”. As we mentioned earlier PiS party platform is based on the doctrine of some conservative circles of the Catholic Church especially when it comes to the issues of LGBT population, artificial insemination, contraception and abortion (Medović, 2018). Most of these issues are regulated by constitution and subsequent laws. In situation when it has no majority to adopt the new constitution or amend the existing one, ruling PiS resorted to its *de facto* changes through new laws or interpretations of the Constitutional court which composition was previously modified by the legislative. Many of those laws were declared unconstitutional by the earlier composition of the Constitutional tribunal. Refusal of the Government to publish and observe those rulings of the Tribunal, and refusal of the President of the Republic to take oath of the judges lawfully appointed to

the Tribunal violated the core of the principle of rule of law, rendering the Tribunal “ineffective and toothless” (Daly, 2018: 6-7). Some scholars even noticed that by these techniques, which affect the Constitutional tribunal, the political majority “can successfully relativize the constitution and the principles of the rule of law, democracy and human rights” (Drinoczi and Bien-Kacala, 2019: 1156).

In the essence this is a clash between two different political and constitutional concepts: illiberal democracy and liberal democracy.<sup>15</sup> Some authors opted use term illiberal constitutionalism or political constitutionalism instead of illiberal democracy. In attempt to explain the differences between legal and political constitutionalism Polish professor of constitutional law Czarnota wrote that legal constitutionalism alienated constitution from citizens and that place of citizens was taken by lawyers. He praised the PiS appointment of the judges that represent its worldview, which is based “on the principle of supremacy of the Parliament in relation to constitutional review and acceptance of role of the judicial restraint not judicial activism which was earlier the norm”. In his view this “is attempt to take constitution seriously and return it to the citizens” what would be the fulfillment of political constitutionalism (Czarnota, 2017 in Halmai, 2019: 14). However, the best description of this concept was made by Wojciech Sadurski who named it as “plebiscitary autocracy” in which the electorate approves of government disregard of the constitution (Sadurski, 2019: 242-243).

How the ruling of the Constitutional tribunal fits to this concept? As we mentioned above the Tribunal considered abortion due to irreversible impairment of a fetus as contrary to the constitution because it was prejudicial to the absolutely protected life of a fetus. In addition the Tribunal stated that the “mere fact of an impairment and/or incurable illness of a child at the prenatal stage – which is linked with eugenic considerations, as well as with potential discomfort in the ill child’s life – may not, alone, weigh in favor of the permissibility of terminating the pregnancy”. Although it was not expressly mentioned in the ruling itself, many of the findings and conclusions of the Tribunal, particularly with regard to “eugenic abortion”, were based on Amicus Curiae brief in the case submitted by proCatholic organisation European Centre for Law & Justice.<sup>16</sup> Authors of the brief were specially critical of alleged “eugenics in liberal societies”. “Be imposed by totalitarian or encouraged by liberal society, as in many countries today, eugenics have the same result because it is based on the same premise: a materialist conception of human

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<sup>15</sup> For more on those concepts and terms see Drinoczi T. and Bien-Kacala A., *op.cit.*

<sup>16</sup> European Centre for Law & Justice, Strasbourg, Amicus Curiae Brief submitted to the Constitutional Tribunal of Poland in the case K-1/20, Strasbourg, 16 October 2020.

being whose dignity is reduced to his physical and intellectual capacities”.<sup>17</sup> This argument reveals that debate over abortion is in fact part of much wider conflict between two political concepts: “decadent” liberal democracy illiberal democracy based on “Christian and family values”.

But what were the reasons for this show-trial. The Constitutional tribunal acted on the application made by the group of *Sejm* members belonging to the PiS party. It is clear that Christian values are cornerstone of the PiS political platform. Wasn't it easier to simply change the Law on Family Planning in accordance with PiS platform on abortion? Problem is, however, that abortion is highly contentious topic in Poland. Proposed amendment and public deliberation over this issue in *Sejm* could provoke massive social unrest and diminish the popularity of the ruling party. Instead, presenting this problem as purely legal issue, instead of political one, could have mitigated possible public reaction. The judicial resolution looked like more acceptable than political one. However, this calculation proved wrong. Ruling of the Constitutional tribunal provoked widespread protest in Poland and strong international reaction. The other reason for using the mechanism of constitutional review is purely legal. Simple change of legislation would not solve the matter. Laws could be changed again by the next political majority in the *Sejm*. The ruling of the Constitutional tribunal declaring abortion unconstitutional gave the ban on abortions constitutional significance. In this way the ban of abortion remains a time-long legacy of the PiS that will be difficult to change.

### **5. Legal effects of the Constitutional tribunal ruling within the legal system of the European Union and possible legal remedies**

Apart of initiating the infringement proceeding under the Article 7 TEU, European Commission so far have not taken any legal action before the Court of Justice of EU with regard the violation of the the independence of the Polish Constitutional tribunal. The infringement procedure under Article 7 of the Treaty on EU can led to suspension of certain rights of Poland. At this moment the proceeding is still in the first phase before the Council of the EU which will decide on existence of a clear risk of a serious breach of the fundamental values of the EU. Nevertheless the mere fact that the proceeding is triggered may have some legal effects within the legal system of the European Union. this is especially case with mutual recognition and execution of judicial decisions and the

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<sup>17</sup> European Centre for Law & Justice, *op. cit.*, p. 8.

application of co-operation instruments in criminal matters such as European arrest warrant.

In *LM* case the Court of Justice ruled on the request for preliminary ruling from the Irish court concerning the interpretation of Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.<sup>18</sup> During 2012 and Polish courts issued three European arrest warrants against LM, in order for him to be arrested and surrendered to those courts for the purpose of conducting criminal prosecutions, inter alia for trafficking in narcotic drugs and psychotropic substances. On 5 May 2017 LM was arrested in Ireland on the basis of those European arrest warrants and brought before the referring court, the High Court (Ireland). He informed that court that he did not consent to his surrender to the Polish judicial authorities. In support of his opposition to being surrendered, the person concerned submits, inter alia, that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the ECHR. In this connection, he contended that the recent legislative reforms of the system of justice in the Republic of Poland deny him his right to a fair trial. In his submission, those changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority, calling the operation of the European arrest warrant mechanism into question. LM concerned relied, in particular, on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) TEU regarding the rule of law in Poland and on the documents to which the reasoned proposal refers. The Court of the Justice first noticed that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected. Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. The Court of Justice also noted that the principle of mutual recognition constitutes the 'cornerstone' of judicial cooperation in criminal matters. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly. In the present instance, the person concerned, relying upon the reasoned proposal

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<sup>18</sup> Case C- 216/18 PPU, *LM*, judgment of the Court of Justice, 25 July 2018.



and the documents to which it refers, has opposed his surrender to the Polish judicial authorities, submitting, in particular, that his surrender would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of the courts of the issuing Member State resulting from implementation of the recent legislative reforms of the system of justice in Poland. In that respect the Court of Justice pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. The existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant. Thus, where, as in the main proceedings, the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State. To that end, the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. With that respect the Court of Justice stressed that:

*“information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment.”*

If the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, that authority must, as a second step, assess specifically and precisely whether, in the particular

circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk. In the view of the Court of Justice:

*“that specific assessment is also necessary where, as in the present instance, (i) the issuing Member State has been the subject of a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts, and (ii) the executing judicial authority considers that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in the light of those values, at the level of that Member State’s judiciary.”*

However, the Court of Justice clearly stated that the implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council. This was followed by the the key conclusion from the Court of Justice:

*“... as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.”*

The main consequence of this judgment is that the principle of mutual recognition of judicial decisions in criminal matters will no longer apply automatically to the decisions of Polish courts. The courts of the Member States seized with cases concerning the execution of European Arrest Warrant issued by Polish courts will decide on case to case basis whether to give effect to such warrant. Decision of the executing courts will depend on the assessment whether the person in respect of whom the warrant has been issued will run a real risk of breach of his fundamental right to and independent tribunal in Poland.

It should be noted that illegal termination of pregnancy is not listed in the Article 2 of the Framework Decision on the European arrest warrant and surrender procedures between Members States as the offence for which the European Arrest Warrant may be issued.<sup>19</sup> However, the judgment of the Court of Justice in the *LM* case indicates that the initiating of the infringement procedure under Article 7 TEU on the ground of general deficiencies of the rule of law may affect judicial cooperation and mutual recognition of the judicial decisions in other fields. This means that decisions of the Polish criminal courts might not be recognized nor executed in other Member States. That means, for example, that the courts of other Member states will have no obligation to provide legal assistance to Polish courts in cases where there is a risk of violation of the fundamental risk of defendants. Recent Judgment of the European Court of Human Rights that Polish Constitutional tribunal not constitute a tribunal established by law will certainly contribute to further isolation of Poland within the area of freedom, security and justice.<sup>20</sup>

In case that ECtHR judgment becomes final it will open the way for review of all rulings of Polish Constitutional Tribunal including the ruling on abortion of 22 October 2020 - at least within the legal systems of the Council of Europe and European Union. That will put additional pressure on Poland to implement above mentioned judgments of ECtHR relating to the right to abortion.<sup>21</sup> It is expected that the Committee of Minister of the Council of Europe will again review the execution of the judgments of ECtHR in December 2021. One should also keep in mind that although the Council of Europe is separate international organization the ECHR is integral part of the EU legal system. According to Article 6(3) TEU, fundamental rights, as guaranteed by European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Unions law. Moreover, EU Charter of Fundamental Rights provides for that in so far as this charter contains right which correspond to rights guaranteed by ECHR, the meaning and scope of those rights shall be the same as those laid down by ECHR.<sup>22</sup> That means that in application of the Charter the Court of Justice

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<sup>19</sup> Under the Polish Code women in Poland are not subject to a penalty for illegal termination of pregnancy. According to the Article 152 of Polish Penal Code medical personnel ordering and carrying out the termination of pregnancy with consent of a the women shall be subject to the penalty of deprivation of liberty up to 3 years. The same punishment shall be imposed on anyone, who renders assistance to a pregnant women in terminating her pregnancy in violation of the law or persuades her to do so.

<sup>20</sup> Judgment of the European Court of Human Rights, *op. cit.*

<sup>21</sup> Case 5410/03, *Tysiack*, judgment of 20.3.2007; Case 27617/04, *R.R.*, judgment of 26.5.2011; Case 57375/08, *P. and. S.*, judgment of 30.10.2012.

<sup>22</sup> Article 52(3) of the Charter of Fundamental Rights of European Union.

will follow the jurisprudence of the ECtHR (Medović, 2018: 94) Therefore, non-execution of the judgments of the ECtHR would be considered as violation of the EU law and cause for new infringement proceedings before the Court of Justice.

In these circumstances one possibility should be examined. Drinoczi and Bien-Kacala suggest that the possible way out from this situation might be that ordinary courts “take over the competence of constitutional review from paralyzed Constitutional tribunal” (Drinoczi and Bien-Kacala, 2019: 1163). According to this idea, if the Constitutional tribunal is disabled, ordinary courts should take over constitutional review as they review the consistency of laws with international obligations and EU law. Under this scenario ordinary courts could decide to observe international obligations, in this case ECHR, and to give full effect to judgments of the ECtHR. In addition, they could use procedure for preliminary ruling under Article 267 TFEU to test the consistency of the Polish laws with the general principle of EU law – protection of fundamental rights, and Charter of Fundamental Rights. However, as Drinoczi and Bien-Kacala noticed, “in a captured constitutional setting, this may be an ineffective measure” (Drinoczi and Bien-Kacala, 2019: 1163-1164). As we have already seen Constitutional tribunal ruled that the judgment of the ECtHR of 7 May 2021 was non-existent. Moreover, on 14 July 2021 Constitutional tribunal decided not to observe interim order of the Court of Justice<sup>23</sup> and stated that Court of Justice interim measures concerning the organisation and functioning of Polish courts were incompatible with Polish constitution, as Poland never transferred its competences in this area to the EU.<sup>24</sup> These two rulings of the Polish Constitutional tribunal brought Poland close to legal “Polexit” and effective legal isolation.<sup>25</sup>

### Conclusion

“The ends justify the means” wrote Niccolo Machiavelli in his masterpiece “The Prince” 16<sup>th</sup> century. In this case the goal is to restore traditional Christian and family values which are the cornerstone of the Polish ruling PiS party. Absolute protection of life of fetus and ban of abortion are important parts of that political agenda. even in cases of severe and irreversible impairment or life-threatening incurable illness. The right to life

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<sup>23</sup> Order of the Vice-President of the Court of Justice of 14 July 2021 issued in case C-204/21 R, *Commission v. Poland*. By this interim measure Court of Justice ordered Poland to suspend judicial activities of the Disciplinary Chamber with regard to judges in order to avoid serious and irreparable harm to judicial independence and the EU legal order.

<sup>24</sup> Case P-7/20.

<sup>25</sup> This term is first used by Wojciech Sadurski, a constitutional law specialist at the University of Sidney. See at Battle of the courts: Contradictory rulings in Poland, EU raise specter of ‘Polexit’ – POLITICO

is certainly the most secret and most important human right. In this light, the ruling of the Polish Constitutional tribunal may appear perfectly legitimate. It is not problem even if the ruling coincides with the views of the PiS party. However, the problem arises when political authorities abuses independent institutions in order to achieve the desired goal.

Nevertheless, the findings and conclusions of the Tribunal could be considered as legitimate. It is not problem even if they coincides with the views of the PiS. After the general elections in October 2015 the composition of the Tribunal was gradually changed by the series of unconstitutional acts of the government, legislature and president. Those acts undermined the independence of the Tribunal to such extent that European Court of Human Rights declared that it not constitute a tribunal established by law.<sup>26</sup> In these circumstances, when the independence and legitimacy of the Constitutional tribunal are seriously undermined, the constitutionality of Polish law can no longer be effectively guaranteed. As a consequence, the rulings of the Tribunal “can no longer be considered as providing an effective constitutional review”.<sup>27</sup> That apply also to the the ruling of the Tribunal on the ban of the abortion. Ironically, in order to preserve and protect values that are entirely legitimate in themselves, such as right to life of unborn babies, Polish political authorities have sacrificed greater good for this purpose - the rule of law. As someone said, the road to hell is paved with good intentions”.

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<sup>26</sup>Judgment of the European Court of Human Rights, *op. cit.*

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## THE RIGHT OF A MINOR FOR CONDITIONAL RELEASE

*The paper deals with the application of the institute of conditional release according to a particularly sensitive category of perpetrators of criminal offenses. Namely, the minors as potential perpetrators of criminal acts, where due to a certain expiration of the served sentence of juvenile imprisonment and good behavior, can request a conditional release. Criminal sanctions for juveniles imply the application of only the necessary minimum elements of coercion and restriction of liberty, and are primarily aimed as measures of assistance and protection, in order to establish the best possible cooperation and its unhindered inclusion in the social community. Juvenile criminal law emphasizes in a different way the protective function of criminal law to first apply to juveniles the mildest criminal sanctions that do not have a repressive character, and only then, that in the end, as an ultima ratio, a sentence of juvenile imprisonment can be imposed. While serving a sentence of juvenile imprisonment a minor spends a certain period of time in a prison institution, where that time should be fulfilled in terms of content, so that the intended purpose of punishment, as well as tasks in education and professional training, should be achieved. In that case conditional release of a minor can be realized. The right to conditional release of a minor can be consider as crucial in substantiation the right to continue a normal life as a free person outside of prison institution.*

**Keywords:** rights of a minor, conditional release, juvenile imprisonment

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## Introduction

In modern criminal law, the issue of juvenile delinquency increasingly goes beyond the application of only educational measures in the form of social response to the behavior of young people. The development of a new, “juvenile criminal law” in modern law has gone into two tracks: from the substantive-legal aspect - narrower or broader definition of the central category of the special system of children's justice - the concept of child delinquency, and from the legislative aspect - the adoption of different legal models of special regulation in criminal codes or specific laws (Kambovski, 2020: 13). We cannot neglect the fact that crimes are committed by minors who require the application of a special criminal sanction, ie. punishment. Thus, the importance of special and general prevention in criminal law enables the response to delinquent behavior of young people with a more severe criminal sanction, which has the characteristics of punishment.

In that sense, it is not uncommon for educational measures not to achieve the general purpose of criminal sanctions because the degree of educational neglect is extremely high, and the nature and gravity of the crime requires a severe no bro criminal sanction to be applied to a juvenile. In that way, a special criminal sanction could be applied to a juvenile only exceptionally, which has the characteristics of a punishment with emphasized elements of an educational character (Perić, 2005: 15; Hirjan, Singer, 1987: 60).

In the manner of prescribing and imposing a sentence of juvenile imprisonment, juvenile criminal legislation directly connects certain institutes characteristic, both for the criminal legal position of juveniles and for the criminal legal position of adults. In this regard, special legal provisions are envisaged Law on juvenile criminal offenders and criminal protection of juveniles (hereinafter: ZM)<sup>1</sup> which in a systematic way regulate certain legal possibilities applicable to this punishment. In that sense, during the execution of the sentence of juvenile imprisonment as well as after its termination, the rules of further court treatment of juveniles are prescribed (Stojanović, 2010: 337; Lazarević, 1963: 226), in order to fully conduct the court proceedings. Legal rules are conceptually prescribed in the wat that during the serving of sentence of juvenile imprisonment, institutes can be applied for further court proceedings and the execution of the sentence.

The imposition and application of a sentence of juvenile imprisonment, among other things, is achieved through certain institutes such as: conditional release, statute of limitations for the execution of this sentence, rehabilitation. It is important to say that

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<sup>1</sup> “Official Gazette of the Republic of Serbia” no. 85/2005.



these institutes have their special place in the provisions of the ZM, which comprehensively regulate issues related to this punishment (Blagić, Grujić, 2018: 494-495). Therefore, we will first point out the general issues and their criminal significance and role in juvenile criminal legislation, and then analyze the individual legal provisions that can be applied to institute of a conditional release.

Issues related to conditional release of a prisoners in general has long been the subject of theoretical and practical elaborations in order to provide appropriate explanations regarding the prescribing and application of this institute. Considering that conditional release on the sentence of juvenile imprisonment was the subject of general provisions of the criminal law until the adoption of the ZM, so different views were presented, mainly in the debates concerning adult and juvenile perpetrators. Today's juvenile criminal legislation is characterized by special provisions in Art. 32. st. 1 - 2. ZM which prescribe the conditions and manner of application of conditional release for minors. In the course of further presentation, we will especially point out the legal criteria for the application of conditional release for a juvenile imprisonment.

### **1. General criteria for the application of conditional release of a minors**

When legally regulating conditional release in our criminal law in general, it is assumed that the sentence of deprivation of liberty at a certain stage may cease with its further execution, if the appropriate legal requirements are accomplished, except for the exhaustively listed criminal offenses for which a sentence of a life imprisonment is prescribed by the latest amendments of the Criminal Code<sup>2</sup> (Grujić, 2019: 1114; Grujić, 2021: 145-158). Without going into a special explanation of the legal nature of conditional release (Tahović, 1961: 346; Čejović, 2006: 479; Srzentić, Stajić, 1968: 348; Stojanović, 2010: 270), we will focus mainly on generally accepted definitions in criminal law.<sup>3</sup>

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<sup>2</sup> "Official Gazette of the Republic of Serbia" no. 85/2005, 88/2005 – correct., 107/2005 - correct., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).

<sup>3</sup> In criminal law, the previously stated notions of conditional release imply only one phase in the execution of a prison sentence when the convict is released on parole. Contrary to the stated position, Stojanović points out that it is difficult to say that conditional release is only a phase in the execution of a prison sentence, but points out that part of the sentence is not executed when the convict is at large. Only in the case of revocation of conditional release is the remaining part of the sentence executed. Furthermore, conditional release encroaches on the sentence of imprisonment and the time spent on conditional release in case of its revocation is not included in the served sentence

One of the points is that, in the case of conditional release, the prison sentence is terminated earlier, so that the convicted person is released from serving the prison sentence, before he has fully served the sentence, with the fulfillment of certain legal conditions valid until the expiration of the sentence. (Šuković, 1971: 3).

Thus, conditional release consists in the release of a convict, as the conditions provided by law (formal and material) are achieved, before the person has fully served the entire sentence, if he does not commit a new criminal offense until the expiration of the time for which he was sentenced (Simić, 2021: 266).

When it comes to conditional release for juveniles, the amendments to the Criminal Code from 1959 contributed to a qualitatively different approach to prescribing juvenile imprisonment, ie conditions for imposing and criteria for applying conditional release to juveniles. From then until the adoption of the ZM there were various legal solutions regarding the conditions for imposition and the bodies that can decide on the conditional release of minors.

A specific criminal sanction, such as a sentence of juvenile imprisonment, required the prescribing of certain features concerning the conditional release of a convicted person (juvenile). The institute of conditional release in juvenile criminal legislation is not only related to the sentence of juvenile imprisonment, but there is a possibility of application in situations when a juvenile can be sent to rehabilitation institution or correctional institution. Namely, the conditional release of a juvenile can be achieved only with those educational measures of an institutional character, considering that these are institutional measures, where it is possible to shorten the stay for a certain time. The possibility of applying conditional release with the stated institutional measures and the punishment of juvenile imprisonment indicates that the legislator starts from the fact that the detention of juveniles should be reduced to only the so-called "required time" in the facilities (Kokolj, 1995: 54).

The legal nature and content of criminal sanctions against juveniles in general, to a large extent require application *only to the extent and for the time necessary*, which is in line with the principle of minimum intervention. This principle is especially expressed in the application of institutional educational measures and the very punishment of juvenile imprisonment, because a juvenile is deprived of liberty here for a certain period of time. The application of the provisions of conditional release of minors, points to the fact that their detention should be reduced to as less time as possible, which is necessary for

education and achievement of purpose of special and general prevention (Radulović, 2010: 157).

Among other things, many relevant international documents specifically recommend the legal possibility of applying the conditional release of minors. A conditionally released juvenile should be assisted in terms of community support, in order to best contribute to his or her conduct at large.<sup>4</sup> The right to conditional release, on the other hand, enables the realization of the right of minors to continue “normal” life in the community, in the context of the right to human dignity (Kolaković-Bojović, Grujić, 2020: 240-242; Pavlović, 2020: 46) of each individual.

From the standpoint of the principle of minimum intervention, our legislation also starts when it comes to prescribing conditions and applying conditional release of minors. Therefore, in Art. 32. ZM provides for conditions of an objective and subjective nature, which are decided by the juvenile panel on the basis of its request. The conditions prescribed by law indicate that an older juvenile may be conditionally released if he has served one third of the sentence, but not before the expiration of six months of the sentence. It is also required that such success be achieved while serving the sentence on the basis of which it can be reasonably expected that the juvenile will behave well at liberty and will not commit criminal offenses. The stated criteria must be cumulatively achieved by the juvenile, in order to decide on its reduction during the further execution of the sentence and before the time to which the juvenile was sentenced (Perić, 2007: 97).

During the execution of a sentence of juvenile imprisonment, the time that a juvenile spends in a certain penitentiary institution may be shorter than that provided for in advance by a court decision, if the prescribed legal conditions are met. It is necessary to emphasize that the institute of conditional release has a particularly important role in the punishment of juvenile imprisonment as a specific and different criminal sanction. Punishment of juveniles primarily implies the fulfillment of legal provisions which include formal and material preconditions for imposing a sentence of juvenile imprisonment. In that sense, the application of conditional release in this sentence leads to the release of the juvenile, in order to continue with daily obligations and activities. The goal of this institute comes to the fore when it comes to juveniles, because after the

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<sup>4</sup> Beijing Rules in Article 28, (the part relating to the application of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations). Also the Council of Europe Recommendations on Child-Friendly Justice of 2003, Art. 20, prescribes that deprivation of liberty should last as short as possible and that the juvenile should be provided, if necessary, with accommodation in re-socialization units.

passage of time and the achieved success in education, the juvenile (convicted person) is still encouraged to join the regular life in freedom (Lazarević, 1963: 293).

The application of conditional release on the sentence of juvenile imprisonment requires the fulfillment of the legally prescribed criteria provided for in Art. 32. ZM. During the conditional release of a juvenile, the legislator prescribed certain conditions that the court should take into account when deciding whether a convicted person (juvenile) can be released even before the expiration of the time for which this prison sentence was imposed.

The discussion on conditional release requires a closer clarification of all the above legal criteria, which leads to a more comprehensive approach in its further application. If it is assumed that the release of a juvenile requires the fulfillment of the expiration of a certain period of time, ie that he is released before he has served his sentence, the theory of criminal law generally refers to a formal or objective criterion (Milošević, 1983: 34; Šuković, 1971:

142; Radulović, 2010: 157; Škulić, 2011: 309). In addition to this criterion, the legislator states another legal presumption which refers to the fact that a juvenile can be reasonably expected to behave well at liberty and not to commit criminal offenses. Namely, here we are talking about a material or subjective condition that primarily refers to the so-called “good governance and success” in serving a sentence, which the court takes into account when deciding about applying this institute.

The conditions prescribed by law are of a general character and are in accordance with the principle that a juvenile is exceptionally punished and that the sentence of juvenile imprisonment is always optional. In modern criminal legislation today, the execution of a custodial sentence is not simply aimed at simply imprisoning or physically preventing criminal offenses from being committed. Quite simply, the idea that has been increasingly advocated for a long time is going to re-educate convicts in general, and especially when it comes to minors. In this regard, the upbringing and re-education of minors while serving their sentences is aimed at achieving the best possible success and good governance, so that we can talk about the application of conditional release in general. Also, if we keep in mind the purpose of juvenile imprisonment (Blagić, Grujić, 2020: 479-488), which refers to the upbringing and proper development of personality, it is necessary to connect it with the subjective criterion of conditional release in juvenile imprisonment.

Namely, the purpose of the sentence of juvenile imprisonment, the need and the possibility of its realization require that during the execution of this sentence the convict (juvenile) be actively involved in various programs of his re-education and training. It is the institute of conditional release that, in its qualitative sense, acts in the direction of stimulating the juvenile in the form of raising awareness of the importance of one's own actions and personal responsibility while serving the sentence of juvenile imprisonment. The time spent in the institution should be as useful and meaningful as possible, in order to overcome the difficulties that a minor faces. The connection of the subjective condition in conditional release with the purpose of punishment and through legal provisions clearly indicates a joint endeavor of the legislator in terms of a more permanent and better approach to the criminal position of minors (Bačić, 1985: 523).

The institute of conditional release and its justification, especially when it comes to juveniles, can be said to be primarily based on the idea of re-education of convicts (juveniles), which, on the other hand, is an important characteristic of the purpose of juvenile imprisonment (Blagić, Grujić, 2020: 479- 488). Moreover, the better the purpose of the sentence of juvenile imprisonment during its execution, the more achievable the presumption of the application of conditional release of a juvenile.

Furthermore, while serving a sentence of juvenile imprisonment, the law requires that convicted persons be treated in a manner that best suits their personality and that should be adjusted to their abilities and preferences. In this regard, there is no doubt that the penitentiary institution is actively involving convicts in various activities in order to achieve appropriate success in further education and proper development of the juvenile's personality. This approach enables convicted persons (juveniles) to be treated in accordance with the so- called the principle of individualization of the execution of a sentence of juvenile imprisonment. The necessity of this principle indicates that during the execution of this prison sentence, the juvenile is treated in a manner appropriate to the age, degree of maturity, development of abilities and personal circumstances, in order to achieve the goals of the sentence most effectively. Getting to know the personality of a juvenile in a prison institution is a necessary precondition for any individualization and therefore a special approach to it takes place in the direction of achieving the best possible results during the execution of a juvenile prison sentence (Šuković, 1971: 192-193).<sup>5</sup>

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<sup>5</sup> It is very difficult for the court to fully determine all the inclinations, abilities and other personality traits of the juvenile when determining the sentence of juvenile imprisonment during the criminal proceedings. The focus is mainly on the existence of guilt and determining the degree of guilt, while other circumstances concerning the person himself are approached lightly. In the end, the judge cannot know in advance, but only

The justification for the application of parole undoubtedly enables a convicted person to be released in a prison institution if a certain period of time has elapsed, after which it is expected that he will behave well at liberty and will not commit criminal offenses again. Therefore, respecting the principle of individualization of the execution of this sentence, the time required for a convicted person (juvenile) to spend in a prison institution should be determined, not only on the basis of a court decision, but also while serving a juvenile prison sentence. Respecting the conviction of the court and the successes achieved while serving this sentence, the application of parole becomes inevitable in the sense that the length of stay of the convicted person may be shorter than that specified in the court decision (Šuković, 1971:194).

The application of conditional release in our juvenile criminal legislation requires the fulfillment, first of all, of an objective condition, which refers to the fact that the juvenile has served one third of the sentence and spent at least six months serving parole before being released on conditional release.

### ***1.1. Objective criteria for the application of conditional release***

With regard to determining conditional release for juveniles sentenced to juvenile imprisonment, it is possible if two objectively cumulative conditions are met in the first place, namely: one third of the sentence served and b) that the juvenile has spent at least six months serving his sentence before being conditionally released. The content and meaning of the legal provision in Art. 32. ZM leads to the fact that this legal presumption refers to a certain period of time in which the convicted person is serving a sentence of juvenile imprisonment. The time spent in the penitentiary during the execution of this sentence is related to the stay of the juvenile for a period of one third of the served sentence and is taken as the limit below which it is not possible to talk about the application of conditional release of the juvenile (Radulović, 2010: 157).

Such a clearly set legal limit by the legislator indicates that the application of conditional release is possible only if the juvenile has served one third of the sentence. The criminal-political justification (Blagić, 2018: 319) of this punishment as well as the goals of punishment lead to the fact that the legislator, since its introduction into our legislation,

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assumes what effect this punishment will have on the perpetrator of the crime. Therefore, the application of the principle of individualization of execution in this sentence is essential during its serving. Treatments that can be carried out in a prison institution are of great benefit, because the time used in the sense of a better approach to the convict's personality is more important in a shorter period of time than leaving the convict alone and staying for the time he was sentenced.

in this way decides on the necessary time that a juvenile should spend while serving his sentence. Unlike adult perpetrators,<sup>6</sup> where a convicted person is obligatorily released if he has served two thirds of the prison sentence, if during the serving of the sentence he has improved in such a way that it can be reasonably expected that he will behave well at large, and until the time for who has been sentenced does not commit a new criminal offense (Article 46, paragraph 1 of the Criminal Code). Therefore, it is a matter of mandatory conditional release in case other legal conditions that the court evaluates in each specific situation are met (Stojanović, Kolarić, 2012: 11).<sup>7</sup> According to an earlier legal solution, a court could release a convicted person if he had served two-thirds of his prison sentence and if it was improved during that time period that he could reasonably be expected to behave well at large. In that case, the court could, but did not have to, release the convicted person even when the necessary legal conditions were undoubtedly met (Simić, 2012: 267).

When it comes to the conditional release of minors, then the legislator regulated this issue in a different way in relation to adults. Prior to the enactment of the special ZM, the regulations on the conditional release of minors were contained in Article 38 para. 4. of the Criminal Law, which states that a convicted person (juvenile) may be conditionally released if he has served a third of his sentence, but not before he has spent one year in a penitentiary.

The current regulations on the conditional release of a convicted person in Art. 32. The ZM reflects the general state of the criminal position of a juvenile and the existence of the possibility of his punishment. As the minimum period of time that a convicted person must spend in the institution, it is related to the general minimum sentence of juvenile imprisonment, which is set at six months in prison. Therefore, six months is taken as the minimum time that a convicted person must spend while serving his sentence, before he is released on conditional release.

Interpreting the provision of Art. 32 ZM, it is noticed that the legislator in this case envisages *only the possibility, ie. to be able to conditionally release a minor* from serving

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<sup>6</sup> Amendments to the Criminal Code from 2012 are provided in Art. 4 amendment of the provision of Art. 46th st. 1. CC in terms of that instead of only optional, mandatory parole is introduced if certain legal conditions are met.

<sup>7</sup> Mandatory conditional release is a criminal measure that has several positive aspects and can be an incentive for a convicted person to get a government while serving his sentence. In accordance with modern tendencies of punishment and appropriate criminal-political reasons, the legislator in this way overlooked that in addition to the optional, there is also the obligatory release of a convicted person due to the passage of a certain time and his good conduct.

a sentence in case other legal conditions are met. This provision can be viewed in the same way and its justification and expediency can be rightly questioned, as the previous legal solutions provided, when it comes to adults. Accordingly, if the legislator has provided for mandatory conditional release for adults under certain conditions, the more so, this would be more correct to do when it comes to minors. Bearing in mind that criminal-political reasons indicate the punishment of minors only in exceptional circumstances and that the principle of minimal intervention of the legislator is taken as primary, then that is another reason more for the intervention of the legislator in that sense.

Namely, it is necessary for the convicted person (juvenile) to be released on parole, *ie to be a juvenile's right, and not just a legal possibility* while serving the sentence in case of fulfillment of other legal conditions. However, in the theory of juvenile criminal law, we come across the understanding regarding conditional release, that juveniles who have committed a crime for which a sentence of juvenile imprisonment can be imposed, up to ten years, cannot be conditionally released before they have served half of the sentence. It is also pointed out that this decision is better suited to the parole regime due to the fact that in court practice it is taken not as an exception, but as a rule, that is. the right of the convicted person (Ignjatović, 2004: 547). The view that a juvenile cannot be conditionally released if he has not served at least half of the sentence imposed indicates and raises many questions regarding the legal nature of this sentence and the purpose of the sentence. Recently, the idea has been conceptually advocated that as few minors as possible be kept in a prison institution and that imprisonment should be applied only as a last resort. Any form of extra-institutional treatment should take precedence over those measures that are carried out in institutions. Perhaps this view of Ignjatović would be easier to take as a possible solution when prescribing mandatory and optional conditional release (where a third of the sentence should remain) in the case of serious crimes for which a sentence of over twenty or more is prescribed, for which may impose a sentence of juvenile imprisonment for up to ten years. Therefore, it would be a more acceptable solution for the legislator to prescribe, in addition to the optional, mandatory conditional release for criminal offenses, for which juvenile imprisonment can be imposed for a period of six months to five years, provided that the optional is provided for serious criminal offenses. a sentence of more than twenty or more or, in the case of the acquisition of at least two criminal offenses, for which a prison sentence of more than ten years is prescribed. In that case, a minor may be sentenced to up to ten years.

The existing legal solution enables the convicted person to be released on parole, *but not necessarily, despite the fact that other legal conditions in the formal sense of the word*



*have been achieved*, which the court assesses in each specific case. The time a convicted person spends while serving his sentence (one third) should have a stimulating effect on his behavior as much as possible. As a criminal measure, conditional release exclusively enables special - preventive influence on the personality of a juvenile. With the conditional release of a juvenile after serving a third of the sentence, there is no doubt that special prevention is especially pronounced (Stojanović, Kolarić, 2012: 12).

The treatment of a convicted juvenile primarily refers to getting to know his personality, providing assistance in proper upbringing, education and professional training. Also, it is necessary to keep in mind the statement that achieving special-preventive success, first of all, re-education of a convicted juvenile, it is necessary for some time for treatments and measures that fulfill the content of serving a juvenile sentence to give appropriate results. In this regard, the stated legal solution from Article 32 of the ZM can be seen in terms of the need to determine one third of the sentence as a formal presumption, which the convicted person must endure, in order to talk about the conditional release of a juvenile.

Among other things, in certain foreign criminal legislations, such as in Germany, according to the Juvenile Judicial Procedure Act (*Jugendgerichtsgesetz* - hereinafter JGG) in Article 88 para. 1. (*Aussetzung des Restes der Jugendstrafe*) stipulates that a juvenile may be released on conditional release if he has served part of his imprisonment, provided that he behaves well outside the institution. It is also envisaged that a juvenile may be released on parole before the expiry of six months of imprisonment, only if “particularly important reasons” require so. (*besonders wichtigen Gründen*, Art. 88. para. 2). In the event that the sentence of juvenile imprisonment is longer than one year, the juvenile may be released on parole only if he has served at least one third of the sentence. Therefore, conditional release is optional, whereby the director of prison institution (*Der Vollstreckungsleiter*) allows the postponement of the remaining part of the sentence, after the opinion taken by the state prosecutor and the convicted person. Conditional release of the convict is possible even before the expiration of six months, if it is determined that there is a so-called especially important reasons determined by the execution manager.

The essence is to carefully assess the personality of the juvenile, his behavior during the execution of the sentence and what impact only the delay will have, when the convict is released. The mentioned law also stipulates that instead of the judge who decided on the imposition of a sentence of juvenile imprisonment, now the decision on conditional release is given to the head of prison institution (Laubenthal, Baier, Nestler, 2010: 378.). In addition, in the event that a positive decision is made on the conditional release of a

convicted person, the provisions of this law on conditional postponement of the law from Art. 22 to Art. 26 JGG. The required screening time is determined, appropriate measures of assistance and support are provided, and certain obligations can be determined for the dismissed person. Despite the existence of legal criteria for the conditional release of a convict, the director of prison institution may make a negative decision, if he finds that there are circumstances that make it impossible and do not provide guarantees that the convict will behave well in outside of the prison. In any case, the public prosecutor can always appeal against the decision (*Beschluss*) (Diemer, Schoreit, Sonnen, 2011: 766 – 767).

Conditional release of juveniles in the criminal legislation of Austria is first regulated according to the general rules contained in the Criminal Code (Article 46 of the StGB), and then Article 17 of the Law on Judicial Procedure against Juveniles (*Jugendgerichtsgesetz*). Furthermore, they are explained in more detail in Art. 46th st. 1. and paragraph 2. StGB conditions which imply that conditional release can be given after half of the served sentence with the existence of good conduct of the convicted person. Then, it is stated that after two thirds of the served sentence, the convicted person must be released on parole, unless there are exceptional (special) circumstances that indicate that a new crime has been committed. In any case, a convict who has not reached the age of twenty-one should spend at least thirty days in an appropriate prison in order to be able to talk about parole at all (Foregger, Foregger, 2004: 64-65; Fuchs, 2002: 173). With regard to the aforementioned Juvenile Justice Act, Article 17 of the JGG again states the application of the general rules of the Austrian Criminal Code relating to parole, with special provision that general prevention does not have to be taken into account when it comes to parole (Maleczky, 2008: 50-51).

### ***1.2. Subjective criteria for the application of conditional release***

Prescribing the legal possibility that a convicted person may be released on conditional release while serving a sentence of juvenile imprisonment requires cumulative fulfillment of appropriate subjective conditions. In this case, we are talking about important assumptions that refer to the personality of the convicted person and his behavior during the execution of the sentence of juvenile imprisonment, which the court takes into account when deciding on the application of conditional release of a juvenile.

According to the legal provision in Art. 32. ZM it is necessary that the convicted (juvenile) has improved in such a way that it can be reasonably expected that he will behave well at liberty and that he will not commit criminal offenses. Based on the above

provision, it is undoubtedly pointed out that the essence of subjective criteria is the training of a convicted person by applying various forms of treatment in a prison institution, in order to achieve the necessary success, which the court evaluates in each individual case. From the point of view of the purpose of punishment, conditional release of a juvenile, above all, concerns the goals of special prevention in the form of active action on a person and his re-education in a prison institution (Perić, 2007: 67).

During the execution of the sentence of juvenile imprisonment, the application of educational influence is emphasized in order to further the proper development of the juvenile's personality and the most acceptable way of inclusion in the social community. A special approach towards a juvenile in a prison institution is achieved by applying various measures that enable the best possible acquaintance with their personality and at the same time affect the reduction of their neglect. The behavior of juveniles that should lead to the application of parole largely depends on the manner and success of re-education in a qualitative sense by professionally trained persons. Deciding that a juvenile may be conditionally released even before the time for which he was sentenced, implies that the court is convinced that there has been a change in his behavior, so as not to endanger or damage legally protected goods in the future. In that way, the court, on the basis of the achieved success in the prison institution, evaluates all the circumstances related to the personality of the juvenile and to what extent they were realized in that time period. Conditional release of a minor after serving one third of the sentence is related to the so-called achieved success in the institution. The legislator in Art. 144. ZM orders the court to decide on the justification of conditional release on the basis of the opinion of the expert service of the penitentiary institution, if the other conditions provided for in Art. 32 of the same law.

The provision contained in Article 144 para. 3. ZM enables the court to optionally, ie. not necessary, take into account the report and opinion of the penitentiary. This approach allows the court to decide on the conditional release of minors without the previously obtained opinion of professionally qualified persons who are currently participating in their educational treatment. In this way, great powers are given to the court in deciding on the conditional release of minors, while the opinion of experts who participate in working with them from the first day and provide appropriate protection measures, assistance in education and professional training does not have to be taken into account. We are of the opinion that it would be necessary for the court to obtain the opinion of the staff in the prison institution when deciding, and in that way, with the fulfillment of other conditions, decides on the application of conditional release.

Subjective criterion concerning the so-called of the *achieved success* while serving the sentence of juvenile imprisonment is normatively broadly set and thus it is left to the court to assess and more precisely explain the stated condition. First of all, the behavior of minors should refer to good behavior, school attendance, participation in individual and group treatments and all other planned programs. Active cooperation with educators, overcoming difficulties and strengthening the personal responsibility of minors, leads to better success in behavior and reducing the degree of his educational neglect. Depending on the psychophysical characteristics, the tendency for professional training, different treatments of minors are carried out and thus provides an adequate process of resocialization. The application of combined methods while serving a sentence of juvenile imprisonment enables and ensures the achievement of such success that may ultimately lead to the application of conditional release (Cvjetko, Singer, 2011: 217).

A certain period of time that a juvenile spends while serving a sentence of juvenile imprisonment in terms of content must be met, so that the most appropriate accomplishment of the envisaged tasks in education and vocational training. If in that period certain desired results are achieved on achieving success in the behavior of the minor, then we can also talk about his conditional release. In this way, the court is convinced that during the execution of this sentence, success was achieved, that it can be reasonably expected that the juvenile will behave well after leaving prison institution and that he will not commit criminal acts again. Therefore, the legislator envisages that the results in the behavior of minors are achieved primarily through appropriate success on the basis of which it is further concluded what his behavior will be at large and whether he will commit crimes (Stojanović, 1984: 187-188).

The content and meaning of the legal provision on the application of conditional release of minors indicate that the so-called good governance and success are indisputably the basic criteria that the court evaluates and evaluates. However, in addition, the legislator in Art. 32. st. 1. ZM stipulates that the court may conditionally release a juvenile by determining some of the measures of intensified supervision, as well as to apply one or more special obligations from Art. 14 of this law. Therefore, when deciding on conditional release, the court may release the juvenile without further obligations and measures, but it also has the possibility to determine some of the measures of intensified supervision with the application of special obligations. Namely, it is left to the court to determine some of the measures in each individual case, depending on the need and condition of the juvenile's personality, whereby the legislator did not limit the number and type of measures and obligations that the court applies.

Based on this legal provision, it is possible to determine more measures and more obligations that are implemented when a minor is at large in order to achieve the best possible results in his behavior. Despite the fact that the legislator envisages this possibility, in practical application it would be more acceptable not to accumulate determination of measures and application of special obligations, but to resort to the application of those measures and obligations that are necessary for further good behavior after prison. Depending on the need and assistance, the application of special obligations is generally expected to have a positive effect on the personality of the minor and his behavior, especially if there are reasons for the application of special treatments (Škulić, 2011: 302).

In case of fulfillment of objective-subjective criteria, the juvenile may be released if the court decides on the basis of its assessment and evaluation of the stated conditions. In that case, the juvenile is released earlier, ie before serving the sentence, if it is certain that this will positively influence the juvenile and his behavior at liberty, and thus after a certain time it is considered that the juvenile has served the sentence in full, provided that there is no revocation of conditional release.

## **2. Revocation of conditional release with a sentence of juvenile imprisonment**

The duration of conditional release is determined by the time of the part of the sentence that has not been served. The conditionally released person (juvenile) is at large and thus is checked for the time remaining until the full expiration of the sentence to which he was sentenced. The convicted person is released on conditional release and during that time we must not commit crime. Such a situation lasts until the expiration of the time for which the sentence was imposed, and if the conditionally released person does not commit a new criminal offense within that period, it will be considered that he has served the sentence. In this case, the commission of a criminal offense and failure to act in accordance with the measures of intensified supervision or special obligations may lead to the revocation of the conditional release of the juvenile (Perić, 2005: 94-95).

The legislator in Article 32 para. 2. provided that in the case of revocation of the conditional release of a juvenile, the relevant general provisions from Article 47 of the Criminal Code relating to the revocation of the conditional release of adults, as well as the provisions of Article 144 para. 4. ZM.

According to the general provisions of Art. 47 of the Criminal Code, there are two types of revocation of conditional release, namely: mandatory and optional. The gravity of a

new criminal offense is taken as a criterion for distinguishing between mandatory or optional revocation. Conditional release must be revoked if the convicted person (juvenile) commits one or more criminal offenses for which he has been sentenced to juvenile imprisonment for more than one year while on parole. Namely, the sentence imposed here is relevant, not threatened, which means that the basis for mandatory revocation can be both the commission of a more serious and a minor crime. Also, it does not matter whether the sentence was imposed for more than one year within the prescribed sentence or by applying the provisions on mitigation of sentence. If the conditions for the application of compulsory conditional release are not met, there is a possibility of optional revocation of conditional release when the conditionally released person commits one or more criminal offenses punishable by juvenile imprisonment of up to one year or in this case the juvenile fails to comply with certain measures special obligations (Soković, Bejatović, 2009: 92).

Unlike conditional release with a sentence of juvenile imprisonment, with some institutional educational measures (referral to an educational institution and an correctional institution), their revocation is specifically provided for in Article 22 para. 4. ZM. The revocation of conditional release in this case is always optional, where some of the above measures may or may not be revoked. In paragraph 4, the legislator foresaw cases of revocation of conditional release under these measures, which is not the case with a sentence of juvenile imprisonment, in which the decision on revocation is made according to the general provisions of Art. 47 of the Criminal Code with the possibility of applying Article 144 para. 2. ZM. In the case of a sentence of juvenile imprisonment, it is prescribed in such a way as to equate the decision on revocation of conditional release against minors and adults with the appropriate application of the provisions of Art. 144. ZM. Having in mind the legal nature and character of the sentence of juvenile imprisonment, the legislator did not specifically prescribe the revocation of conditional release, but referred to the general provisions of the Criminal Code. The reason for such a solution lies in the fact that it is a sentence that is to some extent repressive, and the decision-making when it comes to revoking the conditional release of minors is made according to the rules that apply to imprisonment for adults.

Conditional release may be terminated for several reasons prescribed in Article 47 of the Criminal Code, provided that the first condition refers to one or more committed criminal offenses. When it comes to the optional revocation of conditional release, the court will especially take into account the similarity of the committed criminal offenses, the motives from which they were committed and other circumstances that indicate its justification. The similarity of the crimes as a legal condition for revocation indicates the same or

similar committed criminal offence, while the motives for decision-making are ethically evaluated depending on whether they appear as aggravating or mitigating. As for other circumstances, we are mostly talking about those that refer to the time that has passed from the conditional release to the committed new criminal offense. In any case, the court is obliged to compare the so-called other circumstances in relation to the previously and newly committed criminal offense and determine the similarities and differences, so that he could refer in the decision to the reasons for revoking the conditional release (Novoselec, 2007: 400).<sup>8</sup>

In the event that the court revokes the conditional release when the conditionally released person is tried for the criminal offense he committed before he was conditionally released, the provisions of Art. 47. st. 1 and 2 of the Criminal Code on compulsory and optional revocation. Namely, if the convicted person commits a criminal offense before or during the serving of the sentence, the court shall act in accordance with the provisions of Art. 47. st. 1 and 2 of the Criminal Code, provided that it was not known about the committed crime before the decision on conditional release was made. Furthermore, the provision of Article 47 para. 4. of the Criminal Code states that if parole is revoked, then the rules applicable to the imposition of a penalty for criminal offenses committed in the acquisition shall apply. In fact, it is said that a part of the sentence he served after the previous conviction is included in the new sentence, while the time spent on parole will not be included. By applying the provisions on the imposition of a penalty for acts committed in acquisition, a new single penalty from Art. 60 of the Criminal Code, with the possibility of using the rules on sentencing a convicted person, but only if the application of the previous rules on acquisition could not achieve the purpose of punishment, given the unserved part of the previously imposed sentence (Article 62 para. 2 of the Criminal Code) (Stojanović, 2016:186).

A special issue related to the optional revocation of conditional release concerns the situation in which the court sentences a juvenile to up to one year for a new criminal offense, and does not revoke the conditional release. This practically means that the conditional release is extended for the time that the convict spent serving the sentence, ie that the time spent does not enter into the duration of the conditional release. The legislator orders in the provision of Art. 47 st. 5 of the Criminal Code that a conditionally released person who has been sentenced to up to one year in prison for a new offense, and

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<sup>8</sup> In the event that a new criminal offense is committed the same or similar as before (for example: the criminal offense of grievous bodily injury under Article 121 of the Criminal Code), the court has more reason to revoke the conditional release.

has not been revoked conditional release, the time the convicted (juvenile) spent serving his sentence will not be considered to have been on conditional release. In this case, we encounter a deviation from the rule that conditional release lasts as long as the sentence, ie until the remaining part of the sentence expires. Conditionally released persons who have been sentenced to a new sentence, but have not had their conditional release revoked, will first serve a prison sentence, then will be on parole for a previously committed criminal offense (Stojanović, 2016: 187).

Revocation of conditional release may be realized no later than two years from the day when the conditional release expired (Article 47, paragraph 6 of the Criminal Code). According to this provision, revocation refers to both obligatory and optional conditional release, regardless of the existence of a difference in conditions prescribed by law. The rule is that the conditional release expires on the last day of the sentence from which the minor was conditionally released. However, conditional release may be revoked during its duration, as well as after its expiration within two years. If the criminal act was found out after the expiration of the conditional release, the law allows the revocation to be performed later, ie. up to two years from its expiration.

When the conditions for revocation of conditional release are met, the legislator, when it comes to minors, enabled the application of the provision from Art. 144th para. 4. ZM. Namely, it is said here that the revocation procedure will be performed in accordance with the stated provision and that the same court that made the decision on conditional release will decide on that. Therefore, the court will first hear the public prosecutor for minors and juveniles, and then it will make a decision on revoking the conditional release. The procedure for revoking parole in a juvenile prison sentence is not regulated by the provisions of the Criminal Code, but in that case the general provisions of the Criminal Procedure Code<sup>9</sup> apply, from Art. 545 to Art. 551 of this Code. The revocation is regulated by the application of the provisions on the revocation of a suspended sentence and when it comes to the conditional release of a juvenile.

### **3. Scope and dynamics of application of conditional release of minors in the Republic of Serbia**

Criminal policy of courts in Republic of Serbia towards juvenile offenders shows that juvenile imprisonment, in the period from 2006 to 2013, was exceptional social respond

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<sup>9</sup> "Official Gazette of the Republic of Serbia" no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – decision CC и 62/2021 – decision CC



to juvenile delinquency. At first glance, the analyzed data shows that the sentence of juvenile imprisonment is rarely imposed in the practice of our courts, having in mind its participation in the structure of criminal sanctions applied to juveniles. The other data shows but uneven number of sentences of juvenile imprisonment in relation to individual years. In the observed period, a total of 111 sentences of juvenile imprisonment were imposed, or just under 14 sentences at the annual level. The highest number was recorded in 2007, when 30 sentences of juvenile imprisonment were imposed, and the lowest number in 2012, only 2. Juvenile imprisonment was most often imposed for the crimes of murder, aggravated murder, rape, theft and robbery, a lesser extent for other crimes (Blagić, Grujić, 2020: 475).

The research published in 2017 on the application of parole by courts in the Republic of Serbia also presents data related to the application of the institute of parole collected in the penitentiary for juveniles in Valjevo (Vujičić, Stevanović, Ilijić, 2017). These data are crucial in the analysis of the practice of applying conditional release to juveniles and determining the scope of application of conditional release of juveniles from serving a sentence of juvenile imprisonment in practice.

In the period from 2011 to 2015, within the Penitentiary-Correctional Institution for Juveniles in Valjevo, a total of 19 people were conditionally released. The largest number of conditionally released persons served their prison sentences for committing the following criminal offenses: aggravated murder (7), murder (4), rape (4), robbery (2) and grievous bodily injury (1). In the case of a sentence of juvenile imprisonment, the largest number of conditionally released persons committed some of the crimes with an element of violence, which is an important difference in relation to adult perpetrators of crimes. The length of imprisonment and the number of suspended persons according to this criterion: imprisonment from 6 months to 2 years (2), imprisonment from 2 years to 5 years (11), imprisonment from 5 years to 10 years (1), sentence imprisonment for more than 10 years (2). No conditionally released person has been previously convicted, and only one of them has previously been sentenced to an educational measure (Vujičić, Stevanović, Ilijić, 2017: 43).

Of the total number of parolees (18), two thirds applied once (12), while one third applied twice (6). Convicts usually submitted the application themselves (13), while in other cases the application for conditional release was submitted by the convict's defense counsel (5). The opinion of the penitentiary can be assessed as positive in each specific case, stating all the elements that are important for making a correct and lawful court decision, while

prosecutors, in the case of this category of convicted persons, usually gave a negative opinion (12) (Vujičić, Stevanović, Ilijić, 2017: 43).

In the first-instance procedure of deciding on the conditional release of a juvenile from serving a sentence of juvenile imprisonment - in 11 cases, it was completed by a decision on approving the application for conditional release, while in the remaining 7 cases the court issued a decision rejecting the application for conditional release. . In the appeal procedure - in 4 cases, the second instance court issued a decision approving the convict's appeal, revoking the first instance decision and returning the case for a new decision, while in 3 cases a decision was made approving the appeal and changing the first instance decision in favor of the convicted person. The average length of probation was 6 months and 10 days. In almost 1/3 of the cases, in addition to parole, the courts also determined the application of measures of intensified supervision towards the juvenile. If we look at the ward in which convicted persons are at the beginning of serving a sentence of juvenile imprisonment (primary classification) and during release on parole, it is evident that most of them have progressed. Namely, when entering the serving of the prison sentence, the largest number of convicted persons (17) were assigned to a closed ward, while only one person was in a semi- open ward. At the time of parole, only three convicts were in the closed ward, while the others (15) were in the semi-open ward of the institution. Based on comparative data, it is noticeable that there was progress in the treatment of most convicts (16), while compared to the initial category, only two (2) convicts fell behind due to serious disciplinary offenses, after which they were deprived of benefits. All parolees were employed while serving their prison sentences. In addition to work engagement, the largest number of them also took part in the work of the following sections: library, art, sports section. The employees of the institute had no objections to their employment and this was especially emphasized in the reports submitted to the court. A total of ten (10) parolees were not disciplined. Convicts who were disciplined were punished in three (3) cases for one or two disciplinary offenses, while two (2) of them committed more than two disciplinary offenses during the execution of the prison sentence (Vujičić, Stevanović, Ilijić, 2017: 43-44).

Most of the conditionally dismissed persons used some of the benefits, ie special rights. The benefits essentially represent the maximum that a person has achieved while serving a sentence of juvenile imprisonment, and when it comes to the use of rights and benefits. In other words, except for three persons, who were classified in the closed department of the institution, and in that sense they could not be granted other rights, except for the extended right to receive packages and the number of visits, all other persons mostly used non-institutional rights. It was certainly important for the resocialization and reintegration

of convicts into the social community and normal life flows. On the other hand, the fact that the non-institutional benefits used were not abused was a circumstance that the court took into account when deciding on the release of the convicted person on parole. (Vujičić, Stevanović, Ilijić, 2017: 45).

#### **4. Conclusion**

Conditional release of juveniles sentenced to juvenile imprisonment is a significant issue of criminal and juvenile criminal law, while in the context of the right to (continuation of “normal”) life can be a determining factor in the successful social reintegration of juvenile delinquents. Bearing in mind that this is a specific category of juvenile offenders, as well as a specific criminal sanction that can be imposed under special conditions and duration for serious crimes, if the purpose of prescribing and applying criminal sanctions could not be achieved by applying a milder criminal sanction - some of the educational measures, the conditional release of a juvenile from serving a sentence is a significant criminal law institute that provides juveniles with the possibility of early release and inclusion in normal life before the expiration of the sentence of juvenile imprisonment.

The paper is dedicated to the analysis of normative solutions for the application of conditional release of juveniles from serving a juvenile prison sentence, general conditions for the application of the institute, as well as objective and subjective conditions, presentation of previous provisions regulating this issue and presentation of certain solutions from comparative criminal legislation. After considering and critically analyzing the decisions related to the revocation of conditional release, the paper presents the practice of courts in the application of conditional release to minors in the Republic of Serbia in the period from 2011 to 2015.

Having in mind the frequent amendments to the Criminal Code in the part related to the application of conditional release, frequent regressive solutions related to the tightening of conditions for application, but also (the latest amendments to the Criminal Code) which introduce a ban on conditional release of persons sentenced to life imprisonment for some of the most severe crimes, the above-mentioned should not exclude the fact that, among other things, this law provides for the conditional release of an obligatory character for persons sentenced to imprisonment. This fact may be crucial in future changes to juvenile criminal law. Namely, the authors plead for the introduction of mandatory parole in certain categories of juveniles sentenced to juvenile imprisonment after serving one third of the sentence, or at least half of the sentence served in special categories of juveniles sentenced to juvenile imprisonment within the prescribed maximum of this sentence.

In accordance with the principle of minimal intervention in deprivation of liberty of juveniles, achieving successful resocialization and social reintegration of convicted juveniles, and especially from the aspect of the right to (continuation) of life after releasing from serving a juvenile sentence, reforming the normative framework, we are convinced, that is, the introduction of mandatory conditional release of juveniles from serving a juvenile prison sentence would be a step in the right direction in the development of a different response to juvenile delinquency.

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Dušan Ilić\*

## CHALLENGES OF THE LEGAL RECOGNITION OF LIFE PARTNERSHIP OF SAME-SEX PERSONS IN SERBIA IN THE LIGHT OF COMPARATIVE LEGAL SOLUTIONS\*\*

*The issue of the legal recognition of life partnership of same-sex persons in the Republic of Serbia, ie. the recognition of same-sex unions is currently one of the most delicate social and legal challenges. The Republic of Serbia belongs to the group of European countries that do not recognize any form of same-sex unions. For that reason, during the first half of 2021, the law on same-sex unions was proposed, which provoked conflicting reactions from the general public. This article aims to present the constitutional and legal possibilities of the (non)recognition of same-sex life partnership in Serbia, within the existing positive law of the Republic of Serbia. Secondly, this article should present the comparative legal solutions used by other member states of the Council of Europe regarding the legal recognition of same-sex unions. This part will present the solutions of some European countries that recognize certain forms of life partnership of same-sex persons, as well as those that, like Serbia, do not recognize any form of same-sex unions, but in some way regulate the status of these persons in their legal system. Thirdly, possible legal solutions to overcome the current challenges faced by people living within these life forms will be presented.*

**Keywords:** *life partnership, same-sex unions, same-sex partners, Republic of Serbia, comparative law.*

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## INTRODUCTION

The issue of redefining family relations is one of the most current phenomena in comparative Family law. The reasons that affect the redefinition process are different. That is why today, the family, as the basic cell of every society, in certain segments, or manifestations, deviates from the traditional model. But the institute that provokes much more controversy seems to be marriage. The traditional model of marriage, which is based on a monogamous heterosexual relationship, is being reconsidered in some European countries. Therefore, a large number of countries on the Europe began legalizing extramarital unions after World War II, which began to increasingly replace marriage. The reasons for this are numerous, but it is enough to mention the secularization of society, which for the most part saw marriage as an act of a sacral character. Until recently, some conservative states recognized exclusively a marital union, which today remains only an exception. The process of legalization of extramarital unions went as smoothly as possible, because there was no essential redefinition of family relations, rather it was exclusively a matter of recognizing the factual situation in society. Even some authors believe that the extramarital union managed to break into the legal systems because it is only an introduction to marriage, although there are different opinions (Mršević, 2018: 287-288).

In parallel with these processes, unfolded the process of recognizing certain rights of persons of non-traditional sexual orientation.<sup>1</sup> Thus, homosexuality was first decriminalized, and at a later stage, certain rights from the corpus of family law were recognized for homosexual persons. As a result, de facto same-sex partnerships have been legalized in some European countries. However, the way of the legal recognition of these communities, as well as the characteristics of their status, did not unfold in the same manner in some countries. In other words, different European countries have recognized same-sex relationships in different ways, while in most of Eastern Europe they are still not legalized, though some rights of persons living in such unions have been recognized in the field of civil, criminal, administrative law.

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<sup>1</sup> In some countries, the term sexual orientation is used, and in some countries, as in Italy, for example, the term sexual orientation. See more: Caterini, Aragon, 2020, p. 459.



## **POSSIBILITY OF LEGAL RECOGNITION OF SAME-SEX UNIONS IN SERBIA**

Serbia belongs to the group of countries that protect the traditional model of marriage, ie family. Namely, the highest legal act defines marriage in such a way that it prescribes that it be concluded on the basis of the freely given consent of a man and a woman before a state authority.<sup>2</sup> In this way, it clearly expresses the position that marriage is understood exclusively as a heterosexual and monogamous union. Thus, even the highest legal act prevents the legalization of any other form of marriage, known in comparative practice. For example, it is impossible to legalize homosexual or polygamous marriage within the positive constitutional order of Serbia. But, on the other hand, as there are examples of non-traditional forms of partnerships being recognized as civil unions in comparative practice, proposals to Serbia to legalize same-sex partnerships are appearing more and more often in the Serbian public. Human rights activists stand out in particular, who consider public discourse in Serbia homophobic because of their opposition to redefining the institution of marriage (Mršević, 2017: 202).

In that sense, in March 2021, the Serbian Ministry of Human and Minority Rights and Social Dialogue presented a draft law on same-sex unions, which should regulate this issue. Although the proponents termed it a “human rights law”, which is an unusual term in legal theory, the analysis of specific articles of this Draft shows that it uses Family Law terminology, ie introduces institutes that produce the same legal consequences as classic institutes of the Family Law. In addition to the legalization of same-sex unions, the Draft also proposes the legalization of unregistered same-sex unions, which, at the outset, implies an analogy that exists between marital and extramarital unions. Both registered and unregistered same-sex unions are considered a union of family life. It is also envisaged that the partner has the right to protection from domestic violence.<sup>3</sup>

Article 7 states that: Issues related to the formation, registration and termination of same-sex unions, actions and legal consequences of same-sex unions, subsistence and property relations and protection from violence, which are not specifically regulated by this law, shall be subject to the provisions of the law. Governing family relations, which makes it clear and unambiguous that the proposed Draft belongs to the scope of Family Law. This

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<sup>2</sup> Art. 62, paragraph 2, Constitution of the Republic of Serbia, Official Gazette of RS 98/2006.

<sup>3</sup> Art. 2 & 5, Draft Law on Same-Sex Communities, Ministry of Human and Minority Rights and Social Dialogue of the Republic of Serbia, available at: <https://www.minjmpdd.gov.rs/javne-rasprave.php>, accessed 08.06.2021.

statement is additionally confirmed by Article 14, which defines the procedure for registration of same-sex unions. The same-sex union is concluded in front of the registrar, in a solemn manner, in an official room appropriately arranged for that purpose. It is clear that the Draft treats same-sex unions as families, ie gives its members the status of family members.

It was emphasized that the introduction of new institutes, registered and unregistered same-sex unions, which were conceived as counterparts to the marital and extramarital union, would give users of these institutes greater rights, i.e, better legal status compared to marital and extramarital partners. Namely, persons entering into a registered same-sex union would have the opportunity to terminate it consensually before the registrar, which spouses do not currently have as an option, while persons living in unregistered same-sex unions would have the right to inherit each other, which is currently denied to extramarital partners.

Most of the storm in the public was caused by Articles 36 and 37, which regulate the life of children in same-sex unions. Namely, the proponents predicted that children who come under the care of one of the parents who subsequently enters a same-sex union, will be raised and brought up not only by the parents, but also by his/her partner. As our courts mostly assign custody of children to mothers, children in this case would mostly grow up in a lesbian environment, which means that the Draft *de facto* favors lesbians over gays, bisexuals and others. This would also constitute discrimination, this time within the LGBT population. On the other hand, having in mind the valid family law regulations that regulate the position of children, it is clear that these are solutions that deeply penetrate the foundations of the constitutional system and illegally redefine family relations.

### COMPARATIVE SOLUTIONS

When we talk about regulating the status of same-sex partnerships in comparative practice, it should be said at the beginning that there is no universal solution to this issue. Namely, we will focus on European comparative practice, primarily, thinking of the member states of the Council of Europe. In this regard, we can classify all European countries into three groups. The first group includes those states that have already legalized same-sex marriages, ie those that have equated same-sex unions with marriage. These mainly include Western European countries, such as Austria, Belgium, the Netherlands, Luxembourg, Denmark, Sweden, Norway, Finland, Iceland, Ireland, the UK, Portugal, Spain, France, Germany and Malta.

On the other hand, fourteen European countries recognize some kind of same-sex partnership as the so-called civil unions. These are Italy, Switzerland, the Czech Republic, Slovenia, Hungary, Croatia, Greece, Cyprus, Montenegro, Estonia, Andorra, Monaco, San Marino and Liechtenstein. A special group includes six EU member states (Poland, Slovakia, Romania, Bulgaria, Lithuania and Latvia), which interpret family law relations very restrictively, and generally do not recognize any new forms of married life, i.e. allow only limited rights to same-sex partners. Together with the mentioned six countries, most Eastern European member states of the Council of Europe do not recognize any rights to same-sex partners in terms of family law.

Poland does not recognize any form of life partnership of persons of the same sex. In particular, neither same-sex marriages nor same-sex partnerships. The Polish Constitution prohibits a different type of marriage than the traditional one. There is a 2012 Supreme Court ruling recognizing couples who actually live together with limited rights to rent a joint household. The Criminal Code recognizes the institute of “the closest person”. It is a partner for whom it is not specified that he/she must be of the opposite sex.<sup>4</sup> This Law, as it is not specified otherwise, also enables persons who actually live in a same-sex community the right to refuse to testify against the “closest person” and other similar rights in criminal proceedings. The Law on Social Assistance from 2004 covers all persons from the same household under the term family, which enables same-sex couples to use the rights provided by the said Law.<sup>5</sup> Furthermore, the Law on Patients' Rights from 2008 enables rights in the field of health care (for example, visits to patients) to same-sex couples, because it is precisely because of them that it is not specified which family members (households) are the holders of these rights. In this regard, a new legal institute has been introduced. It is an institute of a close person, which, in addition to the spouse, extramarital partner, child and relatives, also includes those persons designated by the patient.<sup>6</sup>

Similar to Poland, Lithuania does not recognize same-sex unions or any form of partnership of this type. In 2011, the Constitutional Court issued a decision stating that

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<sup>4</sup> Art. 115, paragraph 11, The Penal Code of Poland, *Kodeks karny*, z. U. 1997 Nr 88 poz. 553 Ustawa z dnia 6 czerwca 1997 r., available at: <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf>, accessed 02.06.2021.

<sup>5</sup> Art. 6, paragraph 14, Ustawa z dnia 12 marca 2004 r. o pomocy społecznej, *Dz. U.* 2004 Nr 64 poz. 593, available at: <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20040640593/U/D20040593Lj.pdf>, accessed 02.06.2021.

<sup>6</sup> Art. 3, paragraph 1, item 2, Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta, *Dz. U.* 2009 Nr 52 poz. 417, available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20090520417/U/D20090417Lj.pdf>, accessed 02.06.2021.

the family does not arise only from marriage, in order to alleviate the unequal position of persons living in an extramarital union.<sup>7</sup> This decision is also emphasized by LGBT activists, who believe that it should also apply to same-sex unions, and not only to extramarital ones. The Civil Code does not explicitly allow same-sex marriages. But after the decision of the European Court of Justice from 2018 in the case of *Coman vs. Romania*, the Lithuanian Supreme Court has ruled that Lithuania must recognize the right of residence of same-sex partners who have registered their marriage or union outside Lithuania, if one of them is a citizen of the EU. Although after the elections at the end of 2020, one of the parties, coalition partners in the new government, stated that the adoption of the law on same-sex unions was a condition for the formation of the government, such a proposal failed to get the necessary support (*Euronews*, 26.05.2021).

Similar to Lithuania, the Latvian Constitution only recognizes marriage. In that sense, the highest legal act of Latvia does not recognize not only same-sex unions, but even extramarital heterosexual unions. Article 110 of the Constitution defines marriage in a very clear and unambiguous traditional way, and prevents any recognition of same-sex unions.<sup>8</sup> Following the aforementioned judgment of the European Court of Justice from 2018, the Supreme Court of Latvia passed an almost identical decision that was made by the Lithuanian Supreme Court before it.

Slovakia is also one of the EU member states, which does not recognize same-sex marriages or same-sex partnerships. Although the current regulations clearly formulate marriage in the traditional way, four attempts have been made so far to pass the Law on Same-Sex Communities (1997, 2000, 2012 and 2018), but these attempts have been unsuccessful. Following the amendments to the Civil Code and the Criminal Procedure Code from 2018, the institute of “the close persons” was introduced, which recognizes certain rights in civil and criminal procedure matters to a limited extent. Specifically, in addition to a spouse, children, parents, relatives, sister, brother, a person who lives with a certain person in the same family household is also considered a close person.<sup>9</sup> The holders of these rights could, by extensive interpretation, also be considered partners

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<sup>7</sup> Lietuvos Respublikos Konstitucinio Teismo 2011 m. rugsėjo 28 d. nutarimas “Dėl Valstybinės šeimos politikos koncepcijos”. Valstybės žinios. 2011, Nr. 118-5564, available at: <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/p100/ta159/content>, accessed 02.06.2021.

<sup>8</sup> Art. 110, The Constitution of The Republic of Latvia from 1922, Reinstated in 1991, with Amendments through 2016, available at: [https://www.constituteproject.org/constitution/Latvia\\_2016.pdf?lang=en](https://www.constituteproject.org/constitution/Latvia_2016.pdf?lang=en), accessed 04.06.2021.

<sup>9</sup> Art. 116, Civil Code of Slovakia, Zákon č. 40/1964 Zb. Občiansky zákonník, available at: <https://www.zakonypreludi.sk/zz/1964-40>, accessed 04.06.2021.

living in informal same-sex communities. After the decision of the European Court of Justice from 2018, Slovakia also recognized the right of residence of same-sex partners, provided that one of them is an EU citizen.

As for Bulgaria, this country does not recognize any form of same-sex partnership. The Constitution does not allow the legalization of such a union, and Article 46 defines marriage as a union of a man and a woman, and recognizes exclusively civil marriage,<sup>10</sup> although extramarital unions are very widespread. The Family Law from 2009 fully follows the constitutional solutions. Following the 2018 ECJ decision, the Bulgarian Supreme Administrative Court ruled in 2019 recognizing the right of residence of same-sex partners where one of them is an EU citizen, while refusing to recognize the registration of same-sex marriages (Supreme Administrative Court, decision № 11558 of 2018).

Hungary is one of the countries that have legalized certain forms of same-sex life, but not same-sex marriages. In 2009, the Law on Same-Sex Partnerships was passed. These partnerships are on an equal footing with the marital union, except in terms of adoption and in vitro fertilization (ILGA Europe, 2009). However, after the adoption of the new Constitution (2011), same-sex marriages were prohibited. This was done by a restrictive definition of marriage according to which it is an exclusive union of a man and a woman.<sup>11</sup> In addition, there is the Law on Cohabitation which allows partners, without specifying whether they are persons of the same or opposite sex, living in an economic and emotional / sexual union a certain range of rights in the field of social and health care, without the need for registration. For example, visits to patients, prisoners, the right to inherit a pension (Ádám Fuglinszky, 2017). It should be pointed out that the District Court in Budapest in 2018 passed a verdict according to which Hungary has the obligation to recognize same-sex unions registered abroad (ILGA Europe, 2018).

The Czech Republic recognizes registered partnerships for same-sex couples. This form produces legal effects arising from marriage, including the right to inheritance, the right to declare a same-sex partner a relative, the right to visit a hospital, the right to visit a prison, the right to alimony, but do not allow joint adoption, inheritance pension, or joint

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<sup>10</sup> Art. 46, paragraph 1, The Constitution of The Republic of Bulgaria, PROM. SG 56/13 JUL 1991, AMEND. SG 85/26 SEP 2003, SG 18/25 FEB 2005, SG 27/31 MAR 2006, SG 78/26 SEP 2006 - CONSTITUTIONAL COURT JUDGMENT NO.7/2006 , SG 12/6 FEB 2007, SG 100/18 DEC 2015, available at: <https://parliament.bg/en/const>, accessed 04.06.2021.

<sup>11</sup> Art. L, paragraph 1, Hungary's Constitution of 2011 with Amendments through 2013, available at: [https://www.constituteproject.org/constitution/Hungary\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Hungary_2013.pdf?lang=en), accessed 04.06.2021.

property rights. The Law on Registered Partnership was adopted in March 2006 and entered into force on July 1, 2006.<sup>12</sup> The Czech Republic also grants the status of an unregistered partnership to “persons living in a joint household”, which gives couples the right to inheritance and the right to housing. Registered partners do not have the same joint property rights as married couples and do not have the same tax benefits. Another big difference is that registered (same-sex) partnerships can be concluded only in 14 cities, which represent the administrative centers of the Czech regions, while marriages can be concluded at each registry office, ie within each local self-government unit. However, due to the retention of the exclusive right to conduct demographic policy, the Czech Republic makes certain differences in terms of tax and fiscal benefits, to which, in this context, only heterosexual couples are entitled (ECRI Report on The Czech Republic 2015: 32, Danish institute for human rights, COWI, 2009: 5).

When we talk about the ex-Yugoslav space, it should be emphasized that Slovenia, Croatia and Montenegro have recognized certain forms of same-sex partnership, while Serbia, Bosnia and Herzegovina and Northern Macedonia still exclusively protect the traditional family model. Croatia was the first country in the region to legalize same-sex forms of life. It recognizes life partnerships for same-sex couples. This state first legalized same-sex unions in 2003 when it adopted the Law on Same-Sex Unions. This matter was then further regulated by the 2012 Anti-Discrimination Act. As a kind of reaction, in 2013, after a referendum, the highest legal act of the Republic of Croatia was changed, which defined marriage as a union of life of a man and a woman. Already in 2014, Croatia received a new law on same-sex unions, which was called the Law on Life Partnership of Persons of the Same Sex. This Law defined the status of same-sex couples equal to the status of married couples in everything except adoption. However, the Law indirectly allows same-sex couples this right through partnership guardianship, an institute similar to the adoption of a stepson. The Law also recognizes and defines informal life partnerships as family life communities, legally equating them with cohabitation. In parallel with the process of legalization of same-sex communities, different tendencies could be noticed. Namely, in the 2013 referendum, which was opposed by almost the entire political establishment and the NGO sector, citizens almost by a two-thirds majority supported the proposed amendment to the Constitution which provided for marriage to be defined exclusively as a union of a man and a woman (State Electoral Commission of the Republic of Croatia, 2013).

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<sup>12</sup> Zákon o registrovaném partnerství a o změně některých souvisejících zákonů, č. 115/2006 Sb, available at: <https://www.zakonyprolidi.cz/cs/2006-115>, accessed 04.06.2021.

Back in 2006, Slovenia recognized limited rights to registered same-sex couples. After several years, LGBT activists managed to win a referendum on the legalization of same-sex marriage. It was held in 2015, but a convincing majority of voters were against (63%). After that, the Law on Same-Sex Partnerships was passed the following year. It replaced the previous Law on Registered Same-Sex Unions. The new Law regulates the subject matter in much less detail than the case in comparative practice. The provisions of the Family Law relating to marriage apply accordingly to same-sex partnerships. The difference is that same-sex couples do not have the right to adopt children or the right to *in vitro* fertilization.<sup>13</sup>

Montenegro was the third ex-Yugoslav republic to legalize same-sex partnerships. The Law on Life Partnership of Persons of the Same Sex was passed in July 2020, at a time of serious political crisis and the fiercest election campaign. It envisages a solemn form of partnership similar to marriage, also concluded before the registrar. There is an obligation to support the partner's child. Partners have the right to inherit, and are also obligate to support each other. Everyday decisions about raising a child can be made by a partner who is not a biological parent, and this person can take urgent measures when the biological parent is prevented.<sup>14</sup>

On November 26, 2008, the Law on Family Reform entered into force in Greece.<sup>15</sup> For the first time in Greece, a provision appeared in that law that enables an official form of same-sex partnership in the form of a “civil union”, and not marriage. According to Article 1 of that Law, a “civil union” may consist of only two adults of the opposite sex. The Commentary to the Law concluded that such unions represent a new form of partnership, not some kind of “flexible marriage”, and that the institution of marriage will not be weakened by the new law. This law is considered discriminatory on the grounds that it does not offer legal recognition of a relationship between two adults of the same sex or their children. This lack of legal recognition of different forms of families reportedly results in discrimination in many areas of life. For example, same-sex partners are not recognized as relatives in inheritance rights, social security rights, taxation, and pensions. However, Greece is one of 14 European countries that have legalized same-sex unions as a form of civil union, allowing couples to enter into cohabitation agreements

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<sup>13</sup> Art 2, paragraph 3, Zakon o partnerski zvezi, Uradni list RS, št. 33/16, available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7434>, accessed 04.06.2021.

<sup>14</sup> Art. 13, 52, 53, 67, Law on Life Partnership of Persons of the Same Sex, Official Gazette of Montenegro, no. 67/2020.

<sup>15</sup> Law on Civil Union, no. 3719/2008 (FEK = Government Gazette 241/A/26.11.2008).

since 2015. Civil marriage between same-sex persons is not allowed. The new Greek law addresses property and inheritance issues, but does not provide for the adoption of children by same-sex couples (Papadopoulou, 2017).

Romania has different legal solutions related to the issue of same-sex unions. It does not allow same-sex marriages and civil unions, although it recognizes the right of same-sex couples to stay in the country if one of the partners is a citizen of an EU member state. The Constitution of the Republic of Romania does not explicitly define the institution of marriage, but gives an indirect definition, by considering marriages between “spouses” as the basis of the family. In 2018, the European Court of Justice ruled in favor of a Romanian citizen, who requested the recognition of his marriage with a partner, an American citizen (*Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne. Request for a preliminary ruling from the Curtea Constituțională a României*, 2018). Their same-sex marriage was concluded in 2010 in Belgium, where this form has been legal since 2003. European Union law allows a non-EU spouse to join a spouse in the EU Member State in which he or she resides. However, Romanian authorities have refused to issue a residence permit to the Romanian citizen's partner, saying he cannot be recognized as his spouse because Romanian law prohibits same-sex marriage. The couple filed a lawsuit claiming that the rejection was discrimination based on sexual orientation, which is prohibited in Romania.

This case was the trigger for organizing a referendum in 2018 on changing the constitutional definition of marriage. Namely, the Romanian Constitution defines the family as a community based on a free marriage between spouses, without specifying that they must be of the opposite sex. The initiators of the referendum wanted to further specify this article in terms of favoring traditional marriage. However, the referendum failed due to insufficient turnout. Two weeks before the referendum, on September 27, 2018, the Constitutional Court of Romania ruled that same-sex couples have the same rights to privacy and family life as heterosexual couples. The verdict states that legal rights and obligations should be equal by law (Jackman, *PinkNews Daily*, 2018).

## CONCLUSION

The issue of the legalization of same-sex forms of life, specifically same-sex unions, ie same-sex marriages, is one of the most sensitive issues of modern family law. It is also the biggest challenge in terms of preserving the traditional model of marriage. In this field, most changes are recorded in European legal systems. Although at the first glance it may seem that the process of legalization of same-sex living unions has taken off



throughout Europe, a comparative analysis has shown different results. Namely, it is obvious that on this issue, Europe, and above all, the member states of the Council of Europe, is divided into three camps. The first group of countries, which have recognized same-sex marriages, consists almost exclusively of Western European countries. The second group includes those states that have legalized same-sex unions, but in a more or less different way in relation to traditional heterosexual marriage.

The third, most numerous group includes those countries, mostly former members of the Eastern Bloc, which do not recognize any forms of same-sex life, but provide certain rights to same-sex persons without interfering with traditional family law frameworks. Serbia currently belongs to this group. However, if the new proposed solutions adopted by the drafts, such as the Draft Law on Same-Sex Communities, are adopted, Serbia will be classified in the second group in terms of form, but in the essence of legal solutions in the first group of European countries. Therefore, this paper aimed to show by comparative analysis that the improvement of the position of same-sex couples in one country can be done by amending existing regulations, within the existing constitutional order and valid family law, and that it is not necessary to redefine existing family relations, ie change the highest legal act to satisfy these interests. In that sense, Serbia, in improving the position of same-sex partners, can imitate numerous European countries, such as Poland, Slovakia, Romania, Lithuania, Bulgaria and Latvia, which are members of the EU, and which have not radically changed or redefined basic family relationships.

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Jelena Kostić\*

## INTEGRITY OF PUBLIC FINANCES AND CONTROL OF PUBLIC SPENDING THROUGH THE PRISM OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

*The right to an adequate standard of living was first introduced by the Universal Declaration of Human Rights. It implies the satisfaction of the basic life needs of an individual in relation to food, clothing and housing, preserving his dignity without being exposed to humiliation, such as prostitution, begging etc. Its protection in practice largely depends on the level of wealth of a society. Nevertheless, some minimum standards accepted by international documents should be met in practice. The right to an adequate standard of living has great significance for both the individual and the community. Its realization enables individual social integration, because it refers primarily to the most endangered categories of the population. That is why it is necessary to provide sufficient funds in the state budget, in order to enable effective protection of the right to an adequate standard of living for all citizens. The author starts from the assumption that the realization of the right to an adequate standard of living is often endangered due to inadequate budget policy. Through analysis the content of various international and national documents, as well as using the dogmatic legal method, author seeks to make recommendations for the improvement of budget policy in order to more effectively protect the right to an adequate standard of living in the Republic of Serbia.*

**Keywords:** protection, right, adequate standard of living, budget

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## 1. Introduction

The integrity of public finances is an important precondition for the realization of the right to an adequate standard of living. It implies the existence of a balance of budget revenues and expenditures in order to achieve all the goals and priorities of a country in accordance with the plan and within the deadlines. Therefore, it is necessary to establish and take the necessary measures at the national level to enable their implementation. These measures include the establishment of risk reduction mechanisms that may adversely affect their implementation in practice. These include measures that affect the reduction of tax evasion, as well as measures that affect the legal and efficient control of public spending, reducing corruption and money laundering. Illegal activities have a negative impact on budget resources and prevent their investment in priority areas. Therefore, increasing transparency and accountability in the public sector is important for the prevention of such behavior.

The right to an adequate standard of living was first established by the Universal Declaration of Human Rights. Article 22 of the above-mentioned Declaration defines it as the right of every member of society to social insurance, the right to realize economic, social and cultural rights necessary for personal dignity and free development of personality, and with the help of the state and through international cooperation (Ćorić, 2020; Simović, Simović, 2020). However, that depends on the organization of the state, as well as on the resources at its disposal (Article 22 of the Declaration). In addition, the Declaration stipulates that everyone has the right to a standard of living that ensures the health and well-being of each individual and his family, including food, clothing, housing, medical care and necessary social services, as well as the right to unemployment insurance, sickness, disability, widowhood, old age or other cases that may lead to the loss of means of subsistence caused by circumstances independent of his will (Article 25 of the Declaration).

During unforeseen circumstances, the realization of the right to an adequate standard of living is a great challenge for every state. In such situations, it is necessary to find appropriate mechanisms for overcoming the unfavorable situation. One such circumstance was a pandemic caused by the COVID-19 virus (See: Tilovska-Kechedji, 2020: 618). Therefore, the international community has tried to define in its documents the recommendations for the countries that are currently facing and will be faced with the negative economic consequences caused by the pandemic.

There is no strategic approach to poverty reduction in the Republic of Serbia. The last strategy was adopted 2003. Given global trends, that should be established. The United Nations Committee on Economic, Social and Cultural Rights takes the view that poverty should not only be limited to a lack of income, but also to the possibility of living with dignity due to lack of resources and the ability to achieve adequate living standards and civil, cultural, economic and social rights. It is precisely the lack of state resources that reduces the ability to choose, security and the ability to achieve an adequate standard of living, and thus the enjoyment of civil, cultural, economic, political and social rights (United Nations – Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, 2001: 1, 2 and 3; Sekulović, 2020: 3 and 4).

In the first part of the paper, we will analyze the mechanisms for protecting the right to an adequate standard of living, then the content of various national and international documents, as well as regulations and practices at the level of the Republic of Serbia important for protecting the integrity of public finances. adequate standard of living.

## **2. The realization of right to an adequate standard of living**

The Universal Declaration of Human Rights stipulates that in addition to rights, each individual has obligations to the community that allow the free and full development of his personality, and that in exercising their rights and freedoms everyone may be subject only to such limitations as are required by law. and respect for the rights and freedoms of others and the common good and in order to meet the just demands of morality, public order and general well-being in a democratic society (Article 29, paragraphs 1 and 2 of the Declaration). Accordingly, citizens have the right to give up part of their income in order to ensure the rights and freedoms of others and general well-being in society. The rights to social security and the right to exercise economic, social and cultural rights are conditioned, among other things, by the means at the disposal of the state. That is why it is necessary to establish an adequate level of responsibility of each individual at the state level in order for it to be realized in practice.

The right to an adequate standard of living is also defined in the Charter of Economic, Social and Cultural Rights. This right implies the satisfaction of the basic needs of the individual in relation to food, clothing and housing, while preserving his dignity (without exposure to humiliation such as prostitution, begging, etc.). That would mean living above the poverty line in any particular society. Of course, as societies differ in the degree

of wealth, it is clear that this border differs from country to country. However, some minimum standard at the state level must exist in order for the right to an adequate standard of living to be realized in practice (Paunović *et al*, 2007: 271). This right is at the core of the entire human rights system, which is based on the idea that all human beings are equal in dignity and rights and that they treat each other in a spirit of solidarity. This right enables individual social integration, because it primarily refers to the most endangered categories of the population. (*Ibid*, 271 and 272).

Human rights are protected by various mechanisms (Paunović *et al*, 99). In order to achieve an adequate system of protection of these rights, it is necessary that individuals have both obligations and responsibilities towards the state. Such an approach is contained in theories based on the existence of a social contract. According to these theories, humans were autonomous and sovereign beings in a natural state. By joining the community, a contract was concluded, by which they renounced some of their powers in favor of the state, while retaining some of their rights (Dimitrijević *et al* 1997: 47 and 48). The rights that people have renounced in favor of the state are obligations to the state, and those that have retained human rights that have been proclaimed by international and national documents (*Ibid.*, 370-371). In this way, an opportunity is created for the efficient allocation of resources that enable the realization of the right to an adequate standard of living, but also the realization of social rights. The realization of the right to an adequate standard of living should be given priority when planning public spending, but care should be taken to minimize the risk of exercising that right during public spending. In this way, an opportunity is created for the efficient allocation of resources that enable the realization of the right to an adequate standard of living, but also the realization of social rights.

During 1997, the Maastricht guidelines on the violation of economic, social and cultural rights were adopted. According to mentioned document, violation of these rights means the reduction or redirection of certain public spending, when it results in the non-exercise of such rights as well as situation when no measures are taken to ensure minimum subsistence rights. Therefore, the state should influence the alleviation of inequality as much as possible with its fiscal policy. Increasing transparency and accountability in public financial management is also important for the realization of that goal. This should include not only responsibility for public spending, but also responsibility for planning, public revenues and expenditures, discussion in the assembly, as well as responsibility when adopting the budget (Item 14, sub-item d) of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights). Such views are also contained in



the report of the United Nations Committee on the importance of financial integrity for sustainable development of 25 February 2021.

### **3. United Nations report and the situation at the national level**

The United Nations Report on Financial Integrity and Sustainable Development from 2021 states that deficiencies in regulations and their implementation enable tax abuse, corruption and money laundering. Such activities not only reduce trust in the work of public institutions and consume resources, but also increase poverty. Concerns have increased especially after the pandemic caused by the COVID-19 virus, which in itself has an impact on social inequalities. As a result, there is a need to protect the economy and reduce poverty both globally and nationally. The need to strengthen financial integrity was emphasized as a priority, which is of special importance for sustainable development and financing the goals necessary for its realization. During the pandemic, budget revenues were reduced due to reduced economic activity, and public spending increased due to investments in health and social protection (Financial Integrity for sustainable development, Report, 2021: 15T). The World Bank estimates that another 176 million people will become extremely poor due to the crisis caused by the pandemic. The economy has recently been affected by a lack of investment, but also jobs, especially in developing countries (*Ibid*, 16). In order to reduce poverty, it is necessary for various institutions to act at both the international and national level, and without that there is no realization of the right to an adequate standard of living. Of importance for the above, the report states the need to strengthen the integrity, improve policies and work of institutions at the national level, as well as the involvement of civil society organizations. The World Bank estimates that another 176 million people will become extremely poor due to the crisis caused by the pandemic. The economy has recently been affected by a lack of investment, but also by jobs, especially in developing countries. In order to reduce poverty, it is necessary for various institutions to act at both the international and national level, and without that there is no realization of the right to an adequate standard of living. Of importance for the above, the report states the need to strengthen the integrity, improve policies and work of institutions at the national level, as

well as the involvement of civil society organizations. and without that there is no realization of the right to an adequate standard of living. Of importance for the above, the report states the need to strengthen the integrity, improve policies and work of institutions at the national level, as well as the involvement of civil society organizations. and without that there is no realization of the right to an adequate standard of living. Of importance for the above, the report states the need to strengthen the integrity, improve policies and work of institutions at the national level, as well as the involvement of civil society organizations (*Ibid*, 9 and 10).

The recommendations contained in this document are in line with the document Agenda for Sustainable Development until 2030 of the United Nations, which defines seventeen goals necessary for the development and improvement of living conditions at the global level. As an important precondition for reducing poverty, it recognizes the need to improve the health and education system, reduce inequality and improve economic development.<sup>1</sup>

According to the provisions of the Constitution, the provisions on human and minority rights are interpreted in accordance with international standards and the practice of international institutions that supervise their implementation. Therefore, national authorities are obliged to apply them in the manner prescribed by international legal acts. However, according to reports on the application of e.g. The International Covenant on Economic, Social and Cultural Rights, has not been directly applied by the Republic of Serbia. According to international documents, when certain measures are necessary to achieve the consequences of crises, wars or lack of public resources for the realization of economic and social rights, the obligations of the state must be in accordance with Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights. Thus, states have an obligation to make maximum use of available resources for the progressive realization of economic and social rights (Trifković *et al*, 2020: 10).

Regarding the fiscal system of the Republic of Serbia in the period 2012-2020, it was noted that the system of protection of economic and social rights has not been improved, and that fiscal consolidation measures have not been in line with state obligations under Article 2 of the Covenant on Economic, Social and Social Rights. and cultural rights. Therefore, citizens turned to independent state bodies to protect these rights. The

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<sup>1</sup> The agenda was adopted in New York at a UN meeting held on September 25-27, 2015. The goal of its adoption was to promote development in the field of economy, social protection and environmental protection at the global level. Text is available at: <https://sdgs.un.org/2030agenda>, Accessed 20.8.2021.

Commissioner for the Protection of Equality stated in his annual report that numerous complaints relate to the area of labor and employment, a total of 20.8%, and to the area of social protection 13.1%. A similar situation was observed in the execution of the Protector of Citizens. The largest number of complaints sent by citizens (a total of 36, 55%) was sent to the Department for the Protection of Economic and Property Rights, and 14.4% to the Department for the Protection of Social and Cultural Rights. All this indicates that at the national level there was no possibility for a higher level of realization of the right to an adequate standard of living in the observed period (*Ibid*, 7; Abridged Regular Annual Report of the Commissioner for the Protection of Equality for 2018, 2019: 12 and Regular Annual report of the Protector of Citizens for 2018, 2019: 13 and 14).

At the level of the Republic of Serbia, a problem was noticed in connection with certain measures that had a negative impact on the social and economic rights of individuals. An example is the adoption of the Law on Temporary Regulation of the Manner of Payment of Pensions. In order to reduce the budget deficit, the said Law prescribed to reduce pensions for all pensioners who had incomes above 208 euros at that time. However, pensions are not related to the budget, but to public funds. They represent income related to contributions paid into the pension fund. The problem of this measure was reflected in the fact that the law did not establish any mechanism of compensation for the reduction of income, and these reductions were introduced without the right to a legal remedy. Criticism of such a solution is the fact that the circumstances of the individual were not taken into account and that the impact of such a reduction on the exercise of other rights was not assessed. The right to social security, which is an inseparable component of the right to an adequate standard of living, includes the right not to be subjected to arbitrary and unreasonable reductions in social benefits. When it comes to the reduction of pensions, which lasted for four years, the criticism of the lack of a periodic assessment of the justification and proportionality of the reduction is justified (Trifković *et al*, 23).<sup>2</sup>

#### **4. The role of the Fiscal Council and the assessment of economic measures during a pandemic**

Certain social and economic rights are often severely restricted when there is a budget deficit at the national level. The danger of creating a budget deficit is sometimes threatened by inadequate social and economic policy measures. Therefore, a significant

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<sup>2</sup> Law on Temporary Regulation of the Manner of Payment of Pensions, *The Official Gazette of the Republic of Serbia*, no 116/2014).

role in assessing the economic effects of certain measures should be played by the Fiscal Council, which was established by the amendments to the Law on Budget System from 2010 as an independent state body responsible for its work to the National Assembly. The competence of the Fiscal Council is reflected in the assessment of national fiscal policy in order to ensure compliance with fiscal rules, transparency and accountability in conducting fiscal policy, assessment of economic policy and assessment of fiscal risks. The role of this body is of special importance during the preparation and adoption of the budget through the preparation of opinions on the draft Report on Fiscal Strategy, analysis of draft budget laws, draft laws on final budget accounts and preparation and assessment of fiscal impact of various laws.<sup>3</sup>

During the pandemic at the national level, certain economic measures were taken by the state. However, the Fiscal Council assessed that the non-selective payment of financial aid to citizens during 2020 and 2021 was problematic for the state budget. According to the Government, the measures taken were assessed as a significant fiscal incentive to increase domestic demand. In contrast, the Fiscal Council assessed them as inefficient and very expensive. During 2020, the total amount of non-selective cash payments amounted to 72 billion dinars, ie. 610 million euros, and during 2021 over 50 billion dinars, ie. 440 million euros. According to the Fiscal Council, the budget did not have these funds at its disposal, but the expenditures were financed by government borrowing. Therefore, taking such measures was a big expense for the budget (Fiscal and Economic Analysis of Nonselective Cash Payments to Citizens, 5<sup>th</sup> of May 2021: 1).<sup>4</sup>

The economic measures taken during the pandemic caused by the COVID-19 virus were assessed as inadequate from the point of view of social policy. The Fiscal Council stated that payments cannot solve the problem of inequality and poverty, which are permanent, because the same funds in the same amount are allocated to poor and richer citizens. According to the Fiscal Council, it is justified that the budget funds be used to reduce the economic damage for the most endangered citizens and the economy affected by the crisis. In this regard, the said body supports a temporary increase in the budget deficit and public debt. Although mitigating the consequences of the pandemic and the economic consequences for the economy and the population was a big expense for the budget, it is justified to allocate part of these funds for financial support, ie. tax relief for the

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<sup>3</sup> The position, powers and responsibilities of the Fiscal council are defined in Articles 92a-92i of the Law on Budget System, *Official Gazette of the Republic of Serbia*, no 54/2009...149/2020).

<sup>4</sup> Available at: [http://www.fiskalnisavet.rs/doc/analize-stavovi-predlozi/2021/FS\\_Analiza\\_neselektivnih\\_isplata\\_gradjanima\\_maj\\_2021.pdf](http://www.fiskalnisavet.rs/doc/analize-stavovi-predlozi/2021/FS_Analiza_neselektivnih_isplata_gradjanima_maj_2021.pdf). Accessed 20.8.2021.

economically vulnerable population and economy. These measures should be of a temporary nature. In the opinion of the Council, it was justified to postpone certain tax obligations for companies and the population that are not able to pay those obligations with a one-time and limited financial assistance to the most vulnerable population. it is justified to allocate part of these funds for financial support, ie. tax relief for the economically vulnerable population and economy. These measures should be of a temporary nature. In the opinion of the Council, it was justified to postpone certain tax obligations for companies and the population that are not able to pay those obligations with a one-time and limited financial assistance to the most vulnerable population. it is justified to allocate part of these funds for financial support, ie. tax relief for the economically vulnerable population and economy. These measures should be of a temporary nature. In the opinion of the Council, it was justified to postpone certain tax obligations for companies and the population that are not able to pay those obligations with a one-time and limited financial assistance to the most vulnerable population (The State's Debt for Effective Rehabilitation of the Economic Consequences of the Crisis is justified, 20<sup>th</sup> od March 2020: 2).<sup>5</sup>

The draft of the new fiscal strategy of the Government was positively assessed by the Fiscal Council. Although its goals have been assessed as achievable, their realization depends on the Government's determination to implement them consistently in practice. The strategy envisages responsible conduct of fiscal policy and gradual reduction of the budget deficit. However, in order to achieve the goals defined by the said Strategy, it is necessary to increase control over current budget expenditures (pensions, salaries, subsidies and procurement of goods and services). This would have a positive effect on reducing the budget deficit and improving the realization of the right to an adequate standard of living. However, the implementation of these controls depends on the capacity of national institutional mechanisms for external and internal control of public spending (Opinion on the Draft Fiscal Strategy for 2022 with Projections for 2023 and 2024, 28<sup>th</sup> of May 2021: 1).<sup>6</sup>

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<sup>5</sup> Available at: <http://www.fiskalnisavet.rs/doc/analize-stavovi-predlozi/2020/FS%20-%20Saopstenje%2020.03.2020.pdf>. Accessed 20.8.2021.

<sup>6</sup> Available at: [http://www.fiskalnisavet.rs/doc/ocene-i-misljenja/2021/FS\\_Rezime\\_Misljenje\\_na\\_Nacrt\\_Fiskalne\\_strategije\\_2022-2024.pdf](http://www.fiskalnisavet.rs/doc/ocene-i-misljenja/2021/FS_Rezime_Misljenje_na_Nacrt_Fiskalne_strategije_2022-2024.pdf). Accessed 20.8.2021.

## **5. Control of public spending in the regulations and practice of the Republic of Serbia**

Budget policy in the Republic of Serbia is regulated in a general way by the Law on Budget System. Its provisions do not regulate in a direct way that the Republic of Serbia is obliged to provide a certain amount of funds for the realization of economic and social rights. It only defines the goals that need to be achieved by adopting the budget and adequate allocation of funds. The budget system should ensure overall fiscal sustainability and control, which means implementing policies with comprehensive control of budget funds, establishing limits on expenditures and expenditures guaranteed by law, both at the state level and at the level of each individual budget user. The budget should enable the so-called allocation efficiency. It implies the possibility of establishing priorities within the budget, allocating funds in accordance with the Government's priorities within the budget and the possibility of transferring funds from old to new or from less productive to more productive priorities. According to the Law, the priority budget goals in the preparation and execution of the budget are macroeconomic stability, low inflation, economic development, encouragement of regional development and reduction of financial risk of the Republic of Serbia (Article 4 of the Budget System Law). The state policy of revenues and expenditures is very important for the realization of its priorities (Labus, 1997: 83). The importance of taxes and subsidies is reflected in the redistribution of income and the impact on the market operations of consumption entities. In addition to state revenues, there are also expenditures: expenditures for salaries of state and military officials, construction of infrastructure, expenditures for pensions, unemployment benefits, expenditures for social insurance, recourses and subsidies, etc (*Ibid*, 135).

### ***5.1 Importance of external control of public spending***

When we talk about the integrity of public finances, we mean primarily adequate tax and budget policy. Control over the inflow of public revenues that finance various budget expenditures must be effective, as well as control over the payment of social security contributions. In order to use the funds in the right way, there must be adequate control of public spending, and this requires continuous cooperation of various state institutions. Given that the United Nations report on financial integrity and state development emphasizes the importance of financial control and prevention of corruption, it seems that at the national level, more concrete results can be expected from external financial control mechanisms. In the Republic of Serbia, it is embodied in the budget inspection and the State Audit Institution.

The right to an adequate standard of living, arises from the realization of social and economic rights. In order to pass laws that improve the economic standard of individuals and their social position, it is necessary to provide a certain level of public funds necessary for their implementation.

The Government should keep in mind the fiscal principles when drafting the fiscal strategy and the draft law on the budget. One of these principles is the principle of fairness. It implies that the management of a fixed policy is carried out by taking into account its impact on the well-being of both present and future generations. In addition, it is necessary to keep in mind the principle of stability, which implies that fiscal policy is implemented in a way that does not cause sudden changes in the movements of macroeconomic and fiscal indicators (Article 27b, Paragraphs 2) and 4) of the Budget System Law). In that way, the guidelines that need to be taken into account in order to realize and protect the right of individuals to an adequate standard of living are defined in the public budget. Therefore, the Government, in implementing the objectives of fiscal policy, must take into account the sustainability of government debt, orderly debt service, predictability of the levels of tax rates and tax bases for the next year, responsible management of fiscal risks, management of public assets and liabilities, management of natural resources in a way that will not burden future generations, as well as stimulating economic growth.

When it comes to preserving the integrity of the fiscal system, it is necessary to keep in mind the application of preventive measures, which presupposes the activities of mechanisms for controlling the payment of public revenues and mechanisms for controlling public spending. The first means the activity of the tax inspection, and the second the activity of the budget inspection and the State Audit Institution. The activity of the budget inspection consists of controlling public spending over direct and indirect users of budget funds, organizations for obligatory social insurance and public enterprises and legal entities established by the Republic, territorial autonomy units or local self-government, legal entities established by these public enterprises, legal entities over which the Republic, the autonomous province or unit of territorial autonomy and local self-government has direct or indirect control over more than 50% of the votes in the board of directors, as well as over other legal entities in which public funds make up more than 50% of the total capital. It also performs control in other legal entities and other entities to which budget funds for a specific purpose have been allocated directly or indirectly, legal entities and other entities that are participants in the work that is subject to control and entities that use budget funds on the basis of borrowing, subsidies, other state aid in any form, donations, grants and the like (Article 85 of the Budget System

Law). However, the role of the budget inspection is limited to controlling the application of the law in the field of material and financial operations and the purposeful and legal use of funds of users of budget funds, organizations, companies, legal entities and other entities (Article 86 of the Law). The state audit institution has different competencies. In addition to auditing the final accounts of the Republic of Serbia, the Autonomous Province and local self-government units (Article 92 of the Law), it also has other powers prescribed by the Law on State on the State Audit Institution. According to the said Law, it may perform an audit of financial statements, an audit of the regularity of operations, as well as an audit of the purposefulness of operations. Of particular importance for the integrity of public finance is the audit of business expediency. It means examining the spending of funds from the budget and other public funds in order to obtain sufficient, adequate and reliable evidence to report whether the funds by the subject of audit are used in accordance with the principles of economy, efficiency and effectiveness, as well as planned objectives (Article 3 of the Law on the State Audit Institution). Bearing in mind that the Budget Inspection and the State Audit Institution may file misdemeanor and criminal charges against persons who illegally use public funds, this should have a preventive effect on potential violators of the law. Combating crime in accordance with current trends in the field of criminal policy requires a joint action of society as a whole, not only the policy and judicial authorities (Matić Bošković, Kostić, 2019). With their knowledge, various state institutions and individuals can contribute not only to the detection of criminal proceedings and the insurance of the final judgment (Matić Bošković, 2013; Šuput, 2014). However, in order to achieve this effect, controls need to be frequent and effective. Regardless of the existence of the possibility of sanctions, without frequent controls, it can hardly be expected that this prevention of illegal behavior will be realized. If the funds are spent in accordance with the regulations, it exists economically and efficiently, it can be expected that the state budget will have enough resources for the implementation of all activities that enable the realization of the right to an adequate standard of living, which is especially important during the economic crisis. In addition, in this way, public confidence in the work of public institutions increases, which on the other hand can have a positive impact on the attitude towards the fulfillment of tax obligations. The activity of the State Audit Institution should have a positive effect both on accountability in public spending and on its transparency. According to international standards, it is an independent body that controls the legality and expediency of public spending in all modern democracies (Rabrenović, Ćorić Erić, 2012: 282). The SAI's objective is "to help the nation spend wisely" as well as its transparency. According to international standards, it is an independent body that controls the legality and expediency of public spending in all modern democracies. The SAI's objective is "to help



the nation spend wisely”. as well as its transparency. According to international standards, it is an independent body that controls the legality and expediency of public spending in all modern democracies. The SAI's objective is “to help the nation spend wisely” (Dobre, 2012: 698). That means that it should ensure that deliveries of public goods and services maintain proper accounts (Northon, Smith, 2018: 924).

In addition to control and accountability, fiscal transparency is also important for the protection and improvement of public finances. Although the State Audit Institution should contribute to its strengthening in the public sector, a lot needs to be done on that, especially having in mind the fact that the Law on the Final Account of Serbia was not adopted from 2002 to 2019 (Kostić, Matić, 2022: 48).<sup>7</sup>

### ***5.2. Internal financial control, its significance and the state in practice of the institutions of the Republic of Serbia.***

Internal financial control in the public sector is also important for improving the integrity of the fiscal system. It includes financial management and control of users of public funds and internal audit of users of public funds.

Financial management and control is organized as a system of procedures and responsibilities of all persons in the organization. The head of public funds is responsible for its establishment and updating. It should be borne in mind that this type of ex ante control contributes to legal and economical not only public spending, but the overall business of users of public funds. Financial management and control is also important for efficient spending planning at the user level. The second level of ex ante control is internal audit, which in accordance with the provisions of the law should be organizationally independent of the activity being audited and must not be part of any business process or organizational part of the organization. In order to ensure the greatest possible independence at the internal level, it is responsible for its work exclusively to the head of the user of public funds. It is of special importance for directing the legal planning, business and spending of users of public funds when it is established. The activity of internal audit consists of an objective review of evidence that provides assurance on the adequacy and functioning of the process of risk management, control and management of

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<sup>7</sup> The Law on the Final Account of the Budget had been adopted retroactively in December 2019 for every year and published in the national official gazette. Bearing in mind the legal definition of the principle of fiscal transparency, subsequent adoption of a law and its publication do not constitute a realisation of that principle. The Law on the Final account of the Republic of Serbia, *The Official Gazette of the Republic of Serbia*, number 95/2019.

the organization, as well as verify whether these processes function properly and enable the achievement of organizational goals. Its activities are not limited to the above, but also consist in the provision of advisory services, which consist of advice, guidance, training, assistance or other services in order to increase the value and improve the management process of the organization, risks and control (Articles 80, 81 and 82 of the Budget System Law). Bearing in mind that the state is a large consumer, given the cumbersomeness of the state apparatus, protecting the integrity of the fiscal system is a prerequisite for exercising the right of citizens to an adequate standard of living. Therefore, the realization of this right should not be viewed exclusively through investment in social protection, health and education, but also through the general direction of fiscal policy at the state level, both in planning and budget execution (About social protection of the elderly see in: Radaković, 2020: 556-557). Only in this way is it possible to talk about the fiscal responsibility of all entities at the level of one state. However, a special problem is the fact that the system of financial management and control in the Republic of Serbia has not come to life at full capacity, while internal audit has been established for most users of public funds. <sup>8</sup>Having in mind the powers of internal audit and the fact that it was established in some users of public funds much earlier than financial management and control, a reasonable question arises whether it exercises its powers in an adequate manner (Kostić, Matić Bošković, 2022: 57). The establishment of internal control in the public sector of the Republic of Serbia seems to have represented only a formal fulfillment of the conditions for membership in the European Union. It is not understood as an effective means of preventing various types of irregularities at the level of public sector institutions (Šuput, 2013: 247-248; Šuput 2012: 160). At the very beginning of the establishment of internal financial control in the public sector of the Republic of Serbia, according to the European Commission's progress

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<sup>8</sup> The State Audit Institution Report on the Audit of Final Account of the Budget of the Republic of Serbia for 2016, number 400-534/2017.03/31, Belgrade, 29<sup>th</sup> of December 2017, 11; The State Audit Institution Report on the Audit of Final Account of the Budget of the Republic of Serbia for 2017, number 400-575/2018-03/36, Belgrade, 14<sup>th</sup> of December 2018, 23, 37 and 43; The State Audit Institution Report on the Audit of financial statements and regularity of operations of the Ministry of Youth and Sports for 2018, number 400-213/2019-03/12, Belgrade, 2<sup>nd</sup> of December 2019, 29; The State Audit Institution Report of the Audit on Financial Statements and Regularity of Operations of the Anti-Corruption Agency for 2017, number 400-658/2018-03/29, Belgrade, 27<sup>th</sup> of August 2018, 10; The State Audit Institution Report of the Audit on parts of the report on budget execution and regularity of operations of the Ministry of Labor, Employment, Veterans and Social Affairs for 2016, number 400-2033/2017-03/26, 21<sup>st</sup> of December 2017, 19 and 21; The State Audit Institution Report on the Audit of Financial Statements of the Ministry of Defense, number 400-2015 / 2019-03 / 13, Belgrade, August 19, 2019, 19; The State Audit Institution Report on the Audit of Financial Statements and Regularity of Business Operations of the Ministry of Youth and Sports for 2018, number 400-213 / 2019-03 / 12, 2<sup>nd</sup> December 2019, 28; The State Audit Institution Report on the Audit of Financial Statements of the Ministry of Culture and Information for 2018, number 400-208 / 2019-03 / 14, Belgrade, 6<sup>th</sup> of June 2019, 9.

report on Serbia, it was emphasized that internal audit cannot reach its full potential if the system of financial management and control in public sector institutions is not developed. Without such an approach, there is no higher level of responsibility in the management of public funds, which is of particular importance for establishing and maintaining the integrity of the fiscal system (Šuput, 2013: 249). The activity of internal financial control should not be exhausted exclusively in the verification of material and financial operations, but should also refer to the control of the application of regulations of importance for the performance of activities.

## **6. Conclusion**

The realization of the right to an adequate standard of living requires the engagement of material resources of the state. The level of invested material resources does not necessarily mean success in its realization. However, poverty is largely contributed by various crises that cause the emergence of the budget deficit, which is reflected in the reduction of public spending and investment and affects the increase of taxes and government borrowing. This makes it difficult to achieve an adequate standard of living for each individual. As can be seen from the analysis of international and national documents in this paper, the Republic of Serbia in the previous period did not adequately cope with poverty, while in some situations inadequate fiscal policy measures also had negative or erroneous effects on living standards. citizens. Bearing in mind the United Nations report on the importance of financial integrity for sustainable development from 2021, the role of public spending control mechanisms in the process of establishing and improving the integrity of the fiscal system should not be neglected. However, in the Republic of Serbia, the mechanism of internal financial control has not come to life in full capacity. Given its importance for improving accountability in public financial management, we should insist not only on its formal establishment, but also on additional training of public sector managers to understand the importance of this mechanism for improving the accountability of all employees in the institutions they manage. The existence of an adequate system of control over public spending is also important for the prevention of corruption. In order for state resources to be provided for the realization of all priorities, one of the main of which should be the realization of the right of each individual to an adequate standard of living, it is necessary to take into account when planning public spending. On that occasion, the views and opinion of the Fiscal Council as an independent institution should be taken into account. Bearing in mind that the role of the said institution is of an advisory nature, its opinions and advice are not legally binding. Nevertheless, they are important for increasing accountability and transparency in public financial management, which can further contribute to improving the integrity

of the fiscal system. However, given that the Law on the Final Account of the Republic of Serbia has not been adopted for seventeen years, continuous work should be done to improve transparency. A responsible public financial management policy should contribute to the well-being of society as a whole, and thus to the realization of the right of individuals to an adequate standard of living.

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**Milica Kolaković-Bojović\***

**DISAPPEARED PERSONS AND THE RIGHT TO BE CONSIDERED ALIVE  
- THE CURRENT STATE OF PLAY IN THE WESTERN BALKANS -**

*The search for a disappeared person should be conducted under the presumption that he or she is alive. This golden rule has been recognized and incorporated in the main human rights instruments and the soft law dealing with the combating enforced disappearances, but also in those relevant for the search for persons missing in or in relation to arm conflicts. This principle has a multiple influence and tackles as the right of a missing person to be searched, as an obligation to search for him/her. It also has a significant influence on and constitutes a framework for exercising a various property and a social welfare rights of family members of a disappeared person. Considering this and taking into account a gross number of persons who still missing in or in relation with the armed conflicts in Former Republic of Yugoslavia, author explores on how this principle is incorporated in the relevant legislation of the Western Balkans countries. Triggered by the ongoing processes aimed at development of the Serbian Law on Missing Persons, this paper also analyses how this principle should be incorporated in a new law, based on the identification of the existing legal gaps and the comparative legislation in the Region.*

**Keywords:** missing persons, disappeared persons, search for disappeared persons, the right to be searched, Western Balkans

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## **1. Introduction**

The disappearance of a person opens a dark circle of uncertainty. This uncertainty goes far beyond the unknown fate of the missing person and the lack of information about the circumstances of the disappearance. It directly affects the lives of family members, relatives and other people close to the missing person. It causes stress, pain, suffering and emotional imbalance. Furthermore, such a situation results in the legal vacuum, since, to say it simply, being dead or alive has legal consequences. Therefore, disappearance of a person, also results in various problems related to the daily functioning of the family, in terms of the property management, providing material and financial security, child care and access to various forms of social support and protection.

When a disappearance of a person occurred under the circumstances associated to the armed conflicts or internal violence, abovementioned issues get a new dimension, which has been properly recognized in fundamental rules of international humanitarian law and human rights law. This applies as in terms of the obligation of the states to prevent persons from going missing in situations of armed conflict or internal violence, as in terms of the obligation to conduct immediate and effective search in order to find a missing person and not to left his/her family in dark about their fate. Additionally, the families of missing persons should be provided with an adequate protection, assistance and support. All of this may not be preconditioned by any rule and/or the procedure which requires family members to declare a missing person dead in order to exercise their rights.

Therefore, the right to be consider alive until the fate and whereabouts are clarified has the double nature- it is, at the same time, the right of the missing person him/herself, but also the right of his/her family members and relatives. Initially recognized through the general humanitarian law instruments, this right has been further elaborated through the human rights instruments aimed at the prevention and combating enforced disappearances. Furthermore, reflected in the national legislations, this right has been adjusted to and applied so far in various regional contexts.

## **2. Western Balkans and the issue of missing persons**

Two decades have passed since last armed conflicts in the ex-Yugoslav region. Armed conflicts in the former Socialist Federal Republic of Yugoslavia (hereinafter: ex-YU) were characterized by grave, large-scale and systematic violations of international humanitarian law. According to estimates by various organizations during the wars in Slovenia (June-July 1991), Croatia (1991-95), Bosnia and Herzegovina (1992- 1995), in



Kosovo and Metohija and during the bombing of the Federal Republic of Yugoslavia (1999), as well as in the Former Yugoslav Republic of Macedonia, (February-August 2001) - more than 130,000 people lost their lives, with civilians accounting for the majority of them. (Kolaković-Bojović & Tilovska-Kechegi, 2019)

It is estimated that about 40,000 people went missing in the armed conflicts in the former Yugoslavia. 35,007 cases were reported to the International Committee of the Red Cross (hereinafter: ICRC), and according to the data of this organization from December 2020, 10,006 people are still listed as missing in the region, of which 1,642 in AP Kosovo and Metohija, 1,979 in Croatia and 6,385 in Bosnia and Herzegovina. (Report on the Work of the Commission for Missing Persons for 2020)

After a years of the work to resolve cases at the national level, Supported by International Commission on Missing Persons (hereinafter: ICMO), Western Balkans authorities in charge of the search for persons missing due to conflicts in this region, adopted the Framework Plan for resolving the issue of missing persons from the conflict in the former Yugoslavia (2018), the process of search and the processes related to the rights of the families to know the whereabouts of their missing family members and relatives is now fostered by institutionalized regional cooperation, it was previously operated, mainly, on the basis of the bilateral agreements.<sup>1</sup> This has been done under the scope of the Berlin Process, which addresses the issue of transitional justice and victims' rights, through two of the six initiatives covered by this mechanism, i.e. through the initiatives Rule of Law and Regional Cooperation Good Neighbourly Relations. (Sofia Declaration, 2018) The extent to which the EU recognizes the importance of these issues is most evident from the final declarations of the EU-Western Balkans summits held in 2018 and 2019 in Sofia, London (Western Balkans Summit, 2018) and Poznan, which address in detail the need for individual commitment to improve the legislative and institutional framework and practice in accordance with relevant international standards, but also their mutual cooperation in the field of war crimes prosecution, victims' rights and the search for missing persons and good neighbourly relations.

Above-described mechanisms has significantly contributed to the raising awareness of the general public on the issue of missing persons, but also foster the processes of the adoption of the national legislation dedicated to this issue. In this process, the WB States face a various challenges, starting from a need to achieve a large number of international

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<sup>1</sup> The full list of the protocols is available at: <http://www.kzn.gov.rs/latinica/dokumenta.php>, last accessed at August 10<sup>th</sup> 2020.

standards, but also to avoid further regional conflicts through ensuring equal rights to all persons missing under the same circumstances associated to the armed conflicts. One of those challenges appears to be addressing the right to be considered alive until the fate of a missing person has been ascertained.

### **3. International standards which proclaim the right to be considered alive**

Even prior to the explicit incorporation of the right to be considered alive in the international humanitarian law and human rights instruments, the basis to maintain this assumption has been developed through the provisions of the Articles 32-33 of Additional Protocol I to the Geneva Convention (hereinafter: AP-I)<sup>2</sup> and the Articles 136-141 of the Fourth Geneva Convention (hereinafter: GC-IV)<sup>3</sup>, which provide for an obligation of the States to facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact and bring them together. (International Committee of the Red Cross, 2007)

Therefore, a reunion of the disappear person with his/her family has been set up a priority. All the other obligation of the states are prescribed as a secondary, to be implemented if a disappeared person has been found dead. This clearly shows that an intention was to oblige the states to uphold presumption that a disappeared person is alive, until it has been found dead. Defined like this, this obligation of the states, addresses the right of the disappeared person to be searches under the presumption that he/she is alive, but also the right of the family members to uphold this presumption until their family member is found alive or dead, without being forced to give up the search and declare their family member dead after a certain period of time. To bridge the legal gap/vacuum in meantime, states should develop a mechanism based on the declaration of absence in order to deal with the civil status, property/assets and social protection issues. This interim period can be a in the function of the check the circumstances of the disappearance and the ability to investigate it. In the event the person is found alive, the certificate of absence should be annulled and the legal status of the person and his/her rights fully re-instituted. (International Committee of the Red Cross, 2007)

In addition to the above-mentioned general provisions of the Geneva conventions and the Additional Protocols, such guaranties have been explicitly incorporated in the several

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<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.

<sup>3</sup> IV Geneva Convention Relative to The Protection of Civilian Persons in Time of War of 12 August 1949.

international instruments, mostly developed as a reaction of the international community on the practice of enforced disappearances across the world .

In 1992, it was adopted Declaration on the Protection of All Persons from Enforced Disappearance. (Declaration on the Protection of All Persons from Enforced Disappearance, adopted by General Assembly Resolution A/RES/47/133 at the 92nd plenary meeting 18 December 1992) In the Declaration, the General Assembly expressed the deep concern that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law. (Kolaković-Bojović, 2019) The Declaration recognizes the very nature of any act of enforced disappearance as an offence to human dignity (Kolaković-Bojović & Grujić, 2020) and incorporates the presumption that missing person is alive in the art. 20 when ruling the search for wrongfully removed children. (Kolaković-Bojović, 2019)

A much detailed approach to this issue is incorporated in the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006 which represents the UN treaty of the new generation, focused on the narrow scope of human rights, built on developments made under the universal treaties of the first generation designed to protect basic human rights<sup>4</sup>, where the secret detention has been already prohibited. (Turanjanin & Kolaković-Bojović, 2018) This instrument, even still hasn't been globally ratified, has been ratified by Bosnia and Hercegovina, Montenegro and Serbia and sighed by North Macedonia, while Croatia has not made any steps to access the Convention. (Kolaković-Bojović, 2017) So, it is highly relevant in the region.

While Article 2 of the Convention provides for the enforced disappearance as an autonomous, individual and continuous crime<sup>5</sup>, Article 5 of the Convention recognizes

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<sup>4</sup> This development was triggered by widespread practice of enforced disappearances during the second half of 20<sup>th</sup> century, mostly in South America.

<sup>5</sup> Specific nature of an enforced disappearance and zero tolerance for this serious crime are reflected also in the definition of enforced disappearance contained in the article 2 of the Convention.

The Convention for the identifies the following elements in the definition of enforced disappearances:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;

the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Art. 24 (3) of the Convention stipulates that each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains. From this provision, it is obvious that the Convention takes the presumption that a disappeared person is alive. The same goes for Article 15 of the Convention, which provides for the obligation of the States Parties to cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

The Convention also recognizes an importance of overcoming of the legal gap caused due to uncertainty in terms of the fate of a disappeared person. Therefore, Article 24 (6) insists on the transitional mechanism and stipulates that “without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.”

Finally, similarly to the Declaration, the Convention upholds this presumption also in relation to the children subjected to the wrongful removal. (Arts. 25 (2-3) <sup>6</sup>

This specific, hybrid nature of the rights protected by the Convention results, among others, in very specific, multidisciplinary approach to combating and prevention of enforced disappearances, but also in specific approach of the Committee on Enforced

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- That conduct is carried out by agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state;
  - The conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
  - The objective result of the conduct is that the disappeared person is placed outside of the protection of the law. (Kolaković-Bojović, *The Synergy Between Criminal Law and Medicine under the International Convention for the Protection of All Persons from Enforced Disappearance*, 2019)

<sup>6</sup> This is of the great importance taking into account growing issue of missing children in the context of migrant wave. The lack of a comprehensive system of protection of unaccompanied migrant children seems to be an unresolved issue in all countries in the Balkans and, as EUROPOL's reports confirm, around 10,000 unaccompanied migrant minors have disappeared from the European system in 2016, which means that they cannot be provided with adequate protection in any European country. (Batričević & Kubiček, 2019)

Disappearances (hereinafter: CED)<sup>7</sup> In order to develop a comprehensive guidelines for search for disappeared persons, CED has adopted Guiding principles for the search for disappeared persons in 2019. This document appears to be more that relevant for incorporation of the presumption that a missing persone is alive in the legislation, but also in practice. CED widened the scope of the Guiding Principles beyond the Convention, since they are based on the International Convention for the Protection of All Persons from Enforced Disappearance and other relevant international instruments and practices. They also take into account the experience of other international bodies and various countries around the world and good practices in searching effectively for disappeared persons. They identify mechanisms, procedures and methods for carrying out the legal duty to search for disappeared persons. (Committee on Enforced Disappearances, Guiding principles for the search for disappeared persons, 2019)

The Guiding Principles finally established the presumption that a disappeared person is alive as a backbone of the whole document, but also a milestone of the search process. Hence, Principle 1 stipulates that “the search should be conducted under the presumption that the disappeared person is alive, regardless of the circumstances of the disappearance, the date on which the disappearance began and when the search is launched.” This approach is indirectly incorporated in the principle 2, which provides for the obligation to respect a human dignity as the presumption of life is on the force as in respect of human remains.

Finally, the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR) could be used a solid ground to develop a national legislation and practices in the field. Namely, ECtHR took the position that, “in the context of disappearances, having regard to the fact that a disappearance is a distinct phenomenon, characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred and that this situation is very often drawn out over time, prolonging the torment of the victim’s relatives with the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, in such cases, the procedural obligation will, potentially, persist as long as the fate of the person is

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<sup>7</sup> The Committee on Enforced Disappearances (CED) is the body of independent experts which monitors implementation of the Convention by the States Parties. All States parties are obliged to submit reports to the Committee on how the rights are being implemented. States must report within two years of ratifying the Convention. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”. See more at: <https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIntro.aspx>, last accessed on April 15<sup>th</sup> 2019.

unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation. This is so, even where death may, eventually, be presumed.” (Varnava and Others v. Turkey (GC), §148, 2009)

#### **4. The right to be considered alive and the national legislation in the Western Balkans**

As earlier said, in addition to the mechanisms established through the Framework plan, the most of Western Balkan’s countries decided to adopt a national legislation to deal with the issue of the people missing in/or in relation to the arm conflicts on the ex-YU territory.

Such a decision goes in favor the further regulation of the search processes in line with the presumption that the disappeared person is still alive could be found in Principle 3. of the Guiding Principles, which stipulates that the search should be governed by a public policy. Namely, the Principle 3 recognizes the importance of developing “a comprehensive public policy on disappearances, particularly in contexts where disappearances are frequent or on a mass scale.” The par. 3 of the same principle incorporates the presumption of life as a milestone of such public policy, saying that the specific public policy on searches should be built on the basis of States’ obligations to search for, locate, release, identify and return the remains, as appropriate, of all disappeared persons. It should take into account the analysis of the various forms and criminal patterns of disappearances in the country. So, searching for and finding a disappeared person alive is the primary goal.

In addition to the above-mentioned standards, a more concrete guidelines for developing a national public policy on missing persons and to incorporate the right to be considered alive, could be found in the International Committee of the Red Cross, Guiding Principles / Model Law developed to support development of the national legislation in the field. According to this document, Missing persons should be presumed to be alive until their fate has been ascertained. “The foremost right of a missing person is that of search and recovery. Within his/her right to life and security, a missing person has the right to have a thorough investigation conducted into the circumstances of the disappearance until a satisfactory conclusion can be drawn as to his/her fate.” (International Committee of the Red Cross, 2007) Therefore, there are solid, comprehensive and concrete starting point for the Western Balkans countries to develop their own legislation in the field.

#### ***4.1. Republic of Croatia***

According to the Framework Plan, as EU Member State, Croatia has an advisory role on missing persons issues that are pertinent to EU accession of other MPG members. The same document underlines that the Republic of Croatia, as a full-ledged member of the European Union that has achieved international standards in the process of the search for missing persons, will support implementation of the Framework Plan with its participation in the work of MPG. (Framework Plan to Address the Issue of Persons Missing from Conflicts on the Territory of the Former Yugoslavia, 2018, p. 5) However, Croatia has adopted the Law on Persons Missing in the Homeland War<sup>8</sup>, dedicated to the rights of missing persons and their families in 2019, six years since its became the EU Member State and almost a year after the signature of the Framework Plan.

It is important to mention that the scope of the Law is limited to the two categories of missing persons:

- The Croatian citizens missing in the armed conflicts or in the connection of armed conflicts (Homeland War);
- Foreign citizenship who has the status of a Croatian veteran of the Homeland War and who at the time of disappearance did not have a registered permanent or temporary residence in the territory of the Republic of Croatia.

Hence, other persons missing in the armed conflicts or in the connection of armed conflicts have been excluded from the protection of the Law. Furthermore, the presumption of life of a missing person has been incorporated in a bit limited way. Namely, Article 6 of the Law stipulates that “persons missing in the Homeland War are presumed to be alive until the place of burial of the missing person is found or until the missing person is declared dead in accordance with the regulations governing the declaration of a missing person as dead and proof of death. So, there is presumption of a life, but without considering an option that a missing person could be found alive. Differently, Article 7 recognizes as the fundamental right of family members of a person missing in the Homeland War or a person killed in the Homeland War for whom the burial place is unknown to enable them to find out the place of residence or residence of the missing family member or to find his remains for permanent care. Therefore, the possibility to find a missing person alive is there adequately incorporated. In the same manner, Article 27 stipulates that “search activities shall cease when the requested person

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<sup>8</sup> Law on Persons Missing in the Homeland War, Official Gazette 70/19.

or his remains are found” but also underlines that a declaration of a missing person dead, does not prevent the search process from continuation. Such a solution allows the family members of a missing person to deal with a property and social protection issues without authorities stop searching for their missing family members.

#### ***4.2. Bosnia and Herzegovina***

The authorities in BiH has adopted the **Law on Missing Persons (LMP)**<sup>9</sup>, which regulates the entitlements to family members of missing persons. Namely, art 1 of this Law defines the scope of the law to determinates the principles for the improvement of the search process, the definition of a missing person, the manner of keeping central records, exercising social and other rights of family members of the missing persons, as well as other issues related to the search for missing persons from Bosnia and Herzegovina and in Bosnia and Herzegovina.

The presumption that a missing person is alive is not explicitly prescribed by the LMP, but it has been implicitly incorporated in the Article 3 (Right to know) which stipulates that the family members of a missing person have a the right to find out about the fate of missing family members and relatives, their place of residence, or, if they are dead, the circumstances, cause of death and place of burial, if such a place is known, and to obtain mortal remains. Therefore, the initial presumption is that a missing person is alive. In the same manner is the provision of Article 9 which rules the termination of the status of a missing person

The status of a missing person shall cease on the day of identification, and the procedure for searching for a missing person shall be concluded. The same provision obliges the authorities not to suspend the in the case when the missing person has been declared dead his remains have not been found. However, this provision should be read in the context of the Article 2(7) which defines what the identification means in the sense of this law, saying that “an identified missing person is a person who is trusted within the identification process determines that the mortal remains found correspond to a particular person in natural or inherited or biological characteristics or the missing person appears alive.” Therefore, the LMP recognizes the both scenarios (when missing person is found alive or dead), but presents them in the wrong order, from the stand point of the presumption that a missing person is alive.

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<sup>9</sup> Law on Missing Persons, Official Gazette of BiH, No 50/04.



Articles 11-12 determinates the entitlement to financial support as a non-transferable personal right. The monetary compensation may not be used at the same time as the other basis for subsistence, while beneficiaries may choose to use a more favorable right, even after the end of the procedure identification or declaration of a missing person as dead. Therefore, the rights of the family members of a missing person (including search and the financial support are not preconditioned by the declaration of death. However, the situation is a bit different when it comes to the right of a missing person to be considered alive, since according the Article 27, three years after the entry into force of the Law, persons registered as missing in the period from 30. April 1991 to February 14, 1996, and whose missing status was verified within the Central records of missing persons of Bosnia and Herzegovina, are to be considered dead and this fact will be officially recorded in the death registers. Hence, the search for them will continue, but without upholding presumption that they are alive.

#### ***4.3. Temporary Institutions in Priština (Kosovo and Metohija)***

In 2014, the temporary authorities in Priština, have adopted Law No. 04 / L-23 on Missing Persons<sup>10</sup> in order to regulate the status of the persons missing during the armed conflicts or in relation to them, by the end of 1990's. Article 5 of the Law guarantees the right of the family members of a missing person to be informed about the fate of missing persons, including the place where they were found or died, the circumstances of their death, the place of their burial, if known, and also the right to take over their remains. The law also rules the rights of family members regarding the legal status of missing persons (Article 6) and provides for the preserving of the civil status of the spouse of a missing person until the identification of the remains of the missing person is performed and until the death certificate is issued, or the missing person is declared dead by the court according to the Law on Non-contentious Procedure. This provision obviously intended to incorporate the presumption of life of a missing person. However, it missed to include the option to find the missing person alive a possible (and primary desirable) outcome of the search.

The Law also intends to rule the position of the family members of a missing person in terms of the property rights and stipulates that "a member of the family of a missing person may request in the competent court of the last place of residence of the missing person to take over the authorization for temporary management of the property of the missing person. The court may issue that authorization if the request is in the best interests

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<sup>10</sup> Law No. 04 / L-23 on Missing Persons Official Gazette of The Republic of Kosova 16/14.

of the missing person.” This means that a declaration of a dead is not required as a necessary prerequisite for a temporary resolving a property issues. In addition to this, “a family member of a missing person, who can prove his material dependence on the income of the missing person, may apply to the competent court of the place of residence of the missing person, to make a payment taken from the missing person's property to meet family needs.”

When it comes to the presumption of life as the right of a missing person, Article 7 of the Law stipulates that the search for a missing person shall be deemed to be completed when the missing person is found or his remains are identified. Also, according to the Law, the search for a missing person shall not be interrupted even if the missing person is declared dead according to the Law on Non-contentious Procedure. The search for a missing person shall continue until the fate, or if it is possible to determine the location of the person reported missing, has been established, and until the family and relevant authorities have been adequately informed. Therefore, the presumption that a missing person is alive is well incorporated.

#### **5. The right of a disappeared person to be considered alive and the national legislation of Serbia**

By the adoption of the Law on the rights of veterans, military invalids, civilian invalids of war and members of their families (hereinafter: LoRVMICWMF) in early 2020, a new legislative framework for acquiring status of civilian victim of war for the family members of a missing person has been introduced to replace the procedure earlier ruled by the Law on the Rights of Civilian Invalids of War<sup>11</sup> of 1996. The law brings a wide scope of social benefits grounded in the fact that a person has suffered damage in the context of an armed conflict, but without establishing the direct causal link between a crime against humanity committed and a damage suffered. The LoRVMICWMF also recognized the rights of the family members of a missing person, providing them a status of the family members of civilian victims or civilian invalids of war. Namely, according to article 27 of the same Law, a family member of a civilian war victim or invalid is considered a member of the family of a deceased civilian war invalid, if they lived together in a joint household for at least one year before death. The circles of family members are limited to:

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<sup>11</sup> Law on the Rights of Civilian Invalids of War (“Official Gazette of the RS”, No. 52/96).

1. a spouse or a person who lived in an extramarital union with a civilian war invalid or a civilian victim of war and had a common child together.
2. a child born in or out of wedlock and an adopted child,
3. a child in law who was supported by a civilian war invalid, i.e., a civilian victim of war;
4. a parent or adoptive parent, who was supported by a civilian war invalid, i.e., a civilian victim of war;
5. stepfather and stepmother, who were supported by a civilian war invalid, i.e., a civilian victim of war.

Upon acquiring the status, victims become entitled to monthly cash benefits, subsidized public transport passes, health care, costs for care assistance and funeral costs. (art. 32 of the LoRVMICIWMF) The extent of the right and an amount the monthly cash benefit for the family members of a victim are determined by the damage a victim suffered, but also by various social characteristic of the family members associated with the status of vulnerability.

The competent authority for rendering decision on the status of civilian victims of war is the local municipals/self-governments (the first instance) and the Ministry of Labor, Employment, Veterans, Social Affairs (MoLEVSA) as a second instance.

While listing the documents which need to be submitted by applicant (family member of a missing person)<sup>12</sup>, LoRVMICIWMF requires, among others, to submit a declaration of death. This declaration/certificate could be issued to the family members as a result of a procedure for the declaration of missing person dead and proof of death, according to the Law on Non-contentious proceedings.<sup>13</sup> This law (art. 57, par. 1(d)) provides that, among others, persons who disappeared during the war in connection with the events of the war, and about whose life there was no news for a year from the day of the cessation of hostilities, may be declared deceased. A proposal for declaring a missing person dead can

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<sup>12</sup> “For beneficiaries of rights - family members of killed, deceased and missing soldiers, military invalids, civilian war invalids and civilian victims of war: certificates of education of children; decision of the competent body on incapacity for work, i.e. finding and opinion of the competent medical commissions; death certificate; certificate of circumstances of death, death or disappearance; decision of the competent body on declaring the missing person dead; a certificate on the time spent in the war, i.e. armed actions, as well as on the time spent on military service, i.e. in military educational institutions; final decision on the recognized property according to the regulations in the field of veteran-disability protection.”

<sup>13</sup> Law on Non-contentious proceedings, “Official Gazette of the SRS”, No. 25/82 and 48/88 and “Official Gazette of the RS”, No. 46/95 - other law, 18/2005 - other law, 85/2012, 45/2013 - other law, 55/2014, 6/2015 and 106/2015 - other law)

be submitted by any person who has a direct legal interest in it, as well as by the public prosecutor. (Article 58)

Basically, this means that the family members of missing people are not considered as civilian victims of war until a declaration of death is issued (Article 177), which is not in line with art. 24, par. 6 of the UN CPPED and prevents a numerous potential family member of the victims of enforced disappearances to access the social protection measures. They are supposed to choose between the upholding a presumption that their family member is alive and the right to access some social benefits.

Therefore, there is a need either to align the provisions of the Law on the rights of veterans, military invalids, civilian invalids of war and members of their families (article 177) with the relevant provisions of the UN CPPED (art. 24, par. 6) in terms of the status of family members of the victims of enforced disappearances who are still not considered as civilian victims of war until a declaration of death is issued, either to adopt a new law to rule the rights of the persons disappeared in/or in relation to the armed conflicts in ex-Yugoslavia and their families.

### ***5.1. A new Law on the Missing Persons***

In early 2021 Serbian Government has established the working group to develop a draft Law on Missing Persons. A few months later, an initial draft has been published addressing the comprehensive scope of the rights of the persons missing in, or in relation to the conflict in ex-Yugoslavia.<sup>14</sup> As a basis for the draft the working group used the Guiding principles for the search for disappeared persons and reflected them, in details, as in the chapter of the law dedicated to the main principles, as in the section which regulate the rights of the missing persons and the members of their families. In addition to the right to be searched, the Law provides for the wide spectrum of the rights of the family members, starting from the right to be inform about the progress and the results of a search, through the monthly cash benefits, to the other social protective, assistance and support measures.

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<sup>14</sup> “In terms of this law: 1) Missing person is a person about whom the family has no news, and whose disappearance occurred during or in connection with the armed conflicts in the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter: SFRY) in the period from 1 January 1991 to 31 December 1995 and in the territory of the Autonomous Province of Kosovo and Metohija (hereinafter: AP KiM) in the period from January 1, 1998 to December 31, 2000 (hereinafter: armed conflicts) and which was reported on the basis of reliable disappearance data.” (art. 2)

Assumption about the life of a missing person is ruled by the separate article (Article 3) which stipulates that a missing person shall be considered alive, until:

- he/she is found alive;
- the remains are identified;
- or until the missing person is declared dead in accordance with the regulation governing the declaration of a missing person as dead and proving death.

In order not to leave this presumption without legal effects, Art. 3, par. 2 provides that the rights of family members of a missing person or a person whose burial place is unknown shall not cease, in accordance with this Law, with the identification or declaration of the missing person as dead. Therefore, the draft law has introduced a kind of correctional mechanism in relation to the earlier mentioned requirements of the LoRVMICIWMF and the Law on Non-contentious proceedings, having in mind that, not just upholds the presumption that a missing person is alive, but also upholds exercising the rights of the family members even if a missing person has been declared dead.

The legal consequences of this right are also further incorporated in the other provisions of the draft law. Namely, Art. 4 of the draft law, which guarantees the right to truth, recognizes as the primary right of family members of a missing person, the right to enable them to know the place of residence or domicile of a missing family member, prior to the right to find and retrieve his remains for a dignified burial, as well as to be informed of the circumstances of disappearance or death.<sup>15</sup>

Furthermore, the draft Law (Art. 12) which rules the termination of the status of the missing persons, explicitly provides that the decision on the termination of the status of a missing person shall be rendered:

- When a missing person is found alive;
- After the surrender and dignified burial of identified mortal remains of a missing person or a mortally injured person for whom the place of burial is unknown.

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<sup>15</sup> In order to exercise the rights referred to in Article 4, paragraph 1 of this Law, the competent state bodies, institutions and organizations of the Republic of Serbia are obliged to provide available information to the family members of the missing person.

So, the draft Law once more assumes as primary, the scenario where a missing person is found alive. The same is incorporated in the Article 22 which rules the end of a search, and provides that the search ceases when the missing person is found alive or the found remains of a missing person or a deceased person for whom the place of burial is unknown are identified and handed over to family members in accordance with the provisions of this law.

## **6. Conclusions**

Based on the above- presented findings, it is obvious that the right of a missing person to be considered alive has been recently significantly developed, as a he international level, as a the national level of the Western Balkans countries. Despite some inconsistencies, it could be said that this national legislations in this region incorporated the presumption that a missing person is alive prior it has been developed in detailed in the CED Guiding Principles for Search for Disappeared Persons in 2019. However, it should be noticed that ex-territorial nature of disappearances, in the contenxt of newly establsihed borders on Western Balkans in 1990's, requires a more uniform approach to this issue in he Region, to ensure that no missing persons or their family members are left behind, out of protection of law. One of the possible ways to do it so is to coprehensively incorporate the principle of non-discrimination in the national laws, to make them applicable on all persones disappeared in or in relation to the arm conflict in ex-Yugoslavia.

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**Gordana Nikolić\***

## **AN ATTACK AGAINST LIFE AND LIMB AS A MANNER OF COMMITTING EXTORTION**

*The criminal offence of extortion is a typical property related offence and in many modern legislations, as well as in the national one, this criminal offence is classified in the group of offences against property. This determination assigned to the group of offences is completely justified, having in mind that the offender's ultimate intention is to acquire unlawful property gain. Special gravity of extortion, which differentiates it from other typical property crimes, refers to coercion as a manner of its commission, during which an attack against life and limb of the injured party, as a sphere of the greatest vital importance, results in acquisition of unlawful property gain. In support thereof, there are many solutions offered in the legislation of the countries in the region which have recognised the intensity of coercion - more intense violence in the commission of the offence - as its qualifying circumstance. The author will focus on the attack against life and limb of the injured party during coercion as a means of extortion committed by the perpetrator. The focus will also be introduction of new qualified forms of the offence that would criminalise a more intense attack against life and limb of the injured party during the commission of this offence - that would be taken over from the legislations in the region - as well as the injured party's suicide, as a consequence of coercion as an act of extortion. The aim is to point to the violent character of extortion and more complete criminalisation of more serious forms of this offence.*

**Keywords:** extortion, attack, property, life, limb.

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## **1. Introductory remarks**

An attack against life and limb is an act of committing a number of criminal offences, in particular, those that, according to classification, belong to the group of criminal offences against life and limb. Nevertheless, there are many criminal offences in the Criminal Code committed with a different purpose which determines the group of criminal offences they belong to, but whose manner or means of commission consist of attacking life and limb of the injured party (Škulić, 2017: 236-264). In this regard, such criminal offences are some criminal offences from the group of crimes against property, whose act of commission constitutes an attack against the injured party's life, and, therefore, are included in violent criminal offences against property (Branković, Banović, 2019: 54-81). Such criminal offences include robbery and burglary, aggravated theft committed in an especially brutal and cruel manner, extortion, etc.; or, for instance, kidnapping – which belongs to the group of criminal offences against the freedom and rights of man and citizen.

The paper will analyse the criminal offence of extortion, where the perpetrator appropriates unlawful material gain by forcing the injured party to act to the detriment of his or another's property. Although the essence and goal of the criminal offence of extortion are to acquire material gain, the emphasis of the analysis of this offence will be coercion as a manner or means of extortion, bearing in mind that it is by force or threat that the perpetrator acted to the detriment of the injured party's property with the aim to acquire unlawful material gain.

In addition to coercion, force and threat which show violent nature of extortion – whereby, if committed, they constitute an attack against life and limb of the injured party in various forms - this paper will review more severe forms of extortion in national legislation, bearing in mind that circumstances that classify the offence are determined in terms of the value of material benefit gained, as well as in terms of whether it was committed by a group or an organised group, but not in terms of the classifying circumstances related to the intensity of violence during the commission, where the legislator neglected, to some extent, force or threat as a form of coercion in the commission of this offence.

In respect thereof, the paper will point out the classified forms of extortion in the criminal codes of the countries in the region, which indicate intensified coercion in the commission of extortion, where, by its various means and manners, life or limb of the injured party is attacked, the aim of which is to gain material benefit.

Finally, the subject of analysis will be the Criminal Code of Austria, which prescribes the injured party's suicide as a more severe form of coercion that occur as a consequence of committing this offence, in which case, the attack against life and limb of the injured party directly causes the injured party's personal attack against their own life and limb.

By analysing coercion as an act of committing extortion, its more severe forms and the comparative method of this offence with an emphasis on its violent nature (Lazarević, 2002), this paper will show what solutions our national legislation should take over from the legislation of the countries in the region and criminalise as more severe forms of extortion that refer to the attack against life and limb of the injured party; and, inevitably justify why this offence was listed in the chapter comprising offences against property, due to its essence and the purpose of commission, i.e. unlawful acquisition of material gain.

## **2. Definition of the criminal offence of extortion in national legislation**

In the criminal law of the Republic of Serbia, extortion is regulated by the provisions of the Criminal Code<sup>1</sup> in the group of criminal offences against property, Article 214, Chapter 21. The basic form of extortion consists of forcing (coercing) another person, by force or threat, to act to the detriment of his or another's property in order to acquire unlawful property gain for himself or another (Đurđić, Jovašević, 2010: 112). In addition to the basic form, the given offence has four more severe (qualified) forms.

Given that the goal of extortion is to acquire unlawful property gain, that is the reason why this criminal offence is classified as a criminal offence against property, and not against the freedom and rights of citizens (Pavlović, 2017: 218-235), although the use of coercion violates the rights and freedom of citizens, since this is not the basic goal of the person applying extortion, but to achieve his primary goal, i.e. to acquire unlawful property gain (Škulić, 2015: 264). This criminal offence could also be classified in the group of violent criminal offences, but given the goal and meaning of its commission, the most acceptable and proper way is to classify it in the group of criminal offences against property.

The perpetrator can be any person, and in terms of culpability Bošković, 2020:201-2016), it is necessary that there is direct intent qualified by direct intention (to acquire unlawful

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<sup>1</sup> "Official Gazette of the RS", No. 85/05, 88/2005, 107/2005, 72/2009, 111/2009, 121/12, 104/13, 108/14, 94/16 and 35/19.

property gain for himself or another). If force or threat is used without such an intention, this is not extortion but another criminal offence, primarily, coercion.

Coercion, as a way of committing extortion, has brought out, both in theory and in practice, the issue of distinguishing between this offence and robbery, bearing in mind that, in the commission of both offences, coercion occurs as a means of their commission and for the same purpose (to acquire unlawful property gain). The criterion for delineation is whether the passive subject being affected by coercion has handed over the item to the perpetrator (extortion) or the perpetrator has used coercion to seize the item (robbery).

However, the criminal offence of robbery also exists in the case when the passive subject directly affected by coercion (especially threats) has handed over the movable item to the perpetrator. In this regard, the court's interpretation in case-law differs when classifying the offence. However, the main criteria for distinguishing these offences are the spatial-temporal distance between the activity of the passive subject and the coercion undertaken (Stojanović, 2019: 711), as well as the type of property – whether it is movable or immovable property. This criminal offence is punishable by one to eight years of imprisonment.

### ***2.1. Coercion as a means of committing extortion***

The act of committing the criminal offence of extortion consists of coercing another person, by force or threat, to act to the detriment of his or another's property in order for the perpetrator to acquire unlawful property gain for himself or another. Although the goal of committing this offence is to acquire unlawful property gain, the commission refers to alternative forms of coercion, force or threat, in order to achieve the goal, whereby this offence is included among violent criminal offences. Moreover, force and threat do not directly affect only life and limb of the injured party, but also his mental state, which, like limb, constitutes an aspect of health, i.e. the life of the injured party.

Force (Jovašević, 2010: 140) is the use of physical, mechanical or other power (sound, light, thermal energy) of one person on another in order to coerce him to act. For the purposes of Article 112, item 12 of the Criminal Code, force also means the use of hypnosis or means of intoxication with the objective to bring someone against his will into a state of unconsciousness or make powerless to resist. It is most often used to overcome the resistance of a person, and it does not matter whether the resistance existed or was only expected.

In this regard, force consists of any willful action, i.e. of the bodily integrity which directly or indirectly affects the freedom of decision of such a person and which is suitable to force him to take or not take a certain action. This means that the effect of force cannot be resisted, which means that force must be such in its strength, scope, duration and intensity that the passive subject is not able to resist in the existing circumstances.

Threat (Stojanović, 2013: 1-16) is another, more lenient form of coercion. It is an announcement of harm, a statement whereby another person is warned of the likelihood of being inflicted with harm that is appropriate and sufficient to affect his will, so that the person makes a decision to take certain action or to behave accordingly. Warning another person of the likelihood of being harmed affects his freedom of decision-making, and above all, it directs reaching the decision in a particular way (Jovašević, 2010: 140). In order for threat to exist, it is important that the person who presents it is the person who will directly inflict the announced harm. A threat should be distinguished from a warning because in the case of a threat, it is necessary that the person who threatens in any way contributes to the harm he is threatening with (Stojanović, 2019: 131)

Force and threat, as forms of coercion, directly or indirectly attack life and limb of the injured party, given that force directly affects life and limb of the injured party, putting him in a state of physical or mental danger, which is why the injured party justifiably favours health over property and acts to the detriment of his or other's property. With regard to threat as an announcement of harm and a more lenient form of coercion, the injured party's mental state is directly affected, whereby the injured party is afraid of a physical attack against him by the perpetrator, as an attack against his own life and limb, and therefore, as it is the case with the use of force by the perpetrator, the injured party justifiably favours health over property, and takes action to the detriment of his or other's property.

Having in mind the afore listed facts, the legislator recognised extortion, as well as robbery, as more serious, violent offences against property, bearing in mind that they are committed in order to acquire unlawful property gain by attacking the injured party's life and limb.

## ***2.2. More serious forms of extortion***

As stated, the criminal offence of extortion has four more serious forms. The first and second more serious forms of extortion are classified in relation to the value of property gain acquired. If property gain acquired by applying extortion exceeds four hundred and

fifty thousand dinars, the perpetrator shall be punished with imprisonment of two to two and ten years (Article 214, Paragraph 2 of the CC), and if material gain acquired by committing the basic form of the offence exceeds one million and five hundred thousand dinars, the perpetrator shall be punished by imprisonment of three to twelve years (Article 214, Paragraph 3 of the Criminal Code).

In addition to these more serious forms, which are classified in relation to the value of property gain acquired, there are two other more serious forms of the criminal offence of extortion. The third more serious form (Article 214, Paragraph 4 of the Criminal Code) exists in one of the two alternatively prescribed cases: 1) if the perpetrator is habitually engaged in committing the basic or more serious form of extortion previously referred to, or 2) if the offence is committed by a group.

Fourth, the most serious form of the offence (Article 214, Paragraph 5 of the CC) exists if extortion (as a basic or more serious form) is committed by a group. This is a group which, pursuant to Article 112, Paragraph 22 of the CC, exists when at least three persons act to commit continuous or occasional criminal offenses and which does not have predefined roles for its members, continuity of membership or a developed structure. This offence is punishable by imprisonment of five to fifteen years, according to the value of the property gain acquired by an organised criminal group. Pursuant to Article 112, paragraph 35 of the Criminal Code, an organised criminal group is a group that exists for a certain amount of time, comprised of three or more persons acting in conspiracy to commit one or more criminal offences punishable with imprisonment of four or more years, to acquire direct or indirect financial or other material gain or to achieve and maintain influence on the economy or other important state structures. This form of extortion is one of the most typical activities of organised crime, and is referred to as 'racketeering' (Škulić, 2015: 267). This most severe form of extortion is punishable with imprisonment of minimum five years.

With regard to the first and second more serious forms, classification of the offence refers to the value of the property gain acquired, while force or threat used as a means of committing extortion are identical to the means used in the basic form of this offence. The purport of these forms of extortion, i.e. the circumstances that classify this offence as more serious, are the higher value of unlawful property gain ranging from four hundred and fifty thousand dinars to one million and five hundred thousand dinars.

With regard to the third and fourth more serious form, the intensity of violence is higher. If the offence is continuously committed against the injured party in the sense that the

perpetrator is engaged in extortion, the continuous action of this offence constitutes continuous intensity of coercion, bearing in mind that permanent force or threat continuously affects the injured party, whereby a higher intensity of extortion against the injured party brings potential completion of the offence to an end. A higher intensity of coercion while committing extortion is achieved also in cases when the offence is committed in complicity by a group and an organised criminal group, i.e. by accumulation of forces or threats, having a stronger effect on the injured party, whereby unlawful property gain is acquired by applying higher intensity of coercion.

The third and fourth forms of extortion constitute a stronger degree of coercion over the victim, whereby the essence, meaning and goal of the offence are achieved with a stronger intensity of coercion, i.e. violence, being the circumstance that classifies the offence.

However, the afore listed circumstances that classify extortion in relation to the higher intensity of coercion do not suffice. The legislator should consider introducing a few more which would emphasise incrimination of more severe forms of extortion according to the degree of violence, i.e. the attack against life and limb of the injured party, giving a fuller meaning to this criminal offence and taking into account the very fact that violence results in acquisition of unlawful property gain.

### **3. Violent characteristics as circumstances that classify extortion in the legislation of the countries in the region**

Criminal codes in the region have recognised violent characteristics of extortion, i.e. the attack against life and limb of the injured party by the perpetrator as a way for him to acquire unlawful property gain. Such and similar solutions have been incorporated into legal texts of many modern jurisdictions, but, due to the scope of work, we will only analyse solutions in the laws of the countries in the region. In this regard, we should consider that, in addition to the existing criminalised more serious forms of this offence, we should include into national law some other forms that intensify coercion as a way of committing extortion, i.e. when the life of the injured party is endangered by acting to the detriment of his or another's property in order for the perpetrator to acquire unlawful property gain for himself or for another - which has already been criminalised in the legislation of our neighbouring countries.

The Criminal Code of the Federation of Bosnia and Herzegovina<sup>2</sup>, in addition to alternatively criminalised more severe forms of extortion, also prescribes the case if weapons or dangerous tools were used in the commission of the basic form of the criminal offence. This classifying circumstance of extortion, when life and limb of the injured party is endangered by the use of weapons or dangerous tools in the commission of coercion, by using force or threat as a manner of committing extortion, has been criminalised in many other comparative legislations. In addition to classified forms of the offence with regard to the value of acquired property gain and whether they have been committed by a group, the Criminal Code of Republika Srpska<sup>3</sup> incriminates as such the following forms: if, during the commission of the criminal offence, a person was negligently inflicted a bodily injury, if the offence was committed in a dangerous manner - by threatening to directly attack life and limb of a large number of persons, even if the act of commission was undertaken with the use of weapons or dangerous means.

The legislator has also prescribed the most serious form of violence during the commission of extortion consisting of negligent cause of death to the injured party. In this case, it would be a typical manslaughter, bearing in mind that it occurred through the use of coercion on the injured party, and that the intention, i.e. the consequence of the offence - material gain - did not occur. Thus, manslaughter should not fall under the circumstances that classify extortion.

However, in this case, the lawmakers opted for the afore-stated solution in order to have a more precise determination of the intent of involuntary manslaughter, which, in this case, is a property gain, as well as to have a possibility of imposing stricter punishment - bearing in mind that, in this case, the legislator prescribed more severe punishment than involuntary manslaughter that is foreseen in the group of offences against life and limb.

The same classified forms of extortion that refer to the attack against the injured party's limb, i.e. to more intensive coercion during the commission of this criminal offence, have been prescribed by the Criminal Code of Macedonia<sup>4</sup>, namely those that refer to cases of coercing another person in a dangerous manner - using firearms or dangerous tools, as well as to cases when, during the commission of the basic offence, a person was intentionally seriously injured. The most severe form of extortion for which the legislator

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<sup>2</sup> "Official Gazette of the Federation of Bosnia and Herzegovina", No. 36/2003, 37/2003, 21/2004, 69/2004, 18/2005, 42/2010, 47/2014, 46/16 and 75/17.

<sup>3</sup> "Official Gazette of the Republic of Srpska", No. 64/2017, 104/18 – Decision of the Constitutional Court and 15/21.

<sup>4</sup> Criminal Code, "Official Gazette of the Republic of Macedonia", No. 37/1996, ... and 226/2015.



has prescribed the most severe punishment exists in the case when a person's life was taken intentionally during the commission of the offence.

In this case, too, the legislator has opted to prescribe cause of death that occurs during coercion as a means of committing extortion as a more severe form of extortion, and not as an offence from the group against life and limb or as joinder of these two criminal offences, bearing in mind that coercion that lead to cause of death that occurs with the offender's intention to acquire unlawful property gain for himself or another.

If the acts of extortion are undertaken in a dangerous manner – by using weapons or dangerous tools and in a particularly cruel and humiliating manner - these are severe forms of the offence that have, similarly to the way how they are criminalised in our legislation, also been incorporated into the Criminal Code of the Republic of Slovenia<sup>5</sup>.

In Croatian criminal legislation<sup>6</sup> too, the lawmakers have criminalised the attack against life and limb of the injured party during the act of extortion, in addition to the basic form of force or serious threat, as extortion with elements of robbery comprising the use of force against the injured party, while threat refers to the attack against life and body of the injured party, as is the case with robbery.

The legislator has also criminalised the use of dangerous weapons or tools during extortion with elements of robbery as a more serious form of the attack against life and limb in the case of the perpetrator threatening to directly attack the life or limb of a large number of persons or to damage buildings of great social importance. The legislator prescribed the most severe form of attack against life and limb during coercion as a manner of committing extortion when another person's death has been caused by undertaking the act of committing the offence.

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<sup>5</sup> "Official Gazette of the Republic of Slovenia", No. 55/2008, 66/2008, 39/2009, 91/2011 and 50/2012, 54/15, 38/16, 27/17, 23/20 and 91/20.

<sup>6</sup> Criminal Code of the Republic of Croatia ("Official Gazette of the Republic of Croatia", No. 125/2011, 144/2012, 56/2015, 61/2015, 101/17, 118/18 and 126/19).

#### **4. The injured party's suicide as a consequence of committing extortion in the criminal legislation of Austria**

In addition to extortion (Article 144), the Austrian Criminal Code<sup>7</sup> prescribes aggravated extortion as a separate criminal offence (Article 145). In this regard, "Whoever commits extortion 1) under threat of death, by causing significant mutilation or distinctive disfigurement of another person, by kidnapping, by arson, by hazardous use of nuclear energy, ionizing radiation or explosives, or by disrupting economic existence or social position; or 2) where the victim or another, by being subjected to dangerous threats or other forms of violence, is kept in a state of extreme agony for a longer period of time, shall be punished by imprisonment of one to ten years" (Article 145, Paragraph 1 of the Criminal Code of Austria).

According to the same Article, in case of aggravated extortion, whoever commits extortion 1) while performing official duties, or 2) commits that offence against the same person continuously for a longer period of time (Article 145, Paragraph 2 of the Austrian Criminal Code) shall also be punished.

The perpetrator will also be punished if the offence results in suicide or attempted suicide of the victim or another against whom violence or dangerous threats were directed (Article 145, Paragraph 3 of the Austrian Criminal Code). This form of aggravated extortion is specific and should be debated in terms of whether to incorporate it into our legislation.

Although this form of extortion would be difficult to prove in terms of linking the victim's suicide and the act of committing extortion against him/her, the legislator has justifiably prescribed this form as qualified for several reasons. First of all, it is known that in practice, suicide as a consequence of extortion against a person has often happened. On the other hand, extortion as a criminal offence has a psychological specificity and its commission also constitutes psychological impact on the victim, bearing in mind that threat or violence against the victim is carried out for a period of time until the perpetrator acquires the injured party's property (a house, an apartment, etc.) or money (which the injured party will hand over to the detriment of their property). In this regard, various victims' life circumstances that would occur by acting to the detriment of his or other's

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<sup>7</sup> Strafgesetzbuch, Manz, Taschenausgaben, 9., durchgesehene Auflage, Wien, 1989; Strafgesetzbuch, Gesamte Rechtsvorschrift für Strafgesetzbuch, Fassung vom 05.02.2020. Bundesgesetz vom 23. Jänner 1974, Änderung 154/15, taken from <http://www.legislationline.org/documents/section/criminal-codes> Criminal Code of the Republic of Austria (1974, amended 2015) (German version), accessed at 09.05.2021.

property can lead to an altered state of the victim's consciousness, to an inability to find a solution, fear to report the criminal offence and, in the end, to suicide.

Although the act of committing this form of extortion does not directly affect the injured party's life and limb, as analysed in the previous part of the present paper, the victim's suicide or their attempt to commit suicide as a result of violence or dangerous threats imposed during extortion are associated with the attack against life and limb, i.e. with coercion as a manner committing extortion. Suicide, as the victim's voluntary cause of death, occurs as a consequence of violence or dangerous threats during the commission of extortion.

Finding adequate incrimination of the victim's suicide due to extortion should be coupled with finding a precise solution that would not cause problems in proving. In the history of Serbian legislation, it is known that we mainly took over legal texts of the Germanic region, such as the laws of Germany and Austria, and that such legal texts proved to be extremely good; thus, we would certainly not err if we took over this solution from the Austrian legislation and incorporate it into our national legislation. Moreover, in his Commentary on the Criminal Code, Professor Čubinski emphasised that it was not uncommon for the victims of the then 'blackmail', who had been brought to despair, committed suicide, and that more attention should be paid to these cases (Čubinski, 1930: 294).

### **Conclusion - De lege ferenda**

The criminal offence of extortion, in its basic form, is regulated in all legislations of the region in a similar or almost identical way as in our legislation and is listed in the same group of criminal offences against property, indicating that its essence and purpose of commission is for offenders to acquire unlawful property gain. Coercion, which occurs in all basic forms of commission of this offence, in all analysed legislations, consists of force or (serious) threat and indicates an attack against life and limb of the injured party to act to the detriment of his or other's property in order for the perpetrator to acquire unlawful property gain. Thereby, this offence is listed as a violent offence against property. In addition to the value of acquired property gain, cumulation of force or threat, when this offence is committed by a group or an organised criminal group, as well as continuous coercion in the commission of extortion have been prescribed by our legislator as more serious forms of extortion.

However, what makes the solutions prescribed in the regional countries' legislations complete are qualified forms of the offence which, in addition to the qualifying circumstances that our legislation prescribes as more severe forms of extortion, include some other that refer to increased intensity of violence during coercion as a manner of committing extortion, i.e. jeopardising the injured party by a direct attack against his life and limb. Some of these qualifying circumstances constitute specific criminal offences prescribed in the group of offences against life and limb; however, the legislator opted to prescribe them as more serious forms of extortion in the group of offences against property in order to have a more precise determination of the intention to commit, i.e. to acquire unlawful property gain.

This solution is justified having in mind that grievous bodily harm or involuntary manslaughter that occur during coercion used as a means of committing extortion result in property gain, which constitutes the offender's intention, and not infliction of grievous bodily harm or involuntary manslaughter. The legislator opted for such a solution due to stricter punishment compared to the punishment prescribed for these offences without qualified intention.

Grass is not always greener on the other side, but the way how attack against life and limb of the injured party as a manner of committing this offence have been criminalised as more serious forms of extortion in almost all legislations in the region (except Montenegro) is fully justified and should be taken over and criminalised as more serious forms of extortion in our legislation too.

The Criminal Code of Austria has criminalised a separate occurrence as a form of aggravated extortion (a separate criminal offence), referring to the case when extortion results in suicide or attempted suicide of the victim or another person against whom violence or dangerous threats were directed. Our legislation should take over this solution as a qualified form of extortion.

In this regard and in the *de lege ferenda* sense, our legislation should, in addition to the existing ones, criminalise as more serious forms of the criminal offence of extortion the following circumstances:

- if the act of commission was undertaken by using weapons or dangerous tools;
- if the act of commission was undertaken in a dangerous manner - by threatening to directly attack the life and limb of a large number of persons;

- if the act of commission was undertaken in a particularly cruel and humiliating manner;
- if the commission of the offence caused grievous bodily harm;
- if the commission of the offence caused the death of a person, and
- if extortion resulted in suicide or attempted suicide of the victim or some other person against whom violence or dangerous threats were directed (commenced extortion) or if the injured party caused damage to his or other's property whereby the perpetrator acquired unlawful property gain (completed extortion).

If the Republic of Serbia would take over and criminalise the mentioned qualified forms of the criminal offence of extortion which have already been standardised in the analysed legislations of the surrounding countries, but also in numerous European countries which have not been listed in this paper, criminal legislation of this offence would be improved whereby more importance would be given to extortion as a means of commission, i.e. to the attack against life and limb of the injured party as the manner of commission, to stricter punishments for the perpetrator - bearing in mind that this offence has not been classified exclusively as an offence against property, but also as an aggravated, violent offence against property.

Finally, in addition to the proper and adequate combat against all forms of extortion, all these forms would be more fully criminalised, especially the most aggravated ones. When discussing coercion as a means of carrying out attacks directly against the life and body of the injured party, as his greatest rights (the right to life), it should be taken into account that stronger and more intense coercion makes the perpetrator's intention fulfilled sooner (property gain), that is, the time flow between the action and the consequences of the offence is reduced, damage is done to the property of the injured party, and the sphere of the greatest vital importance has been violated, i.e. his life and limb.

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**Yang Chao\***

## **THE HUMAN RIGHT SAFEGUARD FOR PERSON EXTRADITED IN CHINA**

*This paper addresses the legal system of extradition in China from the human rights protection perspective. Since China promulgated extradition law and signed the first bilateral treaty in extradition matter, China has improved the whole legal system in the field of international judicial assistance in criminal matters, and this process is development by greater individual human rights protections. In this paper, the human right protection in extradition process demonstrated by introduce the relevant law and examination process of extradition, the fundamental principles of extradition, and the right protection in the extradition procedure in China.*

**Keywords:** Human Right; Extradition; Dual Criminality; Due Process

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## **1. The Legal Framework of International Judicial Cooperation in Criminal Matters in China**

In the era of globalization, more offences contain transnational features, which including the fugitives flee abroad, the crimes committed or the consequences of offences in different countries, then to deal with these offences, the demands for judicial cooperation and extradition requirements is increasing. Overall, although there is no global convention on extradition, there is a growing sense that the basis of extradition is expanding from one based on pure reciprocity to one based on good global citizenship<sup>1</sup>. And the international law is the basis for international community, international law is a body of law consisting of rules and principles that bind civilized nations with one another. Considering judicial assistance or extradition cooperation between States, human rights protection is a key factor that impact on the these cooperation processes. There are some well-known international conventions regard to the human right safeguard. Such as the International Covenant on Civil and Political Right, International Covenant on Economic, Social and Cultural Rights, European Convention on Human Rights and The American Convention on Human Rights. These conventions and regional treaties with the domestic laws are all provided the legal basis for human right protection in the process of extradition. It is therefore of the utmost importance that legislators, the law-creators, bound also to work within the bounds of their legal authority, are familiar with national regulations and legal practice, as well as international standards in this field<sup>2</sup>.

The rule of law is essentially a mechanism for implementing natural law standards on human rights in international law and in national legislation<sup>3</sup>. In these years, China played active legislation progress in the field of international judicial assistance in criminal matters, on 26th August 1993 China signed the first bilateral extradition agreement with Thailand. This agreement represented the first step in the development of collaborative relations on extradition with other countries and led to the beginning of a process of harmonization of the Chinese legal system with the international rules on judicial

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<sup>1</sup> Boister, N. (2018) Global Simplification of Extradition: Inter-Views with Selected Extradition Experts in New Zealand, Canada, The US and EU. Criminal Law Forum, (29):pp327–375.

<sup>2</sup> Pavlović, Z.(2017) The Right to Privacy-Challenges of New Commitments . “Freedom, Security: The Right to Privacy”. International Scientific Conference (pp218-235).Belgrade: Provincial Protector of Citizens – Ombudsman, Institute of Criminological and Sociological Research.

<sup>3</sup> Kambovski, V.(2018) Natural Rights, Legitimacy of Laws and Supranational Basis of Unlawfulness. Yearbook Human Right Protection “From Unlawfulness to Legality”( pp31-51). Belgrade: Provincial Protector of Citizens – Ombudsman, Institute of Criminological and Sociological Research.



cooperation in criminal matters. Till now, China has signed bilateral extradition agreements with 46 countries, including 14 European countries<sup>4</sup>.

### ***1.1 The Law of Extradition of People Republic of China***

On 28th December 2000, the Permanent Commission of the National Popular Assembly enacted the Extradition Law. Besides the rules of substantive and procedural law related to extradition, A significant step forward in the development of contemporary Chinese legislation on international judicial cooperation is represented by the fact that the Extradition Law do no longer identify the extraditable person as an “object”, at the mercy of the political and diplomatic transactions concluded between the requesting country and the requested one. The extraditable person is a legal entity in the process. Plus, as in the common criminal procedure, the extraditable person benefits from the protection of fundamental rights in the passive extradition process.

### ***1.2 The Law of International Judicial Assistance in Criminal Matters of People Republic of China***

On October 26, 2018, the Sixth Session of the Standing Committee of the 13th National People's Congress voted to adopt the Law of the People's Republic of China on International Criminal Judicial Assistance. The assistance refers to providing mutual support when China and other countries deal with criminal cases, including legal document delivery, investigation and evidence collection, freezing, confiscating and recovering assets, as well as transfer and management of offenders, the law stipulated .The law represents a significant step forward in international cooperation, which provided solid legal basis, not only for criminal justice practitioners, but also for the persons suspected and accused in cross-border criminal proceedings. This reflects positive developments on the respect of fundamental rights and individual freedoms, which are a pre-condition for future cooperation in criminal matters. Also, Chapter VI of the Supervisory Law refers international Cooperation against Corruption, clarifies many contents of anti-corruption work and cooperation between the National Supervisory Commission and other countries, regions and international organizations, and provides an important legal basis and procedural guarantee for international person sought and asset recovery of corruption.

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<sup>4</sup>[http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex=1&keywords=%E5%BC%95%E6%B8%A1&chnltype\\_c=all](http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex=1&keywords=%E5%BC%95%E6%B8%A1&chnltype_c=all), accessed on 5.12.2021.

### ***1.3 The System of Examination of Extradition in China***

From the domestic law perspective, extradition may be viewed as part of the criminal process, with the emphasis on the fugitive's rights<sup>5</sup>, and the human right protection shall be respected by all of States in the whole process.

The extradition law of China introduced a system of double verification on extradition requests, in other words a joint administrative and judicial examination system. The State Council, which is the Chinese supreme executive body, is in charge of the administrative control and it exerts its power through the Minister of Foreign Affairs. Differently, the judicial control is exerted by the Supreme Court and the Superior Court which is appointed by the Supreme Court itself. The warrant issued by the superior courts in the proceedings for passive extradition has to be verified and confirmed by the Supreme Court. During both the judicial and the administrative examination, the competent authority has the veto right, that is the power to reject the extradition request, and the decision made on the basis of the veto right is immediately effective.

To briefly conclude this section, these important developments reflecting for decades of effort by Chinese government, in the field of international cooperation of criminal matters.

## **2. Principles in the Extradition Process**

In the sense of criminal law the protection of life represents the fundamental dimension of criminal law protection. This form of protection completely denies fragmented, additional and subsidiary character of criminal law and puts the integral, primary and sovereign criminal law protection of life in the first place<sup>6</sup>. Extradition as an especial process of criminal procedural, involved with the cooperation between two judicial sovereignty, which needs more emphasized on the right safeguard.

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<sup>5</sup> Williams, S.(1992) Human Rights safeguards and International Cooperation in Extradition: Striking the Balance. Criminal Law Forum, 3(2), pp191-224.

<sup>6</sup> Rakočević, V.(2017) Criminal Activities Murder and Aggravated Murder in Montenegro Legislation. "Freedom, Security: The Right to Privacy". International Scientific Conference(pp517-534). Belgrade: Provincial Protector of Citizens - Ombudsman Institute of Criminological and Sociological Research.

### ***2.1 Grounds for Deny the Extradition Decision***

As the UN model treaty listed the grounds may and shall be deny the extradition request, which can be divided to two parts, obligations grounds and optional grounds. In the extradition law of China and the bilateral treaties in China, all of them clearly stipulate the grounds that may and shall deny extradition request because of the request contains the risk that against the person extradited' basic right. In general, these grounds could be catalogued as three groups, firstly, the extradition request against human treatments, such as once the request been approved, the person extradited would be subjected to torture or other cruel, inhuman or humiliating treatment or punishment when he/she back to the requested country or he/she already been thought above inhuman treatment. Secondly, the extradition request is based on unprejudiced opinions, like the political opinion or region grounds, also includes that the person extradited has been granted asylum status. Thirdly, in particular consider the person extradited physical condition, if the extradition may results in harmful impact on healthy condition.

By these grounds, we can see that in the law and treaties in China, the extradition process and final decision all based on the spirt of human right safeguard, if the requirement may result in damages to human right, against the basic right, it would be denied.

### ***2.2 Dual Criminality***

The dual criminality means that the offense must be considered criminal in both states. The crucial factor is whether the conduct is viewed as criminal in both states and there is a sufficiency of evidence—usually from the perspective of the requested state<sup>7</sup>. The UN Model Treaty on Extradition, for example, provides that double criminality is met despite differences in denomination, categorization and in the elements of the compared offences<sup>8</sup>. Obey with the dual criminality is a fundamental principle in extradition process, there are various essential conditions for extradition respected in most treaties and domestic laws. The Canadian Supreme Court emphasized that the principle of double criminality underlies all phases of the extradition process. In practice, consider the diverse law system in different countries, the examination to the act may not strictly according to specific article, but shall examination the act from the technologic perspective, which like

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<sup>7</sup> Williams, S.(1992) Human Rights safeguards and International Cooperation in Extradition: Striking the Balance. Criminal Law Forum, 3(2), pp191-224.

<sup>8</sup> Boister, N. (2018) Global Simplification of Extradition: Inter-Views with Selected Extradition Experts in New Zealand, Canada, The US and EU. Criminal Law Forum, (29): pp327–375.

a quasi-criminal examination process in national judicial system, the judicial shall examine the evidences, made the decision that the act whether meet the requirements that constitutes the offence, and not require that the match the exactly same offence.

In light of what has been talked about the double criminality, if a crime is listed in the treaty some states take the view that that listing is determinative of extraditability and double criminality is not required<sup>9</sup>, the approach taken in China is by clearly explain the requirement for double criminality, nor listed the crimes that shall be decisive for extradition in treaties. In the treaty between China-France on extradition, article 2 refers to the extraditable offences, which stipulates that any act which constitutes an offence under the laws of both States shall be an extraditable offence, the act whether commit crimes not depend on whether the offence belongs to the same certain of crime or the specific crime, but shall according to the laws of requesting or requested country. Also, we can find the similar articles in other bilateral treaties between China and other countries for the dual criminality.

### ***2.3 Rules of Specialty***

Rule of specialty in the extradition is another fundamental way that protect human right, with the binding of specialty principle, the person extradited would not suffer other unjust accusing. The rule sets an obligation to the requesting State that avoid to arbitrary criminal charging to the person extradited. If the specialty rule were not given effect, it would negate the whole worth of the extradition procedure and vitiate any safeguards for the fugitive<sup>10</sup>.

In the extradition law of China, article 14 expressed the rule of specialty, the Requesting State shall make the following assurances when requesting extradition: no criminal responsibility shall be investigated against the person in respect of the offences committed before his surrender except for which extradition is granted, nor shall that person be re-extradited to a third state, unless consented by the People's Republic of China.

With stipulated the rule of specialty, the article also with an exception provision to the specialty, in the circumstance that extradited to the Third State with consent of the China or the person extradited still stay in the requesting country or voluntarily back to it in

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<sup>9</sup> Boister, N. (2018) Global Simplification of Extradition: Inter-Views with Selected Extradition Experts in New Zealand, Canada, The US and EU. *Criminal Law Forum*, (29):pp327–375.

<sup>10</sup> Williams, S.(1992) Human Rights safeguards and International Cooperation in Extradition: Striking the Balance. *Criminal Law Forum*, 3(2), pp191-224.

certain period. Besides the law, in the treaty between China and Portugal on extradition, article 14 is clearly stipulated that the person extradited to the execution of sentence in the requesting party for an offence committed by that person before his surrender other than that for which the extradition is granted nor shall that person be re-extradited to a third State.

By these provisions, it is worth to note that the principle of specialty is shall be covered in the whole process of extradition, which shows the respect to the judicial Sovereignty of requested State, reflects the reciprocal of both States, represents the judicial and political mutual trust. Construct the mutual trust is the solid base of judicial assistance and other cooperation between States. The principle of mutual recognition was borrowed from the internal market sphere and transferred to the criminal justice area. Mutual recognition can be interesting for that opposing harmonization, as it can increase efficiency in cross-border cooperation without requiring member states to harmonize their national legal systems<sup>11</sup>.

There is an extradition case, on Oct 17, 2018, the Chinese fugitive Yao Jinqi was arrested in the country's capital Sofia by Bulgarian police, according to the Interpol Red Notice. Considering China and Bulgaria signed the extradition treaty, China immediately send the extradition requirement to Bulgaria, as the crime of bribery. In the retainment, Yao expressed in writing his willingness to return to China during a visit to his consul at the Chinese Embassy, and actively cooperated to complete the simplified extradition<sup>12</sup>. After extradited back to China, In view of the fact that Yao voluntarily returned to China for investigation, he actively cooperated in completing the extradition and truthfully explained the facts of the bribery in the whole case. The court sentenced Yao obey with the rule of specialty, recognized his willing to back to China as surrender, sentenced him with leniently punishment for six-year prison term. In the criminal procedural, Yao's legal rights are fully protected.

### **3. Due process**

Recourse to criminal law instruments is therefore limited by a number of procedural guarantees and regulating principles, for criminal law to be invoked fairly, in order to

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<sup>11</sup> Willems, A. (2016) Extradition on the Two Sides of the Atlantic: The U.S Model as Blueprint for the European Arrest Warrant? *Criminal Law Forum*, (27): pp443–493.

<sup>12</sup> Cao Yin, Former Official Gets Six-Year Prison Term, available at: <http://www.chinadaily.com.cn/a/202008/28/WS5f48412aa310675eafc55fbf.html>, accessed on 5.11.2021.

protect the individuals from abusive action by the State<sup>13</sup>. Therefore, regarding the extradition process, obey with the principles of safeguard for right of individual person is the way that avoiding person extradited been treated prejudiced by State.

### ***3.1 The Position of Person Extradited in Process and Right Protection***

Regards to the position of person extradited, with the developments of extradition in these years, the process extradited is more likely the third parties in the process rather than the pure passive defendant in the procedural. That is to say, in the extradition process, the right of person extradited have been widely granted by extradition law and other domestic law, which provide solid legal basis for procedural safeguards of the person extradited. In the extradition law of China, the above provisions are expressed the right safeguard in the extradition process. Although some rights are directly silent on the extradition law, considering the extradition process is quasi-criminal process in China as we mentioned, the criminal procedural law of China is another legal source for right safeguard in extradition process, such as the right for defense, the communicate right, and other basic procedural rights could be directly applied with the criminal procedural law of China.

In December 2006, in accordance with the treaty between China and South Korea in extradition, South Korea submitted a request to China for the extradition of a South Korean person, Zheng Mou, accusing the requested person of raping five South Korean women in Malaysia, Hong Kong Special Administrative Region of China and Anshan City of Liaoning Province from August 2001 to April 2006. During the examination of the extradition request, the Supreme People's Procuratorate held that although the Chinese judicial organs also had jurisdiction over the alleged acts, it was appropriate for the ROK to prosecute and had no objection to the extradition request of the ROK.

The Supreme People's Court also stated in the extradition ruling that China has criminal jurisdiction over the crime of rape committed by Zheng Mou in China, which belongs to the situation that extradition can be refused according to the provisions of Article 9 of the Extradition Law. However, in view of the fact that the victims of Zheng's criminal acts are all Koreans, Zheng and his lawyer have no objection to the extradition of Zheng back to Korea, so the ruling of Liaoning Provincial Higher People's Court that the extradition

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<sup>13</sup> Policy Department for Citizens' Rights, Constitutional Affairs Directorate General for Internal Policies of the Union Criminal procedural laws across the European Union: A comparative analysis of selected main differences and the impact they have over the development of EU legislation(2018) . available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL\\_STU\(2018\)604977\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf), accessed on 5.16.2021.

request of Korea meets the conditions for granting extradition stipulated in the Extradition Law and the Sino-Korean Extradition Treaty is approved<sup>14</sup>. By this case, it is expressed that the acceptance of extradition willing of the person extradited has more weight in the accounting the decision, the position of person extradited is no more the “object” in the process.

### ***3.2 The Right of Defense***

In the whole process of extradition, the extradited person granted by Chinese national laws to get the fundamental rights in the procedural, which equals to the defendant in the common criminal procedural.

As the article 34, comma 1 of criminal procedural law of China, A criminal suspect shall have the right to retain a defender from the day when the criminal suspect is interrogated by a criminal investigation authority for the first time or from the day when a compulsory measure is taken against the criminal suspect; during the period of criminal investigation, a criminal suspect may only retain a lawyer as a defender. A defendant shall have the right to retain a defender at any time. Also, according to The Provisions of The Issues concerning the Handling of Cases of Application for extradition cases<sup>15</sup>, the extradited person have the right to against the extradition decision with the Chinese lawyer. Besides that, in the extradition process, the extradited person also has the right to have the law assistance, get fully informed about the basic procedure of extradition, the competent authority, fundamental rights in the extradition process, the standard for extradition in China and the grounds may and shall deny the extradition, the standard for granted political asylum, the duration of compulsory measures for extradition and other relevant information.

### ***3.3 The Appeal Right***

The above section demonstrated the extradition process in China and the competent authorities, as noted that the extradition procedural likes the criminal procedural, the

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<sup>14</sup> 黄风.(2013)“或引渡或起诉”法律问题研究. *中国法学*(3), pp.180-190. 转引段洁龙.*中国国际法实践与案例*(2011), 北京:法律出版社。

<sup>15</sup> The Issues concerning the Handling of Cases of Application for extradition cases, 4.23.1992, [http://www.law-lib.com/law/law\\_view.asp?id=8562](http://www.law-lib.com/law/law_view.asp?id=8562), accessed on 5.8.2021.

person extradited has the same right with the defendant, with the appeal right to against with the compulsory measures, extradition decision and delay transfer.

In the circumstance that expired the period of provisional arrest, the person extradited have the right to prejudice the compulsory measures, and the right also covered in the whole process, in any phase of the extradition, as the investigation phase, the court phase. The appeal against the compulsory measure shall be upon to the competent authority that mandatory the measures or the one that approved, and the appeal may be present by oral or in writing. If the person extradited already have the defense, then the appeal could be upon by the defense.

Regard to the appeal right against the extradition decision, accounting on the nature of extradition process, which is similar with the criminal procedural, although the extradition law of China there is not explicitly stipulate the appeal right of the person extradited, then there is provision construct the “The appeal court have power to made the final decision” about the extradition decision, this system could seems as the special appeal right in the extradition, because in the extradition process, the appeal right is automatic applied, whether person extradited wanted to appeal or not, the extradition decision would be upon to the appeal court.

In conclusion, besides these above rights, for the person extradited also has other fundamental rights, such as the right to communicate, the right of compensation, which are all granted by laws and treaties in China.

### **Conclusion**

A foreign system is not unjust just because is different<sup>16</sup>. Decrease the lack of mutual knowledge and mutual understanding between the different legal systems is the key to development cooperation in the future. As for the extradition process and decision, it could reemphasize that in China the domestic law and bilateral treaties have provided the protection for the extradited person right safeguard.

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<sup>16</sup> Williams, S.(1992) Human Rights safeguards and International Cooperation in Extradition: Striking the Balance. Criminal Law Forum, 3(2), pp191-224.



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## ОПАСНОСТИ И ПОСЛЕДСТВИЯ ВНЕДРЕНИЯ РИСК-ТЕХНОЛОГИЙ В ПРАКТИКУ ПРИНЯТИЯ УГОЛОВНО-ПОЛИТИЧЕСКИХ И УГОЛОВНО- ПРАВОВЫХ РЕШЕНИЙ

*Статья посвящена исследованию вопроса о рисках, которые могут возникнуть в процессе внедрения технологий риск-менеджмента в практику разработки и принятия уголовно-политических и уголовно-правовых решений. Технологии риска сегодня рассматриваются как одно из перспективных средств оптимизации уголовной политики, внедрение которого позволяет выявить и оценить как положительные, так и отрицательные последствия принятия любого решения в области уголовного права. Вместе с тем, риск-менеджмент сам в себе таит некоторые опасности и риски, которые необходимо учитывать в процессе обновления методологии уголовной политики. Эти риски связаны как с подбором экспертов и определением методологии рискологического анализа, так и с результатами рискологического реформатирования уголовной политики. Наиболее существенные опасности, которые могут возникнуть, состоят в манипулятивном использовании общественного мнения для ужесточения уголовного закона, усилении репрессивных начал уголовной политики, ограничении сферы свободы личности и развитии дискриминационных практик. Вместе с тем, эти риски и опасности не должны блокировать самой идеи внедрения технологии риск-менеджмента в уголовную политику и уголовное право.*

**Ключевые слова:** уголовная политика, риск-менеджмент, свобода, репрессии, дискриминации, общественное мнение

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### **Риски риск-менеджмента**

Хорошо известен один из ключевых стандартов рискологии: нет и не может быть в принципе каких-либо видов деятельности, которые не содержат в себе риски. С этой точки зрения и система управления рисками в уголовной политике, призванная разрабатывать стратегии выявления и минимизации криминогенных, законотворческих, правоприменительных рисков, сама по себе также должна восприниматься в качестве потенциально рискованного вида социальной практики. А потом вопрос об угрозах и опасностях, исходящих от риск-ориентированной уголовной политики (как на правотворческом, так и правоприменительном уровнях ее реализации), непременно должен стать частью предмета криминальной рискологии.

Его полноценному обсуждению в нашей науке существенно препятствует то обстоятельство, что технологии управления рисками в отечественной уголовной политике и уголовно-правовой практике еще не стали в полной мере элементом уголовно-политической системы: они не осмыслены теоретически, не институционализированы, не имеют необходимого эмпирического подтверждения. Однако для проведения теоретического анализа это препятствие не является непреодолимым, во-первых, учитывая, что сам риск-менеджмент во многом полагается на экспертные прогностические суждения, а во-вторых, принимая во внимание, что в ряде зарубежных стран, активно использующих технологии управления рисками в уголовной политике, уже накоплен определенный опыт, который может стать основой для таких суждений. При этом в рассуждениях о рисках, исходящих от системы управления уголовно-политическими и уголовно-правовыми рисками, надо принять во внимание и то обстоятельство, что технологии риск-менеджмента далеко не всегда описывают ту или иную будущую проблему как неизбежную; они в большей степени помогают распознавать вероятные, неисключенные проблемы, реальное возникновение которых стремятся предотвратить и блокировать. Акцент в данном случае делается на выявление всех, насколько это возможно, негативных последствий. Степень же собственно вероятности их возникновения зависит от самых разных факторов, включая те, что связаны с осознанием возможности наступления этих последствий.

Учитывая, что технологии управления рисками в сфере уголовной политики и уголовного права проявляют себя на различном уровне и различным, описать в рамках настоящей публикации полный спектр потенциальных рисков от их применения, по разумным причинам, не представляется возможным. В силу этого

позволим себе сосредоточить внимание лишь на некоторых, наиболее явных и (или) ставших уже предметом оценки в литературе угрозах и опасностях.

### Эксперты

Риск-менеджмент это стратегия принятия и реализации управленческих, в том числе правотворческих и правоприменительных решений, в которых в известной степени достаточно жестко разведены функции подготовки и обоснования решения, с одной стороны, и принятия решения, с другой. Даже не обсуждая в деталях вопрос о соотношении “профессионального” и “политического” в уголовной политике, можно констатировать, что в рамках риск-ориентированного подхода экспертное сообщество не просто подтверждает свой профессиональный статус, но и наделяется значимой политической силой, ибо четко разграничить, где заканчивается профессиональное суждение и суждение политическое, вряд ли возможно, равно как невозможно любое профессиональное решение лишить политического контекста.

В таких условиях есть несколько подстерегающих нас опасностей.

Во-первых, происходит неподконтрольное обществу изменение политического ландшафта. Если расстановка сил в парламенте (хорошо или плохо – другой вопрос) определяется демократическими выборами, а через парламент и институт президентства – становится более или менее прозрачной расстановка политических сил на уровне правоприменительного корпуса, то определение пула экспертов – достаточно закрытая, во многом субъективно мотивированная и в любом случае неподконтрольная суду или обществу процедура, элемент внутреннего механизма функционирования парламента. Кем и как формируется экспертное сообщество, какие специалисты проходят в него отбор, за чей счет финансируется их работа – это все непростые, а порой и неприятные вопросы, которые требуют обсуждения, но их решение при всех вариантах не дает гарантий беспристрастности экспертного сообщества. К тому же, функционирование институциональных экспертных групп порождает дополнительного игрока на политическом поле, субъекта, на которого, в случае необходимости, можно возложить всю полноту ответственности за принимаемое решение, а затем, опять же при необходимости, заменить иным игроком.

Во-вторых, даже если отбросить мысль о пристрастности и ангажированности, нельзя не учитывать, что в профессиональном сообществе, теоретически

свободном от политики, нет и не может быть универсальных и общепризнанных подходов к решению уголовно-правовых, криминологических, уголовно-политических проблем. Достаточно вспомнить любую теоретическую дискуссию – от фундаментальных вопросов, касающихся соотношения свободы и безопасности, государственных и личных интересов, глобализма и антиглобализма, до частных аспектов толкования признаков и квалификации любого преступления, например, понимания “третьих лиц” как бенефициаров корыстных устремлений мошенника. Можно гипотетически предположить, что эти проблемы будут решаться на основе консенсуса, но в прикладном разрезе ясно, что в любом таком теоретическом споре с гораздо большей вероятностью “победит” специалист, обладающий сравнительно большим авторитетом вне зависимости от того, насколько предложенное им решение является объективно верным.

В-третьих, теоретические построения в области уголовной политики, права и криминологии всегда базируются на тех или иных порой существенно различающихся методологических платформах, предполагают применение тех или иных научных методов, политическая оценка которых практически невозможна. В силу чего едва ли не все научные результаты и пути их получения остаются, с одной стороны, существенно различающимися, а с другой стороны, - как минимум, непонятными, непрозрачными, недоступными для проверки со стороны лиц, от которых зависит собственно принятие политического или правоприменительного решения. Политические акторы в данном случае вынуждены полагаться на мнение экспертов, имея слабую возможность его проверки (а в случае, когда необходимость полагаться на мнение экспертов станет обязательной, предписанной законом частью принятия решения – и вовсе лишенными такой возможности).

### **Риски**

Технологии управления рисками предполагают глубокую аналитическую и оценочную работу по выявлению и представлению рисков. Как и любая человеческая практика, такая работа во многих отношениях определяется личностными особенностями субъекта, который ею занимается, следовательно, уровень рискологической, политической, профессиональной и общей культуры субъекта существенно влияет на ее результаты. В связи с этим стоит обратить внимание на следующие потенциальные угрозы и сложности.

Во-первых, надежность представляемых измерений факторов риска. Дело в том, что исследование факторов риска далеко не обязательно предполагает акцентированное внимание на выявлении строгой детерминационной связи между тем или иным фактором и последствием, которое мы стремимся предотвратить. Зачастую, факторы риска – это сопутствующие обстоятельства, которые имели место в некотором, статистически значимом числе случаев причинения такого вреда в прошлом, либо обстоятельства, с которыми профессиональное сознание связывает возможность наступления последствий. По этой причине в группу факторов риска попадают весьма неравноценные по своей убедительности явления. К примеру, специалисты, анализирующие британское “Руководство по риску экстремизма”, предназначенное для выявления факторов ранней радикализации молодежи, не без оснований критикуют наличие в нем таких факторов риска, как “изучение студентом химии”, “облачение в одежды, традиционно ассоциируемые с мусульманской общиной”. Подобные факторы не раскрывают никакой связи с вопросами собственно экстремизма и экстремистской идеологии. Однако, строго следуя Руководству, опора на них создает существенные предпосылки для превентивного, в том числе правоограничительного, контроля над химиками мусульманами (Mythen, 2000). Помимо содержательной связи факторов риска с реальным причинением вреда, существует также проблема точности измерения показателей риска и точности прогнозов вредоносного поведения. Например, по некоторым данным, точность прогнозов будущего насильственного поведения в ряде случаев не превышает 30% (Monahan, (1981)..

Во-вторых, это расстановка акцентов в факторах риска, выбор объектов и соответствующих стратегий воздействия и профилактики в ситуации конкуренции рисков. Риск никогда не бывает морально нейтральным (Doyle, Ericson, 2003). Отдельные лица и коллективы выбирают риски, которые их беспокоят больше всего, руководствуясь собственной системой ценностей, предпочтениями и опытом. Последние события, связанные с пандемией COVID-19, наглядно продемонстрировали конкуренцию рисков для здоровья граждан и рисков экономических потерь от предпринимаемых государством карантинных мер, и различные варианты разрешения этой конкуренции. В ситуации противодействия преступности и обеспечения безопасности выбор между конкурирующими рисками также проявляет себя вполне отчетливо. Очевидно, к примеру, что есть множество факторов риска для развития предпринимательства в стране, однако нас настойчиво убеждают, что главный среди них – состояние уголовного закона и практики его применения, которые должны быть существенным образом

скорректированы в части, касающейся экономических преступлений. Выбор одного фактора риска из множества и “назначение его главным” - задача, решение которой само по себе является делом весьма рискованным, не говоря уже о разработке программы минимизации этого риска, которая также может базироваться на различных моральных принципах (Прокофьев, 2019).

В-третьих, это манипуляция рисками в общественном сознании и, как обратная сторона этого процесса, манипуляция общественным сознанием посредством рисков. В огромном массиве значимых для разработки и реализации уголовной политики рисков средствами массовой информации или политиками могут быть “назначены” в качестве “главных” самые разные риски, в том числе те, которые, хотя потенциально и высоки, но в реальности маловероятны, или имеют вероятность несравненно ниже той, которой обладают риски с меньшим потенциалом опасности, но встречающиеся в повседневной практике значительно чаще. Более того, есть основания утверждать, что в политических целях использование маловероятных, но высоких рисков, обладает существенными преимуществами по сравнению с использованием высоковероятных, но низких рисков. За примерами не стоит далеко ходить: политики сегодня эксплуатируют криминогенный риск финансирования какой-либо общественной организации гораздо активней, нежели криминогенное значение бедности. Кроме того, агитационная кампания против какого-либо риска и “накручивание” представлений о его опасности может разворачиваться вокруг какого-либо разового инцидента, разовой акции, которые не имеют характера системной угрозы. Результатом такого выбора и эксплуатации может существенное и зачастую сознательное искажение реальной картины рисков со всеми вытекающими отсюда негативными социально-политическими следствиями.

### **Управление**

Риск-менеджмент – это один из инструментов современной стратегии управления, применимой в любой сфере жизнедеятельности человека и общества, в том числе и в сфере управленческого воздействия уголовного права. Надо сознавать, что управленческая сила уголовного права выходит далеко за пределы собственно нормативного регулирования и нормативной охраны, она простирается гораздо дальше, в область социального взаимодействия людей и групп. И хотя сфера социальных последствий функционирования уголовного права нуждается в отдельном и самостоятельном анализе, уже сейчас можно утверждать: поскольку уголовная политика и уголовное право объективно наполнены множеством



управленческих решений, само собой разумеется, что управляющее воздействие на основе риск-ориентированного уголовного или профилактического законов имеет свою специфику по сравнению с управленческим воздействием законов, имеющих иные основы, а последствия такого управления выходят за пределы известных результатов функционирования классического уголовного права.

Во-первых, объективный рост факторов риска и субъективно-мотивированное манипулирование ими через средства массовой информации создают в обществе весьма специфическую атмосферу, характерными чертами которой становятся ощущение людьми собственной небезопасности в мире постоянных и высоких угроз и желание любыми путями избавиться от них, защитить себя, своих близких, свое имущество, свой город, свою страну. Такая атмосфера может создаваться и поддерживаться экспертами или политиками сознательно и искусственно, более того, эксперты и политики способны формировать в общественном сознании требуемое восприятие вполне конкретных угроз – истинных или мнимых (например, негативное отношение к мигрантам или иностранцам, негативное отношение к работе международных органов, скажем, к Европейскому суду по правам человека). Соответствующим образом сформированное общественное мнение в итоге легко откликается на государственные инициативы “по наведению порядка”, поддерживает их, а порой и начинает требовать от государства решительных мер по устранению угроз и принятию защитных мер. Люди становятся готовыми к восприятию и поддержке дополнительных правоограничений ради обеспечения безопасности, поскольку именно правоограничения преподносятся в качестве единственно надежного средства защиты (как, например, именно ограничения на усыновление российских детей иностранцами преподнесено и реализовано в качестве средства защиты интересов лиц, лишенных родительского попечения). В итоге перед нами разворачивается управленческая стратегия, которая описывается в терминах “авторитарный популизм” и “популистская карательность”, механизм которых предполагает стратегическое решение политиков расшевелить “общественное мнение”, а затем “откликнуться” на него. Формируя общественное мнение, а затем, неискренне, консультируясь с ним, управляющие элиты активно используют “тягу к закону” со стороны общественности и запросы “снизу” на жесткое правление “сверху”. Такое стремление к закону и порядку “свыше” обеспечивает определенную степень народной поддержки и легитимности этих элит. Оно активно используется именно в сфере уголовной политики из-за убеждения, что любые правоограничительные

меры, направленные на обеспечение безопасности, найдут благосклонность у публики.

Во-вторых, “криминальный популизм” как карательно-превентивная реакция на страхи и опасения граждан разрастается в сознании политических элит и преподносится гражданам едва ли не как единственная стратегия обеспечения безопасности. В то время как широкая общественность ожидает, что государство будет защищать безопасность граждан путем содержательного воздействия на первоисточники риска, логика риска, которой придерживается государство, порой обуславливает ставку не на разрешение порождающих риски социальных противоречий, а на выявление и контроль самих рисков. Как следствие, формируется сознательная политика репрессивного решения социальных проблем под флагом раннего воздействия на любые риски в целях обеспечения безопасности граждан.

В-третьих, превентивная стратегия правоограничительного реагирования на риски, объективно выражающаяся в увеличении числа лиц, в отношении которых осуществляется превентивный государственный контроль по причине исходящих (или якобы исходящих) от них рисков, имеет своим следствием разрастание новой формы социальной сегрегации в отношении таких граждан и их групп. Лица группы риска представляют собой типичное воплощение маргинализированных групп населения (безработные, мигранты, злоупотребляющие алкоголем, последователи неформальных субкультур и т.д.). Вытекающее отсюда стремление изгнать таких лиц из “нормального” социума ради обеспечения безопасности может приобретать самые разные формы – от конструирования закрытых для маргиналов городских пространств (охраняемые поселки и кондоминиумы, запрет на появление некоторых лиц в определенных местах и в определенное время) до применения мер, связанных с лишением свободы, причем на длительные сроки. Свою лепту в формирование такой стратегии вносит тиражирование страданий несчастных жертв преступлений на фоне правового благополучия и высоких гарантий прав преступника, соблюдения пенитенциарных стандартов обращения с ним. В итоге усиливается известное с древности противостояние “своих” и “чужих”, “хороших” и “плохих”, “нас” и “их”, что приводит, с одной стороны, к ослаблению и без того слабых в современном мире социальных связей, а с другой стороны, создает удобную основу для управления обществом на основе эксплуатации этого социального противостояния.

В-четвертых, раннее информирование о потенциальных рисках для безопасности, которое может приобретать характер как оправданной общей информационной политики, так и специальных мер профилактики в виде раскрытия информации о месте проживания лица, ранее отбывшего наказание или условно-досрочно освобожденного от его отбывания за совершение некоторых, в частности, сексуальных преступлений, может рассматриваться как часть государственной стратегии перераспределения ответственности за эти риски. Представляя обществу информацию, государство вооружает его определенными знаниями, руководствуясь которыми, люди могут и, по-видимому, должны предпринимать ряд самостоятельных шагов по обеспечению личной безопасности. Хорошо, когда такие шаги ограничиваются установлением охранных систем в домовладениях или квартирах, в усилении родительского контроля за пребыванием детей в общественных местах или в интернет-пространстве. Но нет гарантий того, что защитная реакция населения не приобретет иные, весьма опасные черты, например, в форме неподконтрольного государству и неосуждаемого им ostracism в отношении бывших осужденных, установления негласного общественного контроля над их поведением. Защитная стратегия населения в этом случае может выражаться, кроме того, не только в форме раннего инициативного сообщения в правоохранительные органы о возможно готовящемся преступлении, что само по себе не есть плохо, но она может сознательно формироваться государством посредством конструирования специальных уголовно-правовых норм об ответственности за доноительство. В любом случае такое информирование о рисках можно рассматривать как часть общей стратегии перераспределения ответственности. В определенной степени государство снимает с себя заботу о предотвращении угроз и опасностей, демонстрируя, с одной стороны, высокий уровень доверия к превентивным мерам отдельных граждан и их сообществ, а с другой стороны, свою собственную незаинтересованность или неспособность обеспечить безопасность от некоторых видов угроз (Anderson, 2000: 111).

### **Дискриминация**

Особое беспокойство в связи с развитием риск-технологий в уголовной политике и уголовном праве вызывает проблема дискриминации. Превентивные стратегии, основанные на использовании концепта “риск”, разворачиваются в сфере уголовного права в двух направлениях: в криминализации поведения, минимально отклоняющегося от неких социальных стандартов, и в разработке уголовно-правовых средств, позволяющих обеспечить как можно более длительное пребывание преступников с повышенным статусом риска в условиях ограничения

свободы. В данном случае вектор контроля существенно смещается с деяния на личность, которая может представлять опасность для окружающих, исходя из того, что она обладает некоторыми характеристиками, ведет некоторый образ жизни, совершает некоторые поступки. Основой правоприменительных решений при этом выступает: 1) формирование набора факторов риска и обрисовка общего круга граждан, которые ими обладают; 2) градация граждан из зоны риска на группы по степени опасности, исходя из количества и качества присущих им факторов риска; 3) идентификация конкретного гражданина, в отношении которого принимается правоприменительное решение, как принадлежащего к той или иной группе риска; 4) реализация заложенных в правовой норме ограничительных предписаний. При таком подходе во многом игнорируются представления о свободе воли лица, специфические индивидуальные особенности личности, слабо выясняется или вовсе не выясняется вопрос о том, насколько присущие группе факторы риска проявляют себе в этом конкретном человеке. Санкции, основанные на прогнозах, отклоняют индивидуальную автономию и свободную волю. Следствием всего выступает нормативное предписывание групповых свойств отдельному человеку и применение на этой основе правоограничительных мер. Это и есть, по сути своей, новый вид дискриминации, когда индивидуальные ограничения устанавливаются по причине принадлежности лица к группе.

### **Свобода**

Квинтэссенцией всех преобразований в уголовной политике, уголовном праве и криминологии, которые могут произойти и реально происходят под воздействием внедрения технологий управления риском, можно считать качественный сдвиг в понимании свободы, ее содержания, пределов и предназначения. Об этом уже много сказано, но разговор нельзя считать законченным. Остается непреложным и неоспоримым факт: превентивная криминализация, превентивные наказания, многочисленные правовые запреты общего характера, развитие средств электронного наблюдения, цифровые и биоинженерные средства контроля, все это и многое иное, что объективно нацелено на минимизацию рисков криминального и в целом вредоносного поведения, ограничивает свободу человека. Универсальная формула ч. 3 ст. 55 Конституции РФ, согласно которой “права и свободы человека и гражданина могут быть ограничены федеральным законом только в той мере, в какой это необходимо в целях защиты основ конституционного строя, нравственности, здоровья, прав и законных интересов других лиц, обеспечения обороны страны и безопасности государства”, надо признать откровенно, не создает надежных препятствий на пути расширяющейся практики

правоограничительного контроля. Крайняя растяжимость понятия “интересы безопасности государства” и абсолютная неопределенность “меры”, в какой “необходимо” ограничивать права и свободы человека, формируют конституционные основания для конструирования средств ограничения свободы любой интенсивности для минимизации любой интенсивности угроз. Способствует этому и утверждение в рискологии и использующих ее методы социальных практиках принципа предосторожности, в широкой интерпретации предполагающего, что отсутствие научных или иных подтверждений достоверности существования риска не может рассматриваться как достоверное доказательство отсутствия риска (Amoore, 2008). В таких условиях все чаще (в том числе в научных сочинениях) реактуализируются опасения, навеянные произведениями Оруэлла, Замятина, Дика и других литераторов, которых все сложнее в современных условиях назвать “фантастами” и “авторами утопий”.

### **To be, or not to be, that is the question**

Вечная проблема, возникающая в любой ситуации выбора – “быть или не быть”. Опасения, риски, угрозы, опасности и реальные негативные последствия, связанные с внедрением элементов риск-менеджмента в теорию и практику предупреждения преступлений, ставят закономерный вопрос о том, не перевешивают ли эти негативные эффекты возможной пользы от риск-ориентированного уголовного права, уголовного правосудия и профилактики преступлений, не стоит ли с учетом информации об этих эффектах отказаться от самой идеи управления рисками в сфере уголовной политики. Обсуждение этого вопроса в силу постулатов самой рискологической науки и может, и должно составить часть общего дискурса о криминальной рискологии.

Представляя свое видение поставленной проблемы, обратим внимание на следующие положения.

Во-первых, наличие недостатков не перечеркивает положительных эффектов риск-менеджмента. Имеющийся опыт внедрения риск-технологий в сферы, связанные с противодействием преступлениям, убедительно свидетельствует, что они позволяют достаточно эффективно решать целый ряд важнейших задач и, что важнее, решать их гораздо более эффективно, нежели с применением иных управленческих и правовых подходов. Так, внедрение широкого массива структурированных данных о личности и прогнозирование ее поведения в конкретных условиях пенитенциарных учреждений и постпенитенциарного

окружения с учетом возможных результатов социально-реабилитационных программ позволяет успешно решать вопросы назначения наказания и условно-досрочного освобождения от его отбывания. Развитие системы норм раннепрофилактического и двойного превентивного потенциала позволяет надежней обеспечить безопасность конституционных ценностей, не дожидаясь причинения им реального, порой невосполнимого вреда. Мероприятия по оповещению населения о криминогенных рисках позволяют активизировать функции родительского контроля, меры виктимологической самозащиты и наладить результативное взаимодействие правоохранительных органов и общественности. Можно назвать многие иные, вне сомнений, действенные эффекты, свидетельствующие о том, что риск-менеджмент в уголовной политике способствует повышению надежности правовых и социальных решений. В качестве лишь одной иллюстрации, на которую достаточно часто ссылаются в литературе, приведем тот факт, что внедрение идей риск-менеджмента и принципа предосторожности в антитеррористической политике США способствовало тому, что начиная с 2001 года на территории этой страны не было совершено ни одного террористического акта.

Во-вторых, многие (если не все) из приведенных в настоящем разделе публикации и не отмеченных здесь негативных проявлений в уголовной политике и практике противодействия преступлениям, хотя и связаны с технологиями управления рисками, тем не менее, не могут рассматриваться в качестве последствий, причинно детерминированных исключительно самим риск-менеджментом. Они порождаются комплексом самых разных обстоятельств, содержательно тяготеющих к подвижкам в общих методах политического управления, в отношениях электората к управленческим элитам, к дезорганизации традиционных социальных связей в обществе модерна и атомизации общества, к процессам “сжатия государства” и перераспределения властных ресурсов, к функционированию системы “пенитенциарной экономики” и развитию процессов цифровизации и т.д. Риск-ориентированные трансформации уголовной политики выступают лишь одним из множества факторов, которые способствуют проявлению отмеченных негативных следствий, и определить их удельное значение в продуцировании этих негативных эффектов не представляется возможным.

В-третьих, наше знание о негативных последствиях внедрения технологий управления риском в практику принятия уголовно-политических и уголовно-правовых решений с очевидностью доказывает преимущества самого риск-

менеджмента. Как уже многократно отмечалось, нет и не может быть безрисковых сфер деятельности, и в этом отношении управление рисками есть деятельность, также сопряженная с рисками. Риски бесконечны. Разрабатывая стратегию и тактику противодействия одним видам рисков (криминальным) мы с неизбежностью порождаем другие (правотворческие, правоприменительные), которые требуют внимания и реагирования, а противодействуя им, порождаем новые, и так до бесконечности. Очевидное преимущество методологии рискологического анализа как раз и состоит в том, что оно позволяет уже в самом начале разработки мер уголовно-правового реагирования на преступления определить потенциально возможные опасности самих этих мер и строить уголовную политику с учетом необходимости минимизации негативных последствий самой уголовной политики.

В-четвертых, знание последствий трансформации правовых и социальных институтов под влиянием риск-технологий является неотъемлемым элементом научного, информационного обеспечения процесса их разработки и внедрения, выступает основой для конструирования защитных, “страховочных” мер. С учетом этого знания, вопрос о том быть или не быть риск-ориентированной уголовной политике трансформируется в более удобную и содержательно более полезную формулу – какой быть уголовной политике, основанной на концептуализации понятия “риск”, чтобы обеспечить необходимые гарантии свободы человека и ценности права. Наша информированность о рисках не должна иметь пресекающего значения. Напротив, она обладает стимулирующим свойством, сподвигая к обсуждению негативных последствий риск-менеджмента и определению средств минимизации связанных с ним опасностей. Такая информация ориентирует на постоянную работу по оценке рисков и мониторингу результатов противодействия им, позволяет встроить решение задач противодействия преступлениям в более широкий контекст социальных последствий политического и правового управления и на этой основе формулировать уже новые критерии оценки самой уголовной политики, апеллируя не только к данным о состоянии и динамике собственно преступности, но и к данным о состоянии иных социальных и культурных институтов.

В-пятых, обсуждая вопрос о том, быть или не быть риск-менеджменту в уголовной политике, и склоняясь под влиянием изложенных в настоящей книге аргументов к его несомненно положительному решению, напомним еще одно важное положение, в полной мере соответствующее методологии анализа рисков. Риск-менеджмент, со всеми присущими ему “плюсами” и “минусами”, никогда и никем

не мыслился в качестве единственного средства совершенствования уголовной политики и единственно возможной методологии ее анализа. Сами по себе технологии оценки рисков требуют, чтобы любая проблема всегда была исследована с самых разных сторон, самыми разными методами, самыми разными специалистами. Именно такой подход обеспечивает объективность и полноту оценки проблемы, и адекватность мер ее решения. Следовательно, методология рискологического анализа уголовной политики с необходимостью предполагает, что вопросы противодействия преступлениям должны обсуждаться не только в рамках концепта “риск”, но и с применением множества иных методологических инструментов, герменевтики, аксиологии, экономического анализа и т.д. Такая комплексность, вне сомнений, будет блокировать и корректировать возможные недостатки рискологического анализа, вместе с тем подтверждая значимость и перспективность рискологического измерения уголовной политики.

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## **DANGERS AND CONSEQUENCES OF THE INTRODUCTION OF RISK TECHNOLOGIES IN THE PRACTICE OF MAKING CRIMINAL-POLITICAL AND CRIMINAL-LEGAL DECISIONS**

*The article is devoted to the study of the risks that may arise in the process of implementing risk management technologies in the practice of developing and making criminal-political and criminal-legal decisions. Risk technologies are now considered as one of the most promising means of optimizing criminal policy, the introduction of which makes it possible to identify and assess both the positive and negative consequences of making any decision in the field of criminal law. At the same time, risk management itself is fraught with some dangers and risks that need to be taken into account in the process of updating the methodology of criminal policy. These risks are associated both with the selection of experts and the definition of the methodology of risk analysis, and with the results of the risk reformatting of criminal policy. The most significant dangers that may arise are the manipulative use of public opinion to tighten the criminal law, the strengthening of repressive principles of criminal policy, the restriction of the sphere of individual freedom and the development of discriminatory practices. At the same time, these risks and dangers should not block the very idea of introducing risk management technology into criminal policy and criminal law.*

**Keywords:** *criminal policy, risk management, freedom, repression, discrimination, public opinion*

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Наталья Генрих\*

## | КРИМИНАЛИЗАЦИЯ КАК ВЛАСТНЫЙ РЕСУРС

*Статья посвящена исследованию вопроса о том, как практика криминализации общественно опасных деяний выступает значимым социальным ресурсом, обладание которым легитимирует и укрепляет государственную власть. В целях исследования поставленной проблемы необходим методологический синтез познавательных возможностей ряда известных теоретических платформ: марксистской теории государства и права, эволюционных подходов к пониманию права, учения о правовой политике и правовом управлении, доктрины разделения властей, теории судебного правотворчества, принципов криминализации общественно опасных деяний, учения о функциях уголовного права. Их сочетание обеспечивает возможность всестороннего и объективного познания основных направлений взаимодействия уголовного закона и власти, их результатов и последствий. Сквозь призму содержания конституционной формулы, согласно которой уголовное законодательство находится в исключительном ведении федерального законодателя, раскрываются: основные направления сосредоточения криминализационного ресурса в руках государства, значение и последствия закрепления права криминализации за федеральным органом власти, проблемы конкуренции органов власти и политических сил за право продвижения в парламенте криминализационных стремлений. Установлено, что глобальные тренды развития взаимоотношений власти и уголовного закона, имея объективные основания и цивилизационное значение, таят в себе некоторые опасности, связанные, во-первых, с исключением региональных органов власти из процесса создания уголовно-правовых норм, во-вторых, с допустимым участием органов исполнительной и судебной власти в определении содержания уголовного закона.*

**Ключевые слова:** криминализация; уголовный закон; государственная власть; парламент; уголовная политика

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Криминализация, составляя ядро уголовной политики и уголовного права, само собой разумеется, находится в распоряжении субъекта, который обладает полномочиями по установлению общих для всех членов общества правил поведения. Поскольку установление этих правил с необходимостью предполагает и наличие реальных возможностей по их поддержанию, в том числе путем принуждения к соблюдению, история криминализации и техника ее современного использования напрямую связаны с тем, как формировалось и распределялось между властными субъектами право наказывать (*ius puniendi*).

В современном российском государстве эксклюзивное право криминализировать общественно опасные деяния принадлежит федеральному законодателю. Согласно п. “о” ст. 71 Конституции России, уголовное законодательство находится в исключительном ведении Российской Федерации, а согласно ст. 94 Конституции законодательным органом Российской Федерации признается парламент – Федеральное Собрание. Следовательно, только и исключительно федеральный парламент наделен правом принимать уголовные законы.

Это конституционное положение воспринимается сегодня едва ли не как аксиома и правило на все времена, но именно в силу своей внешней простоты и самоочевидности, оно, как представляется, утратило (или не приобрело) в сознании специалистов характер конституционной ценности и эволюционного, цивилизационного достижения политико-правовой истории страны. Глубокому пониманию рассматриваемого тезиса способствует развернутый анализ каждого из трех отраженных в нем элементов: криминализация есть удел государственной (1) федеральной (2) парламентской (3) власти.

#### **А) Криминализация – эксклюзивное право государства.**

Процесс формирования права государства на уголовное наказание достаточно хорошо исследован в классической уголовно-правовой литературе (Таганцев, 1902; Фойницкий, 1889) и в современных научных источниках (Гурин, 2013). Формирование права на криминализацию можно рассматривать в качестве составной части этого общего процесса перехода возможности применять принуждение от частных лиц и отдельных социальных институтов к государству как некоей надобщественной силе. Можно смело утверждать, что на первоначальных этапах эволюции уголовного права, когда сами запреты обуславливались по большей части народными обычаями и традициями, государство стремилось закрепить за собой право наказания в буквальном его

понимании – право применять меры принуждения. Однако последующее развитие ознаменовано важным дополнением полномочий государства – появлением права устанавливать сам запрет и формировать социальный стандарт поведения.

Это право возникло не одномоментно и далеко не просто. Оно явилось результатом не просто преодоления конкуренции государства с иными источниками власти, но и ограничения, а порой и устранения этих источников.

Так, например, на протяжении значительного промежутка времени в решении вопросов нормирования брачно-семейных отношений и поддержания этих норм церковь существенным образом восполняла отсутствие к ним внимания со стороны светских властей. Как писал Я.Н. Щапов по этому поводу: “Церкви на Руси в X – XII вв. удалось нащупать эти сферы права, которые государство, княжеская власть оставила вне своих интересов, и наложить свою руку на большую группу общественных институтов, не встретив со стороны государства препятствия” (Щапов, 1972: 291). Многие нормы, регулирующие заключение брака, взаимоотношения супругов, родителей и детей, а также санкции за их нарушение (которые мы сегодня вполне может признать уголовно-правовыми), содержались в памятниках церковного права. И только к XVI – XVII векам государство “взяло под свой контроль” эту область общественных и правовых отношений.

Еще один значимый “конкурент” государства в области криминализации и применения наказания – институт крепостничества. Создавая, с одной стороны, экономический и социальный фундамент российского общества в течение долгого времени, он в тоже время порождал такую власть помещика над своими людьми, которую допустимо считать властью “уголовной”, по сути, это была не просто власть судить и наказывать подвластных крестьян, но и определять основания применяемых мер наказания, формулировать для них дополнительные к общегосударственным нормы и запреты (Миронов, 2003: 47).

На протяжении едва ли не всей дореволюционной истории России государству приходилось считаться с родовыми обычаями и нормами, закрепляя уже в общегосударственных уголовных законах (ст. 168 Уложения о наказаниях уголовных и исправительных 1845 г., ст. 2 и ст. 5 Уголовного Уложения 1903 г.) правило о том, что они не распространяются на “деяния, наказуемые по обычаям инородческих племен” (Таганцев, 1994: 67 – 71).

Эти примеры убедительно свидетельствуют, что право криминализации “добывалось” государством с момента его возникновения в процессе и острой борьбы, и поиска компромиссов с иными источниками силами и власти. Не рискуя ошибиться, можно утверждать, что полноценный и всеобъемлющий характер право государства на криминализацию общественно опасных деяний приобрело лишь к XX веку.

Объяснению этого факта в науке не уделяется должного внимания. Как правило, имеющиеся рассуждения сводятся к обоснованию необходимости существования самого права наказания, что порождает известную дискуссию между ретрибутивистами и утилитаристами (Duff, 1991; Smilansky, 1990; McCloskey, 1967). Однако за ее рамками остается вопрос о том, почему право наказания и право криминализации общественно опасных деяний должно принадлежать именно государству.

Системно артикулированный ответ на него, насколько мы можем судить, в литературе не представлен. В самом общем виде можно утверждать, что поиск аргументов в данном случае следует вести в двух направлениях. Во-первых, в области развития представлений о самом преступлении как деянии, которое и посягает на общезначимые нормы или ценности, и требует в силу этого коллективных действий и коллективного осуждения от имени всего общества (Mayson, 2020). И, во-вторых, в области понимания государства как агента, действующего от имени всех граждан, узурпирующего право частной и коллективной мести в интересах предоставления каждому отдельному человеку свободы, прежде всего, свободы вести себя в соответствии с нормами морали, вне зависимости от того, соблюдают или не соблюдают эти же моральные нормы иные люди (Thorburn, 2011).

Как бы то ни было, именно государство сегодня воспринимается в качестве естественного и, по большому счету, единственно возможного субъекта криминализации общественно опасных деяний.

Это обстоятельство приобретает особое значение в современных условиях, когда по свидетельству многих специалистов наблюдается феномен “ослабления государства” (Тоффлер, 2003; Guizar, 2012), выражающийся в перераспределении силы государственной власти “наверх” (в сторону международных институтов) и “вниз” (в сторону институтов гражданского общества, транснациональных корпораций и т.д.). Такая диффузия государственной власти имеет прямые

последствия для криминализации. С одной стороны, не просто обозначена, но в полной мере реализует себя возможность международных властных структур напрямую криминализировать те или иные деяния или императивно предписывать необходимость их криминализации национальным государствам; “мировое сообщество” все уверенней становится полноценным носителем *ius puniendi* (Ambos, 2013), наряду с государством, в известном смысле ослабляя его монополию на установление уголовно-правовых запретов. С другой стороны, высказываются прогнозные суждения о том, что изменение распределения власти в обществе может предполагать “создание неких юрисдикционных органов в организациях или корпорациях, которые осуществляли бы преследование в отношении лиц из числа сотрудников этих организаций за незначительные правонарушения, причиняющие вред интересам исключительно самой организации” (Пудовочкин, 2008).

Эти свершившиеся факты и неподтвержденные прогнозы свидетельствуют о том, что борьба центров власти за ресурс, связанный с возможностью криминализировать деяния, не может считаться завершенной, а эволюционно обусловленное право государства на криминализацию требует постоянных и новых обоснований, подтверждений и защит, если таковое право считать цивилизационным достижением. В любом случае дискурс о том, кому принадлежит или должно принадлежать право криминализировать общественно опасные деяния, должен быть продолжен.

### **Б) Криминализация – эксклюзивное право федеральной власти**

Вопрос о том, кому именно в пределах государства принадлежит право криминализации, также является весьма значимым, причем важность его многократно возрастает как в турбулентные периоды истории государства, связанные с формированием, сменой или реорганизацией власти, так и в относительно стабильных условиях реализации уголовной политики государства, избравшего для себя федеративный тип устройства.

Отечественный правовой опыт свидетельствует, что Россия только в конце XX века приняла для себя правило наличия единого и единственного федерального уголовного закона. До этого момента даже в рамках централизованного государства криминализация в стране легитимно осуществлялась различными инстанциями. Подтверждение тому – Уголовное уложение княжества Финляндского и царства Польского в период империи, общесоюзное и

республиканское уголовное законодательство советского периода, а равно весьма экзотические по сегодняшним меркам уголовно-правовые акты, криминализировавшие определенные поступки в пределах отдельных административно-территориальных единиц (уездов) в острый постреволюционный период.

Очевидно, что вопрос о множественности уголовных законов и, следовательно, о множестве государственных институтов, уполномоченных на осуществление криминализации, непосредственно связан, во-первых, с идеей централизацией власти и, во-вторых, с идеей ее “вертикального” распределения в государстве.

Сегодня, когда революционное переустройство (сеем надеяться) российскому государству не грозит, обсуждение вопроса о федеральном законодателе как единственном акторе криминализации задает вполне определенный дискурс, связанный с исследованием проблем допустимости или недопустимости регионального нормотворчества в сфере уголовного права. Как верно пишет А.Э. Жалинский, жесткая ориентация современного законодателя на отнесение уголовного законодательства к ведению Российской Федерации “нуждается как минимум в обсуждении” (Жалинский, 2009: 32 – 33). Вместе с тем, дискурс этот в отечественной науке практически не сложился. Аргументы сторонников наделения региональных парламентов правом криминализировать отдельные общественно опасные деяния и создавать тем самым свои, региональные уголовные законы (Панченко, 2018), остаются без должной критики, а конституционное положение об эксклюзивной роли федерального парламента по установлению уголовно-правовых запретов – без должного обоснования. Оно воспринимается как данность, аксиома, не требующая доказательств.

Вряд ли такое положение вещей можно признать оправданным. Здесь нужен развернутый анализ проблемы, причем не только с точки зрения социально-криминологической обоснованности региональной криминализации (ведь даже если региональные особенности не содержат потенциала к криминализации деяний, которые будут существенно различаться по своим характеристикам в различных регионах, нет социальных противопоказаний к тому, чтобы в различных регионах были содержательно идентичные уголовные законы), но и с позиций политико-правовой необходимости закрепления уголовно-правовых полномочий исключительно за федеральными органами государственной власти.



Эти проблемы приобретают повышенную актуальность на фоне того, что административно-деликтное законодательство, согласно Конституции РФ, находится в совместном ведении федерации и ее субъектов, а уголовное и административно-деликтное право, в свете решений Европейского суда по правам человека, составляют единую “уголовную сферу”. Обсуждение этих проблем, следовательно, непосредственно связано с вечно актуальными вопросами разграничения, с одной стороны, преступлений и федеральных административных проступков, а с другой стороны, федеральных и региональных административных проступков, причем разграничения, проводимого на фоне теоретического обоснования феномена “деликтизации” (наделения деяния свойствами административного проступка) как противопоставленного и (или) дополняющего феномен криминализации.

#### **В) Криминализация – эксклюзивное право парламента**

Еще один большой вопрос, вытекающий из конституционной формулы властного субъекта криминализации, состоит в том, что полномочия по установлению уголовно-правовых запретов принадлежат исключительно парламенту. Развертывание этого тезиса определяет необходимость обсуждения, как минимум, двух сложных вопросов.

Первый состоит в так называемом “горизонтальном” распределении власти между государственными структурами, отражающем систему сдержек и противовесов в государстве, построенном на принципе разделения властей. Сегодня не требует специальных доказательств (по меньшей мере, в странах, исповедующих континентальную традицию права), что именно парламент является той площадкой, на которой различные политические и социальные силы могут и должны прийти к компромиссу по поводу необходимости принятия и содержания принимаемого уголовного закона. Он олицетворяет собой власть народа, который проводит криминализационные решения, тщательно взвешивая и обсуждая социальную потребность в криминализации, баланс между защищаемыми уголовным законом ценностями и вводимыми правоограничениями, риски и последствия криминализации, позитивные и негативные эффекты от введения уголовно-правового запрета. Демократические принципы формирования парламента и правила принятия парламентских решений призваны гарантировать взвешенные и гармоничные уголовно-правовые решения, отвечающие актуальной повестке дня.

Вместе с тем, практика убедительно свидетельствует, что сосредоточение всей полноты криминализации в рамках парламента является, скорее, общей идеей и принципом, реальное воплощение которых вольно или невольно предполагает участие в установлении преступности и наказуемости общественно опасных деяния и иных властных субъектов, в частности, правительства и судов.

Технически это участие выражается в двух ситуациях. Правительство РФ, как известно, вправе принимать в силу прямой ссылки, содержащейся в уголовном законе, те или иные постановления для целей применения УК РФ (определять виды и размеры наркотических средств, объем и методику исчисления ущерба, причиняемого лесам, признаки различных видов повреждения здоровья и др.). Верховный Суд РФ, в силу принадлежащих ему по Конституции РФ полномочий, вправе давать судам общеобязательные разъяснения по вопросам толкования признаков составов преступлений и квалификации преступных деяний.

Разумеется, что такая практика не приводит формально к корректировке уголовного закона. Конституционный Суд РФ неоднократно подчеркивал, что “исходя из принципа разделения государственной власти на законодательную, исполнительную и судебную, Правительство РФ не вправе, как и другие органы исполнительной власти, устанавливать не предусмотренные федеральным законом основания уголовной ответственности”<sup>1</sup>, а суды не праве давать расширительное толкование положениям уголовного закона<sup>2</sup>.

Однако реальный, фактический объем криминализированных деяний соответствующими решениями Правительства и Верховного Суда меняется вполне существенно. И это обстоятельство ставит серьезные вопросы, связанные с пределами участия органов исполнительной и судебной власти в решении задач криминализации общественно опасных деяний, из них, пожалуй, наиболее обсуждаемый – вопрос судебного правотворчества и судейского права [Анишина, 2011; Ершов, 2020). Не углубляясь в его исследование, отметим главное для

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<sup>1</sup> Определение Конституционного Суда Российской Федерации от 8.02.2007 № 290-О-П “Об отказе в принятии к рассмотрению жалобы гражданина Малютинина Андрея Мартемьяновича на нарушение его конституционных прав положением списка I Перечня наркотических средств, психотропных веществ и их прекурсоров, подлежащих контролю в Российской Федерации”. URL: <http://doc.ksrf.ru/decision/KSRFDecision16359.pdf> (дата обращения: 17.03.2021).

<sup>2</sup> Постановление Конституционного Суда Российской Федерации от 27.05.2008 № 8-П “По делу о проверке конституционности положения части первой статьи 188 Уголовного кодекса Российской Федерации в связи с жалобой гражданки М.А. Асламазян” // Вестник Конституционного Суда РФ. – 2008. – № 4.

развития нашей темы: закрепление права криминализации за парламентом по факту не исключает участие иных ветвей власти в формировании содержания и смысла уголовно-правового запрета. Более того, в зависимости от реального воплощения теории разделения властей, в зависимости от степени свободы суда в толковании уголовного закона, в зависимости от реальной политической силы правительства и суда, возможности их участия могут меняться от эпохи к эпохе и от страны к стране. И в этой связи обсуждение проблем криминализации в связке с проблемой власти всегда должно учитывать реальное распределение государственной власти между отдельными ее ветвями, поскольку это имеет принципиальное значение для соблюдения принципа законности в уголовном праве (в аспектах правовой определенности и стабильности закона).

Второе направление анализа, которое раскрывает тезис о парламенте как исключительном субъекте криминализации, предполагает обсуждение внутрипарламентского распределения политических сил и использование уголовно-правовой проблематики в общественно-политических дискуссиях в процессе парламентских выборов. Как отмечал А.Э. Жалинский, “крайне необходимо, хотя и очень сложно, выявить реальное состояние субъектной распределенности или принадлежности уголовно-правового ресурса, что должно было бы отвечать еще требованиям марксистской теории, а на этой основе реально оценивать характер и возможности его использования” (Жалинский, 2009: 186 – 187).

В современной литературе представлены лишь первые попытки анализа этой большой проблемы: проанализировано содержание программных документов политических партий с точки зрения выявления в них уголовно-правового контента [Бабаев, Пудовочкин, 2020: 100 – 116], дана оценка внешнего проявления примеров откровенной лоббистской деятельности в сфере уголовно-правового нормотворчества (Давитадзе, 2020; Сергеева, 2019). Установлено, в частности, отсутствие конкуренции уголовно-политических идей среди представленных в парламенте политических партий, доказано наличие выраженного влияния бизнес-сообщества, в том числе и крупных бюджетоформирующих компаний, на процессы криминализации, а также уголовно-правовое лоббирование органов правопорядка и религиозных общин. Однако очевидно, что нескольких содержательных публикаций в данном случае явно недостаточно. Некоторые специалисты открыто признают, что уголовное право и его институты развиваются в соответствии с корыстными мотивами лиц, принимающих решения в государственном секторе,

бюрократов и влиятельных групп политических интересов, и многие из социальных и уголовно-правовых последствий кажутся менее желательными, чем те, которые могли бы возникнуть в отсутствие таких корыстных манипуляций (Benson, 1992). А потому требуется более глубокий анализ, чтобы дать всесторонний ответ на поставленный Н.Ф. Кузнецовой вопрос “qui prodest” (Кузнецова, 2004). Именно в нем скрыто истинное распределение власти, напрямую определяющее содержание и направления криминализации, а равно мотивы принимаемых криминализационных решений.

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## CRIMINALIZATION AS A POWER RESOURCE

*The article is devoted to the study of the question of how the practice of criminalization of socially dangerous acts acts as a significant social resource, the possession of which legitimizes and strengthens state power. In order to study this problem, a methodological synthesis of the cognitive capabilities of a number of well-known theoretical platforms is needed: the Marxist theory of state and law, evolutionary approaches to understanding law, the doctrine of legal policy and legal management, the doctrine of the separation of powers, the theory of judicial law-making, the principles of criminalization of socially dangerous acts, the doctrine of the functions of criminal law. Their combination provides an opportunity for a comprehensive and objective knowledge of the main directions of interaction between the criminal law and the authorities, their results and consequences. Through the prism of the content of the constitutional formula, according to which the criminal legislation is under the exclusive jurisdiction of the federal legislator, the following are revealed: the main directions of concentration of the criminalization resource in the hands of the state, the significance and consequences of securing the right to criminalize the federal government, the problems of competition between the authorities and political forces for the right to promote criminalization aspirations in parliament. It is established that global trends in the development of relations between the government and the criminal law, having objective grounds and civilizational significance, are fraught with some dangers associated, firstly, with the exclusion of regional authorities from the process of creating criminal law norms, and secondly, with the permissible participation of executive and judicial authorities in determining the content of criminal law.*

**Keywords:** criminalization; criminal law; state power; parliament; criminal policy

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**Adrian Stan\***

**THE PROTECTION OF RIGHT TO LIFE IN  
ROMANIAN CODE OF CRIMINAL PROCEDURE.  
UNREASONABLE LENGTH OF THE INVESTIGATION  
AND THE EFFECTIVE REMEDIES**

*The paper presents the Romanian CCP guarantees of the right to life, regarding the procedural aspects of the length of the investigation.*

*In criminal proceedings, the accidental death of a person involves a long duration of research by the authorities. It is about carrying out technical expertise of different specialities. Sometimes these means of proof require the opinion of specialists which can be challenged later in court. Jurisprudence revealed that investigations regarding car accidents following the death of a person have a length that exceeds the limit that can be considered reasonable from the point of view of the families of the victims.*

*On the other hand, the Romanian legislation only recently provided a remedy for the excessive length of investigations, a special procedure in force after 2014. By a special provision, it was established that this remedy is applicable only to investigations that started after 1 February 2014. But what happens to the older files, which should be able to be urged by the special procedure? Constitutional Court, faced with this question, held that this is an option of the legislator. But we think it is more than that.*

*ECHR held that the procedural side of the right to life also involves investigating within a reasonable time of any violent death. From this point of view a number of judgments have been held, which I will summarise. The central goal of the paper relates to criticism of Romanian legislation in terms of procedural protection of the right to life and the need for effective procedural remedies (related to art. 13 ECHR).*

**Keywords:** *right to life, procedural limb, length of the proceedings, procedural remedies, reasonable time of the proceedings, ECHR*

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### **Preliminary observations**

So much there has been written about the right to life that any attempt to treat the subject seems doomed to failure. We might affirm, as the old scholars said, that sometimes it is better to remain silent than to risk saying too little. (Mallaurie, 2007, : 96)<sup>1</sup>.

In criminal law, right to life was perceived rather in the context of the state's right to breach it. It is, of course, the sensitive subject of the capital punishment. The death penalty has fascinated philosophers and jurists for the last two and a half millennia, and we can say that criminal law is in fact a right to punish, because the most intense debates have revolved around this topic.

Albert Camus stated in "Reflections on guillotine" that, over the years, he has seen in capital punishment "only an unimaginable torment and a disorderly languor: the death penalty pollutes our society and its supporters cannot motivate it rationally".

Making a small digression, the main and, we have to admit, strong argument of the death penalty supporters, it is shown, is its exemplary force. "Heads are not only cut to punish those who have them on their shoulders, but also to scare, through a frightening example, those who would try to take them as a model, society does not take revenge, it just wants to prevent. He raises his severed head in the air so that all the candidates for a crime can find out their future and turn back." (Koestler, Camus, 2008, : 42-43). The deterrence of the punishment is, even nowadays, one of the strongest effects of it (Paşca, 2015, : 441).

Authors point that "The right to life is the highest civilizational value and the supreme human right. Therefore, human life is in the first place of the scale of values. All the modern states by their highest legal acts protect the right to life which cannot be limited and thereby this most important human right receives a planetary significance. The murder is a general criminal act that endangers mostly the foundations of every society although criminal legal protection of human life did not exist for all members of the human species in the earlier socio-economic formations. In the sense of criminal law the protection of life represents the fundamental dimension of criminal law" (Rakočević, 2017, : 517).

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<sup>1</sup> The phrase was used by German jurists of the XVII-XVIII century, referring to Jaques Cujas (1522-1590), professor of law at the French universities of that time.



Nowdays, right to life is protected by several international documents. The text of Article 2 of the European Convention Of Human Rights, signed at Rome on November 4, 1950 enacts:

1. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

According to Art. 22 of Romanian Constitution<sup>2</sup> : "The right to life and to physical and mental integrity

(1) The right to life, as well as the right to physical and mental integrity of the person are guaranteed.

(2) No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

(3) The death penalty is prohibited."

In accordance with Romanian constitutional authors, "to say that human being is the supreme value of a democratic society is only a partially true statement. This is because it is well known that in the long period in which the principles of democracy and the rule of law have been affirmed in social practice, no single society has fully succeeded in offering the individual the full measure of his value. Even in states considered democratic, without exceptions, there have been and there are threats to the physical integrity of the individual from state authorities and even indifference to his life (Ionescu, Dumitrescu, 2017, : 301-302).

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<sup>2</sup> Romanian Constitution was adopted in 1992 and revised in 2003.

We will try to deal with the issue of the right to life from a procedural point of view, more precisely in relation to the duration of state investigations regarding the accidental death of a person.

If intentional homicide is, without any doubt, the most serious crime, unanimously punished by all penal legislations of the world, unintentional (involuntary) homicide does not receive the same interest<sup>3</sup>. In criminal systems based on subjective element, this is understandable. Certainly the severity of a penalty must depend primarily on the subjective position of the perpetrator. But if we look at the consequence produced, this is the same in both cases, *i.e.* the death of a person.

Modern penal codes juggle these criteria when penalizing an attempt as a criminal offence and choosing the punishment for it. For example, in the Romanian criminal substantial legislation, the attempted murder is punished within the penalty limits for the committed murder, but reduced by half. Although the intention is common with the present one if the murder had been committed, a milder penal treatment was chosen, given that the result did not occur. Compared to the limits for culpable homicide, however, the penalties for attempted murder are much more severe<sup>4</sup>.

Intentional murder produces a strong social disorder. Therefore, the investigations are usually prompt and, in most cases, really effective. If the perpetrator is identified and arrested (it is almost inconceivable that an act of murder should be investigated and tried with the offender being not under privative preventive measures), justice will be realised within a reasonable time. The expectations of society and, possibly, of the family of the victim are fulfilled. In very rare situations when the perpetrator will not admit the accusation, the only aspects, according to the practice, that will be discussed, being given by the mobile of the crime, the lack of a direct intention or instigations caused by the victim's behavior.

However, the unintentional homicide has as a starting point an accident. In fact, the concept of guilt, specific to the events that society call accidents, is the basis of these offences. The offender foresees the result of his conduct but does not accept it,

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<sup>3</sup> In the Romanian 2014 penal code, intentional homicide is the first crime from the special part (art. 188). In the previous Criminal Code (1968), crimes against the state were positioned before murder as importance. We observe a change of concept, regarding the protected fundamental values. The life of the citizen thus becomes more important, protected with priority over the state values.

<sup>4</sup> Intentional homicide: 10-20 years; attempt homicide: 5-10 years; unintentional homicide (without aggravating circumstances): 1-5 years imprisonment.

unfoundedly considering that it will not occur, or does not even foresee it, although he should and could have foreseen it (Pașca, 2007, : 162). A series of human activities are capable of causing, due to carelessness or negligence, the death of a person, but by far the most common nowadays are road accidents.

### **Right to life. Some general aspects. Material versus Procedural**

Although this assertion seems strange, the right to life is not absolute. For example, even right to life would be considered complete and inviolable, the European Convention provides legal conditions for the exclusion of its protection, in the context of defending another person from unlawful violence, of making lawful arrests or of preventing the escape of a lawfully deprived person, or in order to suppress riots or revolts (Pavlović, 2020, : 48). Derogation is inevitable. The Convention thus provides for certain exceptional cases, where the occurrence of death does not constitute a violation of this right (Bîrsan, 2010, : 63).

The legal nature of the right to life has generated a series of controversy. It has been said that it is uncertain in content, because international acts do not define life itself. On the criminal protection of life before the phenomenon of birth there have been written captivating pages, but this is not the object of our analysis (Stănilă, 2015, : 89).

Article 2 contains two substantive obligations, first positive and second negative: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by the list of abovementioned exceptions. Anyway, ECHR has not excluded the possibility that the acts and omissions of the authorities in the context of public health policies, may, in certain circumstances, engage the Contracting Parties' responsibility under the substantive limb of Article 2.

In two very exceptional circumstances, the Court has accepted that the responsibility of the State under the substantive limb of Article 2 was engaged as regards the acts and omissions of health-care providers: firstly, where an individual patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment (Mehmet Şentürk and Bekir Şentürk v. Turkey) and, secondly, where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment where the authorities knew about or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger (Aydoğdu v. Turkey).

In *Streletz, Kessler and Krenz v. Germany*, The Court notes in the first place that in the course of the development of that protection the relevant conventions and other instruments have constantly affirmed the pre-eminence of the right to life. Article 3 of the Universal Declaration of Human Rights of 10 December 1948, for example, provides: “Everyone has the right to life.” That right was confirmed by the International Covenant on Civil and Political Rights of 16 December 1966, Article 6 of which provides: “Every human being has the inherent right to life” and “No one shall be arbitrarily deprived of his life”. The convergence of the above-mentioned instruments is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.

### **The procedural aspect of right to life**

As we affirmed above, the right to life has to be protected by the authorities, by effectively investigating the breaches of it. This is called the “classic” procedural limb of right to life.

The State’s obligation to carry out an effective investigation has in the Court’s case-law been considered as an obligation inherent in Article 2, which requires, *inter alia*, that the right to life be “protected by law”<sup>5</sup>. Although the failure to comply with such an obligation may have consequences for the right protected under Article 13, the procedural obligation of Article 2 is seen as a distinct obligation (*İlhan v. Turkey* [GC], §§ 91-92; *Šilih v. Slovenia* [GC], §§ 153-154). It can give rise to a finding of a separate and independent “interference”. This conclusion derives from the fact that the Court has consistently examined the question of procedural obligations separately from the question of compliance with the substantive obligation (and, where appropriate, has found a separate violation of Article 2 on that account) and the fact that on several occasions a breach of a procedural obligation under Article 2 has been alleged in the absence of any complaint as to its substantive aspect (*Armani Da Silva v. the United Kingdom* [GC], § 231).

In the well-known 2004 case of *Öneryıldız v. Turkey*, the Court separately examined the two aspects of Article 2, substance and procedure, in relation to life-threatening environmental issues, and clearly set out the general principles to be applied to each of these. In the first context, the Court stressed the importance of information to be provided to the public and affected individuals about environmental hazards. The Court gave notable emphasis to various Council of Europe conventions and recommendations in this

field. The case was brought by the head of a family that had lived in slum dwellings next to a municipal rubbish tip in Ümraniye in Istanbul. In 1991, an expert report found that the tip contravened the relevant regulations and posed a major health risk for the inhabitants of the valley, particularly those living in the slum areas. These dangers included a risk of contagious diseases and also, in particular, a risk of explosion of methane gas formed in the tip. The City Council opposed requests from the local mayor seeking an injunction to close the tip and to order redress, but made moves aimed at the development of new sites conforming to modern standards, which were due to open some time in 1993. However, on 28 April 1993 at about 11 a.m. a methane explosion occurred at the site, setting off a landslide. Refuse from the mountain of waste engulfed some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died in the accident, including the applicant's wife, his concubine and seven of his ten children. An investigation was carried out, which identified the officials responsible, and two mayors were prosecuted – but only for “negligence in the performance of their duties”, and not for culpable deaths. In the end, they were only fined the legally minimal sum for that offence of less than 10 euros, and even that penalty was suspended. The applicant and his surviving children were awarded compensation of some 2,285 euros, but this sum was never actually paid to him. In terms of substance, the applicant submitted that the national authorities were responsible for the deaths of his close relatives and for the destruction of his property as a result of the April 1993 methane explosion at the rubbish tip.

The Court reiterated that Article 2 lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction, adding that: this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites. The Court went on to set out the substantive principles applicable in such cases – *i.e.* the principles relating to the prevention of death as a result of dangerous activities – in the following terms: The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 [...] entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life [...].

The Court summed up these requirements as follows: “the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous

activity if and to the extent that this is justified by the findings of the investigation [...]. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue. That said, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts; the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence [...] or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence [...]. On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts [...]. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined. On the procedural side, the criminal-law procedures in Turkey in theory appeared sufficient to protect the right to life in relation to dangerous activities. The investigative authorities had acted "with exemplary promptness", had been diligent, and had identified those responsible for the events. However, the scope of the criminal proceedings had been too limited: the criminal judgment had been limited to "negligence in the performance of [the official's] duties", without any acknowledgment of any responsibility for failing to protect the right to life. In spite of the extremely serious consequences of the accident; the persons held responsible were ultimately sentenced to "derisory fines, which were, moreover, suspended".

Therefore, the main procedural aspect of the right to life concerns the reaction of the state after the violation of the right has taken place, by the state representatives or other persons.

### **Procedural rights of third parties**

An interesting Strasbourg decision was held recently in *Piu and Cîrstenoiu vs. Romania*. The right to life was analyzed from the point of the right of victim's relatives in a forest accident to challenge a decision not to prosecute those considered guilty or suspect.

The Court notes that on 26 November 2013 the investigative authorities adopted a decision to discontinue the investigation. That decision was, however, quashed by the supervising authorities, who considered that further evidence, including a technical expert report and additional testimonial evidence, had to be adduced to the case file in order to clarify the circumstances of the case. The merits of the case therefore suggest that the investigating authorities did not promptly take all the necessary steps in order to carry out a thorough investigation which would be compatible with the Convention requirements.

Court further observes that none of the decisions taken by the prosecutor's office to discontinue or close the criminal investigation into her husband's death appear to have been officially communicated to the first applicant by the relevant domestic authorities. Even though in February and March 2013 the first applicant had asked the investigating authorities to punish those responsible for the death of her husband and had claimed civil damages, she does not seem to have been regarded as a party to the proceedings or as a person interested in the outcome of the aforementioned proceedings. The Court also notes that according to the available evidence, contrary to the Government's submissions, the local Prosecutor's Office decision to close the criminal investigation into the first applicant's husband's death was not officially communicated to her on 3 July 2014.

While the Court noted on the one hand that the first applicant was fully aware of the ongoing criminal investigation and that it does not appear from the available evidence that she had taken any steps to lodge any inquiry before the authorities as to the decisions rendered in the case, it also notes on the other that the Government have not provided any valid reason for the authorities' failure to fulfil their procedural obligation to officially notify the first applicant about the prosecutor's office's decision of 30 June 2014. In this context, the Court considered that the authorities failed to discharge their obligation to involve the first applicant in the procedure to the extent necessary to safeguard her legitimate interests.

Therefore in order for investigations to be effective, Strasbourg Court points that the procedure should be independent and impartial. The Court reiterates in many occasions the principle that any deficiency in the investigation which undermines the ability to

establish the circumstances of the case, or to determine the person responsible, will be likely to fall foul of the required standard. However, this statement is limited in its substantive authority in two ways. First, an investigation only has to be capable of establishing the circumstances of the case. There is no strict requirement to establish fully the circumstances of the case. Therefore, if a High Contracting Party provides the minimum, then it is likely to fulfil this criterion, and theoretically significantly disadvantage the applicant.

As we briefly observed above, the procedural aspect of the right to life also involves an effective investigation of each death, whether caused by state agents, third parties or whether it was intentional or accidental, in a reasonable time. We will now go back to the Romanian legislation and we will see if it contains a provision that guarantees the “reasonable length” of an investigation.

### **The connection with art. 13 ECHR. A non-effective remedy?**

Some authors talk about “right to truth” when referring on effectively investigating the death of a person, even intentional or accidental (Juliet Chevalier-Watts, 2010, : 701-721). We will try to point out the connection of the procedural limb of art. 2 with art. 13 ECHR, by observing a recent case that is pending in front of the European Court.

In last years, European Court have developed the idea of a procedural requirement under Article 2 as an additional protection of the right to life that seeks to ensure the administration of justice following an alleged violation of the right to life. The European Commission and European Court have recognized in recent reports and judgments that, in addition to the right to an effective remedy under Article 13 of the European Convention, there is a procedural aspect of the right to life under Article 2. This procedural aspect of the right to life requires states to conduct an effective official investigation into alleged violations of the right to life. A government's failure to conduct a proper investigation into an alleged violation of the right to life can therefore itself constitute a violation of the right to life itself (Irwin, 1998, : 1838).

Doctrine properly observed that the right to a trial within a reasonable length is a legal standard. All provisions governing this area of international or national type lose their meaning if there are shortcomings and exceptions in the procedure, because the rights must be effective and not just a dead letter on paper. Therefore, if the court procedure is not completed within a reasonable time, the causes of that problem are less important than the harmful consequences that occurred due to this shortcoming, because the fact is that



the party in that case failed to protect its rights and interests. In addition to making a decision within an appropriate period of time, the court must ensure that a decision made within a reasonable time is fair and equitable because these principles of court proceedings must not be disregarded in an attempt to complete the proceedings as soon as possible (Kurtović, Bećirović-Alić, 2020, : 470).

Article 13 of the European Convention on Human Rights stipulates that persons whose rights under the Convention have been violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. According to established case law, both Article 2 (on the right to life) and 3 (on freedom from torture or inhuman or degrading treatment or punishment) contain a "procedural aspect" which includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny. Although the right to an effective remedy has a general scope, whereas the procedural limb of Articles 2 and 3 is attuned to those specific rights, both provisions are obviously strongly related, as they both entail the state's duty to take legal action whenever human rights have been violated (van der Wilt, Lyngdorf, 2009, : 46).

So, if an investigation involving a death of a person seems to be ineffective, the relatives of the victim need to be eligible for a procedural remedy to the inactivity of the authorities. The effectivity means in our opinion both a reasonable time and the administration of relevant means of evidence to find out the truth.

According to art. 13 ECHR, "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Romanian Code of Criminal Procedure from 2014 provided a remedy for the unreasonable length of criminal proceedings:

"The Appeal regarding the duration of the criminal trial

Art. 488<sup>1</sup>: Introduction of the appeal

(1) If the activity of criminal pre-trial investigation or trial is not fulfilled within a reasonable duration, an appeal may be provided, requesting the speeding of the procedure.

(2) The appeal may be drafted by the suspect, the injured party the civil party and the civilly liable party. During the trial, the appeal may also be filed by the prosecutor.

(3) The appeal may be provided as follows:

a) after at least one year from the beginning of the criminal investigation, for the cases during the pre-trial investigation;

b) after at least one year from the sending the file to Court, for the cases pending during the trial in the first jurisdiction;

c) after at least 6 months from the notification of the court with an appeal, for the cases under ordinary or extraordinary means of appeal.

(4) The appeal may be withdrawn at any time until its settlement. The appeal can no longer be repeated during the same procedural phase in which it was withdrawn.”

Nevertheless, the practical cases involving this ”preventive remedy” generated some difficulties (Udroiu, 2020, : 509). This happened because a legal provision present in the Law for the implementation of the Code of Criminal Procedure<sup>6</sup> affects precisely the essence of the institution of the appeal regarding the length of the criminal trial.

According to the legal mentioned text, “The provisions of art. 488<sup>1</sup>-488<sup>6</sup> of Law no. 135/2010, with the amendments and completions brought by this law, regarding the appeal for the reasonable duration of the criminal trial shall apply only to the criminal proceedings started after the entry into force of Law no. 135/2010 (named the CCP).”

In this form, art. 105 of Law no. 255/2013 implementing the Code of Criminal Procedure seems unconstitutional and unconventional, as it unjustifiably restricts the exercise of the right to challenge the length of criminal proceedings only to criminal investigations initiated after February 1, 2014.

Faced with this problem, in Decision no. 668 of October 15, 2015<sup>7</sup>, Romanian Constitutional Court argued that ”it is generally accepted that the criminal process takes place under the authority of the normative law which takes effect through coercion and

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<sup>6</sup> Law no. 255/2013, published in Official Gazzete no. 515 from 14 August 2013.

<sup>7</sup> Published in Official Gazzete no. 870 from 20 November 2015.

compliance, meaning that, on the contrary, precisely in the realization of the right to a fair trial, the newly regulated situation if applied retroactively, *i.e.* to trials started under the rule of the old law, would affect the predictability of the law governing the trial. Moreover, the fact that the trials started under the rule of the old law are not susceptible to the censorship that can be exercised through the appeal regarding the reasonable duration of the trial does not equate to the affectation of the constitutional principle enshrined by art. 21, because, in accordance with art. 8 regarding the equitability and reasonable term of the criminal trial in the Code of Criminal Procedure, Judicial bodies have the obligation to conduct criminal prosecution and trial in compliance with procedural guarantees and the rights of parties and procedural subjects, so that [...] any a person who has committed a crime shall be punished in accordance with the law within a reasonable time. Therefore, regardless of the legal regime under whose authority the trials were initiated, the judicial bodies, in full agreement with the principle of legality of the criminal process enshrined in art. 2 of the Code of Criminal Procedure, are bound to respect a reasonable term for solving the cases.”

More practical, a car accident took place in september 2012, and the victim died. The family drafted several complaints about the incident, but the investigative authorities did not even produce the technical expert report since the end of 2018. In 2016, the daughter of the victim drafted the abovementioned ”Appeal regarding the duration of the criminal trial”. The judge, beeing restricted by the law, rejected the complaint, because of the cited disposition. The Constitutional Court also rejected the unconstitutionality plea, as ill-founded. In 2018 the daughter of the victim adressed a petition to ECHR. The procedure is still pending.

One of the questions of the Court was: ”Did the applicant have at her disposal an effective domestic remedy for her complaint under Article 2, more particular in respect of the unreasonable length of the investigation, as required by Article 13 of the Convention?”

The appliant tried to use the so-called ”procedural accelerating” remedy in force in the Romanian procedural criminal law from 1 february 2014, but the judge dismissed it as innadmissible (first degree court decision from 19 december 2016). The decision was so because of the inexistence of a remedy provided by Romanian law. Accepting that a so-called remedy is innadmissible means that it is not provided by the law.

The judge that sent the file to the Constitutional Court observed, in accorance with the party, that the Law does not contain a remedy for the appliants in the present case, when

the investigation was opened before the entry into force of the Criminal Code (1 february 2014), and accepted, at the appliant request, an un-constitutionality exception.

The Constitutional Court dismissed the request, arguing that the lackness of a remedy is a option of the legislator.

In this abovementioned case, the non-existance of an effective remedy for the applicant blocked the speeding up of the criminal investigations regarding the appliant father's death. This was, in our opinion, a violation of the right guaranteed under art. 13 refering to art. 2 in its procedural limb.

So, we strongly affirm that the appliant, the daughter of the victim, did not have at her disposal an effective remedy in respect of the unreasonable length of the investigation refering to the death of a person, as required by Article 13 of the Convention. So, there has been a violation of art. 2 of the Convention in its procedural limb and also there has been a violation of art. 13 of the Convention.

### **Concluding remarks**

The powerful connection between the right to life in its procedural limb and the right to an effective remedy has been developed in recent years by the ECtHR, through some very influent case decisions, some of them mentioned in our paper. Anyway, the "living jurisprudence" offers us new challenges.

Although the substantial aspect of the right to life does not offer nowadays such discussions, the procedural issues do not seem to end. Adapting to the requirements of fairness and effectiveness of the procedures, the states, as is the case of Romania, struggled to offer remedies to the unreasonable length of the criminal proceedings.

However, we note that the remedy for the excessive length of the criminal investigation is limited by Romanian legislation exactly where it was more necessary. It is true that as we move away from the transitional moment in 2014, the situations will become less often in practise, but the rarer they will be, the serious they will become, because the inactivity of the authorities will be longer.

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Bottazzi v. Italy, Application no. 34884/97, judgement from 28 July 1999.

Suheyli Aydın vs. Turkey, Application no. 25660/94, judgement from 24 August 2005.

Mehmet Şentürk and Bekir Şentürk v. Turkey, Application no. 13423/09, decision from 9 April 2013.

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**PROTECTION OF THE RIGHT TO LIFE  
AND CONSTITUTIONAL COURT OF  
BOSNIA AND HERZEGOVINA**

*The right to life, protected by Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 6 on the Abolition of the Death Penalty in Peacetime, and Protocol No. 13 on the Abolition of the Death Penalty in All Circumstances, is one of the fundamental rights guaranteed by this Convention. Violation of this right is considered the most serious violation of the Convention. This right is protected by the Constitution of Bosnia and Herzegovina and the Constitutional Court of Bosnia and Herzegovina often has the opportunity to consider appeals related to the violation of the right to life.*

*Article 2 of the European Convention stipulates that in the case of a violent death, the competent authorities are obliged to conduct an efficient official investigation. Therefore, the Constitutional Court of Bosnia and Herzegovina will examine in the circumstances of a specific case*

**Keywords:** *Bosnia and Herzegovina's Constitution, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Court for the Protection of Human Rights, Right to Life, Constitutional Court of Bosnia and Herzegovina.*

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In order to protect the right to life, States Parties to the Convention are obliged not only not to cause death intentionally or unlawfully, but also to take the measures necessary to protect the lives of persons within their jurisdiction. In order to effectively ensure the enjoyment of the rights guaranteed by Articles 2-4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>, the case law of the European Court of Human Rights<sup>2</sup> has harmonized procedural requirements, and the most common requirement is to conduct an investigation as part of a broader obligation to establish an efficient judicial system. The imposition of such an obligation is intended to enable the prosecution or initiation of legal proceedings ordered in the case of a violation of the Convention. However, this does not mean that this obligation applies only to cases when the events can be attributed to the state authorities, but it also applies in cases when it is considered that the violation of the rights under Articles 2 or 3 of the European Convention originates from an individual. The aim of this investigation is to ensure efficient protection under the provisions of domestic law and “in those cases involving public authorities, anticipating their liability” for facts within their competence.

Article 2 of the European Convention stipulates that in the case of a violent death, the competent authorities are obliged to conduct an efficient official investigation, the form and content of which depend on the circumstances of the particular case. According to the position of the European Court of Human Rights, followed by the Constitutional Court of Bosnia and Herzegovina, in order for an investigation to be considered efficient within the meaning of Article 2 of the European Convention, it must primarily be “appropriate”, i.e. all relevant facts must be established during the investigation, and when possible, the investigation must lead to the identification of the perpetrators and their punishment. Furthermore, the competent authorities must take all reasonable measures to obtain and secure evidence in the case in question. The conclusions of the investigation must be based on an independent, objective and thorough analysis of the case. The competent authorities conducting the investigation must be independent of other persons who could, in any way, be connected with the case, not only in a hierarchical but also in a practical sense. The investigation must be conducted promptly and in a timely manner, and be available to the victim's family to the extent necessary to protect their rights. Moreover, in certain circumstances, the investigation must be subject to the “public eye”. Therefore, the Constitutional Court of Bosnia and Herzegovina will examine in the circumstances of a specific case, and starting from the appellant's allegations, whether the standards from

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<sup>1</sup> Hereinafter: European Convention.

<sup>2</sup> Hereinafter: European Court.



the investigation have been met, taking into account the circumstances of the specific case.

### International standards

The first sentence of Article 2 paragraph 1 of the European Convention requires the State not only to refrain from intentional or unlawful taking of life, but also to take appropriate steps to protect the lives of those under its jurisdiction<sup>3</sup>. These principles also apply to the field of public health<sup>4</sup>. A positive obligation within the meaning of Article 2 paragraph 1 of the European Convention requires the State to establish an appropriate regulatory system that will require hospitals, whether public or private, to take appropriate steps to protect the patient's life. This is based on the need to protect the patient's life, as much as possible, from serious consequences that may arise in connection with medical intervention<sup>5</sup>. But when the State has established appropriate measures to ensure a high professional standard among healthcare professionals and to protect lives of patients, it cannot be accepted that issues such as error in healthcare professional assessment or careless coordination between healthcare professionals in treating a particular patient are sufficient on their own to call the State to accountability in terms of a positive obligation to protect life<sup>6</sup>.

Thus, the obligation to protect the right to life, according to Article 2 of the European Convention, arises when an individual is killed by force. Furthermore, in the case of *Fergec v. Croatia*<sup>7</sup>, the European Court in its judgment of 9 May 2017 pointed out: "21. The Court further notes that Article 2 of the Convention may apply even if the person whose right to life has been allegedly violated - has not died. [...] In *Osman v. The United Kingdom*<sup>8</sup>, the Court examined the State's obligation to protect the right to life of Ali and Ahmet Osman, although the latter did not lose his life but was wounded in the shooting<sup>9</sup>. In a number of other cases, the Court considered that Article 2 was applicable to shootings

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<sup>3</sup> See, European Court, *L. C. B. v. United Kingdom*, 9 June 1998, paragraph 36, Reports 1998-III and *Vo v. France*, judgment of 8 July 2004, paragraph 88.

<sup>4</sup> See, European Court, *inter alia*, *Powell v. United Kingdom (dec)*, application No. 45305/99, ECHR 2000-V and *Calvelli and Ciglio*, application No. 32967/96, ECHR 2002-I, [2002] ECHR 3, IHRL 2983, paragraph 48.

<sup>5</sup> See, European Court, *Codarcea v. Romania*, application No. 31675/04, paragraph 104, 2 June 2009.

<sup>6</sup> See, European Court, *Ericsson v. Italy*, (dec.), application No. 37900/97, 26 October 1999.

<sup>7</sup> Request No. 68516/14.

<sup>8</sup> 28 October 1998, Reports on Judgments and Decisions 1998-VIII.

<sup>9</sup> *Ibid*, pg. 115–122.

which did not result in death and in which the applicants' lives were at serious risk as a result of the conduct of the security forces or third parties<sup>10</sup>.'

A positive obligation under Article 2 of the European Convention imposes on public authorities the obligation to establish in any case an effective and independent judicial system through which the cause of death of an individual under the responsibility of health professionals can be determined regardless of whether working in the public or private sector and, as may be the case, secured responsibility for their actions<sup>11</sup>. In this context, the requirement of promptness and reasonable expediency is implicit. Prompt investigation of such cases is important for the safety of beneficiaries of all health care services<sup>12</sup>. The obligation of a State within the meaning of Article 2 of the European Convention shall not be met if the available protection under domestic law exists only in theory: first of all, it must be effective in practice, which requires a prompt investigation of the case without undue delays<sup>13</sup>.

Furthermore, although the Convention as such does not guarantee the right to institute criminal proceedings against third parties, the European Court has repeatedly emphasized that an effective judicial system within the meaning of Article 2 of the European Convention may, and in certain circumstances must, include recourse to criminal law<sup>14</sup>. However, if the violation of the right to life or personal integrity is not intentionally caused, positive obligation to establish an effective judicial system imposed by Article 2 does not necessarily - require a criminal remedy in any case. In a specific field of medical negligence, an obligation can also be met, for example, if legal system allows victims a legal remedy before a civil court, alone or in connection with a legal remedy before a criminal court, which allows any liability of the doctor in question to be established and any compensation, such as damages and the publication of the judgment, is obtained<sup>15</sup>. However, in the case where there are several domestic remedies, the person in question is authorized to choose among them the one that best suits his complaints. In other words,

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<sup>10</sup> See, for example, cases *Makaratzis v. Greece* [VV] No. 50385/99, pg. 49-55, ESLJP 2004-XI; *Soare et al. v. Romaia* No. 24329/02, pg. 108-109, 22 February 2011; *Trévalec v. Belgium* No. 30812/07, pg. 55-61, 14 June 2011; *Sašo Gorgiev v. The Former Yugoslav Republic of Macedonia* No. 49382/06, paragraph 29, ESLJP 2012 (excerpt) and *Yotova v. Bulgaria* No. 43606/04, paragraph 69, 23 October 2012.

<sup>11</sup> See, *Calvelli and Ciglio*, quoted, paragraph 49.

<sup>12</sup> See, European Court, *Byrzykowski v. Polland*, application No. 11562/05, paragraph 117, 27 June 2006.

<sup>13</sup> See *Šilih v. Slovenia* [GC], application No. 71463/01, paragraph 195, 9 April 2009.

<sup>14</sup> See *Calvelli and Ciglio*, quoted, paragraph 51.

<sup>15</sup> *Ibid*, paragraph 51.

when one legal remedy has been used, the use of other legal remedies, which are essentially the same, is not necessary<sup>16</sup>.

### **Article 2 of the European Convention in Decisions of the Constitutional Court of Bosnia and Herzegovina**

In accordance with Article VI/3b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina<sup>17</sup> has appellate jurisdiction over matters contained in this Constitution when they become the subject of dispute due to a judgment of any court in Bosnia and Herzegovina. Pursuant to Article 18 paragraph (1) of the Rules of the Constitutional Court<sup>18</sup>, the Constitutional Court may consider an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted and if the appeal is lodged within a time limit of 60 days as from the date on which the appellant received the decision on the last effective remedy he/she used. However, pursuant to Article 18 paragraph 2 of the Rules of the Constitutional Court, the Constitutional Court may consider an appeal even without a decision of the competent court if the appeal indicates serious violations of rights and fundamental freedoms protected by the Constitution of Bosnia and Herzegovina or international documents applicable in Bosnia and Herzegovina.

The provisions of the Criminal Procedure Code applicable in Bosnia and Herzegovina do not provide for the possibility that in the case that the Prosecution decides not to conduct an investigation, parties dissatisfied with such a decision may obtain a decision on the merits - a judgment of any court in Bosnia and Herzegovina, which, within the meaning of Article VI/3b) of the Constitution of Bosnia and Herzegovina, could be the subject of a dispute before the Constitutional Court. Furthermore, having in mind the relevant provisions of these laws, it follows that in such cases the only remedy that the parties can use is an objection (complaint) against the decision not to conduct an investigation. In this regard, the Constitutional Court considers that such legislation, i.e. the impossibility for the appellants to reach a decision on the merits in accordance with the applicable legislation, which could be the subject of the Constitutional Court's assessment - cannot be charged against the appellants. This is particularly the case when an appeal filed with the Constitutional Court raises issues of violation of the right to life in connection with events in respect of which the appellant did not have a legal opportunity to conduct any

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<sup>16</sup> See, European Court, *Bajić v. Croatia*, application No. 41108/10, paragraph 74, 13 November 2012.

<sup>17</sup> Hereinafter: Constitutional Court.

<sup>18</sup> Consolidated text ("Official Gazette of Bosnia and Herzegovina" Number 94/14).

proceedings. In doing so, the Constitutional Court recalls that Article II/1 of the Constitution of Bosnia and Herzegovina obliges the State of BiH and Entities to ensure the highest level of internationally recognized human rights and fundamental freedoms, and that Article 18 paragraph (2) of the Rules of the Constitutional Court prescribe possibility of the Constitutional Court to act even in the case when there is no judgment of any court in BiH.

The Constitutional Court recalls that the European Court interprets Art. 2 and 3 of the European Convention, taking into account, in this regard, the fundamental rights in question, as articles containing the procedural obligation to conduct an effective investigation into alleged violations of the substantive aspect of these provisions<sup>19</sup>. Furthermore, in the area of negligence of doctors, the procedural obligation under Article 2 is interpreted as imposing on the State the obligation to establish an effective judicial system for determining both the cause of death of an individual, for which health care workers are responsible, and the responsibility of other persons<sup>20</sup>. Furthermore, the Court consistently examines the issue of procedural obligations under Article 2 of the European Convention separately from the issue of compliance with the substantive obligation under Article 2 and, where appropriate, has found a separate violation of Article 2 on that basis<sup>21</sup>. Also, according to the position of the European Court, procedural obligation to conduct effective investigation under Article 2 has grown into a separate and independent obligation. Although initiated by actions concerning material aspects of Article 2, the investigation may lead to the determination of a separate and independent “violation”<sup>22</sup>.

Furthermore, the Constitutional Court notes that the mutual enjoyment of parents and children in a common society is a basic element of family life within the meaning of Article 8 of the European Convention. The essential aim of Article 8 is to protect an individual from arbitrary interference of public authority. However, this provision may

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<sup>19</sup> See, European Court, *Šilih v. Slovenia*, judgment of 9 April 2009, paragraph 145 with further references to relevant case law of the European court.

<sup>20</sup> See *Calvelli and Ciglio v. Italy [GC]*, application No. 32967/96, paragraph 51, ECHR 2002-I.

<sup>21</sup> See, European Court, *Kaya v. Turkey*, of 19 February 1998, pgs. 74-78 and 86-92, Reports 1998-I; *McKerr v. United Kingdom*, application No. 28883/95, pgs. 116-61, ECHR 2001-III; *Scavuzzo-Hager et al. v. Switzerland*, application No. 41773/98, pgs. 53-69 and 80-86, of 7 February 2006 and *Ramsahai et al. v. Holland [GC]*, application No. 52391/99, pgs. 286-89 and 323-57 ECHR-2007.

<sup>22</sup> See quoted *Šilih*, paragraph 159.

be characterized by additional positive obligations that extend, *inter alia*, to the effectiveness of investigative procedures related to family life<sup>23</sup>.

(1) Guided by the stated principles of the European Court and the appellant's allegations which, in essence, refer to the positive obligation to conduct an investigation in terms of Articles 2, 3 and 8 of the European Convention, and having in mind Article 18 paragraph 2 of the Rules of the Constitutional Court, the Constitutional Court considers that in the case where the appellant questions the length and effectiveness of the investigation - there exists its jurisdiction. Thus, in case **AP-547/15**<sup>24</sup> of 7 September 2017, the Constitutional Court concludes that there is a violation of the right to life under Article II(3a) of the Constitution of BiH and Article 2 of the European Convention due to the failure of public authorities to act in accordance with the requirement of promptness and reasonable expediency, and the necessary diligence and comprehensiveness in conducting the investigation into the death of the appellant's daughter.

The Constitutional Court notes that it cannot be concluded that in the present case the District Prosecutor's Office, in accordance with its powers, failed to take actions for the purpose of conducting an investigation in the case in question. However, the manner in which the investigation was conducted, above all, the long periods of delays in the investigation when no action was taken, as well as the fact that the investigation lasted 19 years, support the conclusion that the District Prosecutor's Office did not act with due diligence and comprehensiveness, as required in criminal cases under Article 2 of the European Convention. In this sense, the District Prosecutor's Office reasons that the investigation in this case took a long time due to the fact that several prosecutors changed in the work of the case - cannot eliminate the requirement of promptness and reasonable expediency required in such cases and cannot justify the duration of the investigation for 19 years. Therefore, the Constitutional Court finds that the investigation into the death of the appellant's daughter due to an alleged medical error lacked timely and adequate response in accordance with the positive obligation under Article 2 of the European Convention.

(2) In case **AP-131/18**<sup>25</sup> of 13 November 2019, the Constitutional Court concluded that there was no violation of the right to life under Article II(3a) of the Constitution of BiH

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<sup>23</sup> See, *mutatis mutandis*, and in the context of "private life" *M. C. v. Bulgaria*, application No. 39272/98, pgs. 152 and 153, ECHR 2003-XII.

<sup>24</sup> <http://www.ustavnisud.ba/dokumenti/AP-547-15-1093514.pdf>.

<sup>25</sup> <http://www.ustavnisud.ba/dokumenti/AP-131-18-1210677.pdf>.

and Article 2 of the European Convention when the Prosecutor's Office decided not to investigate the death of the appellant's father in a situation when, in accordance with the expert opinion and the evidence offered, it gave a clear explanation that the patient's death occurred naturally despite the doctor's actions according to the rules of medical science and practice.

With regard to the appellant's allegations on violation of the right to life, before considering the specific case, the Constitutional Court recalls the relevant principles established by the European Court in *Šilih v. Slovenia*, in its judgment of 9 April 2009, which stated the following:

“(a) Applicable principles 192. As the Court has held on several occasions, the procedural obligation under Article 2 requires the States to establish effective and independent judicial system to determine the cause of death of the patient cared for by the medical profession in both public and private sectors, to make those responsible accountable for what was done<sup>26</sup>. The Court reiterates again that this procedural obligation is not an obligation in terms of results but only in manner<sup>27</sup>.

Even if the Convention itself does not guarantee the right to institute criminal proceedings against third parties, the Court has repeatedly stated that effective judicial system required under Article 2 may, and in certain circumstances must, include recourse to criminal law. However, if the violation of the right to life or personal integrity was not caused intentionally, the procedural obligation under Article 2 to establish an effective judicial system does not necessarily require the provision of a criminal remedy in each individual case<sup>28</sup>. In a specific area of medical negligence, the obligation may also be met if, for example, the legal system allows victims to seek redress before civil courts, both separately and in conjunction with legal remedy before criminal courts, allowing them to obtain determination of the responsibility of the doctors concerned and appropriate civil law compensation, such as a claim for damage compensation and/or the publication of judgment. Disciplinary measures are also envisaged<sup>29</sup>.

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<sup>26</sup> See, among other sources, case *Calvelli and Ciglio*, cited, paragraph 49 and *Powell v. United Kingdom*, (odl.), No. 45305/99, ESLJP 2000-V.

<sup>27</sup> *Paul and Audrey Edwards v. United Kingdom*, No. 46477/99, paragraph 71, ESLJP 2002-II.

<sup>28</sup> *Mastromatteo v. Italy* [GC], application No. 37703/97, of 24 October 2002, paragraph 90.

<sup>29</sup> Case *Calvelli and Ciglio*, cited, paragraph 51 and case *Vo*, cited, paragraph 90.

The requirement of promptness and reasonable speed is implied in this context. Even if there are obstacles or difficulties that may hinder the progress of the investigation in a particular situation, prompt response of the authorities is extremely important to maintain confidence of the public in the context of their respect for the rule of law and prevention of collusion or tolerance of illegal actions<sup>30</sup>. The same applies to cases of medical negligence governed by Article 2 of the Convention. The State's obligation under Article 2 of the Convention will not be fulfilled if the protection ensured by domestic law exists only in theory: it must, above all, be effective in practice, and this requires a prompt examination of the case without undue delay<sup>31</sup>.

Finally, in addition to the concern for respect for the rights enshrined in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of deaths in hospital conditions. Knowledge of the facts and possible mistakes made during provision of medical care are essential in order to enable specific institutions and medical staff to eliminate possible shortcomings and prevent similar mistakes. Urgent investigation of such cases is therefore important for the safety of beneficiaries of all health services<sup>32</sup>.”

The Constitutional Court must also note that the appellant did not use any other possibilities offered under Article 2 of the European Convention, related to the initiation of disciplinary or civil proceedings<sup>33</sup>, i.e. did not inform the Constitutional Court about any possible actions taken.

(3) In the case **AP-1057/19**<sup>34</sup> of 25 June 2019, the Constitutional Court pointed out that there was a violation of the right to life under Article II/3a) of the Constitution of BiH and Article 2 of the European Convention due to the failure of public authorities to act in accordance with the requirement of promptness and reasonable expediency, and necessary diligence and comprehensiveness in conducting the investigation into the murder of the appellant's brother.

Given that a violation of the right to life has been established, the Constitutional Court, in terms of Article 74 of the Rules of the Constitutional Court, considers that in the

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<sup>30</sup> See *Paul and Audrey Edwards*, cited, paragraph 72.

<sup>31</sup> See *Calvelli and Ciglio*, cited, paragraph 53; *Lazarini and Ghiacci v. Italy* (odl.), No. 53749/00 of 7 November 2002 and *Byrzykowski*, cited, paragraph 117.

<sup>32</sup> See *Byrzykowski*, cited, paragraph 117.

<sup>33</sup> See cited judgment *Šilih v. Slovenia*.

<sup>34</sup> <http://www.ustavnisud.ba/dokumenti/AP-1057-19-1195345.pdf>.

circumstances of the case in question the appellant should be awarded monetary compensation as compensation for non-pecuniary damage caused by the violation of the aforementioned right since the damage suffered by the appellant “cannot be compensated by a mere determination of the violation”<sup>35</sup>. In this regard, the Constitutional Court recalls the content of the provision of the Rules according to which the Constitutional Court may award compensation for non-pecuniary damage (paragraph 1), whereby monetary compensation is awarded on equitable basis, taking into account standards set forth in the case-law of the Constitutional Court and the European Court<sup>36</sup>.

Having in mind the specific circumstances from which it follows that the public authority did not act in accordance with the requirement of promptness and expediency, and the necessary diligence and comprehensiveness in investigating and discovering the perpetrator of murder to the detriment of the appellant's brother, the Constitutional Court decided to determine the appellant the compensation for established violation of the right to life, in the amount of 5,000.00 KM<sup>37</sup>. The Government of the Republika Srpska is obliged to pay the stated amount to the appellant within three months from the day of delivery of this decision, with the obligation to, after the expiration of this deadline, pay the appellant legal default interest on any unpaid amount or part of the compensation determined by this decision. The decision of the Constitutional Court in this part is an executive document.

(4) The Constitutional Court finds that there is no violation of Article II/3a) of the Constitution of BiH and Article 2 of the European Convention because it did not find any omissions in the actions of the Prosecutor's Office when issuing the order not to conduct an investigation, whereas it has been established that the criminal prosecution of the reported persons has become relatively obsolete, which implies the exclusion of criminal prosecution in relation to the perpetrators listed in the criminal charges, and that there was no obligation to reactivate the procedural aspect of that article. An analysis of the case file found that the period between death, as a trigger event, and the entry into force of the European Convention was not reasonably short, nor was most of the investigation carried

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<sup>35</sup> *Mutatis mutandis*, M. et al. v. Croatia, paragraph 100.

<sup>36</sup> *Mutatis mutandis*, European Court, *Jularić v. Croatia* of 20 January 2011, paras. 49-51.

<sup>37</sup> *Mutatis mutandis*, Constitutional Court, Decision on Admissibility and Merits No. AP-547/15 of 7 September 2017, paras. 68 and 69, available at [www.ustavnisud.ba](http://www.ustavnisud.ba).



out or should have been carried out after the entry into force of the European Convention on 14 December 1995” (Decision No. **AP-2371/18**<sup>38</sup> of 25 June 2019).

Since in this particular case the suspects are charged with committing serious criminal offense of murder in a cruel, i.e. brutal or insidious manner, the Cantonal Prosecutor's Office in Zenica analyzed and interpreted the aforementioned regulations in order to determine whether and, if so, on the basis of which regulations obsolescence of criminal prosecution of the suspects occurred, whereby as the basic dates in the decision-making it took into account and marked 5 August 1983 as the day when, according to the allegations from the charges, the criminal offense of murder in a cruel and insidious manner was committed, and 22 June 22 2017 when criminal charges were filed. In order to legally and properly resolve this case, it was noted and pointed out that death penalty, which was provided for and prescribed in the Criminal Code of SFRY, was abolished by the 1995 Constitution of BiH because Annexes IV and VI of the Dayton Agreement stipulate that all persons must be guaranteed rights and freedoms proclaimed by the European Convention and its Protocols, but also by other human rights acts. This includes Protocol No. 6 to the European Convention, and the Second Optional Protocol to the International Covenant on Civil and Political Rights - which abolish the death penalty.

(5) In Decision No. **AP-2661/18**<sup>39</sup> of 8 April 2020, the Constitutional Court concluded that there was no violation of Article II/3a) of the Constitution of BiH and Article 2 of the European Convention because the Cantonal Prosecutor's Office in Travnik issued an Non-Enforcement Order following the appellant's criminal charges, because it is obvious from the charges and accompanying files that the reported offenses are not criminal offenses, since in the proceedings in question no one was killed or anyone's life was endangered to the extent that the guarantees provided by that article should be activated. The Constitutional Court recalls the position of the European Court that Article 2 of the European Convention does not impose an obligation that persons in charge of the investigation must satisfy every request of the victim's relatives for certain actions during the investigation. In this case, the fact is that the Federal Prosecutor's Office examined the legality of the work of the Cantonal Prosecutor's Office in Travnik and established that it acted in accordance with the provisions of the Criminal Procedure Code of the Federation of BiH.

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<sup>38</sup> <http://www.ustavnisud.ba/dokumenti/AP-2371-18-1229170.pdf>.

<sup>39</sup> <http://www.ustavnisud.ba/dokumenti/AP-2661-18-1229174.pdf>.

### **Case-law of the European Court of Human Rights**

#### ***Smiljanić v. Croatia of 25 March 2021 ( request No. 35983/14)***

On 25 March 2021, the European Court issued a judgment finding that the applicants' right to life had been violated in material and procedural terms because the Republic of Croatia had failed to provide an appropriate regulatory framework for punishing the perpetrators of traffic offenses who frequently repeated those offenses, which resulted in violation of the human rights of the applicants. Also, the actions of domestic authorities failed to ensure public confidence in respect for the rule of law and the ability of the authorities to prevent any occurrence of similar illegal acts, which constitutes a violation of the Convention. Taking such actions would be in accordance with mechanisms set forth in relevant international regulations (first of all, in the Convention, but also in the regulations of the European Union). The Court, therefore, found that there had been a violation of the State's positive obligation under Article 2 of the Convention.

At the same time, it was pointed out that it was not entirely clear why the execution of the sentence was postponed to the convicted person for a year after the sentence became final and that this could not be considered reasonable. Such unjustified delay was inconsistent with the State's obligation under Article 2 of the Convention to enforce final judgments of criminal court without undue delay.

#### ***Mazepa et al. v. Russia, of 17 July 2018 (request No. 15086/07)***

The applicants are mother, sister and children of murdered journalist Ana Politkovskaya, a well-known investigative journalist who reported on alleged human rights violations in Chechnya during actions against rebels in that region, and a sharp critic of President Vladimir Putin's policy. She was killed in the elevator of her building in Moscow in 2006. The same day, the Prosecution initiated criminal investigation. Four men have been charged - two brothers, a police officer and an FSB (Federal Security Service) officer, who were released after trial in February 2009. Following further investigation, in May 2014, five men, including two brothers and a police officer who were originally tried, were charged and convicted of murder.

The applicants complained that the State had violated the procedural and substantive aspect of the right to life guaranteed under Article 2 of the Convention because the authorities had failed to conduct an effective investigation into Ms Politkovskaya's murder and had not identified who ordered and paid for the crime. The applicants insisted

that the European Court should consider not only procedural obligation of the State to investigate violent death, but also the other two obligations of the State under Article 2 of the Convention, which are - positive obligation of the State to protect life and material obligation to refrain from deprivation of life.

Also, the European Court did not accept the respondent State's objections that the applicants did not have the status of a victim because they had not submitted certain documents and were awarded damage compensation in domestic proceedings. The Court considered that the failure to submit certain materials could not affect the existence of victim status, and that monetary compensation awarded to the third and fourth applicants could not be considered as compensation due to procedural violation of Article 2 of the Convention. Consequently, it declared the application admissible.

In this case, the key issue was the fulfillment of the respondent State's obligation to conduct an effective investigation into the murder of the investigative journalist. In such cases, it is important to check out the possible link between the crime and the professional activity of the journalist. The European Court, as has repeatedly stated in its case-law, emphasized that the procedural obligation under Article 2 is not an obligation of results but of means. In this particular case, the investigation brought tangible results because five people who were directly responsible for the murder were convicted. However, in the investigation of the murder, genuine and serious investigative actions had to be taken in order to identify the person or persons who ordered the murder. As the respondent State did not provide a copy of the investigation file, the European Court's ability to assess the nature and extent of the investigation in this case was significantly reduced and limited to the analysis of the parties' written observations.

The criminal investigation began on 7 October 7 2006 and was still pending. The respondent State did not provide convincing and admissible reasons to justify the length of the proceedings. In particular, its reference to the number of the volumes of the investigation file and to examined witnesses was irrelevant in the absence of tangible results of the investigation in relation to those who ordered the murder. The investigation, therefore, did not meet either the requirement of promptness or reasonable speed.

The above findings of the European Court were sufficient to conclude that the investigation into the murder of Ana Politkovskaya was not effective. The European Court, therefore, did not consider it necessary to examine the issue of independence of the investigation.

Accordingly, there has been a violation of the procedural aspect of Article 2 of the Convention.

***Semache v. France of 21 June 2018, request No. 36083/16***

The applicant, Annissa Semache, is an Algerian citizen and lives in Argenteuil, France. Referring to Article 2 of the Convention, the applicant complained that her father's death had been the result of police action during his arrest and stay at the Argenteuil Police Station. She claimed that the authorities had not taken the necessary action and that the investigation had not been effective. She also complained that her father had been subjected to inhuman and degrading treatment contrary to Article 3 of the Convention.

The European Court found that the autopsy and the findings of the medical expertise did not exclude a connection between the force used by the police against Ziri during his taking to the Police Station and his death. The investigation and judgment of the Court of Appeal in Rennes shows that the purpose of using force against Ziri was to restrain his anxiety, which represented a risk to his safety, the safety of other passengers in the vehicle, as well as the safety of other traffic participants. The Court, therefore, concluded that this measure pursued a legitimate aim. In addition, the judgment of the Court of Appeal contained very precise reasons as to the proportionality of the use of force against Ziri. Accordingly, the Court found that the applicant's restraint, when taken to the Police Station, was justified and proportionate to the aim pursued.

The European Court emphasized that the police officers had to be aware of Ziri's condition at the time of his arrival at the Police Station. Namely, it was an older man at the age of 69, in an alcoholic state. When he came to the Station, he was vomiting and could not stand. He was mistreated during the arrest and transportation, and immediately before his arrival he was restrained by a technique that the Police had to know could be dangerous.

The obligation to treat persons in custody with care in this case was greater given Ziri's age and weakness. He was left lying on the floor, in his own vomit, without medical supervision or care for about an hour and 15 minutes at the Police Station. The Court also emphasized that the Court of Appeal in Rennes, in its judgment, relied on by the French Government, had not reasoned or in any way analyzed whether the treatment of Ziri had been appropriate in view of his general condition and required the competent authorities greater care in such cases. It follows that the Police's treatment of Ziri at the Argenteuil Police Station was negligent, as confirmed by the National Security Ethics Council, which

gave its opinion in this case. The Court, therefore, found that the authorities had not done what was reasonably expected of them to prevent the risk of the applicant's father's death and that there had been a violation of Article 2 of the Convention in material aspect.

Finally, the European Court pointed out that the investigating judge was actively conducting the investigation. However, the Court also noted certain shortcomings in the conduct of the proceedings. Namely, the procedure lasted for a total of six years and eight months, and no reconstruction of the event was carried out. However, these shortcomings were not such as to call into question the effectiveness of the investigation as a whole. The Court, therefore, found that there had been no violation of Article 2 of the Convention in its procedural aspect.

***Talpis v. Italy of 2 March 2017 (request No. 41237/14)***

The Court found that after the applicant had lodged a complaint of violence committed by her husband and in which she had raised concerns about her daughter's life and her own life, the domestic authorities had not provided any protection to the applicant, although the situation required immediate protection, and the applicant herself has been questioned only seven months after filing the application. The domestic authorities should have taken into account her situation, that she was insecure, and morally, physically and materially vulnerable, and accordingly provided her with appropriate support, which they did not do.

The authorities did not assess the risks faced by the applicant, including the risk of further physical attacks. By failing to take urgent measures following her report, the authorities deprived that report of any effect, and the impunity of her husband led to a recurrence of violence. Impunity eventually led to tragic events on the night of 25 November 2013. Although the Police intervened that night, they did not take any special measures to provide the applicant with adequate protection given the gravity of the situation, even though at that time her husband's violent behavior was known to the Police, and criminal proceedings for grievous bodily harm were ongoing. The Police should, therefore, have known that he posed a real threat to the applicant.

The European Court concluded that the competent authorities had not taken measures which could undoubtedly prevent the risk to the lives of the applicant and her son. The authorities therefore did not show necessary diligence and did not fulfill their obligation to protect the lives of the applicant and her son. These omissions, moreover, made the criminal report useless.

Therefore, the European Court found a violation of Article 2 of the Convention.

***Aydoğdu v. Turkey of 30 August 2016 (request No. 40448/06)***

The request was submitted to the European Court by two Turkish citizens, a couple whose prematurely born daughter died two days after giving birth. In their application to the European Court, the applicants complained that the mistakes of the medical staff and organizational deficiencies within the hospital system had led to the death of their daughter, and that the criminal proceedings had not been fair. As the applicants did not point out any article of the Convention, the Court decided to examine their complaints in the context of the substantive and procedural aspects of the first sentence of Article 2 paragraph 1 of the Convention.

The European Court found that the child's life was endangered due to several factors, but that the decisive factor was that the doctors at Atatürk Hospital had to perform an emergency caesarean section in the thirtieth week of pregnancy due to complications that had occurred, even though the hospital was not equipped with appropriate neonatal care. The Court held that the doctors must in any event have been aware of the potential risk to the child's life if there was a need to transfer him to another hospital and that hospital refused to admit the child. The Court found that the hospital in which the child was born had not, before referring the child to another hospital, taken measures to provide the child with the care required by his health condition. Such action constitutes negligent treatment caused by a lack of coordination between hospitals, for which the medical staff is responsible and, according to the Court, it in itself requires consideration under Article 2 of the Convention.

According to the Court, the real problem follows from inadequate organization of the procedure for transferring premature babies from one hospital to another, and from the treatment of other hospitals in the region which “do not accept such patients”. Furthermore, the Court found that the hospital in which the child was born did not have technical equipment or the appropriate Department for providing care to premature babies. Such a situation was well known to the Turkish public, and the competent health authorities had to be aware of the fact that a certain number of patients were in danger of death. However, no measures were taken that could be expected to prevent such a risk. Accordingly, the Court found that the applicant's daughter had been the victim of negligent treatment and structural deficiencies which prevented her from receiving adequate emergency treatment, which subsequently had led to a life-threatening denial of medical care.

In the opinion of the European Court, only detailed and scientifically based reports that contain sufficient explanations and provide answers to the questions asked - can strengthen public confidence that proceedings are conducted in accordance with applicable regulations and with due diligence. In accordance with the requirements of Article 2 of the Convention, the investigation should cover all fundamental aspects by which the circumstances of an individual's death can be clarified. This requirement should also apply to the content of the findings and opinion of the expert obtained in the court proceedings - if it is the main evidence on the basis of which the investigative body makes a decision on the initiation, course and completion of the investigation. In the present case, the experts did not answer the fundamental questions: whether the death of the child was inevitable, whether it occurred as atypical and unpredictable consequence of the medical staff's actions (which automatically excludes negligent treatment) and whether the cause of death was denial of adequate medical care for a premature baby suffering from respiratory distress syndrome. The Court concluded that there was no evidence that the experts had consulted a neonatologist, whose opinion was crucial in this case, and that the Commission was not in full composition when issued a report. Thus the Commission acted contrary to the Law No. 2659.

Given the shortcomings in the Commission's report, the European Court found that no body had made a consistent and scientifically based assessment of this case and the doctors' responsibilities. In other words, the State Prosecutor's Office decided not to file an indictment on the basis of a report that ignored basic aspects of the case, and the Court rejected the applicant's appeal without proper reasoning, stating that there was insufficient evidence to initiate criminal proceedings.

The Court therefore found that such course of actions did not comply with the procedural requirements of Article 2 of the Convention, according to which the State authorities must take steps to provide adequate evidence to establish a complete and accurate sequence of circumstances and an objective analysis of the findings of death of a child. Consequently, the criminal proceedings were not effective as to establishing and punishing violations of the child's right to protection of life.

***Tagayeva et al. v. Russia of 13 April 2017 (requests No. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11)***

In the early hours of 1 September 2004, more than 30 armed terrorists crossed the border between Ingushetia and North Ossetia. At nine o'clock, the solemn celebration of the beginning of the school year began in the yard of school number 1 in Beslan. Minutes

later, terrorists surrounded the gathering and forced more than 1,100 persons into the school gym (including about 800 children). The terrorists turned the school into improvised fortress and mined it. They executed numerous hostages, refused to accept any offer aimed at alleviating the hostage situation and, starting 2 September denied their victims even drinking water.

Security forces surrounded the premises. An Operational Headquarters was established to command the operation and attempts were made to negotiate with terrorists who had made political demands.

There were two powerful explosions at the school on 3 September at 1 p.m. Some hostages tried to escape through a hole in the wall, and terrorists shot at them. This prompted an exchange of gunfire with security forces, who were then ordered to break into the building.

More than 330 people were killed and hundreds were injured. Among the dead were 12 soldiers and over 50 were injured. One suspected terrorist was caught and all the others were killed.

The European Court found that the authorities had specific information at least a few days in advance about a planned terrorist attack in the area, which was linked to the beginning of the school year in educational institutions, and similar major attacks previously committed by Chechen separatists which included taking hostages at public places and severe casualties. Given such a threat, it could reasonably be expected that all educational institutions in the area would be covered by some preventive and protective measures, and that a number of security steps would be taken. Although certain precautionary measures have been taken, preventive measures in this case can generally be characterized as inappropriate. Security measures at the school were not increased; local police did not take sufficient measures to reduce the risk; the school administration and the public attending the ceremony were not alerted, and no high-level body was appointed as responsible for resolving the situation. The authorities therefore did not take measures to prevent or reduce known risk, which constituted a violation of Article 2 of the Convention.

The court also found serious shortcomings in the investigation into the attack. First, it has not been properly investigated how the victims died. Authorities did not perform a complete forensic treatment of most of the victims, and did not properly secure the scene where the vast majority of the hostages' bodies were located. The exact cause of death



has not been determined for one third of the victims. Second, the investigation did not properly obtain and seize evidence before the site was irreversibly altered by large machinery and the removal of the security cordon just a day after the rescue operation was completed. This caused irreparable damage to the subsequent analysis of events. Third, the investigation did not adequately examine the use of lethal force by the authorities, despite the existence of credible evidence that security forces used weapons that could cause indiscriminated damage inside the building, such as grenade launchers, flame throwers and tank cannons. The lack of objective information is a major failure in clarifying this key aspect of the event and creating a basis for drawing conclusions about individual and collective responsibility.

Finally, the investigating authorities and the courts repeatedly refused to provide the applicants with access to key findings and expert opinions on the use of lethal force and the cause of the first explosions in the sports hall. It turned out that there was no justification why the victims could not get acquainted with these findings and dispute them.

The court also found that the Russian authorities had failed to plan and conduct rescue operation in a way that minimized the risk to life, which had violated Article 2 of the Convention. The cause of this failure is the way the Operational Headquarters, the body responsible for carrying out the operation, functions. There have been delays in the establishment of the Headquarters and inconsistencies in determining its leadership and composition, and the absence of any records of the work of that Headquarters only emphasizes the lack of formal accountability.

The lack of formal leadership has resulted in serious failures in the decision-making process and coordination with other bodies. Among other things, this affected the ability of the authorities to coordinate the response of ambulances, rescue teams and firefighters. The Court could not avoid concluding that this lack of accountability and coordination contributed to some extent to the tragic outcome of the events.

The Court held that Russia had failed to establish an effective legal framework to prevent arbitrary use of force, as the relevant law did not prescribe the most important principles and restrictions on the use of force in lawful counter-terrorism operations. Together with broad immunity from liability for any damage caused during counter-terrorism operations, this situation resulted in a dangerous gap in regulation of actions during life-threatening situations and had direct significance on the Court's finding on that basis. Combined with the lack of accountability and coordination in the Operational

Headquarters, this led to a situation where decisions on the use of force were left to the commanders in charge of the intrusion. In addition, there is very little explanation for the use of deadly force. Furthermore, the Court concluded that although the decision to resort to the use of lethal force was justified in such circumstances, such excessive use of explosives and non-selective weapons could not be considered absolutely necessary and, therefore, Article 2 of the Convention was violated.

### **Conclusion**

According to the linguistic meaning, Article 6 of the European Convention, to which the appellants refer in criminal proceedings, guarantees the right to protection only to someone against whom “[...] the merits of any criminal charge are established”. Namely, only such a person can be considered a “victim” within the meaning of Article 6 of the European Convention. Therefore, a reverse interpretation of Article 6 of the European Convention, according to which the right to a fair trial would also be guaranteed to someone seeking to establish the merits of a criminal charges against another person, would go beyond the interpretation of Article 6 of the European Convention<sup>40</sup>. It follows that the right to a fair trial under Article 6 paragraph 1 of the European Convention does not include the right to initiate an investigation and criminal proceedings against third parties. On the other hand, there is the jurisdiction of the Constitutional Court even in the case when the prosecution makes a decision not to conduct an investigation. In support of this is the fact that the Constitutional Court in its case law has already decided appeals filed for violations of the right to life and the prohibition of torture, due to unexplained circumstances under which the death of loved ones occurred, and that it made decisions according to which failure to investigate lead to violations of this right. However, this does not mean that appellants in filing an appeal in such cases should not meet other requirements under Article 18 of the Rules of the Constitutional Court, but, on the contrary, all other requirements of admissibility must be met in order to open the possibility for the Constitutional Court to act.

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<sup>40</sup> See Decisions of the Constitutional Court No. AP-19/02 of 17 March 2004 and No. AP-408/04 of 18 January 2005.

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Zhenjie Zhou\*

## WHERE SHALL CAPITAL PUNISHMENT GO CHINA: A REALISTIC PERSPECTIVE

*China saw many constructive and substantial reforms on capital punishment in recent two decades, especially the abolition of 13 and 9 capital offenses respectively in 2011 and 2015. Meanwhile, China stated that it had carried out all these reforms with the final aim to completely abolish capital punishment. Although these reforms deserve positive comments and to abolish capital punishment in law has gained strong academic support and recognition even in judicial and political circles to some degree, it is obviously unrealistic in foreseeable future. It can be inferred from analysis of such influential elements as symbolic and political meaning of capital punishment, execution of nationally notorious corrupt officials and public opinion that the most realistic choice for China may be not to abolish capital punishment in law or in practice, but to strictly limit its application within the scope of crimes potential to result in death and serious corruption crimes with such circumstances as causing massive social damage and the amount involved being exceptionally large.*

**Keywords:** Capital Punishment; Right to life; Constitution; Criminal Policy

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## Introduction

The abolition of 13 and 9 capital offenses by the Standing Committee of National People's Congress (NPC) respectively in 2011 and 2015 received highly positive comments in both academic circle and among citizens for its main purpose to strengthen protection of civic rights pronounced by the legislature.<sup>1</sup> Especially the Eighth Amendment to the Criminal Law of People's Republic of China (the Eighth Amendment) that entered force as of 11 May 2011 is thought of as the starting point of China's long march toward total abolition of capital punishment (Gao and Chen 2011:3), and believed to be helpful in limiting application of capital punishment in practice, pushing forward changes in public opinion and ensuring the implementation of international documents that China has ratified because it abolished capital offenses in substantive criminal law for the first time since the promulgation of first penal code in 1979 (Zhao 2011: 13).

Theoretically, whether to abolish capital punishment might be a matter of principle, and political leaders might be expected to take positive steps to turn a world without capital punishment into reality depending on such reasons as protection of human rights, equality and prevention of justice miscarriage (Hood 2002:245). Realistically, whether to abolish capital punishment or not is mainly a political issue, and it wouldn't be so easy for a political leader to make such a decision if he/she couldn't obtain enough public support, unless the issue won't undermine his/her political prospect. China has been taking measures intending to ensure a fair and accurate application of capital punishment and improve transparency and openness of capital proceedings since late 1990s, just as Hood (2011: 1) once commented: "The last few years have witnessed a distinct change in the discourse". Then, could we say that China will eventually abolish the system for all crimes?

To find a realistic answer to this question, this article first gives a general introduction to capital offenses in Chinese criminal law. Then, it summarizes death penalty reforms since the beginning of the new century in China. Moreover, it conducts an overall analysis of elements potential to influence political decision on the future of capital punishment. Finally, it draws a realistic conclusion basing on the analysis above.

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<sup>1</sup>Standing Committee of National People's Congress, *Draft Eighth Amendment to the Criminal Law and Introduction* (August 28, 2010).

## 1. Capital Offenses in Chinese Criminal Law

In the beginning of 1950s, only few special criminal laws provided capital punishment such as *Ordinance of Punishing Anti-revolution Activities (1951)*, *Provisional Ordinance of Impairing Regulation of Currency (1951)* and *Ordinance of Punishing Corruption (1952)*. However, a document issued by the Supreme People's Court of China (SPC) in 1956 shows that more than 10 crimes including murder, assault resulting in death, rape, hardened thief, hardened cheat, maltreatment resulting in death and damaging communication equipment in addition to those in the above ordinances were frequently punished by capital punishment in practice according to the criminal policy of combining severity with lenience due to the absence of criminal laws and the need to fight anti-revolutionists and strike crimes endangering social stability (Zhao 2011:2).

The Criminal Law promulgated in 1979 (hereinafter, 1979 Criminal Law), the first penal code of People's Republic of China (P.R.C), established a death penalty system with unique Chinese characters. According to article 43 of 1979 Criminal Law, capital punishment shall only be applied to criminals who have committed extremely serious crimes. If the immediate execution is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence. In other words, there are two types of death penalty sentence, death sentence (immediate execution) and death sentence (two years suspension). In latter case, capital punishment would in principle be mitigated to life imprisonment if no intention crimes are committed during suspension period.

1979 Criminal Law provided 27 capital crimes in its Special Part, 14 of which were anti-revolution crimes and 13 were common ones. It should be noted that crimes of violating duties of military servicemen then weren't provided in the 1979 Criminal Law, but in *Provisional Ordinance of Punishing Violating Duties of Military Servicemen (1981)*, which provided 11 capital crimes too. Because the Provisional Ordinance was in fact a part of 1979 Criminal Law, it might be better to say that the total number of capital crimes in 1979 Criminal Law wasn't 27 but 38.

The rapid turn from a planned economy to a market one since the implementation of opening-up and reform policy in the beginning of the 1980s brought China not only economic prosperity, but also surprisingly quick increase in crimes, especially in fields of economic activities and social management. Correspondingly, China launched campaigns intended to strike severely economic crimes and those endangering social management. To lay down legal foundation for these *strike hard* campaigns, legislature

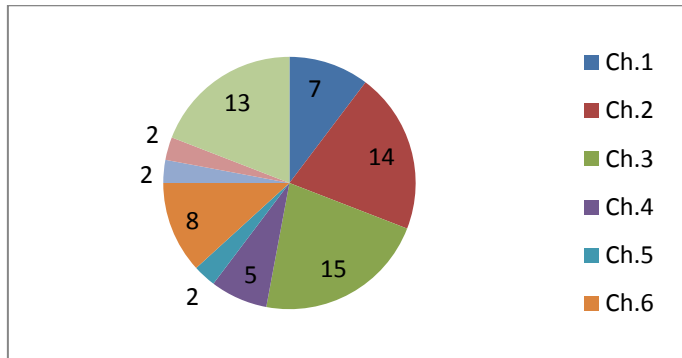
adopted more than 10 special criminal laws and more supplementary criminal provisions in economic and administrative laws between 1982 and 1995, and thereby added 33 capital crimes. In other words, the total number of capital crimes had reached 71 by the year of 1997, when the 1979 Criminal Law was thoroughly amended.

The task to promulgate an integral and complete criminal code entered the timetable of Chinese decision makers in 1995, and two years later, the Amendment to 1979 Criminal law (hereinafter, the Criminal Law), which is actually a collection of provisions in 1979 Criminal Law and all special criminal laws and supplementary criminal provisions, was passed by the Fifth Session of the Eighth National People's Congress and became effective from 1 October 1997. As for death penalty system, the Criminal Law made several important changes in its General Part. For example, it abolished the article providing that minor criminals between 16 and 18 could be punished with death sentence with two-year suspension. In the Special Part, although two capital crimes were abolished, and the number of capital crimes was reduced to 68, no substantial change happened because the conducts in question were absorbed into other capital crimes.

As can be seen in Graph I, capital crimes could be found in 9 of 10 chapters in Special Part of the Criminal law, except for Chapter 9 providing crimes of dereliction of duties. The fact that capital crimes in chapter 3 (crimes undermining the socialist economic order) and chapter 2 (crimes endangering public security) account for nearly 43% of the total number indicates a shift in the Chinese government's concerns from political interests in the past to economic and social issues in the present. Meanwhile, that most capital offenses don't involve deadly consequence implies that what is stressed in legislators and judicial practitioners' mind is still the tool value of criminal law. In other words, capital punishment is considered no more than a tool to strike resistance, control society and punish criminals. This is also a common character and image of criminal laws at all dynasties in Chinese history (Chen 1993: 315).



Graph I: Capital Crimes in Criminal Law in 1997



## 2. Criticism and Key Reforms in Recent Years

### *2.1 Criticism against Capital Punishment*

Death penalty system in the Criminal Law is criticized from various perspectives, just as a foreign reporter said, “China's enthusiasm for capital punishment has long been a target for international criticism of its human rights record.” (Jakes 2011) As far as substantive criminal law is concerned, the criticism is mainly focused on the scope of capital crimes and amnesty system.

#### 2.1.1 The Scope of Capital Crimes

As mentioned above, the Majority of 68 crimes eligible for death in the Criminal Law isn't potential to cause deadly consequence. More than one Chinese scholar has pointed out that this isn't in accordance with *International Covenant on Civil and Political Rights* (ICCPR), article 6 (2) of which provides that in countries which have not abolished capital punishment, sentence of death may be imposed only for “*the most serious crimes*” in accordance with the law in force at the time of the commission of the crime. According to the ECOSOC Safeguards guaranteeing protection of the rights of those facing capital punishment, the notion of “the most serious crimes” here refers to intentional crimes with lethal or extremely grave consequences.

Chinese government has formally signed the *ICCPR* on 5 October 1998. Although the Standing Committee of People's Congress hasn't ratified it, from the perspective of the provision in *Vienna Convention on the Law of Treaties* that a State is obliged to refrain

from acts which would defeat the object and purpose of a treaty when it has signed the treaty, China has promised to take the moral responsibility to abide by the ICCPR even since the day on which it signed the Convention (Qiu 2011:372). Article 48 of the Criminal Law requires that capital punishment shall only be applied to criminals who have committed “extremely serious crimes”. From the perspective of wording, “extremely serious crimes” might be unlimitedly close to “the most serious crimes”. However, the fact that crimes such as theft, smuggling, tax fraud and bribery are punishable by capital punishment according to the Criminal Law shows that the scope of “extremely serious crimes” is apparently broader than the explanation given by Article 1 of the ECOSOC Safeguards guaranteeing the protection of those facing capital punishment in respect of “the most serious crimes”.

Applying capital punishment to non-deadly crimes such as property and economic crimes incapable of resulting in death consequence has also been criticized according to article 5 of the Criminal Law by Chinese researchers. According to the article, the degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender. However, the punishment of non-deadly crimes could never be said to be equal to that of capital punishment, just as Professor QIU Xinglong with Hunan University acutely questioned capital punishment for smuggling rare cultural relics and products of rare animals in article 151 of the Criminal Law, “which one is more valuable between a human head and a piece of stone? Which one is more worthy between human skin and that of panda?” (He 2011). Therefore, abolition of capital punishment for non-violent and non-deadly crimes such as theft has been proposed ever since 1990s (Gao and Wang 2011: 248).

### 2.1.2 Amnesty System

Article 6 (4) of ICCPR provides that “anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.” Amnesty system could be found in the Constitution of PRC amended in 1982. Article 67(17) of the Constitution provides that the Standing Committee of the NPC exercises the power to decide on the granting of special pardons. Correspondingly, its article 80 provides that the President of PRC issues orders of special pardons in pursuance of the decisions of the Standing Committee. However, the amnesty system hasn’t been used for more than 30 years in China. On one hand, “these provisions are so simple that the application and the execution of special pardon couldn’t be counted on.” (Yin 2011: 96). On the other hand, special pardons granted to war criminals before 1975 shows that “in China special pardon was initiated

by either the Party Central Committee or the State Council while criminals or prosecutors had no right to seek it.” (Yin 2011:96).

Therefore, it has been suggested by researchers that procedure of special pardon of capital punishment should be established as soon as possible in order to make effective use of amnesty system in Chinese Constitution. E.g. Professor YIN Jianfeng with Beijing Normal University suggested the procedure be established by granting criminals and prosecutors the right to apply for special pardon, setting up a committee entitled to receive and deal with the applications in capital cases under the direction of the Standing Committee of NPC and delegating to the SPC the power to execute special pardon according to the decision of the direction of the Standing Committee. (Yin 2011: 96).

## ***2.2 Key Reforms in Recent Decades***

### **2.2.1 Substantial Law Reforms**

#### ***(1) The Eighth Amendment***

Responding to aforementioned critical comments, Chinese decision-makers took a substantial and historic step forward in 2011. The Eighth Amendment, the most massive and important one ever since 1997 (Gao and Chen 2011:1), abolished capital punishment for following 13 crimes, 19% of the total number: smuggling of cultural relics; smuggling of precious metals; smuggling of precious animals or their products; smuggling of ordinary freight and goods; fraud connected with negotiable instruments; fraud connected with financial instruments; fraud connected with letters of credit; false invoicing for tax purposes; forging and selling value-added tax invoices; larceny; instructing in criminal methods; excavating and robbing ancient cultural sites or ancient tombs, and excavating and robbing fossil hominids and fossil vertebrate animals. Although it is argued that the Eighth Amendment won't necessarily lead to a significant fall in the numbers of criminals executed because all the crimes for which capital punishment was abolished are all non-violent crimes, and what is more important, for which capital punishment was rarely if ever applied (Hogg: 2011), the fact that 19% of capital crimes were abolished makes it fair to call it a breakthrough in the way of reforming capital punishment. What is more meaningful, the Eighth Amendment indicates a change in value choice of Chinese legislature.

Traditionally, criminal law is considered a tool to strike crimes and maintain social order, and punishment as weapon to protect state and people in China, just as article 1 of the

Criminal Law provides: “The aim of the Criminal Law of the People's Republic of China is to use criminal punishments to fight against all criminal acts in order to safeguard security of the State, to defend the State power of the people's democratic dictatorship and the socialist system, to protect property owned by the State, and property collectively owned by the working people and property privately owned by citizens, to protect citizens' rights of the person, their democratic and other rights, to maintain public and economic order, and to ensure the smooth progress of socialist construction”. Therefore, it isn't surprising to see that Chinese legislature kept extending the list of capital crimes after 1980s, when China were confronted with rapid increase in economic crimes, expecting to make full use of deterrent of capital punishment, the severest punishment. The comparison between the importance traditionally placed on the tool value of criminal law and the abolition of capital punishment for 13 non-violent crimes implies that Chinese legislature has begun to rethink its value choice in promulgating criminal law and shift its focus from maintaining social order by using severe punishment to achieving a balance between social order and human rights.

In addition to reducing the number of capital crimes, the Eighth Amendment provides in article 3 that seniors who are 75 years or older at the time of trial shouldn't be sentenced to death, except in cases where the senior causes another person's death by especially cruel means. In other words, death sentence for seniors beyond 75 is in principle banned. Meanwhile, article 1 of the Eighth Amendment provides that seniors beyond 75 who committed intention crimes may be given a lighter or mitigated punishment, and in case of negligence crimes, they should be given a lighter or mitigated punishment. Moreover, article 19 of the Eighth Amendment provides that criminals who were less than 18 at the time of commission of a crime and sentenced to less than 5-year imprisonment don't have to fulfill the duty to report to the unit concerned about the fact that he/she had been subjected to criminal punishment before being recruited in the army or employed provided in article 100 of the Criminal Law. Judging from provisions about the death penalty and liability for seniors and minors, it might be said that the Constitutional promise that “the State respects and protects human rights”<sup>2</sup> is being gradually turned into reality in the realm of criminal law at macro level.

#### *(2) The Ninth Amendment to the Criminal Law*

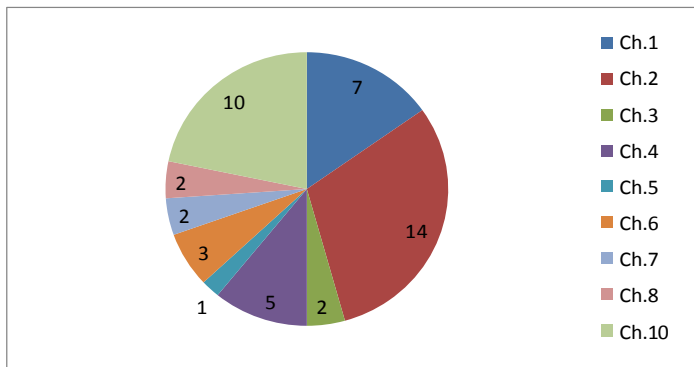
The Ninth Amendment to the Criminal Law of P.R.C (the Ninth Amendment) that entered force as of 1 November 2015 further abolished capital punishment for 9 offenses,

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<sup>2</sup>Article 33 of the Constitution of People's Republic of China.

reducing the total number of capital offenses from 68 in 1997 to 46, as can be seen in Graph II. Meanwhile, the Ninth Amendment created a Chinese version of life without parole (LWOP) by providing in article 44 that in the case where a convict is sentenced to death with a two-year suspension (suspended death sentence) according to item (3) of article 383, the people's court may decide to commute the sentence to life imprisonment upon expiration of the two-year period, and sentence the convict to life imprisonment without any possibility of commutation or parole in light of the circumstances of the crime committed. According to authoritative interpretation of a Justice in the Supreme People's Court (the SPC), LWOP can only be applied to offenders convicted of graft or accepting bribes respectively provided in article 382 and article 385 of the Criminal Law and eligible for death with immediate execution. Meanwhile, the decision of LWOP should be made along with a suspended death sentence. Moreover, LWOP must be used resolutely if legal requirements are satisfied to maximize its special function of filling in the blank between death with immediate execution and life imprisonment with parole and commutation and strictly punishing corruption and bribery, and be used cautiously to prevent (Pei, Miao, Liu & Wang, 2016).

Graph II: Capital Crimes in the Criminal Law in 2015



### 2.2.2 Procedural Law Reforms

It should be noted that China had been carrying out reforms in specific proceedings before reforms mentioned above, intending to ensure accuracy and fairness and thereby to create conditions for restricting the use and abolishing capital punishment since 2006 when the SPC issued its Second Five-Year Reform Plan (2006-2010), and several legal documents governing procedural aspects of death penalty cases have been issued. Table 1 highlights contents of major documents. Moreover, it is worth noting that the SPC made reform of

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HUMAN RIGHTS PROTECTION  
RIGHT TO LIFE

use of capital punishment as a key part of its third Five-year Plan outlined in March 2009 and this has seen important work taking place on sentencing guidelines and review procedures. This approach has also been endorsed by the first *National Human Rights Action Plan* issued by the State Council in April 2009.

Table 1: Key Reforms in Death Proceedings (2006-2010)

Documents Issued	Issuing Date	Issuing Body	Subject Matter
Notice Improving Work on Open Trial for Second Instance Case with Death Sentences	December 7, 2005	SPC and Supreme People's Procurator (SPP)	Open Trials for second instance in cases that may result in capital punishment and for which importance facts and evidence were in dispute
Provisions on Some Issues Concerning the Court Trial Procedures for the Second Instance of Cases Involving capital punishment (for Trial Implementation)	September 21, 2006	SPC and SPP	Open trials in second instance courts in all death penalty (immediate execution) cases
Amendment to the Organic Law of the People's Court	October 31, 2006	Standing Committee of the NPC	SPC to review all lower court decisions ordering a death sentence (immediate execution)
Provision of the SPC on Several Issues Concerning the Review of Death Penalty Cases	February 27, 2007	SPC	Details of circumstances in which the SPC would uphold a death sentence and when it would order a retrial in lower courts
Opinions on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases	March 9, 2007	SPC , SPP, Ministry of Public Security (MPS) and Ministry of Justice (MJ)	Elaboration of procedure to reduce wrongful death verdicts, including the presence of witness at trial, and reaffirms that confessions extracted under torture cannot be used as the basis of conviction
Provisions Concerning Issues in Examination of Evidence in Handling Death Penalty Cases	June 13, 2010	SPC , SPP, MPS, Ministry of National Security(MNS) M J	Principles and detailed rules for scrutinizing and gauging evidence used in cases involving capital punishment
Regulation on Issues Concerning Exclusion of Illegal Evidence in Handling Criminal Cases	June 13, 2010	SPC , SPP, MPS, MNS and M J	Detailed procedures for examining evidence and for excluding evidence obtained in an illegal way like torture

These procedural reforms have brought considerable changes, and table 2 provides a comparison of policy, principle and procedure before and after capital punishment

reforms began in 2006. Although problems and deficiencies could still be found in capital proceedings in such aspects as judicial independence, absence of transparency and presumption of innocence, it would be fair to say that proceedings in capital cases are advancing in the direction toward democracy, fairness and transparency. Especially, the two sets of legal rules jointly issued by five Chinese ministries and judiciary organs in June 2010 not only adjusted the criminal evidence system, but also introduced new principles. E.g. article 2 of Provisions Concerning Issues in Examination of Evidence in Handling Death Penalty Cases specifies that the facts in capital cases must be determined according to *evidence*. This is a big step forward compared with the previous general principle of “be based on *facts* and be judged according to law” in article 6 of the Criminal Procedure Law in that “evidence” must satisfy all formal and substantive requirements specified in Criminal Procedure Law while “facts” may be based on illegal evidence such as confessions obtained through torture.

Table 2: Key Changes in Death Proceedings (2006-2010)

	Subject Matter	Before Reforms	After Reforms
1.	Exercise of capital punishment in general	No official on the frequency of imposing capital punishment	Officially stated the principle of killing fewer and cautiously
2.	Death Penalty (immediate execution) cases review body	Higher People’s Court at provincial level reviewed certain kinds of death penalty (immediate execution) cases	SPC reassumes power to review all death penalty (immediate execution) cases
3.	Decisions on a wrongful conviction/sentence	Review court empowered to replace death sentence (immediate execution) with more lenient sentence when ruling that application of law was wrong or sentence inappropriate	SPC will order a lower court to retry a case in most cases, except in very limited scenarios
4.	Questioning of convicted person during review	Review judges not required to question convicted person	SPC judges should question the convicted person “in principle”.
5.	Open trial in second instance court	Open trial not required when certain procedures carried out and when facts are clear	Open trial for all cases that may result in death penalty (immediate execution)
6.	Exclusion of illegal evidence	Exclusion of illegal evidence not required	Illegal evidence such as confessions obtained through torture should be excluded

These reforms created an atmosphere favorable for limiting the use of capital punishment and decreased execution in practice. As early as in 2008, the SPC declared in its annual report that the number of death sentence (two years suspension) exceeded that of death

sentence (immediate execution) for the first time ever since 1979. Meanwhile, statistics shows that majority of death sentences are used in the most serious violent crime cases such as murder, robbery, kidnap and intentional attack resulting in death. It is these procedural changes that laid down sound foundation for reforms substantial law reforms mentioned above. When modifying the *Criminal Procedure Law* in 2012 and 2018, legislators incorporated essences of reforms mentioned above into the new Amendments. Now, what is urgent in terms of capital procedure is to ensure fairness and transparency in death sentence review procedure to realize due process (Liu 2021).

It is a determined political policy to strictly restrict the use of, gradually reduce and eventually abolish capital punishment in China, just as China's representative in the UN Human Rights Council stated in March 2007: "capital punishment's scope of application was to be reviewed shortly, and it was expected that this scope would reduce, with the final aim to abolish it." (Hood 2011:2) Inspired by all these changes, the majority of Chinese researchers are very optimistic and believe that these reforms will eventually lead to total abolition. Is it really safe to say so now?

### **3. Elements Potential to Influence the Decision to Retain or to Abolish**

Opinions on the future of capital punishment of Chinese scholars could be generally divided into three categories. The first one suggests that China abolish capital punishment immediately. For example, Qiu (2004: 18) insists that China should take steps to restrict use of capital punishment immediately and abolish it in law in near future because the universal nature of human rights indicates that basic human rights of criminals are supreme and couldn't be deprived of, and to abolish capital punishment is the direct requirement of protection of human rights. Moreover, international standards of limiting use of capital punishment don't conflict with Chinese reality, so Chinese death penalty system must comply with international standards. This is not only necessary but also feasible.

On the contrary to above proposal, majority of average citizens insist that capital punishment be retained, and they are also backed by academic support. For example, Zhang (2007: 81) holds that whether to abolish or retain capital punishment is specifically affected or even decided by particular background. In present China, the notion of "blood for blood, life for life" is still deeply rooted, and although general deterrent of capital punishment could no way be accurately calculated, it is still believed to be an element potential to prevent serious crimes. Therefore, presently China shall surely retain capital punishment, or it is safe to say that China won't totally abolish it in at least 50 years.



Most Chinese researchers are for the opinion that although it isn't feasible for China to abolish immediately, active measures should be taken to restrict its use and thereby gradually abolish it. For example, Zhao (2009: 29), while questioning the opinion that China should abolish capital punishment in immediate future, holds that it isn't feasible for the mainland to totally abolish capital punishment in short term because of absence of cultural condition and social foundation. However, in regions where required conditions are mature, we can establish pilot zone, in another word, Special Zone of Criminal Justice, to collect judicial experience for future gradual abolition of capital punishment. Furthermore, Zhao (2005:56-57) suggests that China should abolish capital punishment in three steps: in the first one, capital punishment for non-violent offenses should be abolished before 2020 when China enters well-off society; in the second one, capital punishment for non-fatal common violent crimes should be abolished when conditions are mature after development of further ten or twenty years; in the final one, capital punishment for all crimes should be abolished when China becomes a relatively developed state. And this goal should be achieved at the latest, before the year of 2050. Some Foreign scholars also agreed that this opinion was in accordance with Chinese tradition (e.g. Bakken 2011).

Obviously, above arguments are mainly based on public opinion, social safety and international influence. As mentioned above, whether to abolish capital punishment or not is more a political than a principle decision. Therefore, another important element that we should never neglect is symbolic meaning of capital punishment.

### ***3.1 Symbolic Meaning***

Capital punishment, as a system created by political organ, can naturally be used to achieve political ends, such as to gain public support or restore public confidence. For example, in the federal election in Canada held in November 2000, the right-wing party adopted the phrase "putting the justice back into the justice system" to win out and "all opposition parties, even the left-wing New Democratic Party promised to make sentencing tougher and to champion changes that respect victims' rights. And this trend, it should be recalled that, this occurred in the country that has experienced the most protracted period of declining crime rates" (Robert 2003:13). This might also be true in China to some degree. Corruption problem has led to a major trust crisis on Chinese government. Justice is called the last line of defense for social conscience in China. However, even a deputy president of the SPC regretfully admitted that "some citizens' distrust in justice system has gradually evolved into a kind of universal social psychology. This is an extremely terrible phenomenon" (Wu 2009). To restore public trust, calm

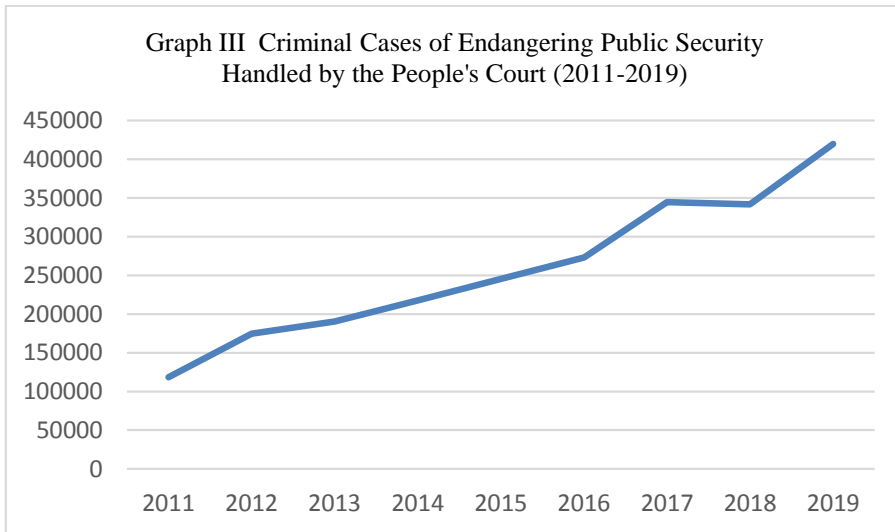
citizens down and kill a hen to scare a monkey, giving severe punishment in cases where the amount involved is extremely large or consequence caused is exceptionally serious may be the most economical and noticeable way. This may partly explain executions of high-level officials in recent years, such as Lai Xiaoming, former CEO of China Huarong Corporation, who was convicted of taking bribes of 1.788 Billion and sentenced to death on 5 January 2021. That is, although use of capital punishment in bribery cases should be restricted, it doesn't necessarily mean that we shouldn't use it in major corruption cases (Wang 2021).

This is a choice based on penal populism, a symbolic response that favors popularity over other policy considerations, and as has been shown in Western countries, it can be politically useful, but has nothing to do with penal effectiveness, because populist penal policies in some cases are just “a consequence of an intentional attempt to exploit public anxiety about crime and public resentment toward offenders” (Robert 2003 :3).

### ***3.2 Crime Rate and Strike Hard Campaign***

When overall crime rate is on increase or heinous crimes such as murder, rape and robbery happen so frequently as to cause public anger, Chinese supreme organ of legal and political affair will usually launch a strike hard campaign (strike hard at serious crime with severe punishments), during which police usually take tough measures against crimes and judicial authorities hand down swifter and harsher penalties. Capital punishment is undoubtedly a sharp sword in the strike hard campaign, and this is right the reason that NPC delegated the power to review and approve death sentence decisions to provincial courts, for cases of homicide, rape, robbery, bombing, and other crimes that seriously endanger public security and damage social order, and the strike hard policy is thought of as a leading reason for the continually high number of executions in China (Trevaskes 2008).

As can be seen from Graph III, criminal cases of endangering public safety have been on continuous and quick increase in the past decade, exceeding 40 thousand in 2019. Moreover, China witnessed a string of violence against primary school children in recent years, making public security authorities realize the urgency of the situation. Therefore, following previous three rounds in 1983, 1996 and 2001, the Ministry of Public Security announced the fourth round strike hard campaign targeting extreme violent crime, gun and gang crime, telecom fraud, human trafficking, robbery, prostitution, gambling and drugs in June 2010 (Jin 2010).



Source: China Annual Statistics (2012-2020)

Reforms on capital punishment in recent years have reduced the use of capital punishment, but deteriorating crime situation in public security area and the fourth round strike hard campaign makes it impossible for China to stop using it, at least in cases of “extreme violent crime”, although it might be argued that “In China, the popularity of the harsh anti-crime campaigns have been used as a means for the regime to gain support in an insecure environment of transition. Harsh punishment proves the point to the public that the government’ is doing something’ about the negative consequences of economic reforms. The alleged positive net effect on the crime rate, however, is of a more dubious character, and it is less than likely that the campaigns managed to reduce crime.” (Bakken 2011:40)

### ***3.3 Public Opinion***

“Public opinion is frequently cited as a major factor in the decision whether to abolish, retain, or reinstate capital punishment” (Hood 2002:245), especially in Asian countries such as Japan, China and Thailand. It was said that public support for capital punishment was a misunderstanding in China and therefore “it is obvious that the state wouldn’t listen to them unilaterally, on the contrary, the state shall even take the responsibility of leading them to rational considerations” (Liu 2011). However, in a state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and

peasants where all power belongs to the people,<sup>3</sup> public opinion will naturally not be neglected, just like what has been repeatedly stressed by the SPC: judges should try to realize both legal and social effect when sentencing (Xi 2008). Researchers also admit that political leader should fully take into account specific social background, crime situation, public opinion and collective consciousness in deciding the future of capital punishment, and public opinion and capability of controlling society should be given special attention in China (Liang 2004). “Abolition of capital punishment would be no more than a dream if the problem of public opinion couldn’t be overcome” (Mo 2011:71).

“Although Asia is the most important region of the world when it comes to capital punishment, it is also one of the most understudied.” (Johnson and Zimring 2006:28) This applies to China too. A few surveys have tried to measure public attitudes toward capital punishment in China, and all these surveys show that majority of Chinese strongly support capital punishment. For instance, Law Institute of Chinese Academy of Social Science (CASS) and the National Bureau of Statistics of China conducted a population survey in three Chinese provinces in 1995. They found that over 95% of the respondents supported capital punishment (Hu 2000:341-346). In another survey among 2000 persons in 2005, the respondents were asked if they supported capital punishment or if they wanted it to be abolished: 82.1% supported it, while 13.7% said they wanted it abolished. Even when the question was changed and rephrased on the assumption that capital punishment had already been abolished by the state, 60.6% still wanted to retain capital punishment, although the number of abolitionists increased to 33% (Bakken 2011:42).

Another survey conducted in Beijing, Hubei and Guangdong provinces by the Research Center for Contemporary China (RCCC) at Peking University in 2007-2008 and administered as face-to-face interview shows that, among 4472 samples that were eligible and responded, when confronted with the standard general question, without any qualifications as to the type and circumstances of the crime or the characteristics of the offender, 57.8% support capital punishment, 14% oppose it and 28% are undecided. Even if when asked from the opposite about their attitudes toward abolition, still a moderate majority support capital punishment (55% in the question “Should China follow the practice of many countries abolishing capital punishment” and 53% in the question “Should China speed up to abolish capital punishment”). But if asked more concretely about their support level of capital punishment for specific crimes, 78% of the respondents support capital punishment for murder which is much higher than for capital

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<sup>3</sup>Article 1 and Article 2 of the Constitution of PRC.

punishment generally (Obwittler and Qi 2011). The latest survey conducted by Peking University Law School, while insisting that capital punishment has just symbolic meaning, concludes after interviewing 30 thousands samples nationwide that the public extremely supports the retribution function of the punishment and believes in its deterrence. Therefore, it is critical for death penalty reforms to understand such a public ideology (Liang and Ma, 2020).

It may be argued that public opinion is just the embodiment of the social public's values of the region or sector in which a case take place. It is vague, sometimes based on misunderstanding and therefore irrational, and is quite easy to change (Mo 2011:72-73), just as once commented: "public opinion could be guided, and it should be guided" (Lu 2011:76). For example, a survey in 2006 shows that among 897 respondents, as for application of capital punishment to crime of taking bribery, when told "capital punishment would not be used wrongfully", more than 20% answered I support. However, when told "capital punishment might be used wrongfully", the support rate dropped dramatically to around 5% (Zhou 2008:238).

Then, how can the public opinion be guided? As far as I am concerned, the best way would be to tell citizens the facts, such as whom and for what crime is executed, what executions bring us and whether there are wrongful death sentences and executions? However, as has been noted, execution toll is kept state secret in China. Therefore, although it might be true that public opinion could be guided, there is a possibility that it is guided into wrong direction if citizens could never have access to truth.

### ***3.4 International Pressure***

The last element that Chinese policy makers will never neglect when deciding the future of capital punishment is international pressure. According to AI, among 198 nations and regions worldwide, up to 2017, 106 nations had abolished capital punishment wholly, 7 had abolished for ordinary crimes, and 29 were abolitionist in practice, not having executed anyone for at least ten years and having a settled policy not to carry out executions. Thus, when the latter two are added to the nations that are abolitionist in law, 72% (142) of states no longer inflicts or intends to inflict the ultimate penalty.<sup>4</sup> 106 states voted in favor of a resolution calling for a world-wide moratorium on death sentences and executions, with only 46 countries voting against at the United Nations in December 2008

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<sup>4</sup>The statistics is available at <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries/> (retrieved on 12 June 2020).

(Hood 2011:4). In retentionist countries such as Japan and USA, death sentences are only given in cases where death consequence was caused. And even in countries that use capital punishment to punish crimes other than those resulting in death such as Singapore, it is very rare to see that such crimes as smuggling common goods and theft are punished by death. In a word, to limit use of capital punishment, if not to abolish it wholly, has become an irreversible international trend.

“There can be no doubt that the latest wave of abolition has been influenced greatly by the process of democratization in Europe, Foremost among these influences has been the development of international human rights law and international covenants to put them into effect (notably Protocol No.2 to the ICCPR (1989) and Protocols No.6 (1982) and No.13 (2002) to the ECHR), as well as new democratically inspired Constitutions in many countries that embody the right to life”(Hood 2011:10). China has ratified more than 200 international covenants in these 20 years, and thus is supposed to take international responsibilities, including that to respect the right to life by limiting use of capital punishment. Meanwhile, Chinese government is devoting itself to establishing at international stage an image that stresses protection of human rights, facilitates rule of law and development of civil society. Therefore, active measures to limit use of capital punishment are necessary for Chinese decision-makers’ macro strategy. From this perspective, reforms in recent years might also be regarded as China’s responses to outside pressure to a degree, just as a foreign reporter commented when draft of the Amendment was published for public scrutiny in 2010, “it is believed that the proposed amendment is one of several recent moves by the Chinese government to soften its image as the world’s biggest executioner” (Watts 2010).

#### **4. A Realistic Analysis of the Future of capital punishment in China**

In China, “the question of whether to retain or abolish capital punishment is not so much about culture and psychology as it is about power, politics, and political will.” (Bakken 2011:39) “Even if China today is exceptional in the use of harsh punishments and executes more people than the rest of the world combined, there is no need to see this fact in terms of Chinese culture. China can use its own traditions to end this situation effectively in a fairly short period of time if there is the political will to do so. Given such political will, public opinion will follow suit” (Bakken 2011:33). Then, will Chinese political leaders make such a will under present political system? It is very unlikely. On one hand, when deciding on the future of capital punishment, the first thing that appears in political leaders’ minds might not be principle consideration such as humanitarianism

or protection of human rights, but what consequence the abolition will cause. As noted above, China is being confronted with increasing crime rate, serious corruption problem and universal distrust in government. The relatively rational choice to resolve these problems is undoubtedly, while maintaining moderate deterrent of criminal law, to push forward reforms in economic area such as to redistribute social wealth reasonably and narrow income gap, and in political area such as to promote supervision outside the Communist Party of China. However, what such reforms may cause to political stability and authority of the ruling party? No political leader can and wants to answer this question, not to say to take the historical responsibility. Therefore, severe punishment has become the easiest and least costly means to respond to public dissatisfaction and show that the authority is working hard to cope with crime problem in China. On the other hand, because the ruling party is trying to restore public trust, penal populism will continue to prevail, although public opinion in favor of capital punishment is somewhat irrational because it isn't based on enough information in China. Therefore, capital punishment will be used in cases where universal public indignation was caused or image of ruling party gravely damaged.

Meanwhile, apart from international criticism against the scope of capital offenses and execution record, bungled cases reported in recent years involving capital punishment have also prompted a more cautious approach in China. For example, a work report by the SPC in March 2004 revealed that the Court "adjudicated 300 cases for both review of death sentence and trial supervision in the previous year. Among those cases, original judgments of sentences of 182 cases were maintained, 94 changed and 24 conducted retrials by courts at lower levels. In other words, the rate of error correction is rather high in those cases for review of death sentences." (Yin 2011:89) According to China Daily on 31 May 2010, the SPC announced that about 15 percent of death sentence verdicts by lower courts in 2007 were found to have faults, as shown by ZHAO Zuohai case and Nie Zhubin Case. In the former one, a 57-year-old resident of Zhaolou village in Zhecheng County was wrongfully convicted of the murder of a fellow villager in 1999, and declared innocent and released after languishing for about 10 years in jail because his alleged victim returned home in May 2010 (Wang and Li 2010), and in the latter one, the defendant was convicted of rape and murder and soon executed on 27 April 1995 and declared innocent twenty years later in 2016 (Luo and Bai 2016). Miscarriages continuously disclosed have attracted an enormous amount of public comment and, at times, strong disagreement with the court's decision.

The competing forces mentioned above imply that the most realistic and feasible choice for Chinese government might not be, given that no substantial and constructive change

happens to the present political system, to abolish capital punishment in law or in practice, but to retain it while limiting its use to violent crimes that caused death and corruption, also, ones that led to grave consequences such as severe damage on Party's reputation. And this is just what Chinese government is doing.

### **Conclusion**

To realize the Constitutional promise that the state respects and protects human rights, Chinese government has taken effective measures to limit the use of capital punishment and proclaimed that it is doing all this with the final aim to completely abolish it. Meanwhile, confronted with strong public support for capital punishment resulting from increasing crime rate and spreading distrust in governments due to corruption problem, Chinese government has no choice but to utilize capital punishment as a symbol showing angry citizens that it is Being tough on crime problem and is doing something.

Therefore, although procedural actions to promote transparency, ensure fairness and accuracy in capital cases have been taken in recent decades and the Eighth Amendment and Ninth Amendment abolished 22 Capital crimes, China will retain capital punishment under existing political system, while limiting its use to violent crimes potential to cause death consequence and corruption ones with such circumstances as massive social damage and the amount involved being exceptionally large in foreseeable future. This might be a realistic and feasible choice for Chinese government.

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**COMBATING TERRORISM ON THE INTERNET TO  
PROTECT THE RIGHT TO LIFE.  
THE REGULATION (EU) 2021/784 ON ADDRESSING THE  
DISSEMINATION OF TERRORIST CONTENT ONLINE.**

*Terrorism undermines, among other things, the right to life and often exploits the potential of the Internet. For this reason, it is necessary that States adopt effective counter measures, capable of rapidly removing terrorist content online. With that in mind, the European Parliament and the Council approved Regulation 2021/784 on addressing the dissemination of terrorist content online. This article analyses this important regulation, highlighting how it can contribute to improving the effectiveness of the fight against terrorism. However, two critical issues are also discussed in the article: the slowness of the instruments of cooperation between States, and the fact that terrorist content, even if removed, can easily be put back online.*

**Keywords:** regulation (EU 2021/784), removal order of terrorist content, addressing the dissemination of terrorist content online, fundamental rights, right to life.

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## **1. Right to life and terrorist attacks**

The right to life is provided by several sources, including the Universal Declaration of Human Rights (proclaimed by the United Nations General Assembly in Paris on 10 December 1948), and the European Convention on Human Rights (opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953). In particular, Article 3 of the Universal Declaration of Human Rights provided that “Everyone has the right to life”. This right is an absolute right and, therefore, it is a right that can never be interfered with by the State.

Article 2 of the European Convention on Human Rights (ECHR) also seems to consider the right to life as an absolute right. This is because Article 2 provides that “Everyone’s right to life shall be protected by law”. However, such an article encompasses situations in which the right to life could be lawfully violated. First of all, this happens in those cases in which the execution of a sentence of a court allows for the penalty of deprivation of life as provided by law. Moreover, this happens if the deprivation of life results from the use of only that force which is absolutely necessary in the following cases: “in defence of any person from unlawful violence”; “in order to effect a lawful arrest or to prevent the escape of a person lawfully detained”; and “in action lawfully taken for the purpose of quelling a riot or insurrection”.

The situations provided for in Article 2 ECHR in which the right to life could be violated can never include the deprivation of life caused by terrorist attacks. On the contrary, States must fight to the highest degree such deprivation of life, whatever the motivation claimed for terrorist attacks (political, religious, or other). For this reason, for example, Article 6 of the Organization for Security and Co-operation in Europe (OSCE) Charter on preventing and combating terrorism states that all the participating States “Reaffirm their commitment to take the measures needed to protect human rights and fundamental freedoms, especially the right to life, of everyone within their jurisdiction against terrorist acts”.

Frequently, the activities related to terrorism are carried out on the Internet (sometimes on the Dark Net, which is a part of the Internet) or by means of the Internet. These activities include, e.g., recruitment for terrorism, providing and receiving training for terrorism, public provocation to commit a terrorist offence, travelling for the purpose of terrorism, organising or otherwise facilitating travelling for the purpose of terrorism, terrorist financing, terrorist offences, offences related to a terrorist group and offences related to terrorist activities. All these activities could cause deprivation of life. Therefore,

in order to guarantee the right to life, States must also adopt effective means of combating terrorism on the internet.

## **2. Addressing the dissemination of terrorist content online: the removal order**

On the one hand, the European Union (EU) is founded on the respect for human rights and fundamental freedoms. On the other hand, acts of terrorism constitute one of the most serious violations of the enjoyment of human rights and fundamental freedoms. This fact highlights the need for specific legislation regarding terrorism.

Taking into account the evolution of terrorist threats, the European Parliament and the Council approved Regulation 2021/784 on addressing the dissemination of terrorist content online. This regulation, done at Brussels on 29 April 2021, shall apply from 7 June 2022. Unlike a directive, which is a legislative act that sets out a goal that all EU countries must achieve, a Regulation is a binding legislative act (Kostoris, 2018: 25). Regulation 2021/784 aims at fighting the dissemination of terrorist content online and provides for the possibility of issuing orders to remove terrorist content or to disable access to terrorist content. In particular, the competent authority of each Member State may issue the removal order of terrorist content to the hosting service providers, which are the provider of services that perform “the storage of information provided by and at the request of a content provider” (Article 2.1). As a result, in accordance with Whereas 13, a removal order cannot be sent to all those who are not involved in data storage such as providers of ‘mere conduit’ or ‘caching’ services, registries and registrars, providers of domain name systems (DNS), providers of payment and providers of protection services against distributed denial of service (DDoS). Moreover, the recipient of the removal order must be a provider of services which can disseminate to the public information and material provided by a user of the service on request. In other words, it is required that the provider of services makes information available to a potentially unlimited number of persons.

A removal order of terrorist content can be addressed to any hosting service provider offering services in the EU, regardless of whether it is established in the Union or in third countries. This order must specify the terrorist content to be removed or access to it which is to be disabled in all Member States. Moreover, URL and any additional information enabling the identification and exact location of the terrorist content must be specified in the order.

In the event that the competent authority issues a removal order, the hosting service provider must remove terrorist content or disable access to terrorist content in all Member States. This has to be carried out as soon as possible and in any event within one hour of receipt of the removal order. Moreover, if the hosting service provider does not comply with the removal, it is subject to penalties effective, proportionate and dissuasive.

### **3. Removal order and safeguards to ensure the protection of fundamental rights**

The removal order of terrorist content is aimed at contributing to the protection of public security. However, it can lead to a violation of fundamental rights such as the freedom of expression, the right to protection of personal data, the right to respect for private life (Pavlović, 2017: 162), the freedom to conduct a business, etc. It is therefore necessary to prevent the risk that the removal order may be used for distorted or disproportionate purposes, illegitimately limiting the fundamental rights and, in particular, the freedom of expression and information. Regarding this, the fact that the Internet is now one of the preeminent means of communication and expression must be taken into account (Carbonell– Correcher J., 2017: 455).

Basically, it is necessary to identify the “right balance” between fundamental rights and security needs related to the fight against terrorism (Bachmaier, 2018: 56).

For this reason, Regulation (EU) 2021/784 provides that the issuing of the removal order of terrorist content and the measures taken by a hosting service provider as a result of a removal order are balanced by appropriate and robust safeguards to ensure the protection of fundamental rights. Firstly, no more than those measures which are necessary, appropriate and proportionate within a democratic society can be taken. Secondly, both hosting service providers and content providers have the right to an effective remedy. In particular, they have the right to challenge a removal order of terrorist content before the courts of the Member State whose competent authority issued the removal order. Moreover, within 48 hours of receiving either a removal order or relevant information, they have the right to submit a reasoned request to the competent authority. In this case, within 72 hours of receiving the request, such an authority adopts a reasoned decision following its scrutiny of the removal order.

#### 4. Conclusions

The new frontiers of terrorist activities are now emerging online. In terms of criminal law, this could lead to a change in many paradigms of criminal law itself (Pasca, 2016: 168). In terms of criminal procedure, the response to terrorist threats requires a strong and rapid response from every State. In fact, acts of terrorism can lead to serious violations of fundamental rights, including the right to life. For this reason, several States ascribed new powers to intelligence and law enforcement agencies (Signorato, 2018: 449). Finally, it must be taken into account the fact that the Internet has no borders and that terrorism often has a cross-border nature and that investigations often require cooperation between States.

At the EU level, some measures were taken in order to implement the cooperation and interaction between the Member States, as well as with and among the competent Union agencies and bodies, including the European Union Agency for Criminal Justice Cooperation (Eurojust) and the European Union's Law Enforcement Agency (Europol). These measures are very important and contribute to the strengthening of the area of freedom, security and justice (AFSJ), as well as to the effectiveness of the fight against terrorism.

Cooperation between EU Member States strengthens security within both individual States and the EU, but that is not enough because terrorist threats can also come from outside the EU. In these cases, with specific reference to addressing the dissemination of terrorist content online, Regulation (EU) 2021/84 provides for the possibility of imposing penalties on hosting service providers established outside the EU but which offer services in the EU. However, the question remains of what happens if these hosting service providers fail to comply with the penalties. Consequently, in order to obtain an effective fight against terrorism it is necessary and essential to strengthen cooperation between EU Member States and other States, identifying cooperation tools that are faster than letters rogatory.

There is a further fact that needs to be highlighted. The removal order of terrorist content is an important and necessary tool, but not a decisive one. This is because the characteristics of the Internet are such that terrorist content, once removed by a hosting service provider as a result of a removal order, can be reintroduced to the Internet immediately afterwards by another provider.

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## **RIGHT TO LIFE IN THE LIGHT OF REQUEST (CONSENT) OF AN INJURED PARTY TO MURDER**

*Among the basic human rights, in the first place, there is the right to life as a presumption for the enjoyment of all other human rights (freedoms). But this right is being from the oldest time hurtled or threatened by numerous crimes. These are murder crimes. Murder, as unlawful deprivation, taking the life of another person, occurs in several forms or manifestations such as: ordinary, aggravated (qualified) and privileged (easy) murder. Within privileged forms of murder "deprivation of life on request or consent of an injured party" appears as a specific act. There are different situations, which are known in much European criminal legislation, and about which this paper is about, in which acts of deprivation of life are preceded by consent, consent or even the request of the injured person for self-destruction, for deprivation of his/her own life. In these situations we are talking about the conflict of the human right to freely decide on one's goods, and even such goods as it is his/her own life with the human right to protection of inviolability, inviolability of one's life.*

**Keywords:** *life, deprivation, law, crime, murder, request of the injured party, consent of the injured party, liability, punishment*

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## Introduction

One of the most important natural, fundamental, general civilization, and universal human rights, of course, represents the right to life (Račić, Milinković, Paunović, 1998: 51-59). The right to life is the basis and condition of the existence of all other human rights and freedoms. It is one of the most important, not only personal, but also social goods. The right to life is also guaranteed by numerous international legal acts: Article 6 of the International Covenant on Civil and Political Rights with the Optional Protocol and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Rights and freedoms with protocols nos. 4, 6, 7, 11, 12 and 13 (Dimitrijević, Paunović, Đerić, 1997: 222-227).

But despite this universal significance of the inviolability of life (or the right to life) of a Man/woman, yet from the earliest times society has faced various forms or kinds of the manifestations of an attack, injury or threat to another person's life. These are criminal acts of murders, murder crimes, consisting of the unlawful deprivation (violation, deprivation) of another person's life. Criminological findings indicate that greed or other low motives, such as revenge and jealousy, most often appear as motives for blood crimes. However, it is possible that these criminal acts have a different psychological significance for the perpetrators, especially if we are talking about the ritual or sexually colored killings. In that sense, the characteristics of the victims can be quite different, and above all, they can be placed in the appropriate contextual level with the nature of the murder / injury / threat (Pavlović, in press). Although in the past few years, there has been a noticeable increase in the number of murders of women done by their current or former partner or other family member, most countries assume that women and men are equal before the law and that it is unnecessary to single out victims by gender and criminalize the murder of a woman as a special form of murder, and therefore do not prescribe femicide as special criminal offense (Tahirović, Radulović Glamočak, in press). There are several forms of the murder crimes depending on the circumstances under which the criminal offense of murder is committed, also the manner or means of perpetration are used, and the characteristics of the perpetrator or of the victims, motive of the perpetrator, etc. These are: a) usually/ordinary murder (basic offense), b) aggravated or aggravated qualified murder and c) light or privileged murder, the legislature prescribes different punishments for each of the stated.

On the other hand, every man/woman is free of disposing of his/her rights (and freedoms), within the limits of the law, i.e. within other legal regulations. That would mean that every adult (sane) man/woman is completely free to decide about his/her own life as the highest

human and social good. Having that in mind, certain European legislations (including Republic of Serbia legislation) provide milder punishment in case of deprivation of a life of another person on his/her request or with his/her consent (privileged murder).

### **International and constitutional protection of the right to life**

The right to life enters today into a system of human rights and freedoms that have a universal, general civilization protection. At the core of this international human rights protection are standards provided for in the relevant international instruments/documents. Depending on the bearer, the two types of international documents are distinguished. These are: a) universal documents, adopted within the United Nations and b) regional documents, adopted within the Council of Europe (Djordjevic, 2014: 21- 25).

Universal international documents (relevant to the topic of our work) primarily include: a) Universal Declaration of Human Rights and b) International Covenant on Civil and Political Rights<sup>1</sup>. Universal standards represent the content of the most important international acts, which protect the most important human rights (freedoms), and that is, above all, the universal human right - the right to life. Without the right to life, there is no possibility of exercising other human rights and freedoms, that is, it would not even exist. The right to life as a basic human right has been protected since antiquity and creation of the first state creations, but only in the middle of the twentieth century it received international legal protection. With the development of society and the creation of a modern civilization, conditions were created for the equality of all members in one society, and thus also the basis for uniform criminal protection of life for all his members. Human stands in the first place, so the protection of human life becomes the most important personal and social phenomenon.

The Universal Declaration of Human Rights is a cornerstone of international human law rights. It is the first international document of universal significance that establishes the human system of rights and freedoms that should be universally protected from all forms of injury or endangerment in civilized part of humanity. Thus, the provision of Article 1 of the declaration emphasizes that all human beings are born as free and equal in dignity and rights. They are endowed with reason and consciousness, so therefore they should act towards one another in a spirit of brotherhood. To every man/woman (regardless of origin, age, status or other diversity) in the sense of Article 2 of the declaration belong all rights and freedoms which are precisely in this place and are established, therefore, in this

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<sup>1</sup> Official Gazette of the SFRY, International Agreements No. 7/1971 and 4/2001.

Declaration, without any differences in respect of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other circumstances. After the initial principles of equality, freedom and equality among people, Article 3 of the Declaration follows, which reads: “Everyone has the right to life, liberty and security of a person”. In this way, the protection of: a) life, b) freedoms and c) personal security is placed in the first place.

Another international document, of universal importance, for the protection of the right to life and bodily integrity represents the International Covenant on Civil and Political Rights. This pact in the third part guarantees the inviolability of basic human (political and civil) rights. Article 6 of the Covenant, guarantees that every human being has the right to life. This right must be protected by law. Therefore no one can be arbitrarily deprived of life. This means that in the case of arbitrary, therefore, unlawful deprivation of another person's life there is a criminal offense, which must be prescribed by national criminal law. At the same time, the punishment must be prescribed for such a person by competent state authority. In countries where the death penalty has not been abolished (in the criminal justice system of sanction), the death sentence can be pronounced only, exceptionally and only, exclusively and exceptionally for the most difficult crimes, in accordance with the legislation in force, at the time when the crime was committed and which is not in contrary to the provisions of this Covenant, nor to the Convention on the Prevention and Punishment of Crimes of genocide. This most severe (capital) punishment can be applied to the perpetrator of the most serious criminal offense (crimes) only on the basis of the final (final) judgment rendered by the competent court.

In addition to universal international documents for the protection of human rights and freedoms, in Europe, the regional document adopted within the Council of Europe is of particular importance to the continent. It is Convention for the Protection of Human Rights and Fundamental Freedoms <sup>2</sup> as amended by the Protocols 11 and 14 and Protocols 1, 4, 6, 7, 12 and 13. Thus, this European Convention in Article 1 establishes the obligation to respect human rights. Namely, the high contracting parties guarantee to everyone in their own jurisdiction of the rights and freedoms set forth in Part One of this Convention. Part one of the convention has the title: “Rights and Freedoms”. In this part, the right to life is guaranteed in the first place (Article 2). According to this decision, the right to life of every person (persons) is protected by law. Namely, no one can be intentionally deprived of his/her life, except during the execution of a court judgment

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<sup>2</sup> Official Gazette of Serbia and Montenegro No. 9/2003, 5/2005 and 7/2005

convicting him/her of a crime for which this penalty is provided by law. That means that every illegal and intentional taking of the life of another person, according to national law, is a criminal offense for which are prescribed certain types and measures of punishment. At the same time, the Convention states in which cases exclude illegality in deprivation of life of another person (in which case it does not exist as a murder offense).

Based on universal and regional international standards, all national legislation establish a system of protection of human rights and freedoms in accordance with their interests and needs, but also according to tradition, customs, state of morals, etc. The constitution as the highest legal act of the state provides a basic, fundamental guarantee of human rights in any case. The provisions of criminal (and other criminal, primarily misdemeanor) legislation provide reinforced and extreme (as the last and absent guarantee means) legal protection of human rights (and freedoms). That means that the attack, violation or violation of human rights occur as illegal and by the law (and other legal regulation) provided criminal offense. On the other hand, such actions also appear as unconstitutional activities since they violate, hurt or endanger the system of human rights guaranteed in constitutional acts.

Therefore, in the following we will point out the basic constitutional solutions of the human rights protection system in general, and thus the right to life (which has the property of a constitutional principle) in the law of individual states in the region.

The Constitution of Montenegro<sup>3</sup> in the second part entitled: “Human Rights and Freedoms” guarantees the corpus of human rights and freedoms. Already in the provision of Article 6 of the Constitution, it is explicitly prescribed that Montenegro guarantees and protects rights and freedoms. Rights and freedoms are inviolable values. Finally, everyone is obliged to respect the rights and freedoms of others. In terms of Article 17 of the Constitution, rights and freedoms are exercised on the basis of Constitution and ratified international agreements. Everyone is equal before the law, no matter what particularity or personal property. According to Article 19 of the Constitution, everyone has the right to equal protection of their rights and freedoms, and thus their right to life. But the Constitution allows for the restriction of human rights and freedoms (Article 24). Guaranteed human rights and freedoms may be restricted only by law, in and to the extent permitted by the Constitution and to the extent that is necessary to meet the purpose for which the restriction is allowed in an open and free democratic society. No restrictions

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<sup>3</sup> Official Gazette of Montenegro No. 1/2007 and 28/2013

can be introduced for purposes other than those for which they are prescribed. Death punishment is banned in Montenegro (Article 26).

The Constitution of Serbia<sup>4</sup> in Article 1 emphasizes that the Republic of Serbia is a state of the Serbian people and all citizens who live in. It is based on the rule of law and social justice, civil principles of democracy, human and minority rights and freedoms and adherence to European principles and values. The second part of the Constitution is entitled: “Human and Minority Rights and Freedoms”. In accordance with the article 18 of the Constitution, human and minority rights guaranteed by the Constitution are directly applicable. The constitution bail, and as such, the human and minority rights guaranteed by generally accepted rules of international law, ratified international treaties and laws, are directly applicable. Article 24 of the Constitution of Serbia is entitled: “Right to life”. Human life is inviolable. There is no death penalty in the Republic of Serbia. Cloning of human beings is prohibited. Inviolability of the physical and mental integrity is a constitutional principle stated in Article 25 of the Constitution. According to this kind of a solution, physical and mental integrity is inviolable.

The Constitution of Croatia<sup>5</sup> acts in a similar way, and in the third chapter: “Protection of human rights and fundamental rights and freedoms” guarantees a set of human freedoms and rights. Thus, according to Article 14 of the Constitution, everyone in The Republic of Croatia has rights and freedoms, regardless of its race, skin colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics. Everyone is equal before the law. The constitutional solution contained in the provision of Article 21 has special significance. According to this constitutional provision, every human being has the right to life. There is no death penalty in the Republic of Croatia. Beside that, human freedom and personality are inviolable (Article 22). That means that freedom shouldn’t be taken away from anyone either to restrict freedom, except when provided by law, about which in each specific case the court decides.

Finally, the Constitution of Northern Macedonia<sup>6</sup> in the second part: “Fundamental freedoms, human and civilrights”, Article 9, stipulates that the citizens of the Republic of Northern Macedonia are equal in freedoms and rights regardless of gender, race, colour,

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<sup>4</sup> Official Gazette of the Republic of Serbia No. 98/2006

<sup>5</sup> Official Gazette of the Republic of Croatia No. 56/90, 135/97, 8/98, 113/2000, 124/2000, 28/2001, 55/2001, 76/2010, 85/2010 and 5/2014.

<sup>6</sup> Official Gazette of the Republic of Macedonia No. 52/91, 1/92, 4/92, 31/98, 59/2000, 91/2001, 12/2003, 84/2003, 55/2005, 107/2005, 18/2007, 3/2009, 13/2009, 104/2009 and 49/2011

national and social origin, political and religious belief, property and social status. Citizens are equally equal before the Constitution and the law. According to the constitutional principle from Article 10 of the Constitution, it is explicitly guaranteed that human life is invulnerable. No one can be sentenced to death in the Republic of Northern Macedonia without grounds. In addition to the constitutional guarantee of the right to life, Article 11 of the Constitution prescribes that physical and moral human integrity is also inviolable.

### **Law of the Republic of Serbia**

Criminal Code of Serbia <sup>7</sup> in Article 113 of the Criminal Code (in the group of criminal offenses against life and body – chapter thirteenth) provides the basic criminal offense of injury, violation of the life of another person. That is a murder which consists in unlawful deprivation, taking the life of another person (Stojanović, Perić, 2000: 27-31).

Specific privileged murder entitled: “Deprivation of life out of compassion” from Article 117 of the Criminal Code is consisted in depriving an adult of his/her life out of compassion due to his/her serious health condition and at his/her serious and explicit request. This crime consists of four privileged elements. These are (Mrvić Petrović, 2005: 212): a) the victim is an adult, a person over the age of 18, b) action of the execution is motivated by a special kind of moral, socially acceptable motive - that is compassion or charity, c) the injured party is a person who is in a serious health condition, physical condition or mental illness that is permanent and severe, which means that according to modern medical knowledge he/she cannot predict how long the treatment will last and whether it will be successful, and he/she is uncertain of an outcome of treatment and d) the act of deprivation of life is undertaken at a serious and explicit request of the injured person. For the existence of this act, the previous activity of the victim (injured party) is required. Namely, such a request of the injured party should be an expression of his/her firm and unwavering decision due to his/her severe health condition to be deprived of life. This request can be made orally, in writing, that is, in any other way, but in such a way that its content is unambiguously known and proven. It is also necessary that the mentioned request must be made without the use of force, threat, deception or other form of pressure on the will of the injured party, which excludes his/her ability to make

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<sup>7</sup> Official Gazette of the Republic of Serbia No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

decisions. For this privileged act of murder it is prescribed an imprisonment for a term of six months to five years.

### **The law of the states in the region**

Among the countries around the Republic of Serbia, Montenegro, Croatia and Northern Macedonia recognize murder at the request of the injured party (victim) among the privileged, lighter forms of crime murder cases. Thus in a specific way these positive legislations between two rights: a) rights on the inviolability of life and b) the human right to freedom to decide on one's life stands aside of this second right, giving it a more predominant, prevalent significance and effect of application.

Criminal Code of Montenegro 8 <sup>8</sup>in Chapter Fourteen entitled: “Crimes against life and body”, in addition to murder (as a basic criminal offense of deprivation of life of another person) in Article 143 of the Criminal Code and aggravated murder in Article 144 of the Criminal Code, among the privileged forms of murder provides criminal act: “Deprivation of life out of compassion”. It is provided for in the provision of Article 147 of the CC. Although from the legal name of this crime is not visible, its essence makes it “serious and explicit claim” of the injured party for his/her deprivation of life. Namely, the act of depriving a passive subject of life is undertaken at his/her serious and expressed request. This request may be communicated orally, in writing or in another way (symbols, gestures, facial expressions, conclusive actions), but so that it is possible to find out and recognized, to understand, but also to prove its content (Lazarević, Vucković, Vucković, 2004: 518-521).

In addition, this is a minor crime of murder, for which a prison sentence of six months to five years is prescribed, and is made up of the following elements of being. These are: a) the passive subject is only an adult person - therefore, a person aged 18 at the time of deprivation of life, b) the act of execution is undertaken from a special noble, honorable, socially acceptable type of the perpetrator's initiative – “compassion” and c) the passive subject is in a difficult (physical or mental) state of health, i.e., a condition which significantly, to a greater extent, endangers his/her life.

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<sup>8</sup> Official Gazette of Montenegro No. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017, 49/2018 and 3/2020.



Criminal Code of the Republic of Croatia 9<sup>9</sup> in Chapter Ten, entitled: “Crimes against life and body” among the crimes that injure, disrupt the life of another person distinguishes: a) a murder - Article 110 of the CC, b) an aggravated murder - Article 111 of the CC and c) a light killings - Article 112 of the CC, Pavišić, Grozdanić, Veić, 2007: 212-213). Among the privileged murders in Article 112 of the Criminal Code, in paragraph 3 it is provided: “Murder at the request of the injured party”, for which a prison sentence of six months to five years is prescribed. Among its most significant characteristics is deprivation of life of another person at his/her explicit and serious request (Turković et al., 2013: 289-291). Namely, here another person is taken his/her life at his/her explicit and serious request. That request can be given in any way, but so that its content can be learned and understood by other persons. The Law does not require the existence of some characteristics of the injured party at the time of the stating of this claim. The assumption is that we are talking about an adult and sane person who can give a legally relevant statement of intent in a way of a request. That request must meet two cumulative conditions. These are: a) it must be explicit (clear, unambiguous) and b) must be serious.

In addition, this privileged murder consists of two other elements. These are: a) a request for deprivation of one's own life should be highlighted by the injured person who is in a serious health condition; there is a severe physical or mental health condition of the injured party, and it is a factual issue that the court determines on the basis of the findings and opinion of a medical expert and b) the murder is committed from special type of perpetrator's instigation. It is an impulse of “compassion.” So, in this case, the perpetrator has a special relationship of compassion with the difficult health condition of the injured party, as a result of which it fulfills his/her serious explicit request to deprive him/her of his/her life.

Finally, the Criminal Code of Northern Macedonia 10<sup>10</sup> in Chapter Fourteen entitled: "Crimes against life and body " also prescribes criminal liability for several forms and manifestations of the crime of murder. Among these criminal offenses, Article 124 of the Criminal Code provides criminal offenses act: “Murder for noble motives”. It belongs to

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<sup>9</sup> Official Gazette of the Republic of Croatia No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019 and 84/2021.

<sup>10</sup> Official Gazette of the Republic of Macedonia No. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006,

73/2006, 87/2007, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 226/2015, 97/2017, 170/2017 and 248/2018.

privileged murders, as opposed to murders and aggravated murder (Article 123 of the Criminal Code). The crime is punishable by six months in prison up to five years.

This crime consists in depriving another person of his/her life, which was committed "from the noble motives". So, here the privileged circumstance is the subjective element on the side of the perpetrator in mind motives - noble motives, where the concept and content of this type of socially acceptable, positive motives are determined as a factual issue by the court in each specific case. This type of motive must exist on the side of the perpetrator at the time the action is taken, but it does not have to be realized in each specific case. And that motive of the perpetrator represents the only difference between this type of crime and the crime of ordinary murder.

### **The law of Western European countries**

Western European criminal legislation in the system of criminal offenses also recognizes various forms and types of manifestations of criminal acts of murder, as the most serious forms of injury, violation, deprivation of the life of another person. At the same time, murder is rarely prescribed among these crimes (deprivation of life) at the request or with the consent of the injured party. Among such legislations the rights of Germany, Italy and Switzerland stand out.

Italian Criminal Code<sup>11</sup> in Chapter Twelve, in the group of crimes against the person: "Delitti contro la persona", in the chapter entitled: "Crimes against life and bodily integrity" prescribes basic, heavier and lighter forms of the crime of murder (Article 575 of the Criminal Code) which is defined as causing the death of another person (Rammaci, 2007: 331-334).

Murder by consent (L 'omicidio del consenziente) is a privileged form of murder under Article 579. CC (Romano, 2009: 376-382). The act consists in causing the death of another person in addition to his/her consent. Thus, the existence of a serious and express consent<sup>12</sup>, which is freely given as an expression of firm, permanent and unwavering decisions on the part of an adult and sane person as a passive subject and which is given in the time before the execution of the act of execution give this part a privileged character

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<sup>11</sup> Legge 10. October 1930. No. 1398. Testo coordinate ed aggiornate del Regio Decreto Legge 20.3.2016. No. 20 e March 8, 2017 No.24.

<sup>12</sup> (2008). Compendio di Diritto penale, Parte generale e speciale, Napoli: Simone, 401-403.

and a lower degree of social danger for which the law prescribes a milder punishment - imprisonment in lasting from six to twelve years (Caraccioli, 2005: 289-292).

However, the Code prescribes that this criminal offense does not exist (paragraph 2) if it is an act of causation death undertaken against (Aleo, Pica, 2012: 278-283): a) a minor who at the time of execution of the act has not reached the age of eighteen, b) a mentally retarded person, a person who is in time the perpetrator finds himself in a state of reduced sanity or a person who is under the influence of alcohol or narcotics, c) a person who is in difficult life circumstances at the time of the commission of the offense. When there are “difficult” living conditions (material, social, housing, health, etc.) they represents the factual issue that the trial chamber decides in each specific case) and d) the person who gave it “forced” consent to cause his death. This is the case when the injured party did not give his consent on the basis of freely expressed will, but he/she was forced by the use of: force, threats or fraud (Mantovani, 2011: 266-271).

In the Criminal Code of Germany <sup>13</sup>in Chapter Sixteen entitled: “Crimes against life” there are three forms of murder envisaged. These are: a) aggravated murder (Mord) – article 211 CC, b) murder (Totschlag) - Article 212 CC and c) minor cases of murder (Minder schwerer Falls des Totschlags) where deprivation of life on demand (Totung auf Verlangen) is singled out - Article 216 CC (Arzt, Weber, 2000: 117-119).

Privileged murder called “Deprivation of life on demand” consists of deprivation of life of another person (zur Tötung bestimmt worden) at the clearly expressed and serious request (request) of the injured party. According to the explicit legal provision, the attempt of this act is also punishable (Lackner, Kuehl, 1997: 388-395). For this crime, for which a prison sentence of six months to five years is prescribed, it is necessary to cumulatively fulfill the following elements: a) the act of depriving of another’s life undertaken by any activity, in any way or by any means and b) clearly pronounced and serious request of the injured party for deprivation of his/her life. So, the perpetrator takes the act of deprivation a life at the serious and explicit request of the passive subject.

At the same time, the Code does not explicitly set age as a condition for the existence of this criminal offense, the adult age of the passive subject whose decision and even request would be legally relevant in this sense. It is important that such a request is an expression of his/her firm and unwavering decision to be deprived of life regardless of the reasons for such a request (eg serious health condition, etc.). That request can be given orally, in

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<sup>13</sup> (2012). Penalty book - StGB. Munich: Deutscher Taschenbuch Verlag.

writing, in another way, but in such a way that its content is known and proven, whereby this request must be made explicitly without the use of force, threat, deception or other kind of pressure at will which excludes the decision-making ability of such a person.

Finally, the Criminal Code of Switzerland<sup>14</sup> in the first chapter of the Special Part entitled: “Criminal Offenses against life and health” also provides among the offenses of deprivation of life of another person, privileged killings. Within these forms of murder, criminal significance is of particular importance of an offense under Article 114 of the Criminal Code: “Murder at the request of the injured party” - Totung auf Verlangen Totung auf Verlangen (Serebrenikova, Kuznetsova, 2000: 87-88). For this act, which is specific to Swiss law, is prescribed a prison sentence of up to three years or a fine.

This crime is committed by a person who is of respectable motives (motives that are worthy of attention), that is out of pity he/she deprives another man of his/her life at his/her persistent and serious request. Privileged murder in this form is characterized by the following elements (Niggli, Wiprachtiger, 2007: 488-494): a) the perpetrator of the action of deprivation of life undertakes it from respectable - socially acceptable motives - motives which are worthy of attention or out of a motive of pity (mercy). These are morally acceptable, permissible motives, motives that do not cause disgust, disgust or anxiety of citizens and b) the perpetrator undertakes the act of execution at the persistent and serious request of the injured party. This means that the injured (later killed) person is accountable, therefore, has a preserved and healthy mental apparatus, and is fully conscious of his/her request and its contents and that he/she just wants it, wants it or agrees to it in time or just before taking action to deprive him/her of his/her life. The request of the injured party must be (Beat Ackerman Wiprahtiger, 2007: 613.621): a) persistent - therefore, lasting and b) serious – yes it is an expression of a firm and unwavering decision of the injured party to be deprived of life. That is, the request must be clearly and unambiguously stated to the perpetrator, before committing the murder, orally, in writing or in any other way, but so that later its content can be proved, determined (Himmelreich, Krumm, Staub, 2013: 515-522).

### **The law of Eastern European states**

And some, truly rare legislation of Eastern European countries in the system of criminal law protection of life (or the right to life) recognize among the crimes of murder, a privileged, easy act under different names (but the same content) such as: a) Poland -

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<sup>14</sup> (2013). StGB, Schweizerisches Strafgesetzbuch, Aktuell geltende Fassung 2013, 7. Auflage, Zurich, 77-78.

murder out of a pity, Moldova - deprivation of life at the request of the injured party or Romania - an unnamed crime of this kind.

The Criminal Code of the Republic of Moldova, within the framework of criminal offenses against life and body, in addition to the ordinary and aggravated forms of murder, in Article 148 of the Criminal Code states that there is a privileged form of this criminal offense. It is: "Deprivation of life at the request of the injured party". This crime is punishable by long imprisonment up to six years.

This privileged murder consists of the following elements: a) the act of execution consists in deprivation of life of another person. It can be undertaken by various activities of doing or not doing, in any manner or by any means, b) the action of execution is undertaken for special reasons. It can be the request or wish of an adult as an injured party (victim). If it is a minor (a person who is at the time of the commission of the criminal offense under the age of eighteen) a request is required, ie the wish of the relatives of this person and c) the passive subject is in a particularly difficult state of health. Namely, it is about a person who has suffered from an incurable disease or who suffers physical suffering of an unbearable nature. This difficult health condition of the passive subject must be "in relation" to his/her wanting to be deprived of life.

Criminal Code of Poland<sup>15</sup> in Chapter Nineteen entitled: "Crimes against life and Health" envisages several forms and types of manifestation of the crime of murder (Lukashov, Kuznetsova, 2000: 56-57). Among the privileged forms of unlawful deprivation of life are: "Murder out of a pity" from Article 150 of the Criminal Code (Bojarski, 2007: 414), for which a prison sentence is prescribed from three months to five years. However, in exceptional cases (paragraph 2) the court may release the perpetrator of the criminal offense from the prescribed punishment or to alleviate it extraordinarily. When there are exceptional circumstances, there is a factual issue to be decided upon by the court in each specific case (Lammich, 1981: 277-279).

This privileged murder is characterized by two elements. These are (Dlugosz, 2007: 278-280): a) motivation of the perpetrator - a pity. It is a special kind of socially acceptable, moral, permissible motive that characterizes human behavior and b) the request of the victim. This is about taking the life of another person at his/her express request. So it has to be a person who is in a serious health condition, where there is uncertain healing or healing (although the Code does not explicitly state this), where the victim suffers

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<sup>15</sup> Penal Code, June 6, 1997, Dz. In 1997, p. No. 88. pos 553., No. 240. pos. 1431 of 2012.

immeasurable pain, torment, suffering, so in this way he/she wants to end his/her life and further torture, so sends a request for deprivation of life to another person - to the perpetrator (Banasik, 2013: 422-425).

Finally, the Romanian Criminal Code is also in the group of crimes against life and body, in addition to ordinary and aggravated murder, recognizes several different forms of privileged murder. One of them (since these are unnamed crimes) by their elements and characteristics indicates that this is a murder on demand. For this crime, which is provided in the article 190 of the Criminal Code, a prison sentence of one to five years is prescribed (Pasca, 2014: 189-191). This crime consists of the following elements of being (Udroiu, 2014: 117.121): a) the act of execution is determined as deprivation of life of another person, b) the act of execution is undertaken in an explicit and serious manner by the request of the injured party, c) the injured person is in a conscious state and d) the injured person suffers incurable illness or infirmity that must be documented by a physician. This disease and impotence must cause permanent and unbearable sufferings. What does “permanent and unbearable” suffering of the injured party mean? This is a factual issue that the court decides upon in each case on the grounds of the findings and expert opinions.

### **Conclusion**

From the earliest times, until today, all criminal legislation, among the criminal acts by which human life as the most important human and social values is hurtled and ruined, recognize various murder offenses. The significance of these crimes was especially evident regarding that through universal or regional international documents, adopted in the second half of the 20th century, guarantee the “inviolability of the protection of life” or the right to life as one of the most important human rights. This significance is also indicated by the provisions of the constitutions of numerous states that are among them and specially protect social values of the highest level including human life.

Not with standing such international or national human rights regulations, ie their comprehensive protection, there are still cases of unlawful (illegal) deprivation of life (causing death) of another person as a criminal offense in the system of general, classical, conventional crime. There are several forms of murder. These are: a) an ordinary murder, b) an aggravated or qualified murder and c) a light or privileged murder for which a mild sentence is prescribed - imprisonment for up to five years.

Modern criminal law distinguishes between several forms of privileged killings according to various criteria such as: a) the form of guilt of the perpetrator, b) the mental state of the perpetrator, c) the previous request of the injured party, d) the previous provocation of the injured party or e) the character of the injured party. A special form of a privileged murder is a murder at the request or with the consent of the injured party. In these cases, the act of depriving another person of his/her life is preceded by his previous action – a request or a consent to “self-destruction”. Today, criminal legislations are rare in Europe, that explicitly provide criminal liability and punishment for depriving another persons of life at the request or consent of the injured party as privileged circumstances on the part of the injured party (victim - killed).

For this privileged crime of murder, some legislations use different names depending on the type of privileged circumstance that is considered predominant, important or prevalent. Thus, this crime can occur under the following names. These are: a) a murder on demand of an injured party (Germany, Switzerland, Croatia, Moldova, and Romania) or b) a murder by consent of an injured party (Italy). Some legislatures call this crime exactly by the type of motive (motives) that guide the perpetrator to deprive another person of his/her life. So this crime is called: a) a murder out of a pity (Poland), b) a murder out of compassion (Serbia, Montenegro) and c) a murder from noble motives (Northern Macedonia). In addition, all analyzed legislation for this criminal offense provide imprisonment for up to five years, except in Switzerland (where for this offense is prescribed a fine or imprisonment for up to three years) or Italy (which for this offense prescribes imprisonment for up to twelve years). Special minimum prescribed penalties for this privileged murder is most often sentenced to six months in prison, except in Poland (where the minimum is three months) or Romania (with a prescribed minimum of one year).

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Judit Szabó\*

## **NE BIS IN IDEM – THE PRINCIPLE BETWEEN THE BRANCHES OF LAW**

*Over the development of the European Communities (European Union) – among other issues – the freedom of the people’s mobility posed a great challenge, inter alia, for the matter of transnational crimes, which made the ne bis in idem principle – the double jeopardy clause – essential and relevant. In general, the ne bis in idem principle prohibits duplication of proceedings and penalties of a criminal nature for the same acts and against the same person, either within the same Member State or in several Member States if the person has exercised their right to freedom of movement. The purpose of the paper is to discuss what changes are expected in the Hungarian jurisdiction and what aspects are particularly important for practitioners in the right use of the Engel-criteria and the CJEU’s provisions.*

**Keywords:** *Ne bis in idem, Criminal Law, Administrative Law, European Law, general principles*

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## 1. Introduction

The principle <sup>1</sup> of *ne bis in idem* defines the prohibition of double assessment of the same fact and, as such, is one of the cornerstones of modern criminal law (see in particular Nagy, 2001:, 5–7.; Farkas, 2018: 74–97.; Van Kempen–Bemelmans, 2018: 247-267), including both substantive and procedural provisions. The principle, the origin of which can be traced back to Roman law – *nemo debet bis vexari pro una et eadem causa*: no one should suffer criminal prosecution twice for the same act – is an integral part of the applicable legal system of all sovereign states. (M. Nyitrai, 2009: 143)

The principle of *ne bis in idem* therefore constitutes a limitation of the criminal power of the State. In other words, this prohibition applies in the strict sense to criminal proceedings and criminal penalties. (Kondorosi–Ligeti (ed), 2008: 385).

The principle of *ne bis in idem* in the European Union was initially reflected in the case law of the European Court of Justice (hereinafter referred to as CJEU), its first appearance in case no 7/72. The judgment of 14 December 1972 in *Boehringer Mannheim GmbH v Commission of the European Communities* at that time did not yet have a dimension in criminal law, but rather in competition law. (Karsai, 2015: 116–117).

I agree with Krisztina Karsai: “The definition of *ne bis in idem* within EU law is in close connection with issues on parallel sanctions regarding infringement of other community (especially competition) law” (Karsai, 2017: 419.)

In this scope, the principle of *ne bis in idem* prohibits the double proceeding of the Commission for the same infringement – that principle precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalized or declared not liable by an earlier decision that can no longer be challenged.<sup>2</sup>

The CJEU also highlighted that the temporal applicability of the *ne bis in idem* principle in the context of EU law depends not on the date on which the facts being prosecuted

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<sup>1</sup> For more information on the distinction between a principle and a rule of law, see Juliette LELIEUR: ‘*Transnationalising’ ne bis in idem: How to rule of ne bis in idem reveals the principle of personal legal certainty.* Utrecht Law Review Volume 9, Issue 4 (September) 2013. 202. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2334882](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334882) accessed on 10/11/20

<sup>2</sup> C-17/10. (14 February 2012) *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže* [ECLI:EU:C:2012:72] paragraph 94

were committed, but, in a situation such as that at issue in the main proceedings, falling under competition law, on that on which the proceeding for the imposition of a penalty was opened<sup>3</sup>.

And over decades after the judgement of *Boehringer Mannheim*, the Court has held, in competition law cases, as regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected<sup>4</sup> – so CJEU analysis the same criteria as in criminal law cases. (see more: VAN BOCKEL, 2009: 76-126.)

## 2. The relevant case law of CJEU and ECtHR

For a proper analysis of the *ne bis in idem* principle, it is essential to describe the significant and parallel case law of the supranational judicial forums determining European criminal law. Within this framework of this paper, for reasons of space, I do not present all of the relevant decisions in a table (SZABÓ, 2021, under publication).

As it seems according to the chronological order analysis (see more: SZABÓ, 2021, under publication). the case law of the CJEU is primarily based on the ECtHR's conception of fundamental rights, giving reactions on the decisions of Strasbourg's decisions. (see more: NEAGU 2012: 957; Luchtman: 2011: 11; PĂTRĂUȘ, 2018: 34) Returning to the principle of *ne bis in idem*, it was initially reflected in the case law of the CJEU, first published in Case 7/72. *Boehringer Mannheim GmbH v Commission of the European Communities* of 14 December 1972, but at that time it was not yet a criminal rather in the field of competition law.

### 2.1. *Boehringer Mannheim GmbH v Commission*

The subject was a violation of U.S. competition law, so the concerned was fined \$ 80,000 on 3 July 1969, for participation in an international cartel, which was paid on 11 July 1969, by the company concerned. However, the applicant was also fined 180,000 units of account (EUA)<sup>5</sup> by the Commission of the European Communities on 16 July 1969 for participating in the same international cartel. By letter of 3 September 1969, the applicant

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<sup>3</sup> C-17/10. paragraph 95

<sup>4</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P (7 January 2004) *Aalborg Portland A/S and others v. Commission of the European Communities* [ECLI:EU:C:2004:6] paragraph 338.

<sup>5</sup> See judgement no 45/69. of CJEU

requested the Commission to comprise in the amount of the fine imposed the amount of the fine already paid in the United States, which was rejected by the Commission. (see more: ROSANO, 2017: 44–45.; CONWAY, 2003: 230–231.)

In the proceedings before the Court of Justice of the European Union, both parties analyzed the principle of *ne bis in idem*.

Due to scope limits of this paper it would not be possible to set out in detail the full judgment and individual arguments, but in summary, the applicant submits that the contested decision infringes the prohibition on cumulation of fines, one of the unwritten principles of Community law. On the basis of a comparative examination of the laws of the Member States, it maintains that the prohibition of double jeopardy also applies to third countries outside the Community in various forms but in the legal systems of all the Member States. He pointed out that the Court had previously required the Community institutions to take into account all 'previous decisions of a criminal nature', which is a 'general requirement of natural law', when setting fines. The general principle laid down here cannot therefore be limited to the legal relationship between Community law and the Member States.

By contrast, according to the defendant, that principle is applicable to a specific conflict of competences between the Member States and the Community relating to the common market.

In its judgment the Court, accepting the Commission's (defendant's) reasoning, found, somewhat succinctly and merely referring to the reasoning, that the applicant's action should be dismissed.

Of the cases listed in the referred table, due to the size limitations of the dissertation, in addition to those mentioned in Chapter 3, I undertake to describe in detail only two judgments below, both outstanding for the application of the *ne bis in idem* principle, both of which are regular references in terms of our narrower subject.

## **2.2. *Garlsson Real Estate SA*<sup>6</sup>**

By decision of 9 September 2007, the Italian Companies and Stock Exchange Commission (hereinafter referred to as 'Consob') imposed a fine of EUR 10.2 million on Mr. Ricucci, Magiste International and Garlsson Real Estate, for which they were jointly and severally liable. According to that decision, during the period at issue in the main proceedings, Mr. Ricucci acted in a manipulative manner in order to draw the public's attention to the securities of RCS MediaGroup SpA and thus to maintain their subscription in order to achieve his personal objectives. Consob found that, as a result of that conduct, the price of those securities was abnormal and that, consequently, that conduct constituted market manipulation. The fine at issue in the main proceedings was challenged before the Corte d'appello di Roma (Court of Appeal, Rome) by Mr. Ricucci and by Magiste International and Garlsson Real Estate. By judgment of 2 January 2009, that court upheld the action in part and reduced the amount of that fine to EUR 5 million. All the parties to the main proceedings appealed against that judgement to the Corte suprema di cassazione (Supreme Court of Cassation). Mr. Ricucci was also subjected to criminal proceedings for the conduct described above, which ended on 10 December 2008 with a criminal conviction. The Tribunale di Roma imposed a final sentence of 4 years 6 months on him. This sentence was later reduced to three years and then released on pardon.

The national court hearing the application for review had doubts as to whether the administrative procedure for imposing the fine at issue in the main proceedings was compatible with Article 50 of the Charter, read in the light of Article 4 of the Seventh Additional Protocol to the ECHR.

In answering this question, the CJEU assumed that three criteria were relevant for assessing the criminal nature of each administrative procedure and sanction. The first is the legal classification of the infringement under national law, the second is the nature of the infringement and the third is the gravity of the sanction imposed on the person concerned. The CJEU emphasized that it was for the national court to rule on this issue, but a well-founded conclusion could be drawn in the present case as to whether these conditions were met.

The CJEU then concluded that within the meaning of Article 50 of the Charter the Italian legislation allows the imposition of punitive fine against a person who has already been

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<sup>6</sup> C-537/16. (20 March 2018) *Garlsson Real Estate SA*, in liquidation, Stefano Ricucci, Magiste International SA v. Commissione Nazionale per le Società e la Borsa (Consob) [ECLI:EU:C:2018:193]

convicted of a criminal offense. Such an accumulation of this kind of procedures and sanctions constitutes a restriction on the right guaranteed by Article 50 of the Charter. In this judgment, the CJEU also examined the necessity of this restriction and did not consider it justified in the present case, given that Mr. Ricucci's criminal liability for the same act had already been established and that the sanction imposed in the criminal proceedings was sufficiently appropriate to achieve protective aims set out in EU law.

According to the CJEU judgment, Article 50 of the Charter of Fundamental Rights of the European Union must therefore be interpreted as precluding national legislation which allows proceedings aiming to impose punitive fines against a person whose unlawful conduct constitutes market manipulation, and whose such action was finally adjudged as criminal offense , provided that such conviction, in view of the damage caused to society by the offense committed, is capable of effective, proportionate and dissuasive retaliation.

### **2.3. *Di Puma & Zecca* <sup>7</sup>**

On 14 and 17 October 2008, E. Di Puma and A. Zecca purchased 2,375 shares in Permasteelisa SpA using inside information concerning plans to acquire control of that company, which, according to A. Zecca, held at Deloitte Financial Advisory Services SpA. and whose insider nature Mr Di Puma should have known. By decision of 7 November 2012, Consob Italy imposed fines on Mr Di Puma and Mr Zecca for insider dealing.

Mr Di Puma and Mr Zecca challenged that decision before the Corte d'appello di Milano (Court of Appeal, Milan). By judgments of 4 April and 23 August 2013, that court dismissed Mr Di Puma's appeal and upheld Mr Zecca's application. Mr Di Puma brought an action against that judgment, while Consob appealed against that judgment to the Corte suprema di cassazione (Supreme Court of Cassation).

Mr Di Puma argued that he had been prosecuted for the same act and was acquitted by the criminal court for failing to prove the facts of the offense. In the proceedings brought on the basis of Consob 's application for review, the other party, Mr Zecca, also relied on the acquittal. On this basis, the court hearing the application for review referred the matter to the CJEU.

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<sup>7</sup> Joined cases C-596/16. and C-597/16. (20 March 2018) *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca* [ECLI:EU:C:2018:192]



In that context, it sought an answer to the compatibility with EU law, including Article 50 of the Charter, of the imposition of a fine following a final conviction for the absence of a criminal offense having the effect of *res iudicata*, if such a procedure appeared necessary in an effective, proportionate and dissuasive manner. to comply with the obligation to impose dissuasive sanctions.

In its judgment, the CJEU emphasized that the protection afforded by the principle of *ne bis in idem* under Article 50 of the Charter extends not only to the conviction of the person concerned but also to the resignation of the person concerned. In view of this, it found that the conduct of proceedings for the imposition of a criminal fine on the same facts constituted a restriction of a fundamental right guaranteed by Article 50 of the Charter.

It added, however, that such a restriction on the *ne bis in idem* principle could be justified under Article 52 (1) of the Charter and could even be based on the objective of protecting the integrity of EU financial markets and public confidence in financial instruments.

Overall, however, the CJEU concluded that the conduct of criminal proceedings in the present case would clearly go beyond what is necessary to achieve that objective of limitation, as there is a final acquittal establishing that the facts of the offense punishable by EU law have not been established.

Pursuant to the CJEU decision, Directive 2003/6 / EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) does not preclude national rules which do not provide for criminal proceedings. following a final acquittal finding that the commission of the acts which gave rise to the criminal proceedings constituted an infringement of the insider dealing rules has not been proved.

### **3. Assessment of the criminal nature of administrative measures**

One of the most important case-law decisions in this area is the judgment in *Engel and Others v. The Netherlands*, delivered on 8 June 1976<sup>8</sup>, in which the ECtHR established a system of conditions for assessing the criminal nature of administrative measures, known as the *Engel* criteria.

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<sup>8</sup> No. 5100/71., 5101/71. 5102/71.; 5354/72.; 5370/72.

According to the Engel criteria, 3 conditions are relevant in assessing the criminal nature of sanctions: 1. the classification of the infringement under domestic law, 2. the nature of the infringement (retaliation, prevention, scope for all or only a certain group), 3 criterion is the question of the weight and significance of the penalty (FIGULA-ELEK, 2017: part I, limited access).

### **3.1. Åkerberg Fransson<sup>9</sup>**

In the context of Directive 2006/112/EC on the value added tax system (VAT Directive), the CJEU first examined in Fransson case, nr. C-617/10., the punitive nature of the tax fine imposed for fiscal deficit as a possible infringement of *ne bis in idem* principle, i.e. the applicability of administrative sanction in addition to criminal sanction.

In the case, Mr. Åkerberg Fransson was ordered to appear before the Haparanda District Court on 9 June 2009, inter alia, in order to be prosecuted for serious tax fraud. He was accused of providing incorrect information in his tax returns for the 2004 and 2005 tax years, with the risk that the State Treasury would lose personal income tax and value added tax revenues. Mr. Åkerberg Fransson was also prosecuted for failing to declare his employer's contributions for the October 2004 and October 2005 reporting periods, with the risk that social security organizations would also lose additional income. According to the indictment, the offenses had to be considered serious, partly because of the size of the amounts involved and partly because of the fact that these offenses were part of a regular large-scale crime. In view of all this, the person subject to the proceedings was subject to significant tax fines for both the years concerned, both in terms of business income, VAT and employer's contributions. He had to pay these fines together with interest. These fines were not appealed to the administrative court and the time-limit for doing so expired on 31 December 2010 for the 2004 tax year and on 31 December 2011 for the 2005 tax year. The reason for the decision imposing the tax fine was the same misrepresentation of facts as those which the public prosecutor's office had raised in the main criminal proceedings. According to Section 2 of the Swedish Tax Offenses Act, a person who intentionally, otherwise than verbally, misrepresents information to the authority or fails to comply with his or her obligation to file a declaration, voucher or other document, thereby reducing or threatening a reduction in tax revenue that he or another unauthorized receives a tax credit or tax refund shall be punishable by up to two years' imprisonment for tax evasion. The question before the trial court was whether the charge against the accused should be dismissed on the ground that he had already been

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<sup>9</sup> C-617/10 (26 February 2013) Åklagaren v. Hans Åkerberg Fransson [ECLI:EU:C:2013:105]

sanctioned in another proceeding on the basis of the same facts, contrary to Article 4 of Additional Protocol No. 7 to the ECHR and Article 50 of the Charter. In those circumstances, the reference for a preliminary ruling was stayed. According to the CJEU judgment, it cannot be ruled out that a Member State may apply a penalty of both criminal and administrative law to the same facts for failure to pay VAT, provided that the administrative penalty is not of a criminal law nature. That is to say, if it is possible to determine the criminal nature of an administrative sanction, the sanction which is otherwise regulated by administrative law but has the characteristics of criminal law cannot be applied together with the sanction that can be imposed in criminal proceedings.

### 3.2. *Menci*<sup>10</sup>

Another milestone in the interpretation of the *ne bis in idem* principle was the judgment of the ECtHR in *A and B v. Norway*, delivered on 15 November 2016. According to the judgement formally administrative sanctions which are of a criminal nature according to the Engel criteria, i.e. cumulation of sanctioning criminal proceedings and administrative proceedings do not infringe the principle of *ne bis in idem*, , provided that there is a sufficiently close material and legal link between them.

The principles laid in *A and B v. Norway* were examined by CJEU in case *Menci*, where it had to decide whether to apply a more restrictive interpretation of the previous ECtHR judgment to the *ne bis in idem* principle or to maintain the higher level of protection set out in *Fransson* judgement. (see more: FIGULA-ELEK, 2017: part II-IV)

In the main proceedings, the Italian tax authorities imposed an administrative penalty on Luca Menci for failing to pay VAT for the 2011 tax year. The penalty was a fine of 30% of the tax debt, totaling EUR 84,748. Subsequently, criminal proceedings were instituted against Luca Menci before the Tribunale del Bergamo for the same facts. Under Italian administrative tax law, a person who fails to pay tax (eg VAT) is liable to an administrative penalty of up to 30% of the unpaid amount. An administrative sanction can only be enforced if the criminal proceeding ends with a termination decision or a final acquittal. At the same time, in the case of non-payment of value added tax, the Italian criminal law establishes criminal liability for an amount exceeding EUR 50,000, classifying it as a criminal offense punishable by imprisonment for a term of 6 months to 2 years. Under Italian law, administrative proceedings may not be suspended for the duration of ongoing criminal proceedings involving the same facts. In such a procedural

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<sup>10</sup> C-524/15 (20 March 2018) *Luca Menci v. Procura della Repubblica* [ECLI:EU:C:2018:197]

context and in the light of the facts, the Bergamo Criminal Court has initiated a reference for a preliminary ruling seeking a ruling that Article 50 of the Charter of Fundamental Rights must be interpreted as precluding national legislation which provides for the payment of VAT within the statutory period. criminal proceedings may be instituted against a person who has already been the subject of an administrative penalty for the same facts.

In its judgment, the CJEU concluded that Article 50 of the Charter of Fundamental Rights<sup>11</sup> does not preclude national legislation which provides for criminal proceedings for failure to pay VAT within the statutory time limit against a person who is already legally entitled to pay the same facts under Article 50 has been the subject of an administrative penalty of a criminal nature within the meaning of Article However, this presupposes that that legislation pursues, on the one hand, an objective of general interest capable of justifying the cumulation of procedures and penalties, such as the fight against VAT infringements in a given case, and, on the other hand, rules to ensure that third, the additional burden on the person concerned must be limited to what is strictly necessary and, thirdly, the total amount of the penalties imposed must be limited to what is strictly necessary in relation to the gravity of the infringement committed. The CJEU has entrusted the national court with the task of examining whether the additional burden imposed on the party as a result of the accumulation of proceedings and sanctions is not excessive in relation to the gravity of the infringement committed.

### 3.3. *Bonda*<sup>12</sup>

However, in addition to the above, it was necessary to define the precise interpretation of the term “criminal offense” in the context of Article 50 of the Charter of Fundamental Rights, which has already been cited by the CJEU in Case C-489/10 (see more: BANA, 2017: 39.) given that the Court has not yet ruled in detail on the conditions under which criminal or similar proceedings involving the application of the *ne bis in idem* principle may be considered.

In the Bonda case, the producer applied for agricultural aid for an area in excess of the area actually cultivated, an act for which the Polish criminal court convicted him of a

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<sup>11</sup> “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”

<sup>12</sup> C-489/10 (5 June 2012) Łukasz Marcin Bonda [ECLI:EU:C:2012:319]

fraud. Notwithstanding this procedure, the “aid authority” applied the legal penalty provided for in the underlying Regulation (EC) No 1973/2004.

One of the issues in the preliminary ruling procedure (as reworded) in the judicial review of this aid authority's decision was whether imposing penalties under Article 138 of the applicable EC Regulation should be considered as criminal proceedings within the meaning of the *ne bis in idem* principle of EU law enshrined in Article 50 of the Charter of Fundamental Rights. That is to say, deducting from the farmer, for the year in which he provided false information, an amount corresponding to the difference in the area on which his aid application is based, from the amount of aid due for the following three years. The second question was when it was possible to speak of a criminal or similar procedure under the prohibition of double jeopardy. In its judgment, the CJEU also relied on the Engel criteria already referred to and gave a negative answer in the specific case as to the identity of the two sanctions. (see more: LENGYEL, 2019: 62–64.; CZINE, 2020: 256–257.)

#### **3.4. Recommendation R (91) 1 of the CoE <sup>13</sup>**

Recommendation R (91) 1 of the Committee of Ministers of the Council of Europe (hereinafter: ET) (hereinafter: the Recommendation) cannot be disregarded in assessing the criminal law nature of administrative measures. The Recommendation sets out the procedural guarantees that must apply in administrative sanctioning proceedings. It should be emphasized that the principles required by the Recommendation are primarily requirements for administrative decision and administrative procedure and not simple transposition of the principles of criminal law and criminal procedure. (BELCSÁK, 2009: 29) In the preamble to the Recommendation, it refers to the fact that, as a result of the growth of public administration and the trend towards decriminalization, public authorities have significant powers of sanction.

However, most of the principles set out in the Recommendation have been applied by Member States in the past, at most not always with the content required by the ET document. This is explained by the fact that the required principles are enshrined not only in the principles of criminal law and criminal procedure, but also in the constitutions of

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<sup>13</sup> Adopted by the Committee of Ministers on 9 September 1991 at the 461st meeting of the Ministers' Deputies

the Member States, and as a result have become part of the rule of law in the Member States. (BELCSÁK, 2009: 29.)

The scope *ratione materiae* of the Recommendation covers administrative acts which penalize persons for conduct contrary to the applicable rules, be it a fine or any other punitive measure, whether financial or different kind. However, measures which the administrative authorities are required to take as a result of criminal proceedings or disciplinary sanctions shall not be regarded as administrative sanctions.

#### **4. The principle between the branches of law**

The principle transposes and mediates the provisions of the Fundamental Law to the field of litigation, regardless of branches of law. The principle provision stipulates that in case of several interpretations of a rule, the one which complies with the principle must be chosen. If there is no detailed rule applicable to a given situation, it must be judged on the basis of the principle, in which case the principle fills a legal gap. In other words, the principles also have a bridging role in the application of the law, where procedural law has to be applied in the absence of a specific, explicit legal provision. It follows from all this that the principle also has a normative content, which must be taken into account when interpreting and applying the various procedural provisions. In addition to the above, the principle does not define an itemized procedural rule or behavior, but because it is of general wording, it gives the court a greater possibility of interpretation than the average normative rule.

The hierarchy between the examined branches of law is determined not only by the determination of the “order” of taking into account the facts, but also by the individual rules of jurisdiction.

It seems evident that in the case of a criminal offense, the trial court will in all circumstances act in accordance with the provisions of the Code of Criminal Procedure<sup>14</sup>, but if the administrative court establishes its own jurisdiction, this decision is binding on the civil court. Moreover, the condition for the claim for compensation for damage caused in an administrative jurisdiction to be enforceable is that the court hearing the

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<sup>14</sup> However it is not so evident that in case of criminal offence the Code of Criminal Procedural shall be applied, which is also referred to in the Commentary connected to Article 1 of Kp. It important to emphasize that neither before nor after 1 January 2018 the adjudication of the legality of criminal proceedings and investigative acts is not subject to administrative court.

administrative case, if the administrative judicial route is provided, has established the infringement in a final manner.<sup>15</sup>

The current Administrative Procedure Code - taking into account Recommendation 1 of the ET (R91) - seeks to introduce guarantees approximating criminal law.

It is interesting that with regard to administrative decisions, the organizer considers a complete decision on the legality of an administrative activity to be immutable in civil law, while with regard to a criminal decision, only the property consequences of and the administrative court that it cannot annul the criminal liability of the former defendant, but the civil court is free to decide on the historical facts themselves, the time, place, and exact amount of property damage. In contrast, in a criminal conviction, the court is bound only by the findings of civil status proceedings (since they apply *ex lege* to everyone), whereas a decision given in another proceeding, regardless of the legal nature of the other proceeding, is not, including the facts and evaluation.

The assessment of identity required for the application of the *ne bis in idem* principle also differs significantly from one law to another: in criminal law, identity means factual identity, while in civil law it means legal identity. In comparison, in administrative law, in addition to factual identity, the identity of the protected legal interest or value is also necessary.

Current experience has shown that in administrative disputes, the assessment of the criminal nature of administrative sanctions and breaches of the *ne bis in idem* principle rarely occur because, typically – owing to the specialties of procedural rules –, in the order of administrative and criminal sanctions against the same person based on the same facts, usually the administrative sanction is the first. (FIGULA–ELEK: 2017: part III.)

Thus, in criminal cases, the issue of *ne bis in idem* arises more and more frequently in proceedings where the criminal court proceedings were previously preceded by administrative, typically tax, proceedings. In the case of administrative, labor or even civil law cases, the framework should be created for the inclusion of a sanction previously imposed and already partially or fully implemented in the criminal law sanction. (AMBRUS, 2017: 134.)

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<sup>15</sup> Act CXXX of 2016 on the Code of Civil Procedure 24. § (2)–(3)

In criminal cases, the issue of *ne bis in idem* is thus increasingly raised in proceedings where the criminal court proceedings were previously preceded by an administrative, typically tax, procedure.<sup>16</sup>

#### **4.1. 8/2017. (IV.18.) decision of the Constitutional Court<sup>17</sup>**

An example of this is the Constitutional Court (hereinafter: AB) 8/2017. (IV.18.). In its decision, the AB stated that “the constitutional requirement arising from the principle of legal certainty and the prohibition of double jeopardy and punishment is that in case criminal liability might be stated or a final conviction has already been given for misdemeanor or felony of cruelty of animals, a fine shall not be imposed against the same person for the same offence in an official animal welfare procedure”.<sup>18</sup> In its decision, the Constitutional Court clearly applied the so-called Engel criteria.

Anyway, in the Hungarian legislation, the conflict between an administrative sanction and a fine imposed for a criminal act appears mostly in the relationship between criminal law and administrative law.

The conflict was also addressed by the case law analysis group of the Curia<sup>19</sup> and the Commissioner for Fundamental Rights<sup>20</sup>.

#### **4.2. BH2020. 202.**

Another example is BH2020. 202. ad hoc decision. Although the Curia decided primarily on the issue of optional extraordinary remedies<sup>21</sup>, it stated, drawing on the Engel criteria already referred to, that the mere fact that the accused was sanctioned in an administrative but not in criminal proceedings for an act which was the subject of the final judgment

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<sup>16</sup> See 4.2. point

<sup>17</sup> Constitutional requirement concerning the application of Article 43 section (1) and (4) Act XXVIII of 1998 on the protection and welfare of animals.

<sup>18</sup> 8/2017. (IV.18.) decision of the Constitutional Court

<sup>19</sup> Opinion of the Case-law analysis group of the Curia (10 Nov 2014) 182–187.

[http://www.kuria-birosag.hu/sites/default/files/joggyak/a\\_kozigazgatasi\\_birsagok\\_vizsgalati\\_targykorben\\_joggyakorlat-elemzo\\_csoport\\_osszefoglalo\\_velemenye](http://www.kuria-birosag.hu/sites/default/files/joggyak/a_kozigazgatasi_birsagok_vizsgalati_targykorben_joggyakorlat-elemzo_csoport_osszefoglalo_velemenye) accessed on 02/04/21

<sup>20</sup> AJB-305/2012.

<sup>21</sup> The question whether a sanction imposed in criminal proceedings, in addition to requiring the tax authority to pay an excise fine, infringes the prohibition on double jeopardy is not a matter for review but for renewal.



infringement of the principle of *ne bis in idem*, the ECtHR aspects must always be considered as a whole.

#### **4.3. EBH2019. B. 16.**

Decision EBH2019. B. 16. should also be highlighted from the new application of the law. This case-by-case also stated (prior to the above-mentioned decision of the Curia) that a tax fine imposed in a tax proceeding does not preclude the initiation of criminal proceedings and the imposition of a criminal sanction for the act on which the tax fine is based, but does not infringe the tax fine imposed may be relevant in criminal proceedings.

The Judgment of the Regional Court of Appeal of Debrecen referred by way of example and forward-looking not only to the practice of the CJEU and the ECtHR, but also examined the administrative law practice of the Hungarian Curia.

### **5. Conclusions**

Following Lisbon, the European Council in June 2014 set out strategic guidelines for the development of an area of freedom, security and justice in the coming years, focusing on the implementation and consolidation of existing legal instruments and policies.

In the field of judicial cooperation, the European Council emphasized the need to create a genuine European area of justice in which the various legal systems are respected and in which the Member States have mutual trust in each other's judicial systems, including strengthening victims' rights and enhancing their rights, also the mutual recognition of decisions and judgments.<sup>22</sup>

As for the principle of *ne bis in idem*, no change or progress has been made in this area of law. Thus, the 2016 Council Conclusions on the implementation of the Charter of Fundamental Rights even do not mention.<sup>23</sup>

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<sup>22</sup> EUCO 79/14 5–6  
<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2079%202014%20INIT#page=2> accessed on 21/12/20

<sup>23</sup> Brussels 11 Oct 2017 12913/17 <https://data.consilium.europa.eu/doc/document/ST-12913-2017-INIT/en/pdf>

During the Croatian Presidency in the first half of 2020, a meeting of Home Affairs and Justice Ministers in Zagreb in January 2020<sup>24</sup> discussed draft new strategic guidelines<sup>25</sup> to improve the implementation of existing instruments in the field of criminal justice, to fill gaps in the legislative framework, also to strengthen mutual trust between Member States focuses on developing coordination and synergies between networks. In addition, it is clear from the objectives of the new Commissioner for Justice that the Commission will aim to preserve the rule of law throughout the Union<sup>26</sup> in the period just beginning, accompanied by enhanced judicial cooperation and the exchange of information, including additional legal instruments in the field of mutual recognition. expected to appear.

Analyzing the harmony of the respective Hungarian and international regulations, it can be stated that according to the recent case law of the European Court of Human Rights, other aspects should be examined by national courts, such as the complementary purpose of different proceedings, whether dual proceedings had foreseeable consequences, and whether the prosecuting authorities took all possible steps to avoid double jeopardy, or whether the first binding sanction was taken into account in the other procedure when imposing a sanction, i.e. the sanctions are proportional and does not place unjustified additional burden to the person concerned.

Reviewing the domestic regulations, it can be clearly stated that both administrative and criminal sanctions are foreseeable.

Taking into account the considerations developed by the Court of Justice of the European Union and the European Court of Human Rights, national courts must also take into account the extent to which the administrative sanction applied can be considered a criminal sanction, i.e. the Engel criteria shall be taken into consideration.

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<sup>24</sup> 23–24 January 2020 <https://eu2020.hr/Home/Custom?code=EventsBrussels> accessed on 21/12/20

<sup>25</sup> *A New Strategic Agenda 2019–2024* <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024-en.pdf>, or *A strong Europe in a world of challenges – Program EU2020HR* Page 24 [https://vlada.gov.hr/UserDocsImages/Vijesti/2019/12%20prosinac/31%20prosinca/web\\_FINAL\\_PROGRAM\\_ME\\_EN\\_FINAL.pdf](https://vlada.gov.hr/UserDocsImages/Vijesti/2019/12%20prosinac/31%20prosinca/web_FINAL_PROGRAM_ME_EN_FINAL.pdf) accessed on 21/12/20

<sup>26</sup> [https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf)

The Union objectives are set out in COVID–19. the recovery fund planned to counteract the effects of the coronavirus epidemic, the joint budget for the seven–year term starting in 2021 and the EU–UK relationship post–Brexit as priorities. <https://www.eu2020.de/blob/2360248/e0312c50f910931819ab67f630d15b2f/pdf-programm-en-data.pdf> accessed on 21/12/20

At this point, a question arises: is it a fair trial if the offsetting and imposition of the sanction actually depends on the order of the proceedings, namely on the question which one took place anteriorly, the criminal or the administrative one. From the examples analyzed above, it appears that if the administrative procedure is the latter, the criminal sanction does not count towards the administrative. In other words, the punishments that may be imposed in criminal proceedings can make allowances for a fine imposed during administrative procedures, payment of which may help when it comes to transmuting the sanctions imposed in criminal proceedings into prison terms. (ELEK, 2018: 101)

Although there are several allegations before the Constitutional Court of a violation of the principle of due process (see more: CZINE, 2020: appendix 286–324.), the Constitutional Court has not yet ruled on a case such as the one raised, which is yet to come.

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## THE SPECIFICITY OF ARTICLE 2 OF THE ECHR AND ITS APPLICABILITY IN THE BALKANS: CASE STUDIES

*The purpose of this paper is to present Article 2 of the European Convention on Human Rights (ECHR) and its significance in determining its violation before the European Court of Human Rights (ECtHR). The paper first explains the general features of Article 2, its scope and its application, as it is considered as a right where no deviations can be made. Furthermore, the paper elaborates the application of Article 2 through the analysis of case studies before the ECtHR submitted against some of the Balkan countries. These case studies address violations of Article 2 with regard to the use of excessive police force, death in custody, victims of crime, and in other cases and circumstances. In conclusion, the authors present their own results regarding compliance with Article 2 and future challenges that the law enforcement authorities may face when applying Article 2 of the ECHR.*

**Keywords:** right to life, case studies, Balkans, European Court

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## **1. Introduction**

Article 2 of the ECHR contains a fundamental guarantee whose respect guarantees other human rights. The norm of this article protects the right to life which is a basic value in any democratic society. This guarantee may not be revoked or restricted in any case, even in the event of an emergency under Article 15 of the ECHR – Derogation in time of emergency. Along with Article 3 – Prohibition of Torture, it reinforces one of the core values of the democratic societies making up the Council of Europe and, as such, its provisions must be strictly interpreted.

The norm from Article 2 of the ECHR, above all, is formed positively, in terms of a comprehensive obligation of the state to protect human life. It also contains a comprehensive prohibition on intentional killing of people, except in connection with deaths resulting from lawful military action. Although this is not explicitly stated in Article 2, the prohibition on deprivation of life applies not only to intentional but also to unintentional actions or omissions. From the negative wording that “no one shall be deprived of his life intentionally”, it is clear that the norm, in the first place, refers to the prohibition of state authorities to arbitrarily take the life of any individual. Therefore, deprivation of life is the subject of the most careful investigation by the ECtHR. However, from this formulation does not arise a negative freedom of the individual to take his own life. Namely, unlike the other rights of the ECHR, the right to life is the only right that a person does not decide for himself, just as he does not decide for his own birth. This entails the responsibility of the state for euthanasia and the like.

## **2. Field of Application**

Article 2 protects human life from its birth to death. It is interesting that the controlling bodies of the Convention to date have failed to solve the problem of whether the norm of Article 2 of the ECHR protects the newly conceived life, i.e. the fetus. Such a broad interpretation would be contrary to the nature of this norm (life), but also to the conception of the entire Convention which protects other rights related to the right to life. Given that Article 2 of the ECHR also protects conception, any termination of pregnancy which is not undertaken in order to save the life of the mother should be considered a violation of Article 2 of the ECHR, which has no justification given the scope of the norm, as well as its purpose and systemic place in the Convention. Just as the case law of Strasbourg is indefinite in regard to the moment when the protection of the right to life begins, it is also indefinite in terms of its termination by euthanasia or the provision of voluntary suicide assistance (Jovanović, 2020; 535). The prevailing opinion is that Article 2 does not



contain the right to euthanasia or other assistance in the voluntary taking of one's own life.

Further, the ECtHR has repeatedly emphasized that Article 2 may come into play even if a person whose right to life is allegedly violated does not die. The Court has held that in exceptional circumstances, depending on considerations such as the extent and type of force used and the nature of the injuries, the use of force by law enforcement authorities resulting in death may reveal a violation of Article 2, if the conduct, by its very nature, puts the applicant's life at serious risk, even though he survives. In all other cases where a person has been assaulted or ill-treated by law enforcement authorities, their complaints will be dealt with in accordance with Article 3 of the ECHR. In cases involving applicants who survived a potentially deadly attack by non-state actors, the Court adopted a similar approach to that taken in cases involving the use of force by state agents. Also, the ECtHR found that allegations of applicants suffering from a serious illness fall under Article 2 of the ECHR when the circumstances potentially involve the liability of the State.

As for the merits, the ECtHR considered the allegations made under Article 2 by persons claiming that their lives were in danger, although such a risk had not yet been realized, when it was satisfied that there was a serious threat to their lives. In cases involving potentially fatal accidents or environmental disasters, Article 2 applies either if (a) the activity in question is dangerous in nature and puts the lives of the persons concerned at real and immediate risk, or if (b) the injuries suffered by them were seriously life-threatening. Finally, in failed numerous suicide attempts by persons with psychological difficulties, the ECtHR considered Article 2 to be applicable, notwithstanding that the injuries sustained were not serious, given the nature of the impugned proceedings which put the applicant's life in real and immediate risk.

### **3. Positive Obligations**

Article 2 of the ECHR states that the right to life is protected by law. This means that the state, in addition to being obliged to refrain from depriving individuals of their lives, is also obliged to take positive measures to protect the lives of individuals, both from interference by law enforcement authorities and from the actions of other individuals, as well as the procedural obligation to conduct an effective investigation into alleged violations of its essential limb.

The protection of the right to life must be effective and real. How the state achieves that result remains at its discretion. Thus, the state is not obliged at all to protect human life

in the criminal legislation, but can in another appropriate way to satisfy its positive obligations under Article 2 of the ECHR. The obligation to take positive measures covers the legislation, as well as all other acts within the sovereign government. The positive responsibilities of the state especially extend to the organization of the police and other law enforcement authorities in a way that will most successfully protect the right to life under Article 2 of the ECHR. Thus, when implementing measures to combat terrorism and organized crime, the measures must be appropriate to protect the lives of all participants in the operations (McCann and Others, 1995).

Furthermore, the positive obligations of the state include its duty to investigate any violation of the right to life that occurs within its jurisdiction. The procedure for investigating the death of a person should be undertaken *ex officio*, it must be conducted by an authority that is independent and it must be effective in terms of the purpose of determining the time, place and manner of death, identifying the perpetrators and prosecuting them. This obligation applies to persons who are under direct control of state authorities (prisoners, soldiers, ill people in hospitals, etc.). For example, the state is obliged to regulate the obligations of hospitals, to protect the right to life of their patients, to provide an opportunity to determine the cause of death, as well as norms for possible liability of doctors. There is a special responsibility for the state in relation to the obligation to protect the lives of prisoners. The state is obliged not only to regulate the protection of the right to life in prisons, but also to organize prison officials in order to prevent the violation of this right. Thus, there would always be a violation of Article 2 when a prisoner kills another prisoner, and prison officials were obliged to anticipate the occurrence of such a situation (Paul and Audrey Edwards v. United Kingdom, 2002). However, Article 2 cannot, and should not, be interpreted as guaranteeing for each individual an absolute level of security in any kind of activity in which the right to life could be endangered, especially when the person concerned bears some degree of liability for the accident when exposed to unjustified danger (Molie v. Romania, 2009).

#### **4. Positive obligations in the context of Balkan States**

The use of lethal force by police and security forces is under thorough investigation by the ECtHR. The planning and control of police operations must minimize reliance on a force eligible to take life as far as possible and without discrimination (Simović, Simović, 2020; 383). The Court noted that in deciding whether the force used by law enforcement authorities was “absolutely necessary” it should use a stricter and more convincing test than the one used to decide whether the actions are “necessary in a democratic society” (Nachova and others v. Bulgaria, 2005). Article 2 of the ECHR imposes a positive

obligation on the law enforcement authorities to ensure that the law adequately protects the right to life and should always be considered in conjunction with Article 13 – Right to an effective remedy – which, because of the essential importance of the right to protect the life, imposes stricter requirements on the investigation of fatal incidents.

In the context of a death in custody, this will require a thorough and effective investigation into the circumstances in which the death occurred and those in position will be held accountable. Also, it will be required for the applicant to have effective access to the investigative procedure and that the procedure is conducted to establish the identity of the perpetrators and to punish them. Usually the burden of establishing a connection with a violation of the ECHR falls on the applicant. However, the burden is shifted to the state when the death occurred during detention. In such circumstances, the burden of proof is on the authorities to provide a satisfactory and convincing explanation or plausible explanation of the events leading up to the death of the person deprived of his liberty and to keep appropriate records (*Salman v. Turkey*, 2000). The standard required by the ECtHR in assessing evidence of a violation of the ECHR is the proof that leaves no room for reasonable doubt. The test may be satisfied from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (*Anguelova v. Bulgaria*, 2002).

The positive obligation to protect the right to life of detainees under Article 2 of the ECHR also requires that they be adequately protected when the attack is carried out by other persons held in custody. Furthermore, when detainees are removed from police or security forces premises but remain under state surveillance, the burden of proof will continue to rest on the government, which must provide satisfactory explanations for the death of the detainee.

Article 2 can only be applied even when the use of excessive force has not actually proved to be deadly. The extent and type of force used as well as the purpose for its use will be relevant factors in assessing compliance with Article 2 of the ECHR. Furthermore, the law enforcement authorities are obliged under Article 2 to take appropriate steps to protect the lives of detainees under their control, even in the event of a suicide attempt or suicide injury or death. The ECtHR in such cases has a duty to determine whether the law enforcement authorities knew or should have known that there was a real and immediate risk of suicide, and if so, whether they had done all that could reasonably be expected of them in order to eliminate the risk (*Delibašić*, 2018: 520).

At the beginning, the ECtHR dealt with cases of enforced disappearances primarily under Article 5 – Right to liberty and security – and not under Article 2 of the ECHR. In considering whether there is a positive obligation under Article 2 to conduct an effective investigation into the circumstances of the alleged unlawful murder, the Court applied the test of whether there was “solid evidence” which would not leave a reasonable doubt that the missing person is killed by the authorities. If there is no such evidence, the ECtHR states that applications should be considered in conjunction with Article 5 and not in conjunction with Article 2 of the ECHR (*Kurt v. Turkey*, 1998). However, in determining the responsibility of the State for the alleged death of missing persons, the ECtHR drew “very strong inferences” due to the lack of any evidence and the state’s inability to provide a satisfactory explanation. The failure to conduct a comprehensive “disappearance” investigation may also constitute a violation of Article 2 if the investigation was found to be neither thorough, nor appropriate, nor effective (*Timurtaş v. Turkey*, 2000).

The positive obligation for the state arising from Article 2 may be the obligation to prevent fatal consequences, as well as to conduct an effective investigation regarding the circumstances of the incident that led to fatal consequences. As part of this obligation to prevent and reduce the number of offenses, the Court found that it must be concluded that the authorities “knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.” The ECtHR emphasized that this positive obligation should not be interpreted as imposing an impossible and disproportionate burden on the authorities (*Osman v. Turkey*, 1988). On the contrary, the Court would find a violation of Article 2 if there is an ineffective protection in relation to the actions of the security forces, which means that there was an omission in preventing a real and immediate risk to the life of individuals (*Mahmut Kaya v. Turkey*, 2000).

The obligation to investigate deaths applies not only to deaths while the person is within the state authorities, but also to cases where the authorities are informed of events with fatal consequences. The ECtHR also stated that the obligation to conduct an investigation is an obligation to take appropriate steps, not to obtain results. Accordingly, authorities should take appropriate steps to provide relevant evidence in order for the investigation to be able to identify and punish those responsible. Those responsible for the investigation must be independent of those involved – be it hierarchical or institutional dependence, but also in terms of practical independence. Once the authorities are informed of an event with fatal consequences, or otherwise come to such knowledge, they have the obligation

to conduct an investigation, without the need for a formal complaint. Investigative bodies must also respond reasonably and promptly. Clearly, when suspects are tried, convicted, and imprisoned for murder, it will usually not be possible to argue that the proceedings proved incapable of identifying and punishing the perpetrators.

The obligation of the state to protect life under Article 2 of the ECHR may also apply to cases of endangerment of the environment which are life-threatening. In considering the positive steps that can be taken under Article 2, the Strasbourg Court examines whether the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk. Furthermore, Article 2 may impose an obligation on the State to provide information and advice and to monitor the health status of individuals considered to be at risk or to establish relevant rules. Accordingly, Article 2 can also be considered when there has been no event with fatal consequences. However, cases of gross environmental pollution are more likely to raise questions under Article 8 – Right to respect for private and family life, home and correspondence – than under Article 2 of the ECHR (*Öneryildiz v. Turkey*, 2004).

Article 2 may be the basis for a debate on the scope of commitments to take appropriate measures to protect life in the field of health care. In view of the difficulties of allocating limited funds, it is recommended that the Court only in exceptional cases find a violation of Article 2 regarding medical care. However, discriminatory treatment in the provision of medical care may constitute a violation of Article 2 when it is found that the authorities endanger the lives of individuals by refusing to provide health care intended to be available to the general population.

The Court, in its case-law, points out that even in cases where medical negligence has been established, a substantial violation of Article 2 will usually be found only if the relevant legislative framework does not provide adequate protection for the patient's life. Therefore, the Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2 of the ECHR. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.

The positive obligations from Article 2 set both preventive and investigative obligations, both in the public and in the private sector. The Court urges states to lay down rules forcing hospitals to adopt measures to protect patient's lives and to ensure that the cause of death in the medical profession can be determined through effective and independent judicial system, so that everyone who is responsible must be held accountable. In relation to cases of medical negligence, an indispensable criminal-legal provision is not required, as the civil procedure may be sufficient, if such a procedure is able to determine the responsibility of the professionals in the medical profession involved in providing appropriate civil restitution, such as damages.

On the basis of this broader understanding of the State's obligation to provide a regulatory framework, the Court has accepted that, in the very exceptional circumstances described below, the responsibility of the State under the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of health-care providers.

The first type of exceptional circumstances concerns a specific situation where a patient's life is knowingly put in danger by denial of access to life-saving emergency treatment. It does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment. The second type of exceptional circumstances arises where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patient's lives, including the life of the particular patient concerned, in danger. The Court is aware that on the facts it may sometimes not be easy to distinguish between cases involving mere medical negligence and those where there is a denial of access to life-saving emergency treatment, particularly since there may be a combination of factors which contribute to a patient's death. However, for a case to fall into the latter category, the following factors must be met: (i) the acts and omissions of the health-care providers must go beyond a mere error or medical negligence, in so far as those health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given; (ii) the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly; (iii) there must be a link between the dysfunction complained of and the harm which the patient sustained; and (iv) the dysfunction at issue must have resulted from the

failure of the State to meet its obligation to provide a regulatory framework in the broader sense indicated above (*Lopez De Sousa Fernandez v. Portugal*, 2017).

### **5. Republic of Macedonia and cases concerning Article 2 of the ECHR**

In the case of *Gorgiev*, the applicant alleged that the State was liable for a violation of Article 2 for an action which was dangerous to his life by a police officer (*Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, 2012). The applicant was shot in the chest and sustained several serious injuries, including fractures and internal bleeding. The court sentenced the perpetrator, a police officer, to two years of imprisonment for serious crimes against public safety, who in an alcoholic state, inadvertently pulled the trigger of his service gun and shot Gorgiev.

The applicant's civil claim for damages against the Ministry of the Interior was rejected because the Court of First Instance and the Higher Court held that the State could not be held liable in the absence of a causal link between the applicant's proceedings and his official duties. However, the police officer acted during his working hours, he was in uniform when he shot the applicant and, therefore, was publicly regarded as a law enforcement agent while using a service gun. For these reasons, the ECtHR held that the harmful action taken by the police officer must be recognized by the respondent State and that there has been a violation of Article 2 of the ECHR.

The Government objected that Gorgiev had not exhausted all effective remedies and gave arguments in defence of its allegations, including that the perpetrator had no intention of killing the applicant; that state responsibility had ended with criminal proceedings against the perpetrator who was convicted and imprisoned; that the perpetrator at the critical time left the office during working hours without consent of his superiors; and that the perpetrator acted as a private person.

Analysing the arguments of both sides, the ECtHR concluded that there had been a violation of Article 2 of the ECHR, as Gorgiev had been the victim of conduct that put his life at risk, although he survived (regardless of whether or not the perpetrator had intended to kill him). According to the Court, the State may be liable for unlawful acts of a police officer taken outside of his/her official duties, based on findings that the police officer acted during his/her working hours; the perpetrator was intoxicated; was in uniform at the time of the shooting; and he fired the service gun and was therefore considered publicly as a law enforcement agent. For these reasons, the Court held that the

harmful action taken by the police officer must be recognized by the respondent State and that there has been a violation of Article 2 of the ECHR.

In addition, the ECtHR held that the actions of official State agents taken outside the performance of their duties, which resulted in physical harassment resulting in death, could reveal a violation of Article 2 of the ECHR. The Court also noted that Article 2 does not only deal with deaths as a result of the use of force by state agents, but also establishes a positive obligation on States to take appropriate steps to protect the lives of those in their competence, which also requires them to establish a legislative and administrative framework that should define the limited circumstances in which law enforcement officers may use force and firearms. Thus, the Court recommended that a system of appropriate and effective safeguards be established and rigorously enforced to prevent its agents from misusing official weapons given to them in the context of their official duties, as well as to establish high professional standards regarding recruiting and training of police officers to ensure that persons serving in these bodies meet the necessary criteria.

Furthermore, given the difficulties in policing in modern societies, the unpredictability of human behaviour, and the operational choices that must be made in terms of priorities and resources, the scope of positive commitment must be interpreted in a way that does not impose an impossible or disproportionate burden on authorities. Not every alleged risk to life can require the Convention to take operational measures to prevent that risk from being realized. In order for a positive obligation to arise, it must be established that the authorities knew or should have known at the time of the existence of a real and immediate risk to the life of an identified person from the offenses of a third party and that they did not take action which was expected to avoid such a risk.

For the ECtHR, police officers should not be left in a vacuum while performing their duties, whether in the context of a planned operation or spontaneous pursuit of a person. The duty of the state to protect the right to life must also be considered to include taking reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, to have an effective independent judicial system, which ensures the availability of remedies capable of establishing the facts, bringing the perpetrators to justice and providing adequate justification.

The case of *Kitanovska-Stanojkovic* refers to the delayed execution of custodial sentence imposed on a defendant found guilty of a serious attack on the applicant (*Kitanovska-Stanojkovic and others v. the former Yugoslav Republic of Macedonia*, 2016). The first



applicant was seriously injured during a robbery at her home, while her husband, who was also attacked, later died of his injuries. The father of the second and third applicants also died in the attack. The attackers were convicted of aggravated theft and received prison sentences. However, one of the attackers continued to live in the vicinity of the applicant for 18 months before serving his sentence.

In the proceedings, the applicant complained that the delayed execution of custodial sentence led to a violation of Article 2 of the ECHR. The court found that the effectiveness of the criminal investigation implies timely execution of the sentence. The non-fulfillment of this request, especially due to the lack of coordination between the two departments (the enforcement and the juvenile department) of the same criminal court, as well as the fact that there was no enforcement judge who could deal with the case, is a procedural violation of Article 2 of the ECHR.

Although the ECtHR found that the State had fulfilled its procedural obligation under Article 2 concerning the determination of the circumstances of the incident and the identification and punishment of the perpetrators, it also concluded that the authorities had not exercised due diligence in enforcing the imprisonment sentence which resulted in unreasonable delay, that was not in accordance with the State's obligation under Article 2, notwithstanding the fact that the perpetrator had not shown any hostility towards the applicants following his conviction. The Court further notes that the notion of an effective investigation under Article 2 can also be interpreted as imposing a duty on States to carry out its final judgments without undue delay. For the Court, "The requirement of effectiveness of the criminal investigation under Article 2 of the Convention can be also interpreted as imposing a duty on States to execute their final judgments without undue delay. It is so since the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under this Article."

In the case of *Kitanovski*, the applicants, a father and son, allege a violation of Article 2 of the ECHR because of their claim that the son's life was in danger when police opened fire on his father's car during a car chase (*Kitanovski v. the former Yugoslav Republic of Macedonia*, 2015). According to the applicants, the son, Aleksandar Kitanovski, who was driving his father's car, was driving backwards to reach a fast food restaurant. Police officers started chasing him and after driving around a roadblock set up to stop him, police officers started firing at the car. When police later arrested him, they allegedly beat him with batons and punched him in the face, head, abdomen and the back, which, in addition to violating Article 2, also means violating Article 3 of the ECHR.

Following the criminal charges by Tihomir Kitanovski, on behalf of his son, against unidentified police officers for intimidation, torture and ill-treatment, the prosecutor decided that there were no grounds for prosecution. Following the criminal charges filed by the Ministry of Interior against Aleksandar Kitanovski, the Court of First Instance found him guilty of assaulting a police officer in the line of duty and sentenced him to one and a half years of imprisonment. Following the appeal, the Higher Court returned the case for a new trial.

Relying essentially on Article 2 and Article 3 of the ECHR, the applicants complained that Aleksandar Kitanovski's life had been put at risk; that he was harassed by police officers; and that there was no effective investigation into the allegations. The Court, using the test of absolute necessity, found a violation Article 2 and found that the use of potentially deadly force against the applicant was not absolutely necessary, as there was no suspicion that he had committed a crime justifying the danger from the escape, and the shooting by police officers was not preceded by warnings, as required by international and domestic law. In this connection, the Court also found a violation of the procedural aspect of the right to life for the same reasons which led the Court to conclude that no effective investigation had been carried out under Article 3 of the ECHR.

The Court found that the force used by the police officers to arrest the applicant, who allegedly evaded routine control, was not strictly necessary for his conduct. As a result, the applicant sustained bodily injuries, and his treatment was categorized as degrading. In addition to the violation of the substantive aspect of Article 3, the Court found a violation of the State's procedural duty to conduct an effective investigation into the applicant's allegations that the police had put his life at risk and exposed him to ill-treatment. The Court's judgment focuses on the inactivity of the Public Prosecutor's Office, which, despite the seriousness of the allegations, the fact that the applicant provided the public prosecutor with the identities of the officers concerned, as well as the evidence provided by the applicant, did not take any investigative action nor did he inform the applicant in a timely manner about the criminal charges filed. Finally, the Court notes that the same prosecutor who filed criminal charges against the applicant, accusing him of assaulting a police officer in the performance of his duties, had previously examined his appeal, which the Court found raised doubts about his impartiality.

In the case of *Neškoska*, which concerns the murder of the applicant's son, the ECtHR ruled that in the case of the murder of Martin Neškoski, there was no violation of Article 2 of the ECHR in terms of the effectiveness of the investigation (*Neškoska v. the former Yugoslav Republic of Macedonia*, 2016). Martin Neškoski's mother, Lenka Neškoska,

complained to the ECtHR that the investigation into her son's death was ineffective. The court explains that her son was killed by a member of the special police force, during the celebration of the 2011 election results.

Referring to the domestic procedure, the Court notes that there was a trial for Neškovski's murder, which resulted in a 14-year prison sentence for the perpetrator. Regarding the investigation of the case, the Court explains that the public prosecutor asked the investigating judge to open an investigation against the perpetrator, but during the investigation Martin Neškoski's mother filed criminal charges against four other people, three of whom were police officers, on suspicion that they helped the perpetrator to cover up the murder and mistakenly told the public prosecutor that Neškoski had died of a drug overdose. However, the public prosecutor rejected the charges, finding that there were no grounds to prosecute the indicated persons, i.e., referring to the evidence, he found that three of the persons were not present when the perpetrator fatally hit Neškoski. Dissatisfied with this decision, Neškoski's mother continued to seek justice as a subsidiary plaintiff, but her application was rejected. Finally, Lenka Neškoska submitted an application to the ECtHR, stating that there had been a violation of Article 2 and that the investigation had not been effective because the judiciary had not examined all aspects of the incident that resulted in murder of Neškoski, as well as the failure to establish the responsibility of all persons involved.

Examining the application, the ECtHR issued a judgment stating that in the case of the murder of Martin Neškoski, there was no violation of Article 2 of the ECHR and that the state undertook an effective investigation into the cause of death of her son, i.e. that the State has met all the criteria established by the ECtHR case law in similar cases. The court found that the actions or omissions of those persons allegedly involved in failing to report the offence or the perpetrator and assisting the perpetrator after the execution of the offence were not detrimental to the effective conduct of the investigation for the purposes of Article 2 of the ECHR, as it refers to the establishment of relevant facts; the identification and punishment of the person responsible for death; and the accessibility and quality of the evidence obtained, were not compromised by any of the shortcomings identified by the applicant. Finally, the Court held that the additional evidence submitted by the applicant in the form of a CD-ROM with audio content and transcripts of taped telephone conversations involving high-public officials relating to conversations about a possible perpetrator of the offense, which was apparently occurred shortly after the incident, has no probative value, as it has not been previously tested by the domestic authorities, nor has its authenticity been confirmed. As a result, the Court found no violation of Article 2 of the ECHR.

## Conclusion

Article 2 of the ECHR protects the right to life and addresses three main requirements: first, a prohibition on unlawful killing by state agents; second, the duty to investigate a suspicious death; and third, a positive commitment that requires steps to be taken to prevent an avoidable loss of life. States must take appropriate steps to protect the lives of those within their jurisdiction and, as stated in the case law of the Republic of Macedonia, must establish a legislative and administrative framework designed to ensure effective prevention; must exercise the utmost care and define the limited circumstances in which law enforcement authorities may use firearms and deadly force; must take reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, to have an effective independent judicial system in place to ensure the availability of remedies capable of establishing the facts, to prosecute and punish the perpetrators and ensure adequate compensation for the victims. Despite all the above positive obligations by the state, these same obligations were not fulfilled in the presented cases and are negative examples that must not be repeated.

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**Khilyuta V.VI.\***

**CRIMES AGAINST THE CIRCULATION OF  
OBJECTS OF CIVIL RIGHTS: CONCEPTUAL  
AND THEORETICAL BASIS OF MODELING**

*The aim of the research: is the development of the theory of reforming a concept of theft and formulation provisions of the new theory – criminal legal protection of a turn of objects of the civil rights. The concept of reforming of the penal legislation in the sphere of economy is developed and the doctrine about crimes against objects of the civil law is formulated; the new system of the penal legislation in the property sphere is offered; inefficiency of the existing signs of theft in the penal statute is revealed and the new principles of criminalization of the relations in the sphere of economy are offered.*

**Keywords:** *theft, crimes against property, property crimes, signs of theft, a crime in the sphere of economy, economic crimes, criminal law.*

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1. Currently, criminal law is being positioned with a shift in paradigms and theoretic concepts. There is no longer the classical criminal law that existed in the twentieth century. Today, criminal law is characterized by pluralism of views, a variety of concepts and theoretical constructions of new institutions, the denial of basic postulates that previously seemed inviolable (the concepts of crime and criminal responsibility, the corpus delicti, etc.). Criminal law is increasingly proposed to be considered in a broad sense, like Western European standards in a triad of crime-misconduct-offence, as a result of which it is already impossible to avoid reforming the protection of the public sphere of social relations.

All this was made possible by the fact that society entered the age of information technology and globalization processes were further developed. The era of postmodernism imposes a new method of research, including in criminal law, and criticism of modernity, along with the method of deconstruction, is the basic impetus for the large-scale modernization of public relations in the post-industrial era. This state of affairs has both positive and negative features.

Today, one cannot but see that significant changes occurred in economic relations. New objects of civil rights appeared, the statics and dynamics of property relations became more complicated, and the property itself began to be considered as one of the types of "rights in rem". These processes cannot go unnoticed for the science of criminal law and do not affect one of its key problems - the protection of property relations. Moreover, the question can be raised in another way: is the current criminal law able to adequately respond to ongoing criminal processes in the economy and properly protect property relations from criminal encroachments? Obviously, in such a situation, the old institutions of criminal law protection of property relations and the applied design of theft of someone else's property cannot be fully perceived today. So, if previously criminal attacks occurred mainly on corporeal forms of property, now they are aimed at incorporeal (immaterial) property benefits, sometimes of no less value than ordinary things.

All this raises the issue of the content and signs of the subject of criminal encroachment in the economy and the possibility of applying old, established dogmas (the concept of taking possession of a thing or stealing someone else's property) to new forms of property encroachment. In other words, the question is whether the theory of theft can be applied to cases of criminal encroachments on immaterial (incorporeal property). It should also be noted that the existing criminal law (crimes against property) is focused exclusively on the protection of things and is less aimed at the criminal law protection of property rights and the circulation of economic benefits.



For this reason, known costs and contradictions in scientific approaches to the qualification of property crimes became inevitable: from complete denial of all previous experience and attempts to once again create “fundamentally new,” “ultra-modern” legal constructions to equally unsuccessful ideas for the preservation of ideas and institutions of criminal law protection of property relations. Meanwhile, the main way of criminal law protection of property relations should be free from these extremes. It is necessary to take into account both the classical concepts and categories worked out for centuries (pre-revolutionary and Soviet ideas about the theft of other people's property) and the modern realities of the development of economic relations, including the specifics of the mechanism of the functioning of crimes in the economy.

It is obvious that in connection with the modification of the subject of criminal encroachment in the property sphere (mainly due to the inclusion of non-material benefits) today it is extremely difficult and impractical to create a single doctrine on the theft of material and intangible property benefits. Objectively existing differences in the natural properties of objects of civil rights are reflected in their legal regulation and create the prerequisites for their distinction and non-identical legal protection.

Thus, the depth and importance of the problems of combating theft raises the question of developing a mechanism for the radical transformation of criminal legislation, which cannot be reduced to fragmented innovations and requires an integrated approach - a revision of the established provisions of the criminal law in order to provide a conceptually new view of the legal regulation of economic activities in the country and the suppression of selfish crimes in this area. In this part, a hypothesis is put forward about the inconsistency of the concept of “theft” with established social relations in a socially oriented market economy and the need to develop a new theory in criminal law - the doctrine of crimes against the circulation of objects of civil rights (Khilyuta, 2017: 4).

**2.** In the context of reforming economic relations, the existing doctrine and the system of crimes against property do not reflect the complex model of criminal law protection of property relations (real and property rights in property turnover).

Comprehensive criminal law protection of property relations is possible only on the basis of the differentiation of the system of crimes against the property itself in the framework of detailing the doctrine of theft and other property encroachments, which is a fundamental task for the science of criminal law and involves solving practical tasks to protect property and the protection of objects of civil rights from criminal encroachments.

The chapter of the Criminal Code should be presented in a new version and called “Crimes about property and the circulation of objects of civil rights.” This is because the criminal law protection of property relations does not meet the realities of society, political life and the level of development of socio-economic relations, due to the fact, that both real and compulsory relations should be subject to legal protection.

The composition of the crimes in this chapter should be structured on the basis of three groups of crimes: (a) theft; b) intentional or negligent destruction or damage of property; c) crimes about the circulation of objects of civil rights. The differentiation of the system of crimes against property and the circulation of objects of civil rights implies that the object of the crime (material and non-material benefits), the method of action (capture and acquisition, use, alienation, evasion) and the other possible goal (enrichment and extraction of property benefits).

The right of ownership in the classical sense is adapted to regulate relations about things, and it is impossible to apply most of the rights of ownership to incorporeal property due to the lack of material shell for such objects. In this regard, the doctrine of criminal law should revise the final approach of criminal protection of corporeal (material) and incorporeal (non-material) property benefits.

The norms on crimes against property in their original (current) state protect and should protect only the statics of property relations, since property relations are protected within the framework of the basic doctrine of crimes against property (theft of someone else's property, its destruction or damage, appropriation of found property, etc.). In turn, the norms of the criminal law on property crimes should be systematized into norms-prohibitions that protect the statics of property relations, and norms, focused on protecting the dynamics of property relations, due to the turnover of property benefits (crimes against the circulation of objects of civil rights).

The prerequisites for the formation of the doctrine of crimes against the circulation of objects of civil rights indicate that as property relations developed and became more complicated, socially dangerous acts began to appear, which consist in the extraction of property benefits, but are not associated with an attack on a specific “corporeal thing.” In the existing paradigm of crimes against property, only the “corporeal thing” can be the subject of the crime, since real property cannot arise on any other property. A separate subsystem should be created for the criminal law protection of “incorporeal things” facilities, since crimes against property are designed only for the protection of “corporeal things.”

Crimes against the circulation of objects of civil rights - a new direction of criminal law protection of public relations. Legal prohibitions aimed at protecting the dynamics of property relations related to the circulation of property goods are aimed at comprehensive protection of property relations. Crimes against the circulation of objects of civil rights are intentional acts committed in the field of circulation of objects of civil rights, related to the unlawful acquisition, use, alienation of objects of civil rights or evasion of obligations in order to obtain property benefits and entailed causing damage in a significant amount in the absence of signs of theft.

The institutionalization of the concept of property crimes raises the question of abandoning the outdated Soviet theoretical heritage of crimes against property and the creation of a new modern criminal law doctrine for the protection of real and compulsory rights. This is due to the fact, that the Soviet concept of “theft of someone else's property” was designed to solve completely different institutional and social problems than today. Therefore, old doctrinal constructions cannot be universal and must be revised.

The reform of economic relations raises the question of revising the object and system of crimes against the procedure for carrying out economic activity. The current Chapter 22 of the Criminal Code of the Russian Federation by inertia includes two blocks of criminal encroachments: a) crimes against the established procedure for conducting economic activity (art. 169, 170, 170<sup>2</sup>, 171, 171<sup>1</sup>, 171<sup>2</sup>, 171<sup>3</sup>, 171<sup>4</sup>, 172, 172<sup>1</sup>, 173<sup>1</sup>, 173<sup>2</sup>, 174, 174<sup>1</sup>, 175, 181, 184, 185<sup>5</sup>, 186, 187, 189, 190, 191, 191<sup>1</sup>, 192, 193, 193<sup>1</sup>, 200<sup>1</sup>, 200<sup>2</sup>, 200<sup>3</sup>, 200<sup>4</sup>, 200<sup>5</sup> of the Criminal Code of the Russian Federation); b) crimes against property interests of entities engaged in their activities in economic turnover (art. 170<sup>1</sup>, 172<sup>2</sup>, 176, 177, 178, 179, 180, 183, 185, 185<sup>1</sup>, 185<sup>2</sup>, 185<sup>3</sup>, 185<sup>4</sup>, 185<sup>6</sup>, 194, 195, 196, 197, 198, 199, 199<sup>1</sup>, 199<sup>2</sup>, 199<sup>3</sup>, 199<sup>4</sup> of the Criminal Code of the Russian Federation).

Crimes against the procedure for carrying out economic activities encroached on the main link in the mechanism for regulating public relations in the economy - economic activity. Today chap. 22 of the Criminal Code of the Russian Federation does not have a single object of crime, because the individual acts contained in this chapter lie outside its limits (art. 169, 184, 189, 190 and 2005 of the Criminal Code of the Russian Federation).

The chapter of the Criminal Code on crimes against the procedure for carrying out economic activities should contain only those offences that prohibit the unlawful conduct of entities carrying out various actions (economic operations) related to the conduct of business and economic activities. Such activities may not contain an element of obtaining direct property benefits at the expense of another person and his property benefits.

3. In view of the fact that civil turnover is a legal form of economic turnover that regulates the process of transferring property and subjective rights of participants in civil law relations, criminal law should protect public relations on the proper transition of material and non-material property benefits of participants in these legal relations and establish liability for violation of the rules for conducting activities in economic turnover.

The object of crimes against the ownership and the circulation of objects of civil rights should be property relations, that is, relations associated with the ownership of property to a certain person, as well as related to the defense of property benefits. Thus, criminal law protection should be subject not only to material, but also to compulsory relations, since prior offenses are aimed not only at the thing itself (as a material substrate), but also at numerous rights, which in most cases are not real.

The classical approach to the subject of crime only as the subject of the material world unreasonably narrows the scope of the use of this right of the fourth category in identifying new forms of general dangerous deviation, where the object of criminal encroachment is exclusively non-material goods. This situation in criminal law protection is particularly evident in the modern practice of the circulation and use of property rights in market conditions of economic activity. Therefore, corporeal (material) and incorporeal (non-material) benefits must be recognized as the subject of the crime, for which social relations arise and the influence on which the perpetrator acts as a criminal offense.

Accordingly, the subject of encroachment in theft as a basic doctrine of a crime against property can be exclusively a thing, and other non-material benefits cannot be the basis of the subject of criminal encroachment in the commission of theft, since they are aimed not at taking possession of other people's property, but at obtaining property benefits. Attempts to mechanically transfer the provisions of economic theory on property to the sphere of coal law outside the context of civilization give rise to uncertainty and an infinite transformation of the subject of criminal encroachment by expanding the concept of theft.

In the context of globalization of law and its digitalization not only objects of civil rights as such, but also to the very circulation of these rights should be subject to legal protection. Based on this, it is stated that objects of civil rights can be subjected to various effects: a) theft, when illegal seizure of things, money, documentary securities occurs with the simultaneous movement of these material goods in space and their deprivation by the owner or other owner; b) destruction or damage, appropriation of found property;

c) unlawful use, acquisition, alienation, evasion of obligations, i.e. when there is no criminal seizure of a material object, but there is another extraction of property benefit by replacing the owner or other owner of the property (we are talking about cashless funds, non-documentary securities, the results of work or services, property rights), or unlawful enjoyment of civil rights (intellectual property, information) where the objects of civil rights remain with the owner or other owner and are at the same time with the perpetrator.

When determining the subject of crimes against the circulation of objects of civil rights (as a structural element of the element of encroachment), it should be assumed that the material sign of property must be correlated not only with objects of the material world with physical properties, but also with a thing and its place in the system of objects of civil rights. For this reason, it was proposed that non-material goods should be considered the subject of crimes against the circulation of objects of civil rights.

The specificity of criminal attacks on cashless funds and without documentary securities requires a review of the established and folded system: “crimes against property,” because criminal encroachments of property can be directed not only to property rights as such, but also to other rights. Property rights cannot be the subject of theft, they cannot be stolen, but they can be illegally acquired, which requires a different approach to modeling the signs of such property crimes and their qualification. From this point of view, it is necessary to deal with the unlawful acquisition of property rights of the owner or other legitimate owner.

In the event of a criminal encroachment on property rights, the perpetrator does not carry out the act of physically moving foreign objects into his own property, but gains property benefits as a result of the unlawful acquisition of property rights, their use for his own purposes, illegal alienation or evasion of obligations. The illegal acquisition of objects of civil rights is not expressed in the seizure of someone else's property, but in the illegal transfer of objects of civil rights into the possession of the perpetrator. Having acquired various rights, the actions of the perpetrator are aimed at causing damage to the owner or another legitimate owner and are characterized by the extraction of property benefits. The facts of taking possession of documents of a property nature should be regarded as infringement of property rights.

Criminal encroachment on intellectual property objects is significantly different from theft of material objects, because intellectual property rights do not depend on the right of ownership of the material carrier (thing), in which the corresponding results of intellectual activity or means of individualization are expressed. Therefore, in case of

illegal use (acquisition, etc.) of such results, the rights to them should not be subject to protection. It is advisable to consider the unlawful violation of property rights to objects of intellectual property as a crime against the circulation of objects of civil rights, because the criminal law should protect not only the material carrier from criminal influence (within the framework of the doctrine of crime against property), but also the information component of the invention, utility model or industrial design. The assignment of machine information, including software, unauthorized copying of information, possession of information that constitutes bank or commercial secrets, etc., is not considered as theft because illegal receipt of information does not lead to a decrease in its volume from a legitimate user, which cannot be the case with the physical seizure of someone else's property. Information is the subject of crimes against property benefits and, where the offender is not subject to special criminal liability, such acts for obtaining property benefits should constitute crimes against the circulation of objects of civil rights.

Crimes against the circulation of objects of civil rights (property benefits) can be committed in various ways, the essence of which is not to seize someone else's property, but to cause damage in order to gain property benefits through the unlawful use of other people's property or other objects of civil rights, their illegal acquisition, alienation or unlawful evasion of obligations.

Recognition as the object of theft of property only requires a review of such features as "right to property," "actions of a property nature," "property benefit" in the context of their relationship with the concept of a thing and its varieties in the structure of objects of civil rights. Data on signs of property crimes are constitutional signs of crimes against the circulation of objects of civil rights.

The right to property is a criminal legal fiction that cannot be attributed to the object of theft. The content of the concept of "acquisition of the right to property" does not correspond to the content of the right to property as a subjective right of a person, therefore the current legislative formulation - "acquisition of the right to property" is devoid of any meaning in the context of the concept and signs of theft and should be excluded from its features. The acquisition of the right to property is not connected with its physical seizure (seizure, circulation), but is an independent illegal act in the system of crimes against objects of civil rights.

It is proposed to supplement the chapter of the Criminal Code on crimes against property and the circulation of objects of civil rights with new criminal legal prohibitions:

1) illegal use of objects of civil rights (intentional illegal gratuitous use of other people's property or other objects of civil rights in order to obtain property benefits, resulting in significant damage); 2) illegal acquisition of objects of civil rights (intentional illegal gratuitous acquisition of objects of civil rights in order to obtain property benefits, which entailed causing damage in a significant amount in the absence of signs of theft); 3) illegal alienation of objects of civil rights (intentional illegal gratuitous alienation of someone else's property or other objects of civil rights in order to obtain property benefits, resulting in significant damage); 4) unlawful evasion of obligations (deliberate unlawful evasion of obligations, as well as imposing the burden of their expenses on another person in order to obtain property benefits, resulting in significant damage).

A distinctive characteristic of the system of crimes against the circulation of objects of civil rights is the method of criminal encroachment and the mechanism for causing damage to the owner or another owner. Such crimes are committed in the system of civil traffic and have a property character, as a result of which they encroach on property relations regarding the transition of material and non-material benefits; the subject of crimes are objects of civil rights (property benefits); acts involve significant damage, are committed intentionally and have the purpose of obtaining property benefits.

Damage in crimes against the circulation of objects of civil rights should be defined as material losses caused to subjects of economic relations by restricting or depriving them of the ability to satisfy their material interests (to benefit) from the economic turnover of objects of civil rights.

Property benefits cannot be the subject of theft, but there is a constructive sign of crimes against the circulation of objects of civil rights. The property benefit is also not the subject of a crime, since a person cannot influence it, but is a result that is formed by certain actions with objects of civil rights. Thus, property benefits are property-related actions performed by a person (both the victim and the perpetrator) with objects of civil rights and aimed at extracting property benefits by saving his own property fund, recovering profit or getting rid of material costs.

**4.** Theft is a delict of an absolute nature, where the wrongfulness of an act consists in taking possession of someone else's thing and causing damage to the owner or other owner. The definition of theft should be preserved exclusively as an attack on someone else's thing, thereby protecting the static nature of the thing on the right of ownership or possession of certain subjects.

Criminal encroachments on objects of civil rights (with the exception of things) should be removed from the system of encroachments constituting theft, and form an independent group of crimes covering acts against property relations, and formulated according to a different model of criminal law prohibition, different from the seizure of property. In this case, there is a different mechanism for committing a crime than in theft. While classical theft is characterized by the movement of things in space by taking possession of it and joining someone else's illegal possession, in the event of a criminal attack on non-material goods, there is no influence on the material shell, but a mechanism for obtaining property benefits from illegal actions with non-material goods.

Legislative definition of theft has to be formulated as follows: "Theft is the deliberate illegal gratuitous taking by someone else's property by stealing, robbery, extortion, fraud, breach of confidence, assignment, use of the computer equipment which caused damage to the owner and directed to enrichment of the guilty person or other persons due to physical possession of property".

The criminal law doctrine in modern conditions should detail the physical, economic and legal characteristics of the object of theft due to the development of a multidimensional economy of a socially oriented type.

The subject of theft can only be a thing that has individually defined characteristics that condition the establishment of "right in rem" regime.

Criminal attacks on real estate in most cases do not infringe on immovable property as a thing, an object of material world with certain physical characteristics and legal status, but on a set of property rights owned by its owner or another legitimate owner, the possession of which is the purpose of committing a crime. Therefore, real estate can be the subject of any form of theft, as well as illegal use or acquisition of property rights with the simultaneous extraction of property benefits. Accordingly, criminal infringements may occur not only with respect to the right of ownership of immovable property, but also with respect to the separate rights to real estate - the right of use and possession.

The characteristics of the object of theft in market conditions are determined by the value of the goods (their price); hence, the object of theft is recognized as such a thing whose value is expressed in price or measurable. The economic characteristic of the object of theft is determined not only by the consumer and exchange value of the thing, but also by its ability to be the subject of civil turnover. The subjective attitude of a person to a thing



can serve as a criterion for assigning property to the category of valuable things due to the special importance of property. From these positions, the value of property should be determined not only by its price, expressed in monetary form, but also by the ability to satisfy the social and individual needs of a person.

Natural objects can be the subject of theft and crimes against the loss of civil rights objects.

Possession of property seized or restricted in civil circulation must be recognized as theft of other persons' property and be regarded as a crime against property, except in cases where the theft of objects seized or restricted in civil circulation is already subject to independent criminal liability. At the same time, the value concept of assessing the economic characteristic of the object of theft cannot be applied to objects withdrawn from civil circulation, because in this case the cost (monetary) of such property is not important, since the very fact of encroachment on such objects is criminal.

The property is alien to the perpetrator, who has neither the real nor the alleged right to the property, and such property belongs on the right of ownership (or otherwise) not to the owner, but to the other person. This property is the object of someone else's possession, while the seized property is in the actual possession of a certain person, and not the perpetrator.

The criminal law should protect not only the right to property, but also the actual possession of property. From this point of view, the purpose of criminal law on property crimes is to prohibit harm to both the interests of owners and owners of property. By committing an unlawful act of taking possession of another's property, the guilty person commits theft as such, that is, seizes another's property in a prohibited way, and the criminal consequence of causing damage (to the owner or other owner) is secondary to the criminal act of assault.

The object of theft cannot be found, abandoned, accidentally showing up property in the face. Assignment of abandoned things (left by the owner in a place reliably known to him or for a short time; has identification signs of belonging) must form the theft of someone else's property. Theft of lost, forgotten things will occur if the culprit, when appropriating the thing, reliably knows who owns the property to be appropriated, or has reasonable grounds to believe where the owner of the thing is and that he can return for it. The external conditions, environment, position and properties of a thing may indicate that it is not lost by its owner, but left or forgotten by him.

Objective and subjective signs of theft have a direct connection with the subject of criminal encroachment and largely determine the precedence of criminal law protection of property relations.

The method of theft should be related to the subject of the criminal offender and correlate with it. The criminal mode of action in theft cannot be linked to the extraction of property benefits. In the case where the method of activity consists in the extraction (obtaining) of property benefits, this is a crime against the circulation of objects of civil rights.

Taking possession is the act of seizing someone else's property, transferring it to his physical possession against the will and consent of the owner of the property or its legal owner. Taking possession consists of actions on: a) the seizure of someone else's property, that is, the extraction, exclusion, separation of the property of the proprietor or its owner and its introduction into its property turnover; b) the conversion of someone else's property to the criminal possession, that is, when the owner himself transfers the property to the perpetrator, trusting him, with or without giving authority over the property, under the influence of deception or threats.

The moment of completion of the theft should be determined by the moment of seizure of someone else's property by the guilty, regardless of whether he had a real opportunity to use or dispose of the stolen. If the owner of the property during the theft loses real dominance and control over his thing, while the culprit takes possession of someone else's property, then there is a final theft.

Reducing the possession of stolen property to the limits of the real possibility to use and dispose of the stolen one gives rise to a wide question about the source for subjective perception (judicial interpretation) of the situation and levels an objective criterion for the moment of the end of the crime. The time of completion of the crime should be uniform for all forms of theft.

The illegality and gratuity of theft are binding constructive signs of the objective side of theft, and they should not be excluded from its definition. When determining the gratuity of theft, along with the sign of insufficient equivalence, one more thing must be taken into account - whether the subjective rights of the owner or another owner of the property are violated in the equivalent seizure of property.

Damage in theft should be calculated according to the value of the theft of property (the monetary expression of the value is the price), and the loss of profit and other possible

types of material harm are not included in the concept of damage due to the fact that the mechanism of harm to property relations as an object of criminal law protection is determined by the subject of the crime. In this part, it is necessary to design all forms of theft according to the type of material elements of crimes, including in them as socially dangerous consequences of real property damage - direct positive material damage caused to proprietor or another owner in the form of loss of property (Khilyuta, 2012: 98).

A selfish goal cannot be a systemically important sign of theft, as it does not indicate the result to which the perpetrator seeks to commit an act of theft. For a more complete definition of a crime, the nature of the perpetrator's actions and the motive for his conduct must be decisive. Therefore, from the point of view of subjective signs of theft, its purpose should indicate that such an act is aimed at enriching the perpetrator or other persons. Such an outline of the purpose of theft, (theft is aimed at enriching the perpetrator or other persons by physical possession of property) can serve as one of the clear criteria for distinguishing between theft, and other mercenary crimes.

In the chapter on crimes against property and the circulation of objects of civil rights, it is advisable to highlight a special criminal law norm that would provide for responsibility for the unlawful seizure or alienation of someone else's property in the absence of the purpose of enrichment (Article: Illegal actions with property: "Illegal gratuitous alienation or seizure in a significant amount of someone else's property in the absence of selfish motives").

When theft, is committed, the direct impact on the object can only be physical, and it is inherent only in such property crimes that are committed in the form of an act. The object of theft, was interrelated with the objective side, since criminal acts were committed against the object and direct criminal influence was carried out on it.

From these positions, we propose to consider that: theft - secret seizure of property; robbery - open non-violent possession of property; violent robbery - possession of property involving the use of physical violence; extortion - taking possession of property by means of coercion involving the threat of violence, destruction or damage of property, restriction of the rights, freedoms or legitimate interests of the victim or his relatives, disclosure of information that they wish to keep secret, or other actions (inaction) that the victim fears; fraud - taking possession of property by deception; abuse of trust - taking possession of property by intentionally using a person's relationship of trust, as well as the rights and opportunities granted to him to the detriment of the perpetrator, or owner of the property; embezzlement - taking possession of property entrusted to the perpetrator,

as well as using official powers; theft using computer technology - seizure of property by modifying the results of automated processing of computer system data.

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**LEGAL UNDERMINING OF HUMAN DIGNITY IN SPAIN  
THROUGH CRIMINAL LAW AND LAW ENFORCEMENT  
PROTOCOLS ON “GENDER VIOLENCE”:  
INTERNATIONAL TRENDS AND POLITICAL CAUSES.**

*Since 2008 in Spain there was passed legislation that states unequal treatment for the same acts depending on the sex of the perpetrator. Substantive and procedural Criminal Law was amended as well as Law enforcement protocols. The causes of these changes are international trends that come from the anglo/western political elites. In this sense, this unequal treatment is in reality a form of political control, dividing populations and naming male individuals' official enemies of the people/State. This treatment reinstates the Author Criminal Law and the Criminal Law of the Enemy. Human dignity stresses the equal value of all human beings and, paradoxically, sexual discrimination is enacted in the name of equality.*

**Keywords:** *enemies of the people/State - gender violence – feminism - NATO/Western elites - Feindstrafrecht*

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## **1. Introduction: Human dignity and the use of law for politico-religious purposes**

Human dignity is not anymore predicated on every human being instead it seems that “all genders are equal, but some genders are more equal than others”, to paraphrase the (in-)famous Orwellian motto. *Dignitas* means in Latin the “weight” (*gravitas*) of a person, the social acknowledge of his deeds and influence, the effect that his value made on the community, and as such his worthiness. With the influence of the Christian tradition, it was applied to every man as every man is a “son of God” and worthy of the sacrifice of the Christ. From a juridical point of view, we establish dignity as a juridical ground and so we stress the equal value of every human being on the mere fact of his existence as such. For European-Christian tradition, every human being, irrespective of his deeds, opinions, religion, race, or social status is worthy of respect. On the contrary, for the Ancient mind (pagan, pre-Christian) human beings are unequal and deserve different treatments and so Julius Caesar may have *Dignitas*, but not his slaves. Also for the Totalitarian state, not every human being may deserve respect. As it is well known, for National-socialism: Jews, Slavic peoples, religious people, or other non-Arian (if such a thing does exist) people are less worthy than Germanic people. For Communism: *kulaks*, social-democrat, heretic branches of Communism (Trotskyites, anarchist, etc...), *cosmopolitans* (that is, Jews), religious people, and political dissidents (or simply political *not-enough-communism-keen* people) become “enemies of the people” (*Ennemie du people*, враг народа) and an enormous article (17 different activities and even attitudes) of the Penal Code (the infamous art. 58) was devoted to them.

In this sense, human dignity is the ethical ground of juridical Equality before the Law. *Sensu contrario*, if a society or a political regime distinguishes between categories of human beings it will establish juridical differentiation and so not every citizen or human being will have the same rights. It seemed that after two world wars and the “classic” Totalitarian states (III Reich, Leninist-Stalinist USSR, etc...), legal differentiation based upon different kinds of human beings was definitively banned and the use of the Law (and specifically, Criminal Law) for political, religious or ideological repression was impossible again in “developed” countries. This article explores the possibility that this regime of legal discrimination, blurred human dignity in certain categories of citizens, and Criminal Law aimed repression is again enacted.

International trends, especially in the Western world and specifically coming out of the USA/anglo-minded *milieu* are pushing for *positive discrimination* in favor of women and a “gender revolution” (Kuby 2017: 181) that for its pervasiveness, holistic approach, and

“hot” engagement serves the social function of a (new) religion. The historical origin of “positive action” is in the law of the United States of America and has even been projected in the European Community law (art. 141.4 of the *Treaty establishing the European Community* (Consolidated version 2002), the content of which is reiterated by Directive 2002/73/ CE and the proposal for Directive 2004/0084). As a specific application of this trend, the Spanish legislator has passed a Law (Law on Comprehensive Protection Measures against Gender Violence / *Ley Orgánica de Medidas de Protección Integral contra la Violencia de Género*, LIVG, LO 1/2004, December 28<sup>th</sup>, 2004) that establishes, among other measures, specific and *aggravated* Criminal law forfeitures for men, a different and specific *semi-jurisdiction* (Courts of Violence against Women / *Juzgados de Violencia sobre la Mujer*) and the basis of new Law enforcement procedures against offenders *that are men and have* committed a crime against his partner *that is a woman*.

Of course that there is a justification on the (alleged) historical predominant position of men that as a group<sup>1</sup>, collectively and structurally have oppressed women. So there is an inherent mentality of men than makes us *male chauvinistic* and therefore, we need special Criminal treatment, and for special we mean, *aggravated* treatment.

To an unprejudiced and not yet ideological mind, this calls for at least a *minimum* of critical examination: whether the so-called noble purpose of leveraging women and reach the desired equality is precisely eroding the very juridical equality it is pretended to achieve. And in this sense, human dignity is not anymore predicated on every human being instead it seems that “all genders are equal, but some genders are more equal than others”, to paraphrase the famous Orwellian motto.

## 2. The problem

### 2.1 Substantive Law

As of 2004 new legislation, the Spanish state has established a Criminal Law differentiation, amending the Criminal Code (1995, Ley Orgánica 10/1995, de 23 de

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<sup>1</sup> There is a transversal study of researcher Javier Álvarez Deca, that compiling the information of 500 studies on domestic/partner violence proves that levels of violence are similar for each sex and women tend to be the beginners of the violence inside the couple. Study can be consulted here: [https://www.academia.edu/41092862/500\\_razones\\_contra\\_un\\_prejuicio](https://www.academia.edu/41092862/500_razones_contra_un_prejuicio)

Noviembre, del Código Penal) and depending on offender's sex (in this case, not the "gender"), *same actions will trigger different penalties.*

Chart 1. Criminal asymmetries in intimate partner violence

	Man "Gender violence"	Woman "Domestic violence"
Mild intimidation ( <i>Amenazas leves</i> )	Art. 171.4 Criminal Code 6 months to 1-year prison Or works in favor of community 31 to 80 days Losing parental custody up to 5 years Law Enforcement procedure: immediate arrest.	Art. 171.7 Criminal Code + familiar aggravation No prison, permanent traceability 17 to 30 days. Or Works on the favor of community 17 to 30 days Or Fine from 2 to 4 months <sup>2</sup> Law Enforcement procedure: no arrest.
Armed mild intimidation ( <i>Amenazas leves con armas</i> )	Art. 171.5 Criminal Code 6 months to 1-year prison Or Works in favor of community 31 to 80 days Losing parental custody up to 5 years Law Enforcement procedure: immediate arrest.	Art. 171.4 Criminal Code 3 months to 1-year prison Or Works in favor of community 31 to 80 days Losing parental custody 6 months to 3 years Law Enforcement procedure: immediate arrest.
Mild coercion ( <i>Coacciones leves</i> )	Art. 172.2 Criminal Code 6 months to 1-year prison Or Works on the favor of community 31 to 80 days Losing parental custody up to 5 years Law Enforcement procedure: immediate arrest.	Art. 172.3 Criminal Code + familiar aggravation No prison, permanent traceability 17 to 30 days. Or Works on the favor of community 17 to 30 days Or Fine from 2 to 4 months Law Enforcement procedure: no arrest.
Abuse without injuries ( <i>Matrato de obra</i> )	Art. 153.1 Criminal Code 6 months to 1-year prison Or Works in favor of community 31 to 80 days Losing parental custody up to 5 years Law Enforcement procedure: immediate arrest.	Art. 153.2 Criminal Code 3 months to 1-year prison Or Works in favor of community 31 to 80 days Losing parental custody 6 months to 3 years Law Enforcement procedure: immediate arrest.

<sup>2</sup> Spain adopted the Scandinavian system of fine-per-day system. So first it is established the economic capacity of the offender, and after it is condemned to pay a quantity per day. So for example, a common fine is 6 euros per day. And therefore, 6 euros x 30 days, makes a fine of 180 euros.



Aggravated injuries ( <i>Lesiones graves</i> )	Art. 148.4 Criminal Code 2 to 5 years of prison Law Enforcement procedure: immediate arrest.	Art. 147.1 Criminal Code + familiar aggravation 1 year 7 months to 3 years prison Or 9 to 12 months fine Law Enforcement procedure: immediate arrest.
(Source: Observatorio Galileo, in <a href="https://observatoriogalileo.blogspot.com/2017/01/la-asimetria-penal-en-la-violencia-de.html">https://observatoriogalileo.blogspot.com/2017/01/la-asimetria-penal-en-la-violencia-de.html</a> accessed on 25-07-2020).		

As we can see, there are aggravated punishments for men for the same facts in comparison with women, re-instaurating the *criminal law of the author*. The distinction between *Feindstrafrecht/ Bürgerstrafrecht*, (Criminal Law of the Enemy / of the Citizen) is coined by Günther Jakobs (in Jakobs. G. 1985: 751-785). Theoretically -for this author- when a citizen is out of the social contract, it does not merit the protection of Law because he is an enemy, the returns to the *state of nature* in Hobbessian terms, and so it is simply treated as an enemy. The III Reich stated that the *Volksschädlinge* (vermin of the people) do not earn a normal Law treatment and in so, they were quickly condemned by the *Volksgesichtshof* (Court of the People). Jakobs justifies the necessity of a *Feindstrafrecht* philosophically and refers to the Hobbesian social contract theory and its interpretation by Immanuel Kant: Whoever terminates that social contract by dishonoring it, leaves society and enters the lawless natural state. Thereby, he loses his rights as a person and turns into an enemy, and as such, he has to be persecuted by society.

The laboriously general theory of crime, dogmatically developed in the 19<sup>th</sup> century, mostly by german scholars rejects this consideration. Indeed as for Muñoz Conde, “Criminal law is a criminal law of action and not of author. The distinction between criminal law of facts and criminal law of author is not only a systematic question but also, and fundamentally, political and ideological. Only criminal law based on the fact committed can be democratically controlled and limited. Author criminal law is based on certain qualities of the person for which the person, most of the time, is not responsible at all and which, in any case, cannot be specified or formulated with all clarity in the criminal types. Thus, for example, it is very easy to describe in a criminal offense the acts constituting a homicide or theft, but it is impossible to determine with the same precision the qualities of a “murderer” or a “thief”. That is why the criminal law of author does not allow to limit the power of punitive state and favors a totalitarian conception of it. From the conception of criminal law as criminal law of act it follows that neither thought nor ideas, not even the resolution to commit a crime, can never constitute a crime, as long as they are not translated into external acts” (Muñoz Conde, García Arán, 2010:213)

There is also a Gender aggravating disposition. A Criminal Code amendment from 2015 adds the aggravating factor of gender in the Penal Code (art. 22: 4th and 8th circumstances): “4.<sup>a</sup> Committing the crime for racist, anti-Semitic or other types of discrimination regarding the ideology, religion or beliefs of the victim, the ethnic group, race or nation to which they belong, *their sex, orientation or sexual identity, reasons of gender, illness or disability*”.

In 2018 the “Spanish Supreme Court ruled on the use of this new aggravating factor. [...] The most important thing is that the Supreme Court has made it clear that *gender aggravation can only be used when an aggressor is a man and the victim is a woman*, when there is a spirit of domination. So, faced with the same facts, this aggravating factor can be applied to men but not to women” (Observatorio Galileo, in <https://observatoriogalileo.blogspot.com/2017/01/la-asimetria-penal-en-la-violencia-de.html>, accessed on 25-07-2020).

It seems then that, as feminism/gender belief has become legislation, so male individuals are considered *enemies* of the State/of the people, an entire social class deserves special aggravated treatment for the mere sign of their sexual, biological identity. To avoid that this Law may be applied to lesbian couples (male homosexual couples are obviously out of the question since there is no woman victim here), the Constitutional Court (a Supreme Court for constitutional Law) stated that the real reason why there is no place in lesbian relationships is what is established in Organic Law 1/2004, in its article 1, which says that “the present Law is intended to act against the violence that, as a manifestation of discrimination, the situation of inequality and the power relations of men over women is exercised over them by those who are or have been their spouses or by those who are or have been linked to them by similar affective relationships, even without coexistence”. That is the reason why only the man can be an active subject, since what they want to fight against is the situation of inequality in the couple relationship (Constitutional Court Sentence 59/2008, May 14<sup>th</sup>).

This Constitutional Court sentence, that declared the aforementioned “Gender Violence” Law constitutional was declared *for political pressures*. Indeed, it was later revealed publicly by former vice-president of Spain and socialist prominent leader, Alfonso Guerra (declarations 19/11/2019 on Ashurst Lawyers Conference, it can be consulted here: <https://www.youtube.com/watch?v=gspMvm2icuc>, minute 5:40) that when the Law was passed he thought it will be declared unconstitutional (it is against the constitutional principle of equality, art. 14 Spanish Constitution). So he spoke with the President of the Constitutional Court and she stated that this Law will be declared unconstitutional the

very time that case arrived at the Court. But in 2008 the aforementioned Sentence stated the constitutionality of the “Gender Violence Law”. So the former vice-president called the President of the Court and she stated that “you do not know how unbelievable pressures we were under, amazing pressures came so we have no other option as to declare the Law constitutional”. So it was. These public statements of a prominent politician and Deputy for the Spanish congress might cause, in other times or other subjects, a Criminal investigation, and a big political scandal, possibly leading to this very Law immediate derogation, the Criminal indictment of the judges and the active intimidators of the Court. But in the name of the untouchable ideology (feminism) and against the *enemy of the State* (male sex individual) it is possible to justify everything, as in Nuremberg Laws or the soviet Vishinski-Moscow Trials.

## **2.2 Procedural Law**

Procedural Law is also changed in the sense that the Spanish regime has enacted a specific jurisdiction for this kind of crime, that is the crimes committed by male individuals against feminine partners. As of 2018, there are 106 Exclusive Courts on Violence over Women and 355 compatible with this kind of offenses (Directory Of Courts for women, General Council of Judicial Branch, available at <http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Directorio-de-Juzgados-de-Violencia-y-Oficinas-de-ayuda/Juzgados-de-Violencia-sobre-la-mujer/> accessed 1-08-2020). If the general rules are applied also to these Courts, what is the purpose of this differentiation? By making this distinction, the Law will subvert the Procedures by appointing Judges with certain ideological profile because judicial operators that are against this “Gender Violence” Law will avoid this Jurisdiction. Lawyers, Prosecutors, Judges will renounce to assist in this Jurisdiction if they perceive there is no fair process and felt that innocent people are condemned or false complaints are used to get advantages on divorce trials, child custody trials, etc... They also will be reluctant to participate in “gender courses” or feminist seminars, and in so, the political power will have a list of ideological pro or versus judges. In fact, whereas there is a civil procedure, if there is a female partner that complaints against her male partner, the whole process will be transferred to this special jurisdiction, and almost automatically, the male partner will lose custody, and so will have to pay money to the divorced female partner who will conserve the house, the children and receive money for all this. All because a simple claim (even if after is ruled out or even declare false) of the female partner.

This situation has received also *feminist* criticism because of the evident privileged position of the woman. And so, from a feminist perspective: “It is true that article 153 of the CP also punishes more attacks on ‘a particularly vulnerable person who lives with the perpetrator’, assuming that the perpetrator could be a woman and the attacked man, provided that such vulnerability is proven. However, women in a heterosexual relationship as a couple, or ex-partner, do not have to show that special vulnerability, but it is taken for granted. Whenever they suffer threat, coercion, or aggression by the male partner, the woman will be considered especially defenseless and, therefore, the man will be punished with a greater penalty. *We ask ourselves: does it benefit women to always be considered the victims? Doesn't that help to strengthen the masculine stereotypes (power, dominance...) and feminine (subordination, passivity...)?*”

We believe that this *unequal punitive treatment* does not help to reinforce the autonomy of women, a central objective that should never be lost sight of. Promoting the idea that women are always victims and ‘vulnerable beings’ seems to us too expensive a toll in exchange for doubtful effectiveness in protection derived from a systematic greater criminal punishment for the male partner, author of occasional violence. On the other hand, *we are concerned about the real risk of favoring an author's criminal law, derived from belonging to a specific group, even though the reasons of social inequality on which the precept is based are legitimate*”. (Caro – Ortubay 2016)

This concern is fully justified because, through this special Court system, the legislation tries to conform to a special Jurisdiction where male individuals are not presumed innocent but presume guilty and they must fight the way out to their innocence for years. It is a paradoxical situation where, “the legislator has considered that men are always in a situation of superiority over women, because they are usually the ones with the most physical strength, creating a presumption *iuris et de iure*, that is, they do not admit evidence to the contrary. He does not observe the specific case, since the man may be weaker than the woman with whom he has a romantic relationship.

Criminal Law should take into account the real situation of the events carried out, both personal circumstances and objective circumstances of the damage produced, which is why crimes have a minimum and maximum penalty, and not only the minimum and maximum, but also they can increase or decrease in degree, according to the rules for determining penalties, all to individualize the penalty.

What has been done, contrary to what is thought, has been to benefit the one who is much stronger than the spouse, while the one who is not more physically stronger than the woman is harmed”. (Martínez 2009)

In so, the Criminal procedure and concrete praxis accept not only a Criminal Law of the Enemy, or an Author Criminal Law, but also changes the General Principles of Law, distorting the sense of *Equitas* and moving towards a *class interest*. In this class interest, a male individual is at least a suspicious individual who is, intrinsically, a chauvinist, misbehaving criminal. So the Law will be applied not anymore as such, but with a *gender perspective*, exactly as it was stated in Soviet Law, that the “purpose of socialist society” limits the protection of civil rights: “The *protection of civil rights is limited to cases in which their exercise is not in contradiction with the purpose of the same in a socialist society* that builds communism, but also adds the obligation of all citizens of respect, in the exercise of their rights and obligations, not only the laws but also the rules of life in a socialist common and the moral principles of a society that builds communism” (Article 5 of Bases of Soviet Law, in Rey Martínez 1963: 155).

These abusive procedures are now back-firing since, some judges are tired of constant false claims and become more strict in the application of Law, causing that real injustices against women with real abusive criminals became unpunished by the Courts.

### **2.3 Law enforcement procedures**

Police authorities' behavior is modeled into this “class interest”. The mere word of a female partner is enough to put his male partner in jail for 72 hours (if the complaint is made Friday evening, the arrestee most probably will be all weekend under arrest), even if the claim was not proved. A policeman has received orders to arrest the male partner every time they are accused by their female partner, even if there are no proves of the claim. This often causes embarrassing arrests in public places, workplaces, familiar, and even in front of the children of the male arrestee. Frequently, minors are collateral victims of this process where one partner (the female one) has a legal right to “give a civilized” kick to the male partner. And so, “children witnessing domestic and intimate partner violence are secondary victims of violence at home. The impact of domestic violence has tremendous consequences for a child’s psychological development and social behavior. In comparison with the past few decades, the problem of children witnessing domestic violence is much more recognized, especially in the USA and EU states. Despite that improvement, legal and civil responses have match controversy and ambivalent outcomes” (Pavićević 2019: 107-108).

### **3. The causes: international and political causes**

Causes of this Criminal Law distortion are on the international arena, and more specifically on the anglo-globalist agenda that intends to subvert national strength through hybrid war, cultural subordination (Hans Morgentau), and *divide et impera*. Anglo-protestant logic, identity politics, and “sexual revolution” (Kuby 2017) are, among other things, a method of political control that eroding erotical relationships, family life and for life, partner engagement pushes societies to individualism, mass behavior, and easy mass media manipulation. Not a single feminist or “gender-based” agenda has questioned or challenged the NATO power, the financial Wall Street elites, the deindustrialization of peripheral countries, the industrial-military complex, etc... On the contrary, destroying man-woman relationships, naming one sex as an “essential criminal” and distorting Criminal Law and fairness (in the very name of equality) this (anglo-NATO) elites continue to be reinforced in his power. In Spain in a context of the general decline of Criminal felonies and misdemeanors, fatal female victims of male partner offenders are not declining since the inception of this Law. So from a relative perspective, female victims are increasing and not decreasing since the enactment of the Law. If, for example, Kosovo continues to lean on the NATO side and serves as a military standpoint of the USA it might become a more feminist region, but most probably not a more independent, self-governed, stable, and strong political subject. These policies and the Criminal Law changes demanded by the Western-Anglo-Atlantic bloc in exchange for financial aid, military support, and (most important) the “certificate” to be a “civilized modern” Western country is a high price to pay that Slavic cultural countries should ponder very carefully.

### **4. Conclusions: Human dignity degradation in the name of equality**

In Spain, this Law reform on gender violence has stated an aggravated Criminal Law against male partners by the mere fact of being male. It has created a special (extraordinary) jurisdiction to judge these special felonies and misdemeanors and has enacted Law enforcement protocols that allow women partners to put in jail their present *or past* partners based solely on her word. No bad consequences whatsoever may come for the female false accusations. Therefore, the Spanish state has restated the Criminal Law of the enemy considering all-male as intrinsically chauvinist violent-against-woman beings. In the context of the general decline of Criminal rates, female partner mortal victims remain stable, so since the passing of the new “Gender-violence” legislation, violence against women is exacerbated, not reduced significantly.

Victims here are condemned to oblivion, and thousands of innocent male partners, thousands of aggressively punished and unequal punished perpetrators are the object of hate just as the new враг народа, enemy of the people. *Feindstrafrecht* is now in vigor in Europe and in no way is helping male or female to achieve a fair process under equal treatment for all based on common and equal human dignity. The French political thinker, Alexis de Tocqueville saw in the 19<sup>th</sup> century the aurora of this new “democratic” despotism, which is more subtle and more pervading. Let us not normalize unequal treatment under the Law for sexual discrimination in the name of equality.

“But it would seem that if despotism were to be established amongst the democratic nations of our days, it might assume a different character; it would be more extensive and milder; it would degrade men without tormenting them. I do not question, that in an age of instruction and equality like our own, sovereigns might more easily succeed in collecting all political power into their own hands, and might interfere more habitually and decidedly within the circle of private interests, than any sovereign of antiquity could ever do. [...] After having thus successively taken each member of the community in its powerful grasp, and fashioned them at will, the supreme power then extends its arm over the whole community. It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided: men are seldom forced by it to act, but they are constantly restrained from acting: such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd.” (Tocqueville 2002:770-771)

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**Mario Caterini\***

**Giulia Rizzo Minelli\*\***

**THE “RIGHT TO LIFE” OF PEOPLE  
CONVICTED IN ITALY TO LIFE IN PRISON:  
AMONG RECENT JURISPRUDENTIAL ASSESSMENTS  
AND PERSPECTIVES *DE IURE CONDENDO*<sup>1</sup>**

*The present article addresses the issue of the right to life from a double perspective.*

*If – in fact – the protection of life must induce the legislator to introduce particularly effective sanctions to protect this right from unjustified aggression, on the other hand, the punitive claim of the State cannot exclusively consist, in any case, in the neutralization of the offender for life, since this would constitute an exploitation of the human being for contingent purposes of criminal policy and would be in contrast with the re-educational function of the penalty, as it is provided by the Article 27, par. 3., of the Italian Constitution and with the principle of human dignity.*

*A similar prejudice would seem to be recognized in the case of life imprisonment, which – as a perpetual penalty – limits (and we will see later how) any possibility of liberation of the condemned and frustrates his expectations and hopes.*

*In detail, therefore, the paper will examine the recent developments of the jurisprudence of the European Court of Human Rights and of the Constitutional Court on life imprisonment, trying to highlight the illegality not only of the so-called “life imprisonment impediment” (as it was recently affirmed by the ECHR and by the Constitutional Court) but – more generally – also to life imprisonment in all its forms and to propose – de lege ferenda – possible alternatives to the perpetual sanction, necessary to protect the right to life and hope of the offender.*

**Keywords:** *Right to life; right to hope; life imprisonment; life imprisonment impediment; European Court of Human Rights, Constitutional Court.*

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<sup>1</sup> Although the work is the result of shared reflections, paragraphs 2, 3, 4, 5, 6 are to be attributed to Mario Caterini, while paragraphs 1, 3.1., 4.1., 4.2., 4.3. are to be attributed to Giulia Rizzo Minelli.

## 1. The two-faced nature of the right to life

The theme of the right to life can be declined under a double and specular profile.

Indeed, if the need to protect the life, the psycho-physical integrity and the individual incolumity leads the legislator to introduce criminal sanctions aimed at protecting such legal assets from unjustified aggression, their protection should (*rectius*, must) also constitute a limit to the punitive claim of the State, which – in a constitutionally oriented penal system – cannot impose a punishment intended exclusively to neutralize the offender for life, since this would constitute an exploitation of the human being for contingent objectives of criminal politics.

For the first profile the human life, although not expressly mentioned in the Italian Constitution – unlike what happens in German (Article 2, par. 2), Spanish (Article 15) and Portuguese (Article 24, par. 1) Constitutions –, represents a primary legal asset, which is highly personal, pre-existing to any legal recognition and pertaining to the person as such. Its protection can be indirectly inferred from constitutional provisions related to other contiguous rights (*i.e.* the right to health) or dictated for particular purposes (*i.e.* the prohibition of the death penalty) or else by ordinary rules (*i.e.* the crimes against life). Above all, the personalistic principle, provided in Article 2 of Italian Constitution<sup>2</sup>, is extremely relevant, due to the fact that establishes the centrality and the primacy of the human person over any other value and rises the life to the rank of the highest interest, since its protection is a priority for the enjoyment of every other right (physical integrity and personal freedom) and is preeminent over other personal goods (Leoncini, I., 2019).

Life also ranks at the apex of human rights contemplated by the Universal Declaration of Human Rights (Article 3), by the European Convention on Human Rights – which requires member states to legally protect it, also through rules of a preventive nature (Article 2), as “*first of human rights*” and “*supreme value in the scale of human rights*”<sup>3</sup> – and by the Charter of Fundamental Rights of the European Union (Article 2)<sup>4</sup>.

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<sup>2</sup> According to Article 2 of Italian Constitution, “the Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled”.

<sup>3</sup> ECHR, *Streletz, Kessler e Krenz v. Germania*, sent. 22.3.2001, ric. n. 35532/1997, 34044/1996 and 44801/1998.

<sup>4</sup> See more in Kolaković-Bojović, M.; Grujić, Z. (2020). Crime victims and the right to human dignity – Challenge and attitude in Serbia, *Yearbook. No. 3 Human rights protection “The right of human dignity”* (pp. 239-270).

Although – traditionally – there is a tendency to deny the existence of constitutional obligations of criminalization, the criminal punishment appears essential to the effective safeguard of human life, which is protected, directly or indirectly, in a wide range of incriminating norms, monoffensive and plurioffensive, placed in the Italian Criminal Code and in special laws.

Therefore, given that the national legal system is called – in order to defend goods such as life – to adopt suitable measures for the repression of facts that seriously offend them, in doing so it cannot avoid to take into consideration the necessity to offer to the convicted a path of resocialization, necessarily oriented towards the return of each convict – also the one most difficult to “recover” – in the society (Montagna, M., 2019).

This last consideration leads to deepen the second – opposite – profile of the right to life, whose safeguard cannot, in fact, allow the State to commit acts that are harmful or – in any case – excessively restrictive of this legal asset.

The two-faced nature of the theme emerges in the case of life imprisonment (pursuant to Article 17 of the Italian Criminal Code) that, from a victim-centric perspective, constitutes the maximum sanction imposed for those more serious crimes that harm the lives of individuals or their public safety– including that of slaughter with the death of one or more people, murder pursuant to Articles 576 and 577 of the criminal code, torture in which the death of the victim is voluntarily caused (Article 613-bis of the criminal code) or of kidnapping for the purpose of extortion, followed by the death of the kidnapped as a consequence desired by the agent (Article 630, par. 3, criminal code) –, on the other hand, for the condemned represents a sort of “civil death”, given that the guilty is deprived, for his entire existence, of the hope of being able to be reintegrated into society<sup>5</sup>.

Thus, although the death penalty no longer exists in the Italian legal system, there is still a penalty “*untill the death*” (Musumeci, C. & Pugiotto, E. 2016), that is the life imprisonment, on whose peculiarities and different forms we will focus on in the

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<sup>5</sup> On the respect of human dignity during the criminal proceeding and in the execution of the sentence see Matić Bošković, M. (2020). Human dignity in the criminal proceedings – interpretation of the European Court of Human Rights. *Yearbook. No. 3 Human rights protection “The right of human dignity”* (pp. 61-74). On the balance between human dignity and prison, in a comparative perspective and with reference to the situation in Serbia, see Pavlovic, Z. S. (2020). Personal dignity and challenges of imprisonment. *Yearbook. No. 3 Human rights protection “The right of human dignity”*, 45-60.

following pages; in fact, the life sentence represents a subject that is still deeply discussed, which arouses conflicting social reactions and agitates the sensitivity of the jurists.

## 2. Be locked up until death

Although the penalty assumes *de facto* a polyvalent physiognomy, being afflictive and preventive, both in a special and general sense, its main purpose – attributed *de jure* by the Italian Constitution – is the social integration; so, the afflictive and preventive effects that characterize the penalty should not compromise *tout court* its re-educational aim.

Any penalty imposed on the perpetrator of a crime – so even that one of life imprisonment – cannot consist only of an eternal punishment for the fact committed, but – in a constitutionally oriented perspective – must be marked by humanity and should tend to re-educate the offender (Art. 27, par. 3, Constitution).

In the second half of the last century, in order to reduce the severity of the discipline affecting the life prisoner, were introduced the institutions of conditional release (Article 176, par. 3, Criminal Code) – which allows the convicted to life imprisonment to suspend the prison penalty and to replace it with another less affective, if at least twenty-six years of prison have been served – of premium permits – to which the condemned can access after having spent at least ten years in prison (Article 30 of Law No. 354, the so-called Penitentiary Law, hereinafter “PL”) – of the semi-liberty (Article 50, par. 5, PL) – which can be granted to the offender who has served twenty years of sentence – and external work for public or private companies or in public administrations (Article 21, par. 2, PL). These benefits – although they can be used only if the offender has shown constant evidence of good conduct and repentance in order to an effective social recovery – theoretically discolour the fixed, rigid and perpetual nature of life imprisonment.

However, similar beneficiary institutions have suffered a strong limitation by the so-called “Emergency legislation” – introduced in the 90s to deal with the mafia massacres that have bloodied Italy<sup>6</sup> – which has provided for various life imprisonment regimes due to the combined effect of the new Articles 4 *bis* and 58 *ter* PL. In the cases of the so-called “impedimental crimes”, indicated at art. 4 *bis* PL<sup>7</sup>, in fact, the possibility of

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<sup>6</sup> Act. No. 203 of 12 July 1991.

<sup>7</sup> The list of crimes listed in the Article 4 *bis* PL is – actually – heterogeneous. It encompasses the crimes committed for the purpose of terrorism, even international, or subversion of the democratic order, by committing acts of violence; crimes referred in articles 314, first paragraph, 317, 318, 319, 319 *bis*, 319 *ter*, 319 *quater*, first paragraph, 320, 321, 322, 322 *bis* of the Criminal Code (*i.e.* Crimes against the Public Administration), crimes referred in articles 416 *bis* and 416 *ter* of the Criminal Code (Organized Crimes) or crimes committed using the

regaining freedom after having served a period of detention is subject to the acquisition of elements such as to exclude the actuality of links with organized, terrorist or subversive crimes that could harm the life of the citizen, as well as the collaboration with the justice (pursuant to Article 58 *ter* PL), in the absence of which – unless this cooperation is impossible or useless (Dolcini, E., 2019) – imprisonment is endless and normally accompanied by the so-called “regime of hard prison”, *ex* Article 41 *bis* PL. This prison regime, born as a temporary measure to cope with the exceptional resurgence of the mafia phenomenon, is now permanently included in the prison system as a tool aimed at separating the links between certain types of prisoners and criminal organizations, depriving the convicted of any relationship with the outside world and inevitably frustrating the re-educational function of punishment.

Article 4 *bis* PL, therefore, introduced a differentiated treatment (the so-called “double track sanctions”) according to whether the offender (for the crimes indicated therein) collaborates – thus being able to be admitted to the enjoyment of penitentiary benefits – or does not collaborate with the justice system; in this latter case, on the basis of the absolute presumption of persistent danger, any possibility of return – temporary or definitive – to free society is excluded.

All the inmates serving an irreducible life imprisonment (in Italy about 70% of the life prisoners), who decide to make use of their right to remain “in silence” and not collaborate with the justice system, are not allowed to plan their existence for the years following the detention, as this is a phase which is unlikely to be realized; their life is marked, day after day, by the awareness that the restrictions in which they find themselves will probably be the same for their entire existence and this regardless of the path taken in prison.

The distance between this form of life imprisonment and the re-educational purpose of the sentence and its sense of humanity is evident: the objective of social integration is stripped down and the punishment remains the only elements of affliction; the guarantees of the offender are sacrificed in the name of prevailing political-repressive needs and the

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conditions set out in the article 416 *bis* or in order to facilitate the activities of the associations envisaged therein. Crimes referred in articles 600 (Reduction into slavery), 600 *bis*, first paragraph, (Child prostitution) 600 *ter*, first and second paragraphs (Child pornography), 601 (Human trafficking), 602 (The buying or the alienation of slaves), 609 *octies* (Group sexual assault) and 630 (Kidnapping for ransom) of the Criminal Code; crimes of Article 12, paragraphs 1 and 3, of the Legislative Decree n. 286/1998 (Crimes committed in the framework of illegal immigration); crimes of the Article 291 *quater* of the Decree of the President of the Republic n. 43/1973 (Organized crime to smuggle foreign manufactured tobacco) and Article 74 of the Decree of the President of the Republic n. 309/1990 (Organized crime for the illicit trafficking in narcotic drugs or psychotropic substances).

person is exploited to obtain results unrelated to those that the punishment must pursue according to the Constitution (Caterini, M., 2020).

In the light of this, emerges a prison system that presents more and more obscure recesses, obscured by that “prison-centered” attitude, typical of the “criminal populism” reigning in Italy, which – deviating from the legitimate functions of the penalty – focuses the sanction on a totalizing detention. Gradually, the need to review this system is becoming evident and therefore requires the intervention of the Constitutional Court and of the European Court of Human Rights, which – with different rulings – have progressively breached the wall of obstativeness to penitentiary benefits, even going so far as to establish that life imprisonment impediment – leveraging on collaboration as the only way to recover freedom – is an irreducible sanction *de iure* and *de facto*, considering that its depriving the right of the condemned to hope and life and therefore it is incompatible with the Constitution and the EHR Convention.

Prison, in fact, cannot be assimilated to Dante’s hell, there those who enter abandon all hope; while representing a tortuous path, full of contradictions and fears, it – in the interest of all the people – should end with the ascent “into the clear world”, so that the desire for justice does not suffer revenge infiltration.

### 3. Life imprisonment in the ECHR Jurisprudence

As noted by Pinto De Albuquerque (2015), “*the most important penological issue on the European agenda today is life imprisonment*”. If, however, the first rulings of the Strasbourg Court in the matter of life imprisonment were limited to considering adequate, in order not to assert the incompatibility of this penalty with Article 3 of the Convention (which prohibits torture and inhuman and degrading treatment), that the internal legislation of the States envisaged concrete possibilities of accessing forms of liberation, is only with the *Vinter et. others. v. United Kingdom* case, relating to the institution of life imprisonment without parole of the English legal system, that there is a change of pace in the ECHR.

If, the IV Chamber of the Court<sup>8</sup>, called in the first instance to deal with this case, taking up what was stated in its previous rulings, has asserted that the whole life order can be a disproportionate sanction only if there is no perspective – *de iure* or *de facto* – of early release and if the detention is no longer functional to any of the legitimate purposes of the

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<sup>8</sup> ECHR, *Vinter et al. v. Regno Unito*, sent. 17.01.2012, ric. n. 66069/09, n. 130/10 and n. 3896/10.

sentence (punishment, general prevention, protection of the community, resocialization, which – in the specific case – had not been demonstrated by the applicant), it is only with the decision of the *Grand Chambre* on the same question that it is declare the violation of Article 3 of the ECHR by the United Kingdom, in relation to the provision, in the British legal system, of the sentence of life imprisonment without the possibility of conditional release<sup>9</sup>.

In the opinion of the Alsatian Judges, life imprisonment is illegitimate when it does not allow the detainee to prove that he has achieved, with the portion of the sentence already expiated, the objectives that the penalty is intended to implement (identified in repression, dissuasion, correction and social defense), and that he deserves his reintegration into society. It follows that, according to the European Judge, there is no violation of Article 3 of the ECHR if a prisoner remains restricted to life because still dangerous to the outcome of specific review (§ 108).

Provided that the assessment of the persistence of legitimate reasons for detention must be carried out at the stage of implementation (*ex post*), life imprisonment is in any case contrary to the principles of the Convention if the offender is deprived of the possibility of knowing *ab initio* when, how and what he must do to obtain conditional release. The State is therefore called upon to ensure prior knowledge of the conditions and times to allow the condemned to be released.

Thus, the Court found that the sentence of life imprisonment in the meantime can be compatible with the Convention if the State adopts a mechanism for reviewing the effective need to continue the execution of the sentence in relation to the purposes of the penalty itself, which takes into account any changes of the offender and the progress made during the rehabilitation process.

Such a mechanism must be devised in such a way as to offer concrete prospects of release to the condemned once a minimum period of detention has elapsed, there the State can discretionally quantify, taking care, however, to clearly predetermine the timing and the modalities of the review, so that the offender is placed in a position to know, from the beginning of the execution of the sentence, what are the requirements for access to conditional release (§§ 119-122).

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<sup>9</sup> ECHH, *Vinter et al. c. Regno Unito*, sent. 9.07.2013, ric. n. 66069/09, 130/10 and 3896/10.

On the basis of this decision, the following years, three rulings of the ECHR have stated the violation of Art. 3 of the Convention by some member states of European Council.

With the decision *Trabelsi v. Belgium*<sup>10</sup> – concerning a Tunisian citizen guilty of terrorist activities and extradited from Belgium to the United States to serve there his sentence – the Court condemned Belgium for having granted the extradition of the convict in a system (that of the U.S.) not capable to treat the prisoners with the guarantees provided by the Convention. With the cases *Ocalan v. Turkey*<sup>11</sup> and *Harakchiev and Tolumov v. Bulgaria*<sup>12</sup>, the judges censured the norms of these states having previewed life imprisonment without parole.

Common content presents the case *Murray v. Netherlands*<sup>13</sup>, of 2016, concerning the case of a mentally ill prisoner, to whom it was denied the possibility of being placed in center specialized in the treatment of psychiatric subjects, thus depriving him of the hope of obtain conditional release.

Instead, with the case *Hutchinson v. United Kingdom*<sup>14</sup>, of 2017, in contrast to what would have been desirable, the *Grand Chambre* ratified the decision of the Fourth Chamber, rejecting the applicant's reasons relating to the violation of Article 3 of the ECHR, noting that life imprisonment without the possibility of a early release is not in itself incompatible with the provisions of the Convention if it remains both “*a prospect of release and a possibility of revision*” (Monaco, C., 2019).

In this context fits the *Viola v. Italy*<sup>15</sup> case, in which it was addressed the legitimacy of the choice of the Italian legislator to render the life sentence incompressible – hindering the granting of penitentiary benefits – for needs related to the lack of cooperation with justice. Indeed, the Italian life imprisonment impediment arrived in front of the ECHR on appeal by Marcello Viola, sentenced to life imprisonment, but always proclaimed innocent, so much so that he has never collaborated with justice.

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<sup>10</sup> ECHR, sent. 4.09.2014, ric. n. 140/2010.

<sup>11</sup> ECHR, sent. 18.03.2014, ric. n. 24069/2003, n. 197/2004, n. 6201/2006 and n. 10464/2007

<sup>12</sup> ECHR, sent. 08.07.2014, ric. n. 15018/2011 and 61199/2012.

<sup>13</sup> ECHR, sent. 26.04.2016, ric. n. 10511/2010.

<sup>14</sup> ECHR sent.17.01.2017, ric. n. 57592/08.

<sup>15</sup> ECHR, sent. 13.6.2019, ric. n. 77633/2016.



The Strasbourg Judges held (with a majority of six judges to one) that the regulatory mechanism envisaged in Italy to prevent the granting of conditional release to a type of life convicted constituted an irreducible penalty *de facto*, excessively limiting the prospect of freedom and the possibility of re-examining the sentence imposed on the non-collaborating offender (§ 137).

Therefore, the European Court, while recognizing collaboration with justice as a significant manifestation of dissociation from the criminal environment, stated that the Italian legislation, in the part in which the demonstration of the detachment from the association becomes a legal index of repentance, crystallizes an absolute presumption of the subject's dangerousness, without any reasonable basis because there is a doubt whether the choice to collaborate with justice always constitutes an individual choice that is effectively free and aware (being able to depend for purely utilitarian and opportunistic reasons, see § 119), and that the lack of collaboration constitutes in itself an index of social danger (given that the silence kept by the condemned person could depend on evaluations that disregard the continuing membership of the subject, see § 118)<sup>16</sup>.

According to the Strasbourg Judge, “*other elements*” – different than collaboration – “*have to be taken as a parameter capable of demonstrating the condemned's repentance*”.

In conclusion, this form of life imprisonment undermines the protection of human dignity since it deprives “*a person of freedom, without working at the same time for his reintegration and without providing him with the possibility of one day regaining this freedom*” (§ 113) and prevents the judge to make an assessment of the possible progress made by the offender towards the goal of social reintegration (§ 143).

With this decision the European Court, while not opposing to the life imprisonment in general (§ 144), was opposed to that form of life imprisonment which precludes a “*prospect of release or a possibility of review*”, *i.e.* a complete and personalized evaluation of the behavior of the prisoner, even if not cooperating, whose personality does not remain “frozen” at the time of the crime (§ 125) and that may have started to adhere to the rules of social life (§ 128)<sup>17</sup>.

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<sup>16</sup> On the subject of “collaboration risk” and reluctant collaborators, see Cottu, E. (2019). *L'ergastolo ostativo nel prisma del sottosistema penale premiale*, on *Rivista Sistema Penale*.

<sup>17</sup> For a more complete analysis of the decision *Viola v. Italy*, please refer to Dolcini, E. (2019). *Dalla Corte Edu una nuova condanna per l'Italia: l'ergastolo ostativo contraddice il principio di umanità della pena*, on *Riv. It. Dir. Proc. Pen.* p. 925; Pelissero, M. (2019). *Verso il superamento dell'ergastolo ostativo: gli effetti*

***3.1 The protection of the right to life and the States positive obligation to prevent aggression: the dissenting opinion in the Viola v. Italy case***

The Court's decision on the Viola case was not taken unanimously, as Polish judge Wojtyczek expressed the opposite. Significant, for the issue that concerns us, is his dissenting opinion, in which the judge, starting from the right to life enshrined in Article 2, par. 1, of ECHR, asserts that its protection must be a priority over the protection of any other right, given that without life the enjoyment of any other claim guaranteed by the State would become illusory. Therefore, the decision of the Italian legal system to prepare a rigorous system of sanctions suitable for repressing the cases in which the fundamental freedoms of the associates are infringed would be correct – as happens with criminal organizations, which represent a threat to people's lives – and it would be legitimate to choose to subordinate the granting of penitentiary benefits to certain positive behaviors of the offender, including collaboration with the justice system.

In detail, however, the Italian legislation – in the opinion of the judge – would not deprive *tout court* people sentenced to life imprisonment for the crimes referred to art. 4 *bis* PL of the hope that one day they will obtain freedom, but it would bind its conditional release to collaboration with justice. As for the collaboration, the judge notes that the applicant – detained since 1992 and sentenced, first to twelve years in prison for having directed a mafia organization (which still represents a threat to the life and safety of people in Italy), then to life imprisonment, having also been found guilty of homicide crimes – is certainly in possession of information that could help the authorities to prosecute other person active within the association and thus contribute to considerably reduce the threat that weighs on people's lives, preventing new crimes. However, the dissenting judge recalls that the inmate “*refuses to collaborate with the authorities, protesting his innocence and invoking fear for his own life and for that of his family members*”. It is precisely the reason given by Viola for refusing to collaborate that represents – according to Wojtyczek – a paradox: the fear for his life or for the lives of loved ones can only be suppressed through the annihilation of the organized crime and the recovery of legality, which depends only on the collaborator's contribution to the proper conduct of justice.

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della sentenza Viola c. Italia sulla disciplina delle preclusioni in materia di benefici penitenziari, online at <http://www.sidiblog.org/>.

If, in the sentence, it is considered possible that “*other elements*”, different than collaboration, allow “*to evaluate the progress made by the prisoner*” in the belief that the “*dissociation*” with the mafia environment can be expressed differently from the “*collaboration with justice*”, in the decision of the Court – in the opinion of the Polish judge – these “other” indicators are not concretely specified, but only identified, generically, “*in the evolution of personality*” or “*in the positive results of the resocialization process*”, thus leaving open the serious and difficult problem to resolve of establishing how, and with what evidence, a non-cooperating convicted to life imprisonment for serious mafia crimes can prove has changed.

As for the purpose of the penalty, the motivation of the sentence with which the judge disagrees “*suggests that resocialization is its only legitimate purpose*”, when, on the other hand, the punishment has a multidimensional nature so, in addition to the purpose of the re-education of criminal, it must also aim at remuneration and must act as a deterrent towards other potential criminals. As a result, the absence of collaboration would thus not consist in an absolute presumption of social dangerousness, but it would comply with the function of the penalty; thus, in mafia crimes, it would be precisely the lack of help to the authorities to legitimize the more rigid sanctions envisaged for convicts.

Wojtyczek, adhering to the reasons that prompted the Italian legislator to introduce a “double track” for some crimes (and significantly in the cases of mafia crimes) and to distinguish the penalties inflicted on convicts who have committed common crimes from those imposed for crimes committed in being in the field of organized and subversive crime, recognizes how this discipline – which tends to withdraw from the criminal association through reward incentives – is part of the “margin of discretion” enjoyed by the States, which escapes the jurisdiction of the Court, which is not required to assess “*the rationality of political choices in criminal matters taken by the States parties to the Convention*” since “*the choice by a State of a criminal justice system, including the re-examination of the sentence and the manner of release, does not fall within the control entrusted to the Court*”.

#### **4. Life imprisonment impediment to the examination of the Constitutional Court**

Over the decades, the Italian constitutional Court has taken a cautious attitude on the legitimacy of life imprisonment, with rulings that have progressively eroded – without eliminating it – the “never ending sentence”. At first, in fact, the Judge of the Laws,

considered the life sentence not illegitimate because the offender can be released if he repents after having served part of the sentence, and then extends the enjoyment of penitentiary benefits to life prisoners as well.

With the change in the discipline in the early nineties, the Court also scrutinized the constitutionality of the life imprisonment impediment and of the so-called “double track of sanctions”, both with reference to the reported discriminatory character, and with regard to the re-educational function of the sentence, mitigating – with its own conclusions – some harsh obstacles. The Constitutional Court, on one hand, declined the principle according to which the presumption of greater social danger deduced from certain criminal facts must not have the character of absoluteness on the basis of automatic rules<sup>18</sup> and, on the other, affirmed that the greater rigor deriving from a specific type of sanction must not interrupt the re-education process in the absence of further guilty behaviors of the prisoner<sup>19</sup>.

Following the ruling of the European Court of Human Rights in the Viola case, in which was raised “*a structural problem of the Italian system*”, the Constitutional Court, on three occasions, recently express itself on some aspects of the mentioned “double track”, trying to balance the influences arising from the need for harmonization with Strasbourg with the opposing solicitations of a public opinion increasingly conditioned by security obsessions, in some cases electorally emphasized by the political class.

#### ***4.1 The illegitimacy of life imprisonment in the part in which it does not provide that premium permits may be granted to non-cooperating prisoners***

With the first of the aforementioned rulings<sup>20</sup>, the Judge of the Laws declared the constitutional illegitimacy – by contrast with Articles 3 and 27, par. 3, of Constitution – of Article 4 *bis*, par. 1, PL in the part in which it does not foresee that prisoners for mafia-type crimes and for the other crimes indicated therein may be granted premium permits even in the absence of collaboration with the justice, in accordance with Article 58 *ter* of the same law. The pronouncement enhances the re-educational purpose of the sentence

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<sup>18</sup> In this sense, Constitutional Court, sent. 12.4.2017, n. 76; Constitutional Court, sent. 23.7.2018, n. 17.

<sup>19</sup> Argue in this sense, Constitutional Court, sent. 28.7.1994, n. 168; Constitutional Court, sent. 1.3.1995, n. 68; Constitutional Court, sent. 1.12.1999, n. 436.

<sup>20</sup> Constitutional Court, sent. 4.12.2019, n. 253.

which requires not an automatic but an individualized evaluation of the penitentiary benefits.

This decision – unlike the most ancient jurisprudence where a clearly polyfunctional vision of the sentence prevailed – reaffirms the centrality of the re-educational purpose of the sentence with respect to the objectives of prevention, dissuasion and social defense, the achievement of which cannot compromise the ultimate purpose of the penal sanction, which according to the Italian Constitution is – in fact – re-education.

The Constitutional Court, while affirming that the presumption itself is not constitutionally illegitimate – since it is not unreasonable to infer that the condemned who does not collaborate keeps alive the links with the criminal organization – nevertheless found that this presumption, in order not to enter into conflict with the Constitution must be relative and, therefore, winnable with a contrary<sup>21</sup>. Within these limits, in the opinion of the Court, the solution is compatible with the special prevention and with the resocialization imperatives inherent in the penalty.

To provide a contrary evidence, the ruling explains that the so-called “good behavior” in prison or the adherence to a re-education process and a simple declaration of dissociation are not enough, as are necessary specific elements, capable of demonstrating the lack of criminal bond and a concrete evaluation of this change, which should be carried out on the basis of a high-probability parameter, of reinforced evidence to ascertain the non-existence of a negative condition. The overcoming of the presumption of dangerousness of the prisoner who does not cooperate can only be based on the specific “allegation” of elements such as to exclude both the actuality of connections with organized crime and the danger of their recovery; this allegation charges on the convicted person with a sort of inversion of the burden of proof.

Therefore, many difficulties remain in granting a permit to a prisoner convicted of mafia association crimes, as this will depend on the information acquired – for example – from the reports of the Penitentiary Authority and from the Committee for Public Order and Security<sup>22</sup>, as well as, according to Art. 4 *bis*, par. 3 *bis*, PL, from the actual links with organized crime (Chiavaro, M., 2020). Furthermore, the Court specified that, if the

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<sup>21</sup> In this sense also Constitutional Court, sent. 15.12.2016, n. 268; Constitutional Court, sent. 23.7.2015, n. 185.

<sup>22</sup> According to art. 4 *bis*, co. 2., O.p., the Provincial Committee for Public Order and Security (appendix to the National Committee for Public Order and Security, auxiliary advisory body of the Minister of the Interior) provides the competent Supervisory Magistrate with information on the convicted person.

information from the Committee for Public Order and Security are negative, the convicted person is charged with “*not only the burden of alleging the elements in favor, but also that of providing real elements of supporting evidence*”.

We can speak of [almost] diabolical *probatio*, since – under these conditions – the granting of the premium permits is almost impossible, except perhaps for the hypothesis in which the Prosecutor’s assessment is generic and limited to the mere lack of positive elements<sup>23</sup>.

Therefore, although the Court has proclaimed the principle according to which it is legitimate to reward the prisoners who collaborates, while it is inadmissible to further punish them for failure to cooperate on the basis of a presumption *iuris et de iure*, the practical value of this opening risks being undermined by the weight of the evidence imposed on the condemned to overcome the presumption of dangerousness which, although it is defined as relative in the motivation of the Judge of the Laws, still remains, in some ways, almost-absolute (Ruotolo, M., 2019).

If, as clarified by the Council itself in the ruling, the question resolved did not concern the impedimental life sentence – because it did not involve the foreclosure on the conditional release of the non-collaborating life prisoner who had already served twenty-six effective years of prison, but the case of whom was convicted for one of the impedimental offenses included in the heterogeneous list of Article 4 *bis*, par. 1, PL, that cannot access to bonuses unless after a useful collaboration – this does not mean that the principles expressed therein, in harmony with those proclaimed by the European Court, have had – as will soon be seen – important repercussions also on life imprisonment impediment.

#### ***4.2 The illegitimate extension of art. 4 bis PL to juvenile offenders and young adults***

Almost simultaneously with the previous ruling, the Constitutional Court adopted another decision that proposes significant arguments regarding life imprisonment<sup>24</sup>.

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<sup>23</sup> See, Italian Supreme Court, sent. 15.3.2019, n. 28194; Italian Supreme Court, sent.13.9.2016, n. 51878; Italian Supreme Court, sent. 6.12.2013, n. 49130.

<sup>24</sup> Constitutional Court, sent. 6.12.2019, n. 263.

The opportunity was provided by Article 2, par. 3, Legislative Decree 121/2018, which extended the provisions of Article 4 *bis*, par. 1 and 1 *bis*, PL, also to juvenile offenders (for whom there is no life sentence) and young adults, in order to have access to community penal measures, bonuses or to external work.

The Court judged this extension illegitimate, not only for excess of delegation, but also for violation of Articles 2, 3, 27 par. 3, and 31, Par. 2, of the Constitution (Bernardi, S., 2020).

The Constitutional Court, then, reiterated the irreconcilability of art. 4 *bis* PL with the respect of the function of the penalty as outlined by the Constituent Assembly and reaffirmed the illegitimacy of rigorous regulatory automatisms that contradict the progressiveness and the flexibility of treatment as a corollary of the rehabilitative purpose of the offender.

In addition, the Judges have established that in the juvenile trial there is no space for any presumption, not even relative, thus leaving the possibility that – even in trials against adults – it is not legitimate to impose on the offender burdens so difficult to satisfy.

***4.3 Further profiles of the illegitimacy of life imprisonment: towards a sentence in accordance with the sense of humanity and the re-education of the condemned person?***

The Italian Constitutional Court – lastly – expressed itself on the question of legitimacy raised by the Supreme Court<sup>25</sup> in relation to Art. 4 *bis* PL in the part in which it does not allow a person sentenced to life imprisonment, who does not cooperate usefully with the justice system, to request – after a long time in prison – a concrete assessment of his certain repentance, which is a prerequisite for access to parole and, therefore, for the extinction of the sentence (at the end, moreover, of a further period of supervision by the authority)<sup>26</sup>.

Unlike the case examined by the Court with the decision 253/2019, relating to premium permits, in this situation the question submitted to the scrutiny of the judges is even more radical, since are examined both the conditions under which the perpetual penalty can

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<sup>25</sup> Italian Supreme Court, ord. 3.06.2020, n. 18518.

<sup>26</sup> Constitutional Court, ord. 11.05.2021, n. 97.

be considered compatible with the Constitution, and the possibility for the condemned to hope for the end of the sentence.

The constitutional Court, in this case, was – in fact – called to evaluate the possibility of allowing, even the non-collaborating life prisoner for the crimes referred to in art. 4 *bis* PL, the access to the institute of conditional release, which determines – upon successful completion of the probation period – the extinction of the sentence and the definitive re-acquisition of freedom; situation quite different from that concerning the bonuses, consisting in the granting of a brief suspension of imprisonment, without however interrupting the execution of the sentence. Indeed, “*the leave of absence bonuses [...] have a contingency connotation that does not allow them to be fully assimilated to alternative measures to detention, because they do not modify the restrictive conditions of the offender. Only with respect to the latter are the reasons of criminal policy subject to absolute foreclosure pursuant to art. 4-bis, co. 1, Op may appear to meet the needs of fighting organized crime*”<sup>27</sup>.

The Court concludes in the sense that the presumption of dangerousness weighing on the condemned for crimes committed in a “mafia context” who did not collaborate with the justice system, must be able to be overcome also on the basis of factors other than collaboration, indicative of the path of resocialization of the interested party. The absolute nature of the presumption in question is therefore incompatible with the Constitution, as it makes the collaboration with the law the only way available to the inmate to access the evaluation of the surveillance judiciary on which depends his return to freedom.

Among other things, it can often be doubted that the collaboration is the result of a free choice. Without questioning “*the importance and usefulness of collaboration, understood as a free and thoughtful decision to demonstrate the break with the criminal environment*”, the ordinance emphasizes that the current discipline prefigures a sort of “exchange” between information useful for investigative purposes and the consequent possibility of accessing to penitentiary benefits; therefore, the life sentence that aspires to conditional freedom is placed before the dramatic choice between “*the possibility of regaining freedom and its opposite, that is, a destiny of endless confinement*”. There are also extreme cases in which such a choice can be “tragic”, as the condemned person has

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<sup>27</sup> Italian Supreme Court, sent. 20.11.2018, n. 57913.



to decide “*between his (eventual) freedom, which may however involve risks for the safety of his loved ones, and renounce of freedom, in order to preserve them from dangers*”.

If the lack of cooperation cannot be an absolute impediment, according to the Judge of the Laws it is not unreasonable to place it as the basis of a presumption of specific danger, since it is not senseless to believe that the offender retains his links with the criminal organization of original belonging. The Court, in fact, reminds that belonging to a mafia-type association usually implies a stable membership in a criminal association, strongly rooted in the territory, characterized by a dense network of personal connections, with particular intimidating force that is capable of lasting over time. It is therefore quite possible that the associative bond remains unaltered even after long imprisonments – precisely due to the characteristics of the criminal association in question – until the subject makes a choice of radical detachment, such as that which is generally expressed by collaboration with justice.

The Constitutional Court has taken an explicit position in the sense of believing that “*the current discipline of life imprisonment absolutely precludes, to those who have not usefully collaborated with justice, the possibility of accessing the procedure to request conditional release, even when his repentance is certain*” and therefore “*by making collaboration the only way for the condemned to recover his freedom, is in contrast with Articles 3 and 27 of the Constitution and with Article 3 of the European Convention on Human Rights*”. Despite this, the Court found that a merely “demolishing” intervention consisting in an immediate declaration of illegitimacy would jeopardize the overall balance of the discipline in question and the needs of general prevention and collective security that it pursues to combat the phenomenon of the organized crimes.

According to the Constitutional Court, in fact, belongs to the legislative discretion, and not to the Court itself, to decide which further choices are appropriate to distinguish the condition of a non-cooperating perpetual sentence from that of other life prisoners, choices among which for example, it could include the emergence of the specific reasons for the non-cooperation, or the introduction of specific prescriptions that govern the period of supervised freedom for the author of the crime.

In the opinion of the Court, the particularity of this criminal phenomenon prevents an immediate declaration of constitutional illegitimacy of the contested provision, which could lead to disharmonies and contradictions in the overall discipline to combat organized crime and undermine the importance that collaboration with justice it continues to assume in the current system.

For these reasons, the Court granted Parliament one year (setting a new discussion of the issues at the hearing on May 10, 2022, until then suspending *a quo* the case) to fully intervene in the discipline, trying both to prevent the felonies connected with organized crime and to exercise properly the constitutional and penitentiary rules.

The Constitutional Court, therefore, hopes for the enactment of a law capable of eliminating the condition of collaboration with the justice as an essential element for access to conditional release, due to the fact that this condition is often functional to “use” the offender to pursue the purpose of the fight against mafia which – although noble and dutiful – cannot jeopardize the protection of human dignity, even of those sentenced to life imprisonment.

Moreover, this decision does not take into account the risk that if – through this “postponement” technique – the legislator remains 'in default' (as is presumable and it has already happened in the past), the Italian legal system will maintain an unconstitutional law. And this to the detriment of people in “flesh and blood” who will have to wait for their release for (at least) another year, even if the rule that keeps them in prison is not in accordance with the constitutional provision, by the admission of the Constitutional Court (Romano, B., 2021).

### **5. The sophism of legitimacy of life imprisonment only if it is not for life**

The Constitutional Court, with the recent order no. 97/2021, found that the compatibility of the perpetual sentence with the Constitution depends on the actual possibility of obtaining parole; if it is absolutely excluded, life imprisonment is in contrast with the re-educational purpose of the sentence (Article 27, paragraph 3, of the Constitution).

The Court, in fact, considered the doubts of constitutional legitimacy about life imprisonment in general to be overcome, precisely by relying on the fact that this is only “in abstract” a perpetual penalty. In this discussion – however – life imprisonment would appear as a [almost] symbolic sanction with respect to the lack of its full effectiveness, characterized by a sort of contradiction and ambiguity, in the sense that it is illegitimate only when it is not for life, demonstrating – on the contrary – how a perpetual punishment is unconstitutional.

If a life punishment is in contrast with Art. 27, par. 3, of the Constitution, this contrast should already be present at the level of abstract prediction, regardless of the circumstance

that in some cases there are regulatory mechanisms that concretely readmit the offender to some forms of freedom.

The purpose of social reintegration of the offender proper of the Italian Constitution, in fact, must be kept in mind not only in the phase of execution of the sentence, but also at the level of abstract legislative provision, a penalty disproportionate *ab origine* – functional to purely remunerative needs, repressive or mere general prevention – compromises the possibility of re-educating that condemned who will feel the penalty as an unjust abuse of power, with prejudice to the process of re-approaching the values of the legal system.

Moreover, following the decisions of the Constitutional Court, life imprisonment is legitimate if the re-educational purpose, which should characterise it, guarantee the achievement of the resocialization results; according to the re-educational purpose, the offender have to receive a valid and effective program of social integration, the task of which falls primarily to the State, that – after a certain period of intramural detention – should concretely open to instruments more compatible with a path of social integration.

Statistical data show – instead – that, in Italy, for the 70% of life prisoners it is currently impossible to obtain conditional release for the “impediment” mechanisms seen above, while for the remaining 30% of “ordinary” life prisoners, although abstractly it would be possible to reacquire freedom, concretely this does not happen or does happen for a negligible number of cases (e.g. only 4 in the last year). In the rest of the world the situation is reversed: some states (15%) have abolished the life imprisonment, the 70% of the remaining countries foresee that, even in the case in which the sentence of life imprisonment is imposed, the offenders can access to conditional release, allowing – in fact – a similar possibility to 80% of life prisoners (Galliani, D., 2019).

The Italian situation is therefore the opposite, with a life sentence that in the balance between danger and re-education clearly leans in favor of the first, contradicting the purpose of social integration inherent in the Italian Constitution.

Perpetuity, only possible in abstract, proves to be real in many cases and calls into question the legitimacy of life imprisonment which can hardly be considered an acceptable cost in cases where the eventual perpetuity turns into actual.

And this applies to both the life sentence impediment and the ordinary one: the difference between these two forms, however, is not such as to weigh in terms of unconstitutionality

of the only life imprisonment without parole. If it is true, in fact, that overcoming potential perpetuity is more difficult in cases of impeding life imprisonment, in which there is a greater compression of the re-educational purpose, it is equally true that between these two forms there is only a quantitative distinction and not an ontological one.

**6. The “tied” hand of the state:  
from life imprisonment to security measures**

Limiting the rehabilitation purpose of the penalty to the execution phase means transforming life imprisonment into a sort of anomalous security measure of indefinite duration and based on the alleged permanence of the danger of the offender (Galliani, D. & Pugiotto A., 2017).

Indeed, as observed by Pulitanò (2019), in the case of life imprisonment impediment, the regulatory mechanism that it produces involves a restriction of rights in the absence of active conduct (*i.e.* collaboration with the justice system) which presents itself as a further sanction, disconnected from the fact for which the sentence is served, since – on one hand – there is no formal obligation of collaboration from which derive another formal sanction for not having fulfilled it, and – on the other – the effects are practically sanctioning because from the lack of cooperation follows the permanence in prison. The (free) choice to not collaborate is thus – substantially – a duty of collaboration, in order to end the protraction of the imprisonment.

Such a presumption, however, appears to be contrary to Articles 3 and 27, par. 3, of the Constitution, with regard to Articles 3 and 5 of the ECHR (Art. 5 is interpreted by the Court as the deprivation of personal liberty cannot be based on elements that have taken place in the executive phase, but must focus exclusively on the fact that was object of the original conviction<sup>28</sup>). And the contrast is seen not only with the re-educational principle – linked to the idea that is illegitimate a sanction that presents itself as a security measure indefinite in its duration – but also with that of the proportion of the sentence – as life imprisonment risks to be reduced at the mere neutralization of the offender – and with the prohibition of attributing to the sanction the aim of making the offender adhere to a specific ethical concept; the same have to be free to self-determine and therefore cannot be subjected to measures that have the exclusive incapacitating or corrective, treatment or therapeutic purpose.

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<sup>28</sup> ECHR, *M. c. Germania*, 17.12.2009, ric. n. 19359/04.

Therefore, the abstract prediction of the penalty, even if it is a political question, should in any case be guided by the constitutional parameters of the re-education, proportion and dignity of the person, under which the prison term – already at the level of provision legislative – must not have an indefinite duration, but should be prefixed in quantities parameterised to the seriousness of the crime and the devaluation of the case in question.

Thus, once the period of effective detention has elapsed, there should be a sort of presumption of completion the process that aimed at orienting the convict towards an existence respectful of that of others, especially if the penitentiary system was truly marked by the social integration of the offender. This presumption is opposite to the one currently implemented by the Italian law, which implicitly reveals the awareness that the prison system, as it is really structured, difficulty allow the prisoner to carry out an effective process of social integration. If, in fact, after twenty-six years of detention the dangerousness of the detainee is still presumed, this means that the Italian prison system is not organized in such a way as to achieve, in an appreciable number of cases, the constitutional objective of re-education.

What are the solutions?

If we don't want to lean towards the elimination of the life sentence – a decision that might be in harmony with the Constitution and in accordance with the choices made by various other countries – we could – however – try, in order to mitigate the rigor of its discipline, to follow to the prison sentence, after the expiration of a certain number of years, with a security measure that is not unlimited in time and intervenes only for those prisoners of proven social dangerousness, within the limits and in a manner strictly necessary to stem the risk (Risicato, L. , 2015). Thus, if the access to conditional release after a certain period of time should be the rule, the granting of a possible security measure would represent – instead – the exception; an “extraordinary” instrument left to the initiative of the public prosecution that would periodically be required to the burden of proving the continuing danger of the offender, in the absence of which the inmate must be released (Caterini, M., 2020).

A similar mechanism, on the other hand, would not be dissimilar to that is already envisaged in other European countries. And indeed, art. 39 of the Norwegian Criminal Code, which contemplates a maximum period of 21 years of imprisonment, also establishes that this period can be extended by 5 renewable years, in cases the judge considers the offender still dangerous; in Germany, on the other hand, security custody (*Sicherungsverwahrung*) is potentially applicable in conjunction with life imprisonment,

so after the minimum detention period of 15 years (§ 49, co. 1, no. 1, StGB), the provisions relating to custody can be extended; these, in case of probation during the execution of the *Sicherungsverwahrung*, provide for the application of probation, not envisaged in the event of a life sentence.

As for the issue of non-collaboration, the obstacle to the granting of benefits (on which the legislator will hopefully intervene in the short term), could be framed, rather than as an absolute presumption, in the scheme of simple presumptions. If all presumptions are based on the possibility of considering an existing fact (in this case, the danger of the detainee) on the basis of the existence of another circumstance actually ascertained (lack of cooperation), only the simple presumptions find their basis in a *maximum of experience*, the *id quod plerumque accidit*, which by a logical-deductive way allows us to believe that, once a fact has been ascertained, the existence of a further fact is probable (Ca-terini, M., 2020). These presumptions do not provide legal parameters for the formal establishment of the fact, *ex ante*, but they form the conviction of the judge in the specific case; the lack of cooperation should therefore be understood as a simple militant clue in the sense of the danger of the detainee and which could well be contradicted or balanced by other circumstances that the judge should consider and, in the presence of a reasonable doubt, tend to favor of inmate.

Such a reform would lend itself to various objections, relating – above all – to its supposed indulgent character, which would make it unsuitable for a system, such as the Italian one, used to respond to organized crime with exceptional measures for dealing with the extraordinary nature of this phenomenon. If the degree of the civilization of a State is measured by the level of mix between criminal law and fight (Donini, M., 2007) – given that a law that looks too much like violence, or that is identified with it, is a delegitimated right (Resta, E., 1993) – as was stated by Barak (2002) “*only a strong, secure and stable democracy can afford to respect and protect human rights [...]. Precisely for this reason [...] not all means are acceptable in democracy; not all practices drawn from the enemies of democracy can be used by those who defend it; although a democracy often has to fight with one hand tied, it will still have the other at its disposal*”<sup>29</sup>.

If, Nun Marie Vojtěcha Hasmandová, in her letters, describing the situation experienced in the prisons of the Czech totalitarian regime, confided to be “*in the palm of God's hand*”, the hope for those sentenced to life imprisonment in Italy is that the State fights crime

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<sup>29</sup> Barak, A. (2002). Democrazia, terrorismo e corti di giustizia, in Giut. Cost, p. 3390.

with a strong hand, but not brutal, and grants the hope of life even to those who have no faith if not in a Social State of Law.

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**Shin Matsuzawa\***

**ANTI-CORRUPTION AND HUMAN RIGHTS  
- AN ANALYSIS OF JAPAN'S FOREIGN PUBLIC  
OFFICIAL ANTI-BRIBERY ACT -**

*This article to give an introduction about Japan's efforts of preventing world-wide corruption by using the Foreign Public Officials Anti-Bribery Act as the foundation and adding on analyses from the perspective of criminal law theory. In order to protect the rights of citizens, it is necessary to establish a system that does not allow self-serving behavior by public officials. All citizens must be given the rights they deserve, without distinction. The "right to life," the theme of this book, should not mean "the right to survive," but "the right to live while receiving the full range of legitimate rights as a human being. To this end, anti-corruption is a very important issue.*

**Keywords:** *Anti-corruption, Foreign Public Official Anti-Bribery Act, Japanese law, Criminalization*

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## **1. Introduction**

The most important international convention for anti-corruption is the United Nations Convention Against Corruption. This convention was adopted at the United Nations General Assembly held in Mérida, Mexico in October 2003. Japan has since been making efforts to ratify this treaty. In June 2017, with the reform of the Act on Punishment of Organized Crimes and Control of Crime Proceeds, the components of the convention became incorporated in the law and ratification became a reality.

If explained this way, this event creates an image that Japan's anti-corruption efforts experienced a turning point in 2017. Unfortunately, it was not as significant a turning point as it was anticipated to be. The Act on Punishment of Organized Crimes and Control of Crime Proceeds, the domestic law reformed in response to the United Nations Convention against Corruption, has some components that are very similar to the domestic law pertaining to the United Nations Convention against Transnational Organized Crime. Diet deliberations regarding the similar points, together with discussions on conspiracy, proved to be a difficult one and caused the conclusion of this convention to be delayed.

Creating the provision on “Harboring a criminal and other matters involving organized crimes” (Act on Punishment of Organized Crimes and Control of Crime Proceeds, Article 7 (2)) was the extent of the ratification of the United Nations Convention against Corruption. A more prominent effort on part of Japan regarding transnational corruption prevention had already occurred in 1997 – the conclusion of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, also known as the OECD Anti-Bribery Convention. Through this convention, a domestic law, the Foreign Public Officials Anti-Bribery Act, was enacted. This act may have been much more significant than the most recent law reform.

Keeping in mind the above factors, I would like to give an introduction about Japan's efforts of preventing world-wide corruption by using the Foreign Public Officials Anti-Bribery Act as the foundation and adding on analyses from the perspective of criminal law theory.

## **2. The Enactment of the Foreign Public Officials Anti-Bribery Act**

In October 1997, the OECD Anti-Bribery Convention was adopted. This is what the objective of the convention was: Being said that dishonest “benefits” bestowed to foreign

public officials involved in international transactions creates unfair international competition, if each participating country criminalizes this act, combatting dishonest international transactions becomes possible through international cooperation and thus protecting fair and just competition. In order to conclude this convention, Japan established the Foreign Public Officials Anti-Bribery Act.

The Foreign Public Officials Anti-Bribery Act is essentially a provision on bribery, which may have made it possible for this law to be established as a subcategory of bribery. However, in 1998, Japan reformed the Unfair Competition Prevention Act by establishing, as part of it, the Foreign Public Officials Anti-Bribery Act. The protected interests of the Foreign Public Officials Anti-Bribery Act, according to the framers of this law, is different from bribery in the penal law sense. In other words, again referencing the framers of this law, the protected interests of bribery in penal law are the fairness of Japanese public officials and the public's trust toward said Japanese public officials. On the other hand, the punishment of those who bribe foreign public officials, made mandatory by the OECD Anti-Bribery Convention, is based upon protecting fair competition in international transactions. Thus, since the protected interests are very different in the two instances, it is said that the Foreign Public Officials Anti-Bribery Act should not be categorized with penal law (For more information on the legal framework for corruption prevention in general, see Oyamada 2015; p.26-29).

### **3. The Foreign Public Officials Anti-Bribery Act and its Application**

We will now take a look at the details of the Foreign Public Officials Anti-Bribery Act. In Article 18 (1) in the Unfair Competition Prevention Act, bribery of foreign public officials is described as follows:

“No person shall give, or offer or promise to give, any money or other benefit to a Foreign Public Official etc., in order to have the Foreign Public Official, etc. act or refrain from acting in relation to the performance of official duties, or in order to have the Foreign Public Official, etc., use his/her position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, in order to obtain a wrongful gain in business with regard to international commercial transactions.”

In response to this article, the offender will be punished with either imprisonment or a fine according to Article 21(2)(vii), which provides that a person who gave, etc. an improper benefit to a foreign public official, etc. in violation of Article 18(1) shall be

subject to imprisonment with work for a period not exceeding five years or for a fine not exceeding 5,000,000 yen.

For juridical persons, the Dual Criminal Liability Provision will be applied. Article 22 of the Unfair Competition Prevention Act provides that where a representative, agent, employee or any other staff, etc. of a juridical person has committed a violation in connection with an operation of the said juridical person, a fine not exceeding 300,000,000 yen will be imposed on that juridical person, which is in addition to punishment for the offender himself/herself.

There are several cases where this law has been applied in practice (For details, see Manabe, K., Umetsu, H. R., & Ono, S., 2018; p193-194).

#### **4. Theoretical Analysis – Dogmatics/Doctrine**

Now I would like to add in dogmatics/doctrine of criminal law. I would also like to place an emphasis on the theory of criminalization (Readers interested in this crime from a comparative legal perspective may find it useful to refer, Kai 2020).

When analyzing the Foreign Public Officials Anti-Bribery Act from the perspective of criminalization, there are two important points we must address – (1) The creation of this Act was not in direct response of the public voice, but to ratify the convention and (2) The Foreign Public Official Anti-Bribery Act was enacted to protect competition fairness and order – in other words, the protected interest of society is the protected interest of the law, and this is different from “bribery” in the sense of penal law, which lays its protected interest with the protected interest of the state.

The problem with (1) is that this act of bribery was criminalized through international law (convention). The entity that concludes conventions is the government (Executive branch), which may make this seem like a problem of separation of powers, since the government must execute the convention and that execution involves criminalization of a certain action. Traditionally, the government (Executive branch) is responsible for enforcing the law, but in this instance, it seems to be that the government has control over the Diet (Legislative branch), which is responsible for enacting laws. At the end of the day, however, it is up to the Diet to enact laws – even if the government concludes a convention, without the Diet's involvement, the convention cannot be used as a rationale to directly punish civilians. Further, the convention does determine the rough outlines of a certain law, but the Diet is not required to comply with every single detail of the

concluded convention. As long as penalties or laws that punish actions covered in the convention are enacted, any other minor differences or disparities between the convention and the domestic law does not create any problems. In this way, the first problem should be resolved.

The second issue is whether the understanding of “legal goods” established by the Foreign Public Official Anti-Bribery Act in Japan is appropriate. As mentioned before, lawmakers have already said that the legal goods of this act is to protect fair competition in international transactions. Needless to say, if a corporation involved in an international transaction bribes a foreign public official, it becomes impossible to maintain competition fairness. A similar concept can be seen in the United Nations Convention against Corruption.

Article 15 of the same convention is as follows:

“Article 15. Bribery of national public officials Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, of the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

The next article, Article 16, calls for the criminalization of bribing foreign public officials:

“Article 16. Bribery of foreign public officials and officials of public international organizations

1. Each State Party shall adopt such legislative and other measure as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his

or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

If criminalization is executed in accordance with these articles, it can be said that the existing Japanese domestic law (criminal law) that punishes bribery has very different rationales. According to the most commonly accepted theory and judicial precedents, the protected interest of the Japanese bribery law is the society's trust toward the fairness of public duty (the “trust-protection” theory). In other words, bribery is an action that destroys the trustworthiness of public duty – the breach of fair public duty or the potential of a breach does not trigger punishment. The “OECD Convention” and the “United Nations Convention against Corruption” is something that calls for punishment of a corrupt action that allows or disallows a certain public duty to be executed, and thus in this case, the potential of a breach of fair public duty can be interpreted as the rationale of punishing corrupt behavior.

There certainly is an ounce of truth in this logic. It adheres to the harm principle, which holds that criminal law should only be exercised when some kind of right is under attack. The harm principle is central to the criminalization theory in Anglo-American law but it also has its similarities to the European Continental law (especially German; Japanese criminal law theory adheres to this as well) which holds that penal laws and standards can be used to suppress or ban the protected interests of law from being attacked or exposed to danger.

However, this logic proves itself to be insufficient to evaluate punishment of corrupt behavior. According to this logic, corrupt behavior cannot be punished when bribery was committed after dishonest or unfair public duty was executed, since this dishonest or unfair behavior was not caused by bribery. Furthermore, in the case where a public official executes an inappropriate duty by selling favors to criminal organizations, punishment for bribery is not possible simply due to the fact that no actual “bribery” was involved.



In order to fill these potholes, it is advisable to evaluate both the protection fair competition in international business transactions together with the protection of trust at the international level toward the fair and just execution of public duties in each country. In other words, there is a need for each country to come up with a legal policy that transcends the limitations of the convention and is stricter with the punishment of corrupt behavior.

It is certainly desirable for Japan to follow suit and cultivate further discussion about this topic, but it seems to be that Japan's Foreign Public Official Anti-Bribery Act is embedded within the Unfair Competition Prevention Act, which is the very thing that is blocking any further discussion. If the Foreign Public Official Anti-Bribery Act is considered a dogmatic/doctrine of the Unfair Competition Prevention Act, dogmatics/doctrines from a "legal goods" perspective, such as the one previously mentioned, is easier to be passed unnoticed. In order to allow these discussions to develop, it is best that Japan creates an independent law, for example, "(International) Act on Punishment of Corrupt Behavior," and to place its legal standard within the criminal code.

### **5. Evaluation from a Criminal Policy Perspective - The Function of Criminal Law**

Needless to say at this point, the criminalization of the Foreign Public Official Anti-Bribery Act is based upon the notion of "using criminal law as a means to prevent corrupt behavior." What the problem now is, to what extent do we need to evaluate prevention as a basis of criminalization? Usually, the basis of criminalization is different to that of the same criminalization itself. In other words, a certain behavior has harmed another individual and that it is also worthy of blame (Simester and von Hirsch state "The censuring response of the criminal law is appropriate only culpable wrongdoing". See Simester, A.P. & von Hirsch, A., 2011; p.30). It is more about how to deal with the aftermath of the harm, rather than prevention.

However, with this perspective, it may be appropriate for traditional crimes such as homicide and robbery, but it may not be appropriate for newer types of crime. Crimes such as bribery of foreign public officials is a type or financial crime in the sense that it is the prevention of unfair competition, and it is also international crime in the sense that it is the expansion of international transactions. Furthermore, since public officials are involved, it may also be seen as political crime. Newer crime such as bribery of foreign public officials cannot be controlled by merely blaming the offender, but to inform them that that behavior is a crime against civilians and by association, it is inevitable to think

about preventing and suppressing crime. By creating penal regulations, it becomes the perspective of preventing and suppressing crime becomes more evident.

However, even if penal regulations are created, that alone will not prevent crime. That alone will have next to no preventative effects. This has been shown by prior research of criminology, which effectively hold that general preventative effects of penalty does not exist. What is important is that penal regulations exist. With its mere existence, it makes prevention and suppression by other means (based on punishment by criminal law) possible. Penal regulations function as the foundation of prevention and suppression by other means. Only by following this process can preventative effects by way of penal regulations come to light.

The Ministry of Economy, Trade and Industry has drawn up the “Guideline to Prevent Bribery of Foreign Public Officials,” which provides a more specific example. This guideline mentions its objective as to support the autonomous and preventive approach to prevent bribery toward foreign public officials, etc. who are associated with corporations involved in international transactions, and proposes specific measures, especially that of internal structuring within corporations. Some of those measures include the enforcement of corporation compliance, the fostering of corporate ethics, and transparency among different sectors or practices. This can be interpreted as belonging in corporate or economic law more than criminal or penal law. For this reason, I will refrain from pursuing this any further, but I would like to emphasize again that placing penal regulations alone do not prevent or suppress crime — it is most important to be aware of other means, and additionally place penal regulations.

## **6. Conclusion**

Finally, allow me to introduce one perspective of the European interpretation of anti-bribery. My primary interest is Danish criminal law, and Denmark is regarded as one of the least corrupt countries in the world. If I were asked if this is because of its exceptional criminal legal standard, however, I will have to say no. It is also the same case if I were asked if this is because of exceptional internal structuring of corporations. I believe Denmark is one of the least corrupt countries simply because of Scandinavian culture. In Scandinavia, the pressure for transparency of politicians and public officials is especially strong. In a society where voter turn-out is more than 80%, any politician or public official who becomes the target of any suspicion will be unsparingly voted out of office. Additionally, Scandinavia maintains their reputable social security through very high taxes, which places these politicians and public officials under scrutiny of the tax office.

Any suspicious transaction will be watched by the tax office, so, in essence, the people live with the sense that it is very impractical and counterintuitive to both give and receive bribes.

In order to protect the rights of citizens, it is necessary to establish a system that does not allow self-serving behavior by public officials. All citizens must be given the rights they deserve, without distinction. The “right to life,” the theme of this book, should not mean “the right to survive,” but “the right to live” while receiving the full range of legitimate rights as a human being. To this end, anti-corruption is a very important issue.

Punishment by way of criminal law is the first thing that comes to mind when we want to stop a certain behavior, and this thought process by itself is a very important one. However, the problem is, criminal legal standards tend to be enacted before that can be done. Utilizing penalties to prevent corrupt behavior is only the first step toward complete prevention. Penalties alone do not hold preventative or suppressive effects. Jurists of criminal law, or an institution that enacted criminal legal standards should keep these concepts in mind and work toward refining more effective criminal legal standards.

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Milana Ljubičić\*

## | AGEISM IN MEDICINE AND THE RIGHT TO LIFE

*The paper deals with the issue of discrimination against the elderly in the field of medicine. Ageism is widespread in contemporary societies. There are several reasons, one of which we should certainly emphasize - dictates the youth with their perception of the old age and the elderly as less valuable members of society. The same narrative, present in the domain of health care and protection of the elderly, justifies the application of discriminatory practices in medicine. Informally, it expresses compassionate ageism, and sometimes discrimination is openly negative. However, recently the discrimination of the elderly in the field of medicine has received its official confirmation. This is especially visible in the current global moment of the new normality caused by the COVID-19 pandemic. This paper points out such practices that directly threaten the right of the elderly to life, referring to the experience of Italy, Spain, the United States, Switzerland, and Germany. It also discusses the idea of the right to life and the implications of the generally accepted discourse on the elderly in modern societies.*

**Keywords:** *the elderly, discrimination, medicine, right to life*

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## Introduction

Ageism, which owes its name and definition to Butler, judging by previous knowledge, is a phenomenon known since ancient times of human history (Minoa, 1994). Erasmus of Rotterdam also left us a valuable testimony on individuals who were being discriminated against on the basis of their age. "In Praise of Folly" (2019: 74) for the elderly, he says they "...no longer even look like men: driveling, doting, toothless, white-haired, bald ... filthy, crookbacked, wretched, shriveled, bald ... and lame of their best limb."

These are very similar to modern (negative) stereotypes about the elderly. They are said to be unproductive, depressed, senile, sexually inactive, and not particularly bright (Whitton, 1997: 465). Due to their age associated with declining cognitive functionality and physical and mental health, it is widely believed that older people cannot take care of themselves (Marier & Revell, 2017: 1634).

Such attitude is an indispensable element of two dominant discourses about people in the third age. The first, typical of the so-called, negative ageism, recognizes this age category as a burden fallen on the shoulders of the younger generations. Social care for them represents an unnecessary social expense, an investment that cannot be repaid. Such a utilitarian approach justifies the presence of open hostility towards the elderly, expressed at the interpersonal and intergroup level. It is also articulated through institutional policies and cultural traditions at the systemic level. For example, it is enough to recall the cry out, present even in our society, to deprive the elderly of the right to vote for they cannot reason politically responsibly due to their age and wrong beliefs, or to a striking representation of the elderly placed through the media. They are most often presented either as the coopers - those who need the support of others to cope with the problems of old age, or as comic old men and women whom we either laugh at or make fun of. (Swif & Steeden, 2018: 32).

Another, somewhat less common form of ageism is the compassionate one (Olson, 2013). Although it involves a bit higher sensitivity towards the elderly, the mentioned ageism is essentially pseudo-positive. From this perspective, the elderly are warm and wonderful, but they are also dependent, fragile and they need our help - are prejudices hidden behind (Nelson according to Olson, 2013: 5). Thus the compassion and sympathy we give them take on a paternalistic tone: we know better than the old what they need and we do not allow them to be independent and autonomous (Vervecke & Meisner, 2020: 2). Those who deny our picture of old age and resist the informal social rules for the elderly, e.g. if

they dress *inappropriately*, work longer, or enter into emotional relationships with younger people, are being exposed to ruthless informal condemnation and open hostility.

With this in mind, it seems to us that Vervaecke and Meisner's (2020) stand that there is a thin line between negative and compassionate ageism is not far from the truth. This is especially evident in the field of health care for the elderly (Radaković, 2020).

Although we would not expect this, a review of the literature suggests that professional ageism in medicine is quite widespread (Robb, Chen & Haley, 2002; Oral, Gunay & Cetinkaya, 2019). In fact, some (Whitton, 1997: 471-472) claim that this should not surprise us, because ageism in medicine reflects social attitudes towards the elderly and their vulnerability (Whitton, 1997: 480). This type of ageism and all of its manifestations will be discussed more in the next chapter.

### **1. Professional Ageism in Medicine**

Ageism in medicine has two faces: compassionate and negative one and it manifests itself on a personal, intergroup, and systemic level. Thus, when they start from positive prejudices, medics practice paternalism, which is backed by the so-called dependency-support script (Baltels et al, after: Wyman, Shiovitz-Ezra & Bengel, 2018). In fact, it turned out that the medical staff is much more responsive to the needs of those elderly patients who show high dependence, compared to those who are more independent. In addition, paternalistic practices include the use of so-called elder speak or baby speech. This type of communication involves the infantilization of the old person: simple sentence constructions are used, speaking slowly and/or raising the tone due to the attitude that everyone is old, although kind, dear, warm, they are:

a. cognitively insufficiently functional to understand any of the complex realities; and of course - b. deaf.

In practice, such beliefs justify the exclusion of elderly patients from making decisions concerning their medical treatment. Physicians generally impose a mode of treatment, without consulting elderly patients, because they believe that the old cannot make rational judgments (Whitton, 1997: 472).

In fact, there is every chance that compassionate ageism has as serious consequences as the negative one. The point is that paternalism in medicine leads to the abolition of the autonomy and independence of the elderly. According to the principle of self-fulfilling

prophecy, the person to whom the identity of the dependant is imposed eventually accepts such an image of himself. This leads to a further decrement in cognitive, psychological, and emotional functioning, and ultimately an overall decline in quality and life expectancy (Swift & Steeden, 2020). On the other hand, those who resist ageist medical views sometimes face medical necessity denial (Whiton, 1997).

Furthermore, back in the 1960s, Robert Butler found that the age was tied to an extremely inhumane medical approach - therapeutic nihilism. It is reflected in the belief that the success of medical treatment is far lower in the case of older than younger patients, and the practices of non-treatment or inadequate treatment of the elderly which justifies such an attitude (Olson, 2013: 5). Today, there is ample empirical evidence for the presence of therapeutic nihilism. Hence, the belief that it is necessary to deny care to a number of elderly somatically ill patients because they cannot recover anyway and because they only unnecessarily occupy the beds, is common among physicians (Senger, 2019).

In addition, ageism is considered to be one of the key reasons why elderly patients use psychiatric and psychotherapeutic services below average (Robb, Chen & Haley, 2002). There is every chance that mental health service providers avoid clients in the third age, and some authors (Robb, Chen & Haley, 2002) think that this therapeutic pessimism is conditioned both culturally and countertransferentially. The point is that working with elderly service users is contaminated by the belief that age is equated with illness.

However, such a conclusion is based on an obvious research error because medics see only sick old people in front of them, but not those who are healthy. Furthermore, elderly patients remind medical professionals of what awaits them in the future (old age and inevitably - death), and these are topics that cause high anxiety. To avoid such an unpleasant confrontation, we are helped by a cultural script according to which the younger ones cannot identify with the older ones as equals, human beings since there are essential differences between them. Ultimately, such an insurmountable distance lowers the possible guilt of the young for neglect or an openly hostile attitude towards the elders (Ayalon & Tesch-Römer, 2018b).

The consequences of these beliefs are disastrous, as stereotypes (cognitive dimension) and prejudice (emotional dimension of ageism) also shape medical practices (behavioral dimension) (Iversen et al, according to Wyman, Shiovitz-Ezra & Bengel, 2018). This conclusion is a matter of great concern, especially if we keep in mind the data of the World Health Organization, showing 23.1% of the global burden of the disease refers to people aged 60 and over (European Commission, 2008).



Despite the fact that the share of the elderly among consumers of medical services due to demographic changes is becoming more significant, discrimination in different fields of medicine is increasingly present (see: European Commission, 2008). Actually, age becomes an important factor in clinical practice and decision-making when it comes to the elderly (Wyman, Shiovitz-Ezra & Bengel, 2018). For example, it is enough just to recall that healthcare workers are less patient with and less optimistic about elderly patients. Furthermore, only 35% of chronic heart patients over 65 get indicated medications, and the trend of hospitalization declines with age in the case of cardiovascular disease and cancer (Levinsky et al, according to: Robb, Chen & Haley, 2002). In addition, 2/3 of cancer patients fall into the category of the elderly. The possibility of early diagnosis in their case is absent even when screening procedures are approved for them. Palliative care is inadequate, and the extremely devastating finding of one study shows (Barnabei et al, according to: Robb, Chen & Haley, 2002) that more than a quarter of dying patients over 65 in nursing homes, although in severe pain, do not receive analgesic agents. Besides, it has been found that the elderly with diabetes, pulmonary emphysema, as well as those suffering from psychotic symptoms, do not receive adequate therapy (Redelmeier et al, according to Robb, Chen & Haley, 2002; European Commission, 2008). Moreover, psychiatrists diagnose them as more severe cases. Standard diagnostic procedures and treatments are far less accessible to them. The obvious discrimination based on age is also evidenced by the fact that reconstructive surgery after mastectomy for elderly patients is far less commonly used than in younger ones, although recovery does not depend on age (Peake et al, according to Wyman, Shiovitz-Ezra & Bengel, 2018).

This essentially means that when it comes to elder clients, medical treatments are streamlined. The rationalization logic is as follows: since health systems chronically suffer from a lack of resources, in an “either-or” situation, the young are given the advantage because they have more years of life ahead of them than the older ones. The inevitable conclusion follows - it is not such a big pity if they die. Although there are those who justify this essentially utilitarian approach, a number of authors call it openly ageist, ethically and clinically unacceptable. Their argument is that age should not be neither the only nor exclusive factor for cost-benefit treatment (Fischer et al., 2020; Petretto & Pili, 2020;).

On the other hand, the described utilitarian logic can be recognized at the macro level, not only at the level of practical actions. In fact, it could be said that the former encourages the latter.

What is it really about?

The point is that age discrimination is implicit in health care and protection systems and policies. Judging by the European Commission's report on the state of health systems in several European countries, cited by Wyman, Shiovitz-Ezra & Bengel (2018), elderly patients with complicated health conditions are at high risk of being left without the necessary medical care and protection. For example, in Finland, the possibility of covering the costs of medical rehabilitation for older than 65 who had a stroke has recently been abolished (AGE Platform Europe, 2016, by Wyman, Shiovitz-Ezra & Bengel). In addition, in many publicly-funded health care systems, there has been a heated debate in recent years as to whether elderly patients should have the right to health care benefits at all. Actually, taking care of them has been recognized as a significant financial burden.

Such outcomes are influenced by a number of systemic factors, and the authors of the said report, among other things, state:

1. poverty of the elderly e.g. one Polish study found that 40% of low-income people in their third age could not afford the necessary medical therapy;
2. geographical barriers such as e.g. life in rural and/or economically underdeveloped areas, with poor transport infrastructure. An illustrative example is the area of Sami in Finland, geographically located in the north of the country, with a small number of elderly people (European Commission, 2008) or e.g. the area of Banija, Lika, Kordun, and Dalmatia in one of the EU member states, in which members of one nationality are systemically marginalized. The word is about an elderly population that since the end of the civil war in 1995, lives devoid of basic infrastructure: electricity, water, and transport, in a sparsely populated and inhumanely high-poverty area. In terms of health care, they are highly discriminated (Ljubičić, 2020).

The new normality that we have been living in since March 2020, and which has been introduced into our lives by the COVID-19 pandemic, represents an old/new training ground for explicit and implicit ageist practices in the medical profession. On how the health crisis, which hit and paralyzed the world, has affected health policies and practices as well as how they promote open ageism you can read more in the next chapter.

### ***1.1. How did the Coronavirus Strengthen Professional Ageism?***

Immediately after the World Health Organization (hereinafter: WHO) declared a Coronavirus pandemic, various measures were introduced to prevent the spread of the virus (Fischer et al., 2020). WHO reports testify to the speed of spreading disease. Hence we find that 750,890 cases and 36,405 deaths were confirmed at the global level only 20 days after the declaration of the pandemic on March 31, 2020 ([https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200331-sitrep-71-covid-19.pdf?sfvrsn=4360e92b\\_8](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200331-sitrep-71-covid-19.pdf?sfvrsn=4360e92b_8)).

According to official data, the beginning stage of the pandemic indicated that the mortality rate and serious health complications that COVID-19 causes are extremely high among the elderly. Thus, as early as April 2, 2020, Hans Henri P. Kluge, WHO Regional Director for Europe, reported that over 95% of deaths from COVID-19 were over the age of 60 (<https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/statements/statement-older-people-are-at-highest-risk-from-covid-19,-but-all-must-act-to-prevent-community-spread>), and similar findings were discovered by Yanez et al. (2020). By analyzing the epidemiological situation from April 12 to May 8, 2020, in 16 countries, these authors found that the mortality rate has been 8.1 times higher in patients aged 55 to 64, and as much as 62 times in the case of those over 65, compared to those younger than 55. The high mortality rate among French patients aged 80 and over infected with COVID-19 is being supported by the data which were obtained both Guillon et al. (2021), whereas the findings of a Chinese study cited by Malik, Burhanullah & Lyketsos (<https://www.psychiatrictimes.com/view/elder-abuse-and-ageism-during-covid-19>.) are unambiguous in concluding that the mortality rate over the age of 55 is far higher than in the rest of the population.

There should be no doubt that the WHO has recognized senior citizens as the population at the highest risk of illness and death, so it has made a number of recommendations to protect them. However, almost immediately after the outbreak of the rapidly spreading pandemic, with an increase in the number of deaths and infections, the collapse of health systems in many countries occurred. Treatment rationalization succeeded. It followed the logic that in a situation of lack of resources: hospital staffs, equipment, open beds.... it is more useful to protect the lives of the younger patients because the elder ones have already lived long enough. Obvious discrimination based on only one criterion - age, is in some countries formally supported through various regulations and recommendations issued by competent medical organizations (Monahan et al., 2020). More on this can be found in the next chapter.

1.1.1. (In) formally Approved Medical Discrimination against the Elderly - Examples from some Countries

In the face of a serious health system crisis that occurred in late March 2020, the Società Italiana di Anestesia, Analgesia, Rianimazione e Terapia Intensiva provided ethical guidelines for clinicians in a situation of limited resources to treat patients (Cesari, Proietti & Fehra, 2020). Guidelines also take age into account when making decisions about who will be admitted into intensive care units, at the same time guided by the logic of saving resources. Actually, as in the case of COVID-19 infection, a rapid worsening of the clinical picture is expected, and as it is necessary to react very quickly, clinicians are recommended to take the age limit into account when making such decisions. Those who have the best chances of survival should be taken care of first, that is who may have more years of life saved. However, it must be noted that the recommendations were not made ad hoc in a situation of new normality, but rely on a 2013 document that specifically addresses the criteria for admission to palliative care or intensive care. In this document, too, age is - as expected - a key criterion in making treatment decisions.

The Spanish Society of Intensive and Critical Medicine and Coronary Units gave similar ethical recommendations: age is an important criterion when deciding which of the patients in a situation of limited medical resources will be given priority in treatment. The logic is as follows: preference should be given to those patients who have several years of life ahead of them. When it comes to the elderly, the assessment ought to include not only the chance of survival but the probability of survival free from disability, as well as a case-by-case approach when making decisions about putting the patient on mechanical ventilation. It should also be noted that said treatment option is not available for patients with dementia or other degenerative diseases (Michalowski, 2020).

Without going into a deeper analysis of the formal basis of discriminatory practices, both Guillon et al (2021) mention that in France, too, the admission of the elderly (over 80 years of age) is limited due to the lack of beds in intensive care. In addition, these authors believe this is not entirely justified since age should neither be the only nor exclusive criterion for getting medical treatment.

In a similar situation of medical staff and equipment deficiency, Germany, Switzerland and the United Kingdom seemed to have a different attitude. In these countries, a debate has also been launched on the topic of the utilization of limited resources, but age has not been included in clinical guidelines, as was the case in Italy or Spain. For example, The German Ethics Council has decided that it is illegal to base patients' triage on age criteria

and that it is necessary for everyone to have equal treatment. However, a more detailed analysis of the recommendation shows that age is an indirect factor used in clinical decision-making. Thus, the German Interdisciplinary Association of Intensive and Emergency Medicine recommends that a series of criteria should be taken into account during triage, e.g. clinical condition of the patient, comorbidity, and independence in daily functioning. In other words, compared to a younger patient, the elder one is less likely to receive the necessary health care and protection.

The situation is similar in Switzerland. In this country, also, informally speaking, age is a significant factor in making clinical decisions and assessments. For example, when there are not enough resources in intensive care units, those who are estimated to have less than a year of life left or who suffer from dementia or those older than 75 who have been found to suffer from cirrhosis of the liver, chronic kidney disease (III stadium) or heart failure, will not be admitted.

The American Ventilator Allocation Guidelines are based on the same logic, according to which age in case of lack of resources becomes a crucial criterion when making a decision on who will be put on mechanical ventilation (Fraser et al., 2020).

With this in mind, we can conclude that despite the formal commitment to equal treatment, in the lack of resources, age and age-related health conditions are taken into account when making clinical decisions.

### **Instead of a conclusion**

Despite the fact that according to the Universal Declaration of Human Rights of 1948, all people are born free and equal in dignity and rights, there is every chance that the new normality has revealed the presence of open discrimination against the elderly and their an unequal treatment (Doron et al., 2018; Georgantzi, 2018; Pavlović, 2020). Already present professional ageism in medicine probably gained strength during the COVID-19 pandemic. In addition to highlighting a number of shortcomings in health systems, the COVID-19 crisis has made discrimination against the elderly apparent. The evidence obtained by HelpAge certainly testifies to this. Based on the analysis of the situation in 10 low-to-high-income countries, an unequivocal conclusion has been made that the elderly were exposed to human rights violations and systemic discrimination. Public health responses were based on age and the availability of health care was not the same for everyone (Chakamba, March 21, 2021).

It can be concluded that in a situation of limited resources, the lives of those members of society who are thought to be the least productive, also become least valuable (Cesari et al., 2020). This utilitarian logic, and medical treatments based on it, should not be considered naïve. In fact, they have serious implications - the lost lives of the elderly.

What has been said so far leads us to the question: Is there a solution to the problem of professional ageism?

Since it is motivated by various factors: cultural and countertransference ones, it would be worth working in several fields while dealing with this civilization issue. In the first place - at the macro level. Public debate on the wider discourse on the elderly as a symbolic and realistic threat to the younger generations - also came to the fore during the pandemic, as the elderly are seen as consumers of limited resources and those in the name of preserving whose life the economy stagnated. However, it should be insisted on recognizing the real contribution of the older generations to social development (Ayalon & Tesch-Römer, 2018a). Furthermore, the promotion of a more realistic view on age (as a normal phase of human life) and the elderly in public: neither all are sick nor all have the capacity for active aging, could reduce the ageist attitudes of the public. On the other hand, we should work on normative solutions that would outlaw ageism. Yet, it ought to be noted that, despite the fact that ageism is the most common basis of discrimination in the EU (Georgantzi, 2018), there are no laws dealing with it specifically in member countries. Nevertheless, it is considered that the European Council has enough potential and capacity to lead this battle as well (Mikołajczyk, 2018).

Finally, when it comes to professional ageism in medicine, it may be the right time to make a comprehensive analysis of official reports on medical treatment and mortality rates caused by COVID-19 of those in third age (Lloyd-Sherlock & Sempe). This in turn would help to recognize not only professional ageism in practice but also a system factor that spurs and encourages it. We find that such an analysis would be a valuable medical and ethical legacy for professionals in a situation of this pandemic-like crisis that may await us in the future.

Furthermore, we believe that it would be useful to adopt an individualized, person-centered approach, as the least ageist practice which respects the unique needs of the elderly and determines treatment accordingly. In this way, the usual generalizations about the elderly will be avoided because, although ageism teaches us the contrary, they are not a homogeneous group. In addition, education on age discrimination and strengthening

empathy for the elderly and aging has been identified as a factor that could influence the changing attitudes of health professionals.

For now, ageist practices in medicine are supported in some countries explicitly, and in others implicitly by recommendations and clinical guidelines. So, what can we hope for in the future if they are not recognized as highly discriminatory? The script is too scary to be considered at all. In the end, it is up to us to remind that one of the measures of a civilized society is how well it looks after its most vulnerable members: children and the elderly.

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Miljan Lazović\*

## EUTHANASIA AS A NEGATION OF THE RIGHT TO LIFE? COMPARATIVE LEGAL ANALYSIS<sup>1</sup>

*In this paper, the author deals with the criminal law analysis of the institute of euthanasia as well as the issue of protection of the human right to life. Euthanasia as an act of taking life is legalized in certain European countries. The states in which it is legalized have been shown to be both a distinct social justification and, consequently, a large number of illegally performed euthanasias. The institute of euthanasia came to the Republic of Serbia together with the Preliminary Draft of the Civil Code, after which a moral-legal debate started on the issue of its legalization. This institute is not only punishable under the Criminal Code PC, but is also unconstitutional as it violates a basic human right - and that is the right to life. Also, the phrase "right to a dignified death" is problematic from the point of view of terminology and axiology, and it cannot emanate from it an unlimited right to dispose of one's own life, that is, as the patient imagined. Therefore, in this paper, the author will point out the specific problems that this institute brings through criminal - legal analysis.*

**Keywords:** right to life, right to death, dignity, euthanasia, Preliminary Draft of the Civil Code;

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## 1. Euthanasia: etymology, terminology and classification

Euthanasia as an ambiguous term has been recognized in different historical frameworks, cultures and social systems and in these contexts has been interpreted and understood differently (Крстић, 2016:107). This way of perceiving can be understood as general and is far from a modern understanding of the complex procedure of euthanasia.<sup>2</sup> The word euthanasia comes from the Greek word *euthanatos* (Ευθανασία), which consists of the prefix *eu* meaning good and *θάνατος* with the meaning of death and that would mean good or beautiful death. Accordingly, euthanasia in that universal sense signifies a beautiful, painless, glorious, happy, and honorable death (Крстић, 2016: 103 – 104). On the one hand, euthanasia means peaceful or beautiful death, and on the other hand, it is indicated that death as such is good. Based on this, it can be argued that: “Euthanasia is a beautiful, good or mild death.” This formulation of euthanasia is incomplete and problematic and could be defined as a case of death that occurs after a heart attack or stroke or death that occurs during sleep since there is a tendency to say that someone who died in one of these three ways died relatively. by rapid, peaceful, or mild death (Mirjana Đerić, 2018: 7).

That definition lacks the subject of the action - the one who performs it and the object in the euthanasia procedure - the one on which it is performed. Certain circumstances are missing, such as the planned medical institution, and reasons such as strong and unbearable pain of the patient. The term defined in this way does not speak of the various models by which euthanasia is carried out, and from which a whole series of moral conflicts arises that lead to its being legally justified - by legalization or arguably overthrow. Thus, this procedure can be defined as follows: „Euthanasia involves the act of taking a patient's life by a doctor out of mercy (compassion / empathy) causing rapid and efficient death under certain medical conditions at the request of a patient suffering from unbearable pain caused by incurable disease”. Two important things can be emphasized here: 1) euthanasia involves the intentional taking of a person's life; 2) life is taken in the interest of the person whose life it is because he suffers from an incurable disease. This understanding of euthanasia (active voluntary euthanasia) is important because it distinguishes it from most other forms of euthanasia (Piter Singer, 2004: 424). Based on this, the term euthanasia can be classified into several types:

1. **Active euthanasia** - can be voluntary, involuntary and involuntary;

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<sup>2</sup> The euthanasia procedure is complex in nature as it produces a series of moral and legal dilemmas that lead to a discussion of the justification and unjustification of euthanasia.

2. **Passive euthanasia** - can be withdrawal or denial of life support treatment (Jelena Nešić, 2010: 267), removal from the apparatus (respirator) and refusal of the patient to continue treatment in a particular medical institution;
3. **Disthanasia** - mainly prolongation of the patient's life in the terminal phase (Ana Karla Marasović, 2018: 2);
4. **Ortotanasia** - respect for the natural dying of the patient without artificial prolongation of "suffering" (Helen Rimet Alves de Almeida, Cynthia Freitas de Melo, 2019: 145).
5. **Terminal sedation** or „indirect euthanasia” - treatment that may result in shortening of life if higher doses of drugs are given to reduce the patient's symptoms or pain;
6. **Physician - assisted suicide** - a procedure in which a doctor prepares a certain dose of poison in a glass that he gives the patient to drink from his own hand or assists with an injection that the patient injects himself intravenously or the patient presses a button that initiates intravenous delivery of a lethal substance. This form of euthanasia is often equated with active voluntary euthanasia, because in the procedure there is a voluntary request of the patient and the goal is to end his suffering. However, the physician here does not deprive the patient of life directly, but assists him and the patient commits suicide himself (Len Doyal, Lesley Doyal, 2001: 1079).

## **2. Legalized models of euthanasia in Europe**

### **2.1. Netherlands**

After two parliamentary reviews of illegally performed euthanasia in 1990 and 1995, which stated great public support for its decriminalization, the state of the Netherlands continued on the path to legalizing euthanasia. The road to decriminalization in the Netherlands began in 1973 (Veljko Turanjanin, 2012: 18). Strong influence was exerted by one case that received a court epilogue, and which initiated a discussion on euthanasia. In this case, the general practitioner was prosecuted for ending the life of his mother, who remained paralyzed, deaf and had speech problems. Because her mother repeatedly expressed a desire to die, she ended her life by giving her a lethal dose of morphine (Sief Gevers, 1996: 327). Until 1999, on the basis of jurisprudence, a pragmatic policy of tolerance towards euthanasia and medically assisted suicide was adopted. This meant that ending life on demand was openly applied and socially accepted. After a large number of public debates on euthanasia, debates in the media and public opinion polls, the Netherlands legalized euthanasia in 2002. That year, the Law on Ending Life at the

Patient's request and Suicide Assistance came into force when the Lower House passed in 2000, and the Upper House of Parliament passed in 2001. decriminalizing these forms of euthanasia. Under the Euthanasia Act, euthanasia doctors cannot be punished provided they have followed prescribed procedures, appropriate care criteria and reported death from unnatural causes to the regional euthanasia review committee (Ron LP Bergmans, Guy AM Widdershoven, 2012: 111).

Also, the Criminal Code has been amended to include the grounds for immunity from criminal liability. Physicians may adopt both written and oral requests for euthanasia, but they are never required to do so and are punishable if they are performed by non-physicians or if the criteria for necessary care are not fully met. The Dutch Euthanasia Act contains certain criteria which are in fact considered to be a summary of case law. The criteria are as follows:

1. That the request originates from the patient and is voluntary and well considered;
2. That the patient suffers unbearable pain with no prospect of improvement;
3. That the patient is informed about his health condition and perspective;
4. That euthanasia is the last resort for the patient, because there are no other alternatives;
5. That the doctor who should perform euthanasia consulted a colleague who has experience in this field, who examined the patient and agreed that all the conditions were met for euthanasia or suicide assistance to be performed;
6. That the deprivation of life out of mercy and assisted suicide was committed with care with appropriate medical care; (Ron LP Bergmans, Guy AM Widdershoven, 2012: 111).

## ***2.2. Belgium***

Action in favor of euthanasia legislation began in Belgium in 1980 with the founding of the Belgian Association for the Right to Die with Dignity in 1981. Ten years later, the debate reached the Parliament, and during the 1995/6 session, the Euthanasia Laws were submitted to the Senate by four members of parliament. A Consultative Board for Bioethics was also established to advise the Government and Parliament on bioethical issues and consisted of: lawyers, doctors, judges, nurses, philosophers of ethics, theologians, etc. (Raphael Cohen Almagor, 2009: 188). Euthanasia in Belgium was a common occurrence while it was illegal. About 4.5% of deaths in Belgium were achieved illegally, and an interesting fact is that before 2001, there was no case of persecution or punishment of any doctor who performed euthanasia. (Tony Sead, 2017: 185). Unlike in

the Netherlands, in Belgium there were no guidelines or case law regarding deprivation of life out of compassion before the enactment of the law. An important fact is that the Belgian Law on Euthanasia does not regulate suicide assistance, and the reason for this is that there has never been a social need to regulate assisted murder as a separate crime, and that the difference between it (Physician Assisted Suicide) and deprivation of life is out of charity minimal, so the regulation of assisted suicide is superfluous (Turanjanin, 2012: 23). On January 20, 2001, the euthanasia commission of the Upper House of Belgium, the Senate, voted in favor of the proposed euthanasia legislation. Nine months later, on October 20, 2001, the Belgian Senate adopted the bill by a significant majority. On May 16, 2002, after a two-day debate in the lower house of the Belgian parliament, the bill was supported by a parliamentary majority. The law sets out the conditions under which doctors can end the life of a patient who is hopelessly ill and suffering unbearable pain. Potential candidates must be Belgian citizens = which prevents Belgium from becoming a country with “euthanasia tourism” (Turanjanin, 2012: 25), then in order to be granted this right they must be at least 18 years old and submit special, voluntary requests for their lives to end (Raphael Cohen Almagor, 2009: 192).

Thus, in Belgium, a doctor who performs euthanasia does not commit a crime if he has complied with the conditions and procedures provided by this law:

1. That the patient is of legal age and legally competent and aware at the time of submitting the request;<sup>3</sup>
2. That the request is voluntary, well considered and not the result of any external pressures;<sup>4</sup>
3. That the patient is in a medically futile state of constant and unbearable physical and mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness and accident.<sup>5</sup>

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<sup>3</sup> Article 3, paragraph 1, item 1: The patient has attained the age of majority or is an emancipated minor, and is legally competent and conscious at the moment of making the request. *The Belgium Act on Euthanasia of May 28th 2002*.

<sup>4</sup> Article 3, paragraph 1, item 2: The request is voluntary, well – considered and repeated, and is not the result of any external pressure. *The Belgium Act on Euthanasia of May 28th 2002*.

<sup>5</sup> Article 3, paragraph 1, item 3: The patient is in medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident. *The Belgium Act on Euthanasia of May 28th 2002*.

### **2.3. Luxembourg**

Luxembourg is the third European country to legalize euthanasia by passing the Law on Euthanasia and Assisted Suicide on February 20, 2008, which entered into force on March 16, 2009. Deprivation of life out of compassion is allowed in Luxembourg under the following conditions:

1. That the patient is an adult;
  2. That he submitted the request knowingly, voluntarily and thoughtfully;
  3. That the patient is in a serious and incurable state of health;
  4. That the patient suffers unbearable physical and mental pain without the possibility of improving his health;
  5. That the patient is informed about his condition;
  6. To consult other doctors, the hospital team at the request of the patient, as well as any other person requested by the patient;
  7. That the doctor has received approval from the National Control Council;
- (Turanjanin, 2012: 26).

### **2.4. Switzerland**

A physician - assisted suicide is legal in Switzerland if it is offered without selfish motives to the person making the decision. There are no direct legal rules on the engagement of physicians and most assisted suicides are provided by Associations advocating for the right to die (Samia A. Hurts, Alex Mauron, 2017: 199). The Swiss Criminal Code contains specific solutions to deprivation of life out of compassion and suicide assistance, because the first form of euthanasia prohibits, and the second allows under certain conditions (Turanjanin, 2012: 26). Murder at the request of the victim or deprivation of life out of compassion is defined in the Swiss Criminal Code as a criminal offense. In that act of taking the life of another person out of compassion or mercy towards the victim, and at her serious and explicit request, the perpetrator of the crime will be punished by imprisonment for up to three years or a fine.<sup>6</sup> Encouraging or assisting in suicide is also a crime. Anyone who, out of selfish motives, encourages or assists another to commit or

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<sup>6</sup> Article 14: Any person who for commendable motives, and in particular out of compassion for the victim, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence not exceeding three years or to a monetary penalty. *Swiss Criminal Code of 21 December 1937*.

attempt suicide, if that other person subsequently commits or attempts to commit suicide, is subject to imprisonment for a maximum of five years or a fine.<sup>7</sup>

However, there are two non-profit organizations that offer assistance in assisting in suicide without the involvement of a doctor and certain medical conditions for such a request. These two organizations are: EXIT and DIGNITAS. They usually commit suicide assistance in their accommodation, and sometimes rent apartments for this purpose. It is interesting that suicides do not happen in public hospitals, except in Geneva and Lausanne, which approved them. EXIT organization was founded in 1982 and offers services to residents in Switzerland. According to the internal regulations of the association, persons who seek help to commit suicide must show a constant and uninterrupted desire to die because they have unbearable suffering (Roberto Andorno, 2013: 248). DIGNITAS was founded in 1998 by lawyer Ludwig Mineli and offers suicide assistance to residents who do not live in Switzerland (Susanne Fischer, Carola A. Huber, Romy Mabrer Imbof, Stephen Ziegler, Georg Bosshard, 2008). People who want to end their lives must register with the company and pay a registration fee of 200 Swiss francs and an annual fee of 80 Swiss francs, and when they decide to undergo the act of assisted suicide, they must pay a total of 5,000 francs, which includes administrative and funeral expenses. Most people seeking suicide help come from Germany, Great Britain, France. This special phenomenon, which enables assisted suicide to residents of other countries, has generated heated debates in Switzerland about the so-called “tourism of death” (Roberto Andorno, 2013: 248).

## 2.5. *Germany*

In Germany, during the National Socialist government from 1939 to 1941, about hundreds of thousands of people were killed / euthanized. The killing of disabled people during this rule became known as the ruthless Action T4 in the form of a form of euthanasia which affected those groups of the population that the National Socialist government considered “useless lives” and those that doctors declared hopeless, which is people meant the death sentence. These were mentally ill and mentally retarded people, those who could not take care of themselves, as well as people with various physical deformities and disabilities.

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<sup>7</sup> Article 15: Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty. *Swiss Criminal Code of 21 December 1937.*

As part of Hitler's racial ideology, it is also estimated that about 35,000 people were sterilized from 1933 to 1939 (Krstić, 2016: 107).

The word euthanasia remains taboo in the 21st century, since it has been associated with crimes from the National Socialist period. Instead, the word “Sterbehilfe” or help to die is primarily used. There is no special legislation on euthanasia in Germany, the provisions of the Constitution and the Criminal Code regulate this issue (Nuno Ferreira, 2005: 19). Article 1 of the German Constitution states that human dignity is inviolable<sup>8</sup> and that mortal patients are granted the same protection under this provision. Article 1 of the German Constitution states that human dignity is inviolable and on the basis of this provision, the same protection is provided to terminally ill patients. Article 2 protects the right to free development of the human person to the extent that the rights of others are not violated or the constitutional order and moral law<sup>9</sup> are not violated, while in the same article paragraph 2 grants every person the right to life and physical integrity and recognizes freedom man as inviolable.<sup>10</sup> With regard to the Criminal Code, Article 216 of the Criminal Code stipulates that if a person who is forced to kill at the express and serious request of a person is sentenced to imprisonment from six months to five years.<sup>11</sup> Attempting is also punishable.<sup>12</sup> When it comes to the legality of the euthanasia procedure, in Germany the type of passive euthanasia is allowed, ie the interruption of long-term treatment is considered allowed when the patient requests it, when the pain is strong and unbearable and when the predicted death is inevitable. (Nuno Ferreira, 2005: 21).

### **3. Deprivation of life out of compassion as a negation of the right to life in Serbian positive law**

The criminal offense of deprivation of life out of compassion was introduced by the valid Criminal Code from 2005, which entered into force on 1.1.2006. years and until then, the

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<sup>8</sup> Article 1. Paragraph 1. Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. *Germany's Constitution of 1949 with Amendments through 2012.*

<sup>9</sup> Article 2. Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. *Germany's Constitution of 1949 with Amendments through 2012.*

<sup>10</sup> Article 2, paragraph 2. Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. *Germany's Constitution of 1949 with Amendments through 2012.*

<sup>11</sup> Article 216, paragraph 1. Whoever is induced to kill at the express and earnest request of the person killed incurs a penalty of imprisonment for a term of between six months and five years. *German Criminal Code of 13 November 1998.*

<sup>12</sup> Article 216, paragraph 2. The attempt is punishable. *German Criminal Code of 13 November 1998.*



criminal law aspects of euthanasia were considered under the auspices of the crime of murder (Banović, Turanjanin, Ćorović, 2018, 275). In addition to the growing tendencies in the theoretical corpus to decriminalize or even depreciate this form of deprivation of life through other institutes (the institute of extreme necessity), they cannot be accepted as for reasons of principle (inviolability of another's life or its inviolability) - Article 24 para. 1 of the Constitution RS)<sup>13</sup>, as well as for practical reasons such as the possibility of abuse (Stojanović, Delić, 2018, 21). Euthanasia is regulated by Article 117 of the Criminal Code of the Republic of Serbia and reads:

*„Whoever deprives an adult of his life out of pity due to his serious health condition, and at his serious and explicit request, will be punished by imprisonment from six months to five years.”<sup>14</sup>*

According to the dominant understanding of the comparative legal theory, deprivation of life out of compassion is a privileged form of the crime of murder, in our law the basic form of murder from Article 113 of the Criminal Code of Serbia.<sup>15</sup> The act of execution is determined in the same way as in the criminal offense of murder (Stojanović, 2009, 343). The perpetrator intentionally deprives another person of his life, therefore the objective and subjective features from Article 113 must be fulfilled here as well (Vuković, 2007, 236). If the ratio legis in this criminal act is taken into account, and starting from the teleological interpretation, the act of execution is limited by the will of the passive subject. If someone demands to be deprived of life in a specific way, e.g. by giving an overdose of medication, and the perpetrator does so in a completely different way, by firing a firearm, one should take into account that there is ordinary murder and not the crime of deprivation of life out of compassion. When it comes to a passive subject, he can only be an adult, and adulthood must exist not only at the time of the crime, but also at the time when that person demands to be deprived of life (Stojanović, Delić, 2018, 21-22).

When it comes to the elements of the being of the crime of deprivation of life out of compassion, the following conditions must be met:

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<sup>13</sup> Constitution of the Republic of Serbia, Official messenger, no. 98/2006.

<sup>14</sup> Article 117. Criminal Code, Official messenger of RS, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.

<sup>15</sup> Whoever kills another will be sentenced to five to fifteen years in prison. Article 113. Criminal Code, Official messenger of RS, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.

1. That deprivation of life is done out of compassion;
2. To deprive of life an adult who is seriously ill and has no prospect of cure;
3. To be deprived of life at the serious and express request of this person;

The first condition for the existence of this crime is that the murder is committed out of compassion, which distinguishes it from all other forms of murder. Compassion is a motive or motive for committing this crime. The perpetrator must have compassion for the pain and suffering of the person to whom this act is directed (Todorov Jakovljević, 2019, 72). So, the perpetrator knows that a certain adult deprives of life out of compassion due to the difficult health condition in which he finds himself - and he wants to or agrees to it. The work must be done out of compassion. Compassion of the perpetrator is a subjective feature of the act. This motivation is the main reason for deprivation of life. The existence of any other motives does not necessarily exclude this work, if merciful motives dominate. However, some motives by their nature always exclude compassion, e.g. greed or revenge. The perpetrator in that case is responsible for ordinary or aggravated murder. Based on that, the legislator explicitly links compassion to the difficult health condition in which an adult who is deprived of life finds himself (Vuković, 2007, 241). Another condition is that an adult who is seriously ill is deprived of life, and that there are no prospects for his cure. The third condition is that the deprivation of life is carried out at the serious and explicit request of an adult, who is in a serious health condition. The request must exist objectively (Todorov Jakovljević, 2019, 72 - 73).

A person must be deprived of life on serious and explicit request. The request is an activity aimed at achieving some effect on the other, which points to the conclusion that the simple consent of the passive subject would not be sufficient, and that the initiative for deprivation of life must come exclusively from him. It must be current both at the beginning and during the duration of the work and it must not be revoked by a passive subject and it must be referred to a certain person (doctor, close relative) (Vuković, 2007, 237 - 238). The request can be given orally, in writing or in another way, so that its content is known or proven, and that request must be made without the use of force, threat, deception or other type of pressure on the will that excludes the ability to decide (Jovašević, 2017, 76). Bearing in mind that the issue of euthanasia is related to medical activity, it should be pointed out that according to Article 117 of the Criminal Code, any person can report as a perpetrator, which means that this crime is not reserved exclusively for health professionals. The legislator operates with the term “Who”, which means that it is a general crime (*delictum communium*) against the characteristics of an active subject. The perpetrator's consciousness must include all the essential features of this act,

ie the action, consequence, causal relationship, the property of a passive subject (to be of legal age and in a serious health condition), as well as the existence of a serious and explicit request (Banović, Turanjanin, Ćorović, 2018, 277 - 278).

#### **4. The right to a dignified death according to Article 86 of the Preliminary Draft of the Civil Code of the Republic of Serbia**

The phrase “the right to a dignified death” is fundamentally problematic. Death in the context of this phrase is a conceptual excess or error, and the concept of “the right to a dignified death” is not correctly set theoretically. It is argued that this institute should be defined as the “right to die with dignity.” Death is the final thing, the intersection of the state of life. It is a finality that does not imply activity, except natural activity which is expressed through decay and decay of the human body. Dying is a process that still involves life energy or a certain type of vitality. However, when a person comes to a state of incurable disease, he demands the right to die in a dignified manner, so he requires a certain process that will lead him to death in a dignified manner. Thus, in Section 3, Article 86 of the Preliminary Draft of the Civil Code of the Republic of Serbia regulates the “right to a dignified death” and states:

*“The right to euthanasia, as the right of a natural person to a consensual, voluntary and dignified termination of life, can be exceptionally exercised if the prescribed human, psycho-social and medical conditions are met.”*

*“The conditions and procedure for exercising the right to euthanasia shall be prescribed by a special law.”*

*“Abuse of the right to euthanasia, in order to obtain unjustified material or other benefits, is the basis for criminal liability.”<sup>16</sup>*

Since the legislators were aware of the complex issues of the euthanasia phenomenon, in the note to Article 86, as an alternative, they left the possibility to delete the member after the Commission definitely declared itself based on the arguments of experts from various fields, and within the public debate on the Preliminary Draft. By adopting the basic proposal, an appropriate change in the Criminal Code would be made.<sup>17</sup> Since Article 24, paragraph 1 of the Constitution of the Republic of Serbia guarantees the inviolability of human life, the question arises to what extent the right to a dignified death from Article

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<sup>16</sup> Preliminary Draft of the Civil Code of the Republic of Serbia, (working text), Government of the Republic of Serbia, Commission for the Drafting of the Civil Code, Belgrade, 2015, Article 86, paragraphs 1 – 3.

<sup>17</sup> Preliminary Draft of the Civil Code of the Republic of Serbia, Article 86.

86 is compatible with the constitutional provision of the right to life.<sup>18</sup> Proponents of the right to a dignified death from the aforementioned constitutional provision, and the provision on human dignity Article 23, according to which dignity is also inviolable, draw the opposite conclusion according to which such a possibility is allowed. This way of thinking can be seen in the following, and that is that: the right to life and the right to human dignity are inviolable and inviolable, which would mean that a person freely disposes of himself or his life and puts his destiny under his own responsibility. From this can allegedly be derived the unlimited right to dispose of one's life, that is, the right to die according to one's own ideas. In other words, the right to a dignified death is derived from the right to life and dignity (Banović, Turanjanin, Ćorović, 2018, 279 - 280).

In order to protect the human right to life, the question arises whether it is possible to make an "assessment" of whether life is worth living and what are the criteria and conditions under which it is and under which it is not valuable? It can be said that there is no scientific method by which one could assess whether life can or cannot be worth living. The goal of criminal law is to protect human life regardless of the prognosis of the disease and the quality of life of the patient. Any violation of this principle is a criminal offense. Criminal law should sanction any possibility of grading when it comes to the protection of human life, and to exclude all possible criteria on the quality of life and social evaluation of life. In the existential range from the very beginning of birth until the final death of a person, criminal protection has a crucial role in the protection of human life (Drakić, 2013, 240 - 241). The right to a dignified death can in no way emanate from a constitutional provision that guarantees the right to life and dignity that are inviolable. Thus, positive terms such as life and dignity cannot be the basis for justifying the right to a dignified death, since both conceptually and existentially they stand in antithesis. Article 86 of the Civil Code is unconstitutional because it directly violates certain provisions of the Constitution of the Republic of Serbia, as well as the already mentioned two crucial articles. If there are tendencies to legalize the right to a dignified death, then it should find its guarantees in the Constitution (Banović, Turanjanin, Ćorović, 2018, 280).

### **Conclusion**

Comparative legal analysis shows that euthanasia is legalized in certain European countries, since there was a strong social justification, which was reflected in a large number of illegally performed euthanasia. The tendency to legalize the right to a dignified death in Serbia gained its expression through the open possibility for the act of euthanasia

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<sup>18</sup> Constitution of the Republic of Serbia, Official messenger, no. 98/2006, Article 24, paragraph 1.

to be affirmed through the Civil Code of the RS. However, the institute of the “right to a dignified death” is problematic in its terminological, axiological and semantic sense and as such is unconstitutional. Since it is theoretically wrongly set, and consequently existentially destructive to man, this institute can be called an act of murder. The human right to life is a basic human right, hence it has found its place in the Constitution as the highest general prana act of a state. Also, human dignity is inviolable, so everyone is obliged to respect and protect it, and to die with dignity by an act of euthanasia does not mean preserving human dignity. On the other hand, violating this principle means committing a crime. Hence, the criminal code, with its norms, should sanction various variations which grade life and determine the criteria whether it is worth living or not. So it is about protecting human life. The phenomenon of euthanasia is an anti-civilization institute expressed through the phrase “right to die” or “right to a dignified death”. Every state should systematically fight against any kind of legalization of death. Its role is to preserve human life and encourage the birth rate of a society, and not to legally enable individuals to die with the help of a doctor, either by active euthanasia or by curatively assisted autobiography.

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**Mirka Lukić-Šarkanović\***

## **RIGHT TO LIFE VS RIGHT TO DEATH**

*The issue of euthanasia is burdened with many controversies and dilemmas but still, in the modern world, euthanasia is increasingly talked about. The so-called pro-euthanasia idea is more present than ever which has led to the legalization of euthanasia in many countries primarily because, in addition to the human right to life as a basic human right, the human “right to death” is being increasingly discussed.*

*The development of palliative care and sedation, whose main goal is to alleviate the suffering and pain of the patient in the final weeks and days of his life without the intention to affect the end of life, and their increasing accessibility to a wider circle of patients, has significantly reduced the need and will to legalize euthanasia.*

*In recent decades, the issue of euthanasia has become more of a medical issue.*

*Nonetheless, the issue of euthanasia is essentially a multidisciplinary, ethical, legal, medical, social, but also religious issue with numerous sub-questions, to which, in the future, we should try to find the most expedient answers.*

**Keywords:** *euthanasia, palliative care, palliative sedation, right to life, right to death*

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## 1. Introduction

The right to life is a fundamental human right and other human rights derive from it, above all the right to health, as its integral part. It is defined not only by the Universal Declaration of Human Rights proclaimed at the United Nations General Assembly in 1948 but also by the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe in 1950, which implies that the right to life is protected by law and that no one can be intentionally deprived of life, even the ones suffering from incurable diseases and with severe pain, when the end of life is known, even if they no longer want to or cannot bear their pain and suffering (Wreen M., 1988).

The question is how to deal with such patients who want to end their lives to free themselves from pain and suffering?

Every doctor, after graduating from medical school, takes the Hippocratic Oath. Slightly modified Declaration of Geneva adopted by the World Health Organization (WHO) in 1948 is in force today obliging each doctor not to harm a patient in any way: "I will neither give any deadly drug nor make any similar suggestion" and "I will respect human life from its conception" (Harris NM, 2001). The Hippocratic Oath speaks of humanity, as a basic moral postulate, and one of the most important aspects of humanity is the doctor's obligation to provide help to anyone who needs it. Thus, even the Father of Medicine, Hippocrates, declared himself to be for human life and against deprivation of life, even in patients who suffer unbearable pain and endure severe suffering (Harris NM, 2001).

However, if the actions or inactions of a doctor lead to more serious consequences for the one who needed that help, the doctor bears not only moral but also legal, professional, penalty, material, and criminal responsibility (Vodinelić, 1995).

Euthanasia is a word of Greek origin and comes from the words *eu* - good and *thanatos* - death and means intentional shortening of life to lessen the patient's suffering. Synonyms are also good death, pleasant death, merciful death, dignified death, and death out of compassion or assisted dying. This definition of euthanasia refers to active euthanasia, which can be direct (injecting the patient with a lethal dose of the drug) and indirect (prescribing a lethal dose of the drug which the patient will inject himself). In addition to active euthanasia, there is also passive euthanasia, which can also be indirect (failure to take or not initiate rescue measures for patients) or direct (suspension of already initiated measures) (Wreen M., 1988). When a person consciously and voluntarily declares that he



wants to end further suffering and die, we speak of voluntary euthanasia or involuntary euthanasia when a patient is in a coma or with severe mental or physical impairments and is unable to make a decision himself (La Follette H., 2002).

All medical organizations in the world treat each type of euthanasia as the opposite of all ethical principles of medical practice. Most countries in the world consider euthanasia illegal and have laws related to euthanasia. In that sense, a special declaration was made, which states: "Euthanasia, an act that unequivocally leads to the end of life whether at the request of the patient or his closest relatives, is an unethical act." However, the patient has the right to discontinue his treatment, which will result in death. This is his basic right and if the doctor obeys his wish, he does not act unethically (World Medical Association Policy, 2002).

## **2. History of euthanasia and euthanasia in the modern world**

During the development of civilization, from the first written traces, we come to data that euthanasia was first carried out by the Spartans. The main goal of the Spartan society was to subjugate other peoples and thus needed only completely healthy members of the community, so they left the weak and sick on Mount Taygetus, where certain death awaited them (Poredos D, Pirija B, Planinec D, 2003). A similar practice happened in ancient Rome, where the father decided on the life or death of a newborn. The newborn would be placed at his father's feet, and if the father took him in his arms, it would mean life, and if not, the child would be sentenced to death.

Socrates himself is the most famous example of euthanasia in the ancient world, and the whole event was described by Plato in his work "The Apology of Socrates".

There is almost no information about euthanasia in the Middle Ages because at that time religion had a strong influence on all areas of human life and strongly opposed any form of self-destruction. However, separate cases of euthanasia of severely wounded soldiers were recorded, so that they would not fall into the hands of the enemy.

In Thomas Moore's *Utopia*, euthanasia was described for the first time in detail, as a form of helping patients with no hope of recovery (Ress G, Wakely M, 2004)

At the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century, the more heated polemics *pro et contra* euthanasia began. Thus, euthanasia again came to the center of the scientific and general public interest, when two Germans, the lawyer Karl Bunding and the

psychiatrist Alfred Hoche, proposed controlled and voluntary euthanasia, under a doctor's supervision. In Germany, there was an attitude that mentally ill people and people with mental retardation or some physical deformity were candidates for "painless death" (Longerich P, 2010); (Browning CR, 2004).

During World War II and Nazi Germany, Adolf Hitler used this idea in 1939 and launched the Aktion T4 (Thiergarten) program. About 300,000 people were killed under this program (Stanar D, 2020); (Starcevic S, 2020).

Switzerland was the first country to legalize euthanasia in 1941. A law was passed which allowed issuing and injecting a lethal dose of medicine, if not out of greed, to a seriously ill person, either a Swiss or a foreign citizen, in the terminal phase of the disease and end his life.

Euthanasia is also legalized in the Netherlands. In that country, the law was issued in 2002 entitled "Act on shortening life on demand and assisted suicide", popularly called "Law on Euthanasia". Physician-assisted suicide is still a crime, but physicians will not be prosecuted only if they meet the following criteria: 1. the patient sufficiently and carefully considered his or her request 2. his or her sufferings are unbearable and with no chance of improvement 3. the patient is thoroughly informed about his condition 4. both the patient and the doctor agree that there is no reasonable alternative 5. at least one more independent doctor has been consulted and 6. the very act of ending the patient's life was done with due medical care. The doctor has to report every act of that kind. In the Netherlands, the number of euthanasia and physician-assisted suicides has been fairly stable over the past twenty years (Francke A. et al, 2016). However, numerous other studies have shown that this is not entirely true. In the Netherlands, 1,815 cases of euthanasia were registered in 2003, 2,098 in 2007, and 2,636 in 2009 (Pavlović Z., Živković M., 2015). These data led to a strengthening of arguments against euthanasia. The most frequently mentioned arguments are: euthanasia would not be applied strictly and only to the patients in the terminal phase of the disease, it could become involuntary and a means of reducing health care costs, it could lead to an "epidemic" of suicide, which would all lead to the rejection and denial of the importance and value of human life (Euthanasia Pros et Cons, 2014).

Various forms of assisted suicide have also been legalized in Belgium since 2002 - euthanasia without a specific method, in the United States (Oregon) since 1997 - assisted suicide, the United States (Washington) since 2009 - physician-assisted suicide, and

Canada since 2016 - physician-assisted active euthanasia. (Boyd K.A., Chung H, 2012); (College of Physicians and Surgeons of British Columbia, 2016).

Passive euthanasia is legalized in most European countries.

In Serbia, there is no explicit legal framework for passive euthanasia in the Law on Health Care. Although, it can be concluded from the Medical Chamber Code that it is allowed with patient consent not to start certain treatment measures in some cases because they would only prolong the patient's suffering. The ethical dilemma is whether passive euthanasia is a better option per patient than lethal injection.

Passive euthanasia, in the form of non-initiation of cardiopulmonary resuscitation (external cardiac massage, intubation, mechanical lung ventilation, defibrillation) the so-called DNR (Do not resuscitate) or AND (Allow natural death), is defined by law in most developed countries (Mentzelopoulos SD et al., 2016).

A 2003 study by Ferrand et al. found a significant difference between the perception of a doctor and a nurse on end-of-life decisions (Ferrand E. et al, 2004). A study by Hilden et al. found that two-thirds of nurses considered that their opinion was taken into account sufficiently when it came to euthanasia decisions as well as that they were more objective than physicians. The majority of nurses want to participate in the DNR decisions while leaving the final decision to the attending physician. The attitudes of nurses employed in different branches of medicine also differ (Hilden H.M.et al, 2004).

In the modern health care system, where the patient is in the center, the relationship between the patient and the doctor is crucial. In the communication and good relationship between the physician and the patient, the possibility to communicate with empathy is important, especially when it comes to patients whose lives are inevitably coming to an end (Lanken P. et al., 2008). Empathy is an opportunity to understand the patient's feelings, situation, desires, but also to express understanding (Gremigni P., Casu G., Sommaruga M., 2016). Empathy, as a trait, is desirable in health care workers. It is assumed that those who have more empathic feelings use the information they receive from patients to reduce their suffering (Vachon D., Lynam D., 2015); (Kiersma M.E. et al, 2013); (Costello J., 2006).

Numerous studies in a large number of countries show that attitudes about euthanasia differ concerning gender, and previous experience, but also that the religion and religious beliefs of the patient and his family play an extremely important role.

Studies from 33 European countries show that the acceptance of euthanasia differs significantly according to the sociodemographic characteristics of the population and that it is better accepted among men and highly educated people (Cohen J. et al, 2006). Also, acceptance of euthanasia decreases as the strength of religious beliefs increases (Boyd K.A., Chung H., 2012); (College of Physicians and Surgeons Of British Columbia, 2016); (Danyliv A., Ciaran O Neill, 2015).

The world's leading religions do not view euthanasia favorably and they are generally determined against any form of euthanasia. In general, all religions are against any activity whose aim is euthanasia (Jerotic V, 2008). Christianity is against any form of euthanasia, a priori. God gives life and only he has the right to take life.

Islam unconditionally rejects any form of self-destruction or any form of assistance in carrying out human self-destruction. Suffering and pain are given by Allah to purify the soul and should be accepted as such.

Judaism considers human life sacred and inviolable. Life is a supreme value. God created man in his image, so the act against human life is the actual violation of God himself (Letellier Ph., 2003)

In Buddhism, the body is considered a kind of soul temple, and its integrity must not, in any way, be consciously and systematically violated. Suffering and pain are an inevitable part of the path that the body and soul cross to achieve nirvana - abandoning all forms of suffering and pain (Keown D., 1996). When it comes to Hinduism and the attitude towards euthanasia, there are two ways of looking at the problem. According to the first, helping a person in terrible suffering is a good deed. On the other hand, helping a person to end his life as well as maintaining a patient on life support devices disrupts the cycle of reincarnation.

### **3. Ethical and medical aspects of euthanasia**

Healthcare professionals need to understand and apply ethical principles in all aspects of their work, especially before engaging in the end-of-life decision-making process. Ethics is defined as a way of looking at and understanding life morals or applying ethical thinking to medical decision making (Bossaert L.L. et al, 2015); (ACEP Board of Directors, 2017). A European study on ethical principles shows that Serbia is in the last place, with the use of only one out of 41 examined ethical principles (Mentzelopoulos S.D. et al, 2016); (Batricevic A., 2020).

The key principles of medical ethics are patient autonomy, patient beneficence, non-maleficence, and the principle of justice.

The principle of the patient's autonomy implies that the doctor is obliged to make his decisions according to the patient's values and beliefs. In the new approach to health care, used in the developed countries, the patient is at the center of the decision-making process. The principle of patient autonomy is applied through freely given informed consent and an understanding that the patient can change his decision at any time during his treatment. This principle is also recognized by the law on patients' rights. In situations when the patient cannot be asked himself, it is a real challenge to apply these principles. If the patient's wishes are documented, they are usually unavailable at critical moments, causing the further ethical dilemma.

The solution in Western countries is to write “preliminary instructions”. Our law allows us to choose the person who will make decisions instead of the patient, but who that person can be and what his or her commitments are is not defined. “Preliminary instructions” are therapeutic decisions previously written by the patient, in case he or she is not able to participate directly in making medical decisions related to his/her own life at some point. The previous instructions can be in two different but completely exclusive forms:

1. Decisions made during life (will).
2. The authorized representative, the person(s) who will make decisions related to the patient's health, when the patient is unable to do it himself, or in other words, when he or she loses the power of discernment.

They must be consistent, valid, and applicable. In the 2010 Convention on Human Rights and Biomedicine, Article 9 refers to the previously expressed wishes of the patient, which must be taken into account when making a decision.

The principle of beneficence implies that the proposed intervention must help the patient more than it will harm him. For that reason, more evidence-based clinical guidelines are being adopted, in which patients themselves are increasingly involved.

The principle of justice implies that health resources are distributed in such a way that the social status of patients is not taken into account, but that everyone has the right to receive the current standard of care. There is still no consensus on what it is that makes a fair and equal method of balancing the recommendations and needs of an individual patient versus society.

The principle of non-maleficence or “*primum non nocere*” is the principle of Hippocrates' axiom - to help or, at least, to do no harm. Adherence to this principle is reflected in the fact that no treatment is begun that could cause more harm than good.

When we talk about end-of-life decisions, passive euthanasia enables the justified use of this principle. Here we come to the notion of so-called useless, futile treatment. Such treatment is every treatment that “gives unreasonable hope for recovery” or that “prevents the patient to permanently experience any benefits” - the definition of the World Health Organization (WHO). When we think of resuscitation, it is considered useless if the chances of a good quality survival are minimal. The first precondition for the treatment to be considered useless is the absence of an indication. The decision not to start resuscitation does not require the consent of the patient or those close to him, who usually have unrealistic expectations about the possible success and potential benefit of resuscitation.

In their daily work physicians of different specialties make important therapeutic decisions related to the start of cardiopulmonary resuscitation, as well as decisions related to the beginning of certain, potentially futile, treatment of a potentially dying patient (Miccinesi G. et al, 2005).

Resuscitation is a treatment measure, which can restart the heart and thus save a life, but also, more commonly, it can prolong terminal illness and consequently create an extension of the suffering to both patient and his family.

Cardiac arrest is a potentially reversible event and only 8-10% of patients who survive outpatient cardiac arrest are discharged from European hospitals. In Serbia, that number is ten or more times smaller (Horvat-Jakšić B. et al., 2015).

There is only one death and that is brain death. Brain death can be whole-brain death, brainstem death, and neocortical death. Neocortical death alone does not mean the death of a person because it implies the absence of consciousness, with the sustained activity of the brain stem and subcortical activity (Jukić M. et al., 2013).

Irreversible cessation of brain and brain stem function, along with irreversible cessation of circulatory and respiratory function, results in brain death, which essentially represents the death of the organism (Guidelines JAMA, 1981). The three main findings in brain death are coma, a complete absence of the brainstem reflex, and apnoea. Severe head injuries, hypertensive intracerebral hemorrhage, SAH (subarachnoid haemorrhage), hypoxic-ischemic brain injury, and fulminant hepatic failure are the most common potential causes of irreversible loss of brain function (Goila A.K., and Pawar M., 2009). It is extremely important to accurately and timely diagnose brain death and rule out conditions that may appear as brain death (Goila A.K., Pawar M., 2009). These are most often: deep hypothermia, barbiturates and CNS depressants overdose, Guillain-Barré syndrome, Locked-in syndrome (injury of the upper part of the pons, where the patient is fully conscious but cannot move or communicate verbally), and akinetic mutism (deep apathy, with preserved consciousness but slow and rare voluntary movements, that is proven by EEG test). Loss of brain function also leads to systemic physiological instability, which is manifested by loss of vasomotor control, loss of respiratory function, arrhythmia, loss of thermoregulation (hypothermia), diabetes insipidus, and hypothyroidism (Gelb A.W., Robertson KM, 1990). Numerous advanced treatment measures and the development of sophisticated mechanical ventilators enable vital functions to be maintained long after the complete loss of brain function (Goila A.K., Pawar M., 2009). Brain death is diagnosed when a clinical examination confirms a deep coma with no reaction to external and internal stimuli, no pupillary reflex to light (mydriasis or semimydrisis), absence of oculocephalic, oculovestibular, corneal, and cough reflexes, along with atropine, apnea, and additional diagnostic tests: EEG, auditory (BEAP) and somatosensory (SSEP) evoked potentials (Morgan PD, Soriano S., Sloan TB, 2013). Tests to assess cerebral flow include cerebral angiography, transcranial Doppler, MRI/MRA, CT angiography/CTA, and radionuclide perfusion scintigraphy (Wijdicks E.F.M., 2011). Brain death must be confirmed by a board of doctors. The team that confirms brain death must always include an anesthesiologist, a resuscitation specialist, and a neurologist/neurosurgeon.

Brain death was defined in 1959 and thus provided the medical basis for organ transplantation (Mollaret P, Goulon M, 1959). The importance of accurate, timely, and documented diagnosis of brain death, as well as the exclusion of conditions that can mimic brain death, enables the organ donation of a brain dead person and the development of transplantation medicine while eliminating the possibility of criminal liability (Truong R.D. and Miller FG, 2008).

#### **4. Palliative care and palliative sedation**

When talking about euthanasia, it is more and more talked about the man's "right to death". Today, in the age of high-tech development, attention is focused on numerous dilemmas and ethical issues concerning the end of life of a seriously ill patient and the issue of humane and dignified dying (Dupuis H.M., 2003); (Jovanovic S, 2020). A new philosophy is being developed or rather a return to the traditional concept concerning a seriously ill, dying patient, where it is important when, where, how, and with whom the person dies. This is the so-called concept of "good death", which is based on a holistic approach to a seriously ill patient. It consists of symptoms relief, treating the patient in the conditions he wants, and psychological and spiritual support to both the patient and his family, which was made possible by the hospice formation. (Čičak M., 2008); (Smith A.K. et al, 2011).

The first modern hospice was founded by Cicely Saunders in 1967 in London. Through the concept of hospice, a modern concept of palliative care (lat. Pallium - mantle, cloak) is formed (Jurišić A, 2002); (Miličević N., Kovčin V., Babić M., 2001). Palliative treatment enables the elimination, i.e. relief of pain and suffering which is one of the fundamental, primary goals of medicine (Hermesen AM, ten Have H, 2003). Nearly two-thirds of patients, in the terminal stage of malignancy, suffer intense, excruciating pain. However, most pain medicine specialists claim that 95% to 98% of this pain can be reduced by adequate pain therapy (Quill ET, Cassel K.C., 2003).

The goal of palliative care is to achieve the best quality of life for the patient and his family in the given conditions. It affirms life but also accepts death as inevitable, not rushing or delaying it, relieves pain, and other undesirable symptoms, and integrates psychological, social, and spiritual aspects of caring for a seriously ill patient (Miličević N., Kovčin V., Babić M., 2001); (Radakovic S, 2020). The patient not only suffers from pain and other physical symptoms but also suffers from psychological pressure (fear of the unknown), social pressure (feeling of abandonment and loneliness), and spiritual pressure (feeling of meaninglessness, hopelessness, despair). Cicely Saunders called all this "total" pain and directed the patient care towards it in the last months or weeks of his or her life (Jurišić A., 2001). In this way, ethical norms, individual autonomy, non-maleficence, and beneficence are respected and are based on the patient's right to decide on his further treatment. In curative medicine, the basic goal is to cure the patient, and death is considered a failure. In palliative care, the goal is to alleviate pain and suffering, and death, which occurs spontaneously, is considered a success (Brkljač M., 2008).



Even though palliative care successfully alleviates numerous, primarily physical symptoms, there are still symptoms that cannot be treated well enough. These are most often refractory physical symptoms, but also spiritual and very often social problems of the patient and his family. The intensity of these symptoms increases with the deterioration of the patient's condition and approaching death and significantly affects the functioning and quality of life of the patient (Claessens P. et al, 2007). Therefore, to suppress these refractory symptoms and enable the functioning of the patient, various drugs are used, primarily sedatives and hypnotics, but also analgesics (usually opioid analgesics), i.e. the so-called palliative sedation is used. The definition of palliative sedation implies the following: 1. patients die from advanced, incurable disease, 2. the symptoms do not affect any other therapeutic procedure, 3. the incurable disease continues its natural course and leads to spontaneous death in the next few days, 4. it is not a cause of death, 5. it does not tend to affect the dying process (not to speed it up or slow it down) and 6. it is performed at the request of seriously ill patients in the terminal phase of their disease (Muller Buch C., Andres I., Jehser T., 2003). Palliative sedation is one of the most controversial bioethical issues of palliative care. Palliative sedation is often considered “indirect euthanasia”, most often by proponents of euthanasia. However, euthanasia and palliative sedation must be strictly distinguished because there is a deliberate interruption of life in euthanasia by the active action of a doctor, and the result is the death of the patient. Palliative sedation is an act that alleviates patients from unbearable pain and suffering and the outcome is the control of symptoms. The difference is in the intention, which is extremely important from both the legal and the ethical aspects (Cohen L. et al, 2005).

The ethical working group of the European Association for Palliative Care advocates for palliative care, in terms of accepting palliative sedation, through the treatment of “total pain”, and does not accept euthanasia as the only possible solution.

## **5. Conclusion**

The question of death always brings a certain, greater or lesser, dose of fear, probably because we know nothing about death itself and dying, except that death is the final process and that it awaits us all with certainty. Depending on cultural, social, or religious affiliation, death is viewed from different aspects and the individual faces dying and death differently.

Euthanasia, i.e. its legalization, is explained by the human right to death, i.e. the human right to die with dignity.

The logical, ethical question is where the limit is, and is there a limit that we can cross when deciding on life or death, and who is that person who may and can decide on the life and death of another person?

The development of palliative care, whose main goal is to alleviate the suffering and pain of the patient in the final weeks and days of his life, without intending to affect the end of life, whether to shorten or prolong it and its greater accessibility to a wide range of patients will significantly reduce the need and desire to legalize euthanasia.

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**Ranka Vujović\***

**MANDATORY IMMUNIZATION OF CHILDREN  
AND PROTECTION OF THE RIGHT TO LIFE,  
HEALTH AND BODILY INTEGRITY**

*This paper examines the legal aspects of mandatory immunization in the context of the child's right to life and health, on the one hand, and the right to inviolability of bodily integrity, on the other hand, as well as the limits of parental authority and responsibility. Mandatory immunization is a controversial issue that has occupied the public's attention for many years, and has been especially current after the proclamation of the COVID-19 infectious disease pandemic. It is a medical measure whose ultimate goal is to protect the life and health of citizens. Life is a basic value that a person has, which gives foundation and meaning to all other values. The right to life is inviolable. Health is important to save a life. Therefore, all modern legislation proclaims the right to healthcare as a basic human right. The right to health also implies the right to free consent to a medical intervention, medical measure or scientific experiment, because such interventions, as a rule, violate another protected good – bodily integrity. In principle, everyone has the right to freely decide on everything concerning their life and health and bodily integrity. There is disagreement in legal theory as to whether mandatory immunization of children, despite health benefits, is an inadmissible encroachment on the integrity of the human being and where the margins of assessment are, although the case law, both domestically and internationally, has recently conveyed its negative position.*

**Keywords:** immunization, right to life, health, bodily integrity, court, children's rights, parental rights.

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## **1. The right to life as a fundamental value and a fundamental right**

The right to life belongs to the group of personal rights, first generation rights and negative rights. It is an elementary and fundamental right of every human being, and, in the hierarchy of human rights, it is at the very top, above and before all other rights (Sredojević, 2014: 476). Without the existence of the right to life, it would be superfluous to talk about respect for and protection of all other human rights and freedoms.

Human life is a fundamental value. The fact that this is a right that accompanies a person not from birth, but from conception, is indicated by regulations which in the modern world provide special protection for pregnant women and regulate issues of restrictions, and in some countries even prohibitions on abortion. This ensures the protection not only of the life and health of the pregnant woman, but also of the fetus she bears – the fetus, and even the early embryo, the emerging life.

The right to life is protected by a number of international legal documents of a universal character, such as the Universal Declaration of Human Rights (UDHR, 1948), which stipulates in Article 3 that everyone has the right to life, liberty and security of person. The right to life is inseparable from the human being and must be protected by law (ICCPR, 1966: Art. 6. 1). Provisions on the need for special protection and care, including appropriate legal protection, *both before and after birth*, are also contained in the Declaration of the Rights of the Child (DCR, 1959: Preamble, Clause 4).

In the Republic of Serbia, the legal protection of the right to life is based on constitutional guarantees, generally accepted rules of international law and ratified international treaties (Constitution of the Republic of Serbia, 2006: Art. 18, 194). According to the Constitution of the Republic of Serbia, human life is inviolable (Art. 24). The constitutional guarantees of inalienable human rights include the inviolability of the physical and mental integrity of each individual (Art. 25).

The link between the right to life, the inviolability of physical and mental integrity and the preservation and protection of health is obvious. However, the guarantee of the right to life primarily implies the obligation of state authorities to ensure and protect the right to life, not life itself. According to Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), the right to life of every human being is protected by law and no one can be intentionally deprived of life, except in the execution of a court judgment convicting them of a crime for which such punishment is provided by law. Deprivation of life is not contrary to Article 2, Clause 2



of the ECHR if it arises from the use of force which is absolutely necessary to defend a person from unlawful violence, to carry out a lawful arrest or to prevent the escape of a person lawfully deprived of his freedom, or to take legal measures aimed at suppressing riots or unrests. In other words, any intentional deprivation of life is punishable, whether it is an individual or a legitimate representative of the government who has exceeded his/her legal authority. Moreover, in countries that have retained the death penalty, regulations oblige doctors to attend the execution of death sentences – even in situations where life loses its meaning (Belarus, 29 US states, China, etc.).

## **2. The right to health, protection against infectious diseases and bodily integrity**

According to the definition of the World Health Organization (WHO 1947, Preamble of the Statute), health is a *state of complete physical, mental and social well-being, and not just the absence of disease*. The same definition is contained in the Serbian Law on Public Health (ZJZ 2016, Art. 2).

The right to health includes a set of legal rules according to which everyone has the right to a standard of living that ensures the health and well-being of both the individual and his/her family, including food, clothing, housing and medical care, necessary social services, as well the right to insurance in case of unemployment, illness, incapacity, widowhood, old age and other cases of loss of means of subsistence due to circumstances independent of the person's will (UDHR, Art. 25).

By signing the UDHR, all member states have committed to ensuring that no person is deprived of the right to access health care and rehabilitation services as well as other services within the health care system. The duty of member states to ensure the exercise, respect and protection of the right to health includes, inter alia, the duty to take appropriate measures to eradicate practices that endanger the health of all people in their territory.

The same applies to the obligations of member states with regard to the rights covered by the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966, Art. 12). In the General Comment no. 14 on the right to the highest attainable standard of health (E / C.12 / 2000/4), the United Nations Committee on Economic, Social and Cultural Rights noted, inter alia, that the right to prevention, treatment and control of diseases under Article 12 of the ICESCR includes, inter alia, the implementation or improvement of immunization programs and other infectious disease control strategies.

When it comes to infectious diseases, which pose a threat to health not only in a limited area, but, as we could see in the COVID-19 infectious disease pandemic, on a global level, one of the strategies to control the spread and eradicate infectious diseases is immunization. Immunization is a preventive measure of protection against infectious disease by administering vaccines and/or immunoglobulins of human origin, immunobiological preparations containing specific antibodies and monoclonal antibodies. Vaccination is one of the most cost-effective medical interventions available, saving millions of people from illness, disability and death every year. Vaccines, in particular, enable the protection of children from serious diseases and therefore play a central role in reducing mortality and preserving the health of children (UNICEF, 2017: 3). The World Health Organization pointed out on its official website that in the 21<sup>st</sup> century, every child has the right to live free from vaccine-preventable diseases, but that these diseases continue to pose significant threats in Europe and the world, and strengthening immunization remains vital.

The area of protection of citizens from infectious diseases in the Republic of Serbia is regulated by the Law on Protection of the Population from Infectious Diseases (ZoZSZB, 2016). What the infectious diseases that endanger the health of the population are – is determined by the Law itself (Art. 5), while leaving the possibility that in case of danger of a contagious disease that is not determined by that Law and which may endanger the population of the Republic of Serbia, the government, at the proposal of the Minister responsible for health, may declare such a disease a contagious disease, the prevention and suppression of which is in the interest to the Republic of Serbia, and determine appropriate measures, conditions, manner of implementation, executors and means for implementation of such measures (ZoZSZB 2016, Art. 6. par. 1).

A medical measure is a health service that is provided for preventive, diagnostic, therapeutic and rehabilitation purposes. Among the medical measures provided by the Law is the immunization of children of a certain age from certain infectious diseases, which are listed exhaustively, and *which the parent or guardian of the child cannot refuse, unless there is a temporary medical or permanent contraindication determined by a doctor of appropriate specialty or expert team for contraindications* (ZoZSZB 2016, Art. 32).

Mandatory immunization is implementation of a measure that is directed towards the child's body, and for which, according to the ZoZSZB, the consent of the child is not required, i.e. the consent of child's legal representative. The question that has been raised is whether this violates the principle of inviolability of bodily integrity, which implies

that no one may be subjected, inter alia, to medical or scientific experiments without their freely given consent (ICCPR 1966, Art. 7).

Consent as a condition for taking a medical measure is the patient's right. In the Republic of Serbia, without the consent of the patient, we must not, as a rule, take any medical measure against them. This protects his right to inviolability of physical and mental integrity. According to the Law on Patients' Rights (ZoPP), the patient can give consent to the proposed medical measure explicitly (orally or in writing) and tacitly (if the patient did not explicitly object). In order to take invasive diagnostic or therapeutic medical measures, the explicit written consent of the patient, i.e. his/her legal representative, is required. In this, the patient is not bound by consent that was not preceded by full notification of diagnosis and prognosis of the disease, description of the proposed medical measure, purpose and benefits, duration, possible consequences of the implementation and non-implementation and other important issues (informed consent). Consent to the proposed medical measure may be revoked by the patient (orally or in writing), until it's implementation begins, as well as during the treatment. The stated rules also apply *mutatis mutandis* to medical research (ZoPP 2013, Art. 15, 16, 25).

The patient has the right to appoint a person who will give consent on his/her behalf, i.e. who will be informed about the taking of medical measures, in case the patient becomes incapable of making a decision on consent (ZoPP 2013, Art. 16. Par. 5).

The Convention for the Protection of Human Rights and Dignity of the Human Being with respect to the application of biology and medicine: Convention on Human Rights and Biomedicine (CHRB, 1997), with regard to patients' rights, stipulates that contracting parties are obliged to protect the dignity of all human beings and guarantee to everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine, that each party take in its legal system the necessary measures to implement the provisions of that Convention (Art. 1), that the interests and welfare of the human being take precedence over the interests of society or science (Art. 2), that the procedure related to health can be performed only after the person to whom the procedure applies has been informed about it and has given free consent to it, that that person has previously been given appropriate information about the purpose and the nature of the intervention as well as its consequences and risks, that the person may freely and at any time withdraw his/her consent (Art. 5), that, if according to the law, a minor is not able to give consent to the procedure, the procedure may be performed only with the consent of his/her representative or competent authority, or a person or body provided by law (Art 6. Par.

2), that there may be no restrictions on the exercise of the rights and protective provisions contained in that Convention other than those prescribed by law and necessary in a democratic society, inter alia, for the protection of public health or for the protection of the rights and freedoms of others (Art. 26).

Patients' rights are correlated with the protection of human life and health, and these are values of the first order, based on the principles of freedom and dignity of the individual. Therefore, healthcare professionals are not only expected to take care of the life and health of their patients, but also to respect the patient's right to make independent decisions about their own body.

As with the principle of the inviolability of human life, the guarantee of the inviolability of bodily integrity implies the obligation of the state authorities to ensure and protect the right of every person to the inviolability of bodily integrity, not the bodily integrity itself. A medical measure without the consent or against the will of the patient, i.e. the patient's legal representative, may be taken in exceptional cases. These exceptional cases a) must be determined by law, and b) must be in accordance with medical ethics (ZoPP 2013, Art. 15. Par. 3). Thus, for example, an emergency medical measure may be taken on patient who is unconscious, or for other reasons unable to give his consent, without his/her consent, but members of his/her immediate family will be notified whenever possible. Such a measure, in a health institution, is taken on the basis of the decision of the medical council, except during surgery when there is a need for its immediate expansion, which is decided by the medical doctor who performs the procedure (ZoPP 2013, Art. 18).

According to the ZoPP, everyone has the right to refuse medical treatment, even one that saves or prolongs their life. Some legal writers point out that this right is not absolute: "When it comes to refusing vaccination against coronavirus, that right is limited by the rights of others, in this case the right of each of us to life and health protection. Protection is provided by the state, so in case of insufficient response to the recommended vaccination, in order to achieve the necessary collective immunity and protect the population from the infectious disease COVID-19, mandatory vaccination may be not only legal but also necessary to save lives and health of those who, for justified reasons, cannot receive the vaccine, those who are not sufficiently protected by the vaccine, as well as all those whose protection depends on collective immunity" (Beširević, *Novi magazin*, 16 April 2021).

### **3. The child's right to life, health and development.**

#### **Parental rights**

Children are born with fundamental freedoms and rights that belong to all human beings. However, given the physical and mental immaturity, there is a need to emphasize their special rights. The protection of the dignity and bodily integrity of the child, apart from being closely connected with the right to life and the right to family life, cannot be viewed in isolation from the principle of equality of rights (Vujović, 2020, 79).

There are numerous international documents whose purpose is the international legal regulation of the rights of the child and the rights arising from the relationship between the child and the parents. Special importance is given to universal documents, since, not only in the field of children's rights, but in general, in the field of human rights, universality is a desirable goal, because it reflects the position of most countries and thus provides credibility and strength to the adopted international instrument (Šahović-Vučković, Petrušić, 2015: 38). Among the universal documents on the rights of the child, especially important is the Convention on the Rights of the Child (CRC, 1989), which, in addition to defining children's rights as a special category of human rights, encompasses the entire scope of human rights which are defined as the rights of the child – civil, political, economic, cultural and social rights. All rights recognized in the Convention are considered fundamental, indivisible, interdependent and equally important. The Convention stipulates that every child has the right to life, and that countries are obliged to ensure the survival and development of the child to the greatest extent possible (CRC, Art. 6). It also emphasizes that parents have the primary responsibility for the upbringing and development of the child (CRC, Art. 18), and obliges the signatory states to provide the child with such protection and care as is necessary for his or her well-being, taking into account the rights and obligations of his or her parents, legal guardians or other individuals who are legally responsible for the child, and to, to that end, take all necessary legislative and administrative measures (CRC, Art. 3, par. 2, and Art. 4). Member states must recognize the right of the child to the highest level of health and medical care and to rehabilitation, and shall endeavor not to deny any child the right to such health care. The obligation to ensure the highest possible level of child health protection can be provided by the state: 1) directly – by providing health care, including the implementation of measures to control diseases, 2) indirectly – by supporting parents in exercising parental rights and duties, and 3) through international cooperation – in order to achieve full realization of the right to health and medical protection of children (CRC, Art 24). The four general principles – rights (on which all the rights of the child are based), and which are identified as such by the Committee on the Rights of the Child, the contracting

authority responsible for monitoring the implementation of the CRC, include the child's right to life, survival and development and the right to participate in making all the decisions important for them. When making decisions or taking actions that affect the child, the most important thing must be the welfare, i.e. the best interest of the child. This applies both to decisions made by judicial, administrative or legislative bodies, and to decisions made by parents (CRC, Art. 3).

The most important regional international legal act that sets standards for the protection of children and families is the ECHR. Article 8 of that Convention, prescribes the right to respect for family life, as one of the basic human rights from the corpus of the right to privacy, while prohibiting public authorities from interfering in the enjoyment of that right, unless such interference *is in accordance with law and it is necessary in a democratic society in the interest, inter alia, of the protection of health or morals, or of the protection of the rights and freedoms of others.*

The guarantees referred to in Article 8 of the ECHR are very important for the exercise and protection of the rights arising from the relationship between children and parents. They apply to a wide range of issues which, in accordance with the case law of the European Court of Human Rights, are classified under the autonomous notion of *family life*. The essential goal that should be ensured by the application of Article 8 of the ECHR is to protect the individual from arbitrary actions of public authorities, i.e. from arbitrary interference of the state in their family life. In that sense, a positive obligation of member states to establish such internal legal mechanisms that can ensure effective respect for family life is prescribed (Vujović, 2019: 42, 43).

The rights of the child and parental authority arising from the right to family life in the Republic of Serbia, in addition to the Constitution, are regulated in a systematic way by the Family Law (PZ, 2005), and special rules governing specifics related to certain areas are contained in special, so-called sectoral laws. The right of the child to the provision of the best possible living and health conditions for proper and complete development (PZ, Art. 62, par. 1) is correlated with the right and duty of parents to take care of the life and health of the child and the right to receive all information on the child from health institutions (PZ, Art. 68, 69). The right to health care established by the Constitution includes, inter alia, the implementation of measures to preserve and improve the health of citizens, as well as the prevention, control and early detection of diseases (ZZZ, Art. 2). In the process of obtaining health care, a child who is capable of reasoning, regardless of age, according to special rules contained in the law governing patients' rights, has the right to confidential counseling even without parental consent, when it is in the best

interests of the child (ZoPP, Art. 11, par. 7), and a child who has reached the age of 15 and who is capable of reasoning has the right to confidentiality of the data contained in his/her medical documentation, except in the case of a serious danger to the life and health of the child, when information about his/her health condition is obligatorily communicated to his/her parent (ZoPP, Art. 24).

Part of the parental authority includes giving consent to undertake medical procedures on the child (since it concerns representing the child, which is the right/duty of the parents, but it is also the right and duty of the parents to decide on all issues that significantly affect the child's life). A child who has reached the age of 15 and who is capable of reasoning may give such consent independently (PZ, Art. 62, par. 2; ZoPP, Art. 19, par. 4).

#### **4. State interference in the exercise of rights and case law**

International legal acts on human rights prescribe the positive obligations of the state, which mainly consist of providing conditions for the peaceful enjoyment of the guaranteed rights of citizens, and also prescribe the reasons for state interference in the exercise of those rights.

According to a UNICEF study, vaccine-preventable diseases continue to pose a worldwide threat. In the WHO European Region, which includes 53 member states with traditionally high immunization coverage, the recurrence of smallpox, rubella and whooping cough shows that these risks are real. Current immunization coverage rates in the WHO European Region are not sufficient to ensure immunity and stop the spread of vaccine-preventable diseases in the region. In previous years, immunization coverage rates, especially for certain vaccines, have also declined in Serbia (UNICEF, 2017: 3).

When it comes to the reasons why parents avoid or explicitly refuse to vaccinate their children, the UNICEF study shows that they are numerous, but it is known that some children are not vaccinated because parents are not sufficiently informed about the need for immunization (e.g. in hard to reach populations) or maintain misconceptions about the safety and efficacy of the vaccine.

Prescribing mandatory immunization of children without the consent of the child him/herself, i.e. his/her legal representative (parent or guardian) opened several questions. Is the legal stipulation of mandatory immunization of children of a certain age contrary to the rights of a child from the CRC? Does the protection of the child's health justify

state interference in the parents' decisions not to allow their child to be vaccinated in some cases, i.e. is the guaranteed right to respect for private and family life under Article 8 of the ECHR violated in this way? Does prescribing mandatory immunization of children, without consent to immunization or with the opposition of the child and/or his/her parent, constitute an inadmissible encroachment on the physical integrity of the human being? Is mandatory vaccination compulsory vaccination?

Prescribing mandatory vaccination, where it is introduced, is justified by the need to eradicate infectious diseases that endanger the health of all people in a given territory, in which case an individual's personal decision may endanger the life and health of others living in a given community.

There are numerous discussions about the relationship between the individual and society, i.e. conflicts of interest between them. It is the position of privacy (of the individual) that indicates two main components of civilized evolution: the general degree of freedom in a certain society and the level of political, economic, social and legal development of a certain state (Streltsov, 2017: 45). According to some theorists, the use of an individual outside of him/herself is out of the question, i.e. an individual cannot sacrifice him/herself to achieve social goals. This principle is particularly clear through the prohibition of experimenting with human beings for the benefit of other social goals, which is not morally justified, especially against the will and consent of that individual, as stated in the 1964 Declaration of Helsinki. Thus, the individual is the measure of everything, i.e. a goal in him/herself, and cannot be a means to achieve social goals (Čiplič et al., 2010: 771, 772).

The case law of the European Court of Human Rights, established and developed during the decades-long implementation of the ECHR, is still the most effective and sophisticated international legal instrument for the protection of human rights on the long road to their rise in the European legal order (Vujović, 2020: 78). That court recently passed the first verdict in the lawsuit against mandatory immunization, which, since it is the first in that area, will have not only historical significance, but also far-reaching consequences. The case was brought before the European Court of Human Rights by families from the Czech Republic who were fined and whose children were denied access to preschool institutions due to non-fulfillment of the legal obligation to vaccinate. The claims were filed before the COVID-19 infectious disease pandemic, in the period from 23 July 2013 to 31 August 2015, but this verdict comes in the midst of a debate on the need to prescribe mandatory immunization against that infectious disease, which caused the global pandemic, and against which vaccination is, for the time being, organized on a



voluntary basis (true, with numerous privileges that many countries grant to the vaccinated, in an effort to raise the scope of immunization on their territory).

In the ruling made on 08 April 2021, in the case of *Vavříčka and others v. The Czech Republic, Applications nos. 47621/13 and 5 others*, it is stated that under Czech law, children must be vaccinated against nine diseases, including diphtheria, tetanus, pertussis, hepatitis B and measles. Relying on their rights to dignity and respect for physical integrity, as well as freedom of thought and conscience, some parents have argued that they refused vaccination in the interests of their children to protect their health, and that each individual's attitude towards vaccination is based on his or her personal position, and not on general and objectified data, that the prescribing of mandatory vaccination was not preceded by an objective, comprehensive and independent expertise that would confirm that this is a necessary measure to protect public health, and that the state did not take any responsibility for side effects or injury to the health of children caused by vaccination, from which, according to the applicants, it follows that there was no fair balance between the public interest and the rights of the individual. The European Court of Human Rights has stated that there is a *general consensus on the positive effects of vaccination, which is not questioned due to the inevitable side effects because there is strict scientific control, and that vaccination policy pursues legitimate goals to protect health, as well as the rights of others, as it protects both those take vaccines and those who cannot be vaccinated for medical reasons*, since those who cannot take the vaccine then *depend on collective immunity to protect themselves from severe infectious diseases*. The court also found that the imperative legal provision on mandatory vaccination does not mean coercion, since a relatively mild misdemeanor sanction (a fine in the amount of 10,000 Czech crowns, approximately 400 euros) was stipulated for non-compliance with it, for violating that obligation, and that the ban on enrolling unvaccinated children in preschool institutions is not a repressive sanction but a preventive measure established to protect the life and health of other children. The court also confirmed that mandatory vaccination encroaches on the right of parents to private and family life, but stressed that this right is limited by the need to protect public health, because the state has an obligation to protect the right to life and health of all citizens, and ruled that the Czech Republic did not violate the rights of parents under Article 8 of the ECHR by prescribing mandatory vaccination.

At one time, the Constitutional Court of Serbia reasoned in the same way, when in its ruling it rejected the initiative to initiate proceedings to assess the constitutionality and compliance with international treaties ratified by Serbia, the provisions of the ZoZSZB prescribing the mandatory vaccination of preschool children (SCC, IUz-48/2016). One of the initiators considered that prescribing the obligation to immunize persons of a certain

age (children) and other persons determined by the said law represents an unconstitutional encroachment on the physical integrity of a human being, contrary to Article 25 of the Constitution, because it implies taking measures against the human body without person's consent, and is thus equal to torture, inhuman and degrading treatment due to the threat of deprivation of parental rights and forced immunization of children, as well as preventing the exercise of other constitutionally guaranteed rights, such as the right to education. Other initiators dispute the obligation of immunization in relation to the same provision of the Constitution because they believe that in this way, contrary to the constitutional provision, experiments are conducted on children. All initiators believe that immunization without the consent of the person is contrary to the rights set out in the provisions of Article 7 of the ICCRP, as well as Article 5 of the CHRB, according to which a health-related procedure can be performed only after the person concerned was informed and gave free consent to it, and in the case of minors only with the approval of their representatives. The Constitutional Court took the position that the authority of the legislator to prescribe health care measures by law, which, according to the rules of the profession have been determined to achieve the most favorable results in preventing the spread of infectious diseases, is indisputable. As immunization is a preventive health care measure which is an area of public health and is undertaken to protect the population as a whole from certain infectious diseases, the Constitutional Court considers that the legislator moved within its constitutional authority by prescribing the obligation of immunization against certain infectious diseases defined by law, since it is a measure aimed at eliminating certain diseases from the entire population, which is a legitimate goal, and at the same time an obligation of the state. The court also noted that the available data on vaccine immunizations for 2015 in the immunization schedule show the lowest vaccination rate in the last ten years, and that this increases the risk of epidemics of infectious diseases that had been prevented by vaccination for decades, because a high level of collective immunity is needed to prevent an epidemic outbreak. Given all the circumstances, including the duty of all to respect the public interest and not endanger the health of others, the court found that the criterion of necessity was met. Regarding the argument that, compared to vaccinated children, those who remained unvaccinated were discriminated against because they were deprived of their constitutionally guaranteed right to education, the court found that the fact that children's attendance at educational institutions is conditioned by their vaccination cannot be interpreted as relevant in constitutional terms for any form of discrimination with regard to the right to education.

The CODICES database of the Venice Commission contains decisions of the constitutional courts of several European countries, including decisions of courts from

France, Italy, Hungary, Slovenia, Croatia and Moldova, which relate to the issue of mandatory vaccination of children of certain ages and in which the same standards and the same reasoning have also been applied – that the introduction of mandatory vaccination does not violate the guaranteed rights of children and parents.

There are numerous decisions and numerous papers in which cases of violation of children's human dignity in proceedings before administrative bodies and public services are pointed out and the importance of ensuring the child's right to participate in making all important decisions is emphasized (Đanić Čeko & Šego, 2020: 300, 301). From the perspective of the right of parents to participate in making all important decisions regarding their child, even when children are under the protection of social services and outside the parental home, and in the context of vaccination, the judgment of the United Kingdom Court of Appeal [2020] EWCA Civ 664 of 22 April 2020 is interesting. The case concerns a baby placed under the protection of local authorities, who was vaccinated despite parental opposition. Although vaccination is not specified as mandatory, the guardianship service accepted the recommendations for vaccination of children issued by the body in charge of public health, without requesting that in a situation of parental opposition, the competent court make a decision on vaccination. Considering this case, the British court reminded that the views of the parents regarding immunization must always be taken into account, but the decision cannot be based exclusively on the position of the parents, unless that position is in the best interest of the child. It also concluded that the use of standard or routine vaccinations could not be considered a “serious” or “difficult” thing, except where there were specific contraindications that suggested that it might not be in the best interests of the child to be vaccinated and therefore it was neither necessary nor appropriate for the local authority to refer the matter to the High Court in any case where a parent opposes the proposed vaccination of their child. This would unnecessarily waste valuable time and resources of the court and other involved services, which could be better used. This court also concluded that scientific evidence now clearly shows that it is in the best medical interest of children to be vaccinated in accordance with the guidelines of Public Health in England, unless there are special contraindications in a certain case.

## **5. Concluding remarks**

Finally, it can be concluded that European case law has built a unified position on the relationship between mandatory vaccination of children and the rights of recognized by the CRC, EHCR and other international human rights instruments and thus seems to have put an end to this issue.

According to the highest courts of various European countries that have introduced mandatory vaccination of children of a certain age, and which are summarized or listed in this paper, this measure is not in conflict with the essence of guaranteed rights of children and parents to respect their private and family life, with the right to inviolability of bodily integrity and education. It is stated that the health measure of obligatory vaccination encroaches on the right of parents to private and family life, but it is emphasized that it protects life and health, i.e. provides protection of public health, which is a permissible restriction and permissible interference of the state in the enjoyment of guaranteed rights. It is also pointed out that the views of parents regarding the immunization of their children must always be taken into account, but that no decision can be based solely on the position of the parents, but must primarily take into account the best interests of the child. It is also emphasized that mandatory vaccination does not reduce the achieved level of the right to health care, considering that this is a measure aimed at eliminating certain diseases from the entire population, which is a legitimate goal, and at the same time an obligation of the state.

The measure of mandatory vaccination is not discriminatory, because the obligation equally applies to all children in the same age group. All children in certain age groups are subject to vaccination, unless it is contraindicated for health reasons. As this duty applies equally to all who belong to a given group, those who have not complied with it cannot be considered discriminated against those who are, because they have not been in the same or a similar situation.

The healthcare measure of obligatory vaccination of children is not a compulsory measure, because misdemeanor fines are provided for its non-compliance. In addition, the ban on enrolling unvaccinated children in preschool institutions is not a repressive sanction but a preventive measure established to protect the life and health of other children.

From the perspective of possible obligatory vaccination against the infectious disease COVID-19, which is currently recommended, especially important is the position of the European Court of Human Rights that the state has the right to assess whether due to insufficient response it will switch from the recommended model, i.e. voluntary vaccinations to the model of mandatory vaccination in order to protect those who, for medical reasons, cannot be vaccinated, but achieve protection through collective immunity. Some domestic legal authors believe that there are no legal obstacles to the introduction of mandatory vaccination against COVID-19 in Serbia, because mandatory vaccination does not imply coercion. It only means that anyone who refuses to be

vaccinated without a justified medical reason would have to pay a fine for non-compliance with the prescribed obligation. In addition, his freedom of movement would be conditioned by an appropriate test, the costs of which they would bear themselves. Otherwise, such a person would have to stay at home or in the summerhouse, provided that he/she is lucky enough to own it (Beširević, 2021).

The results of a recent research conducted by the Belgrade Center for Human Rights in cooperation with the United Nations Human Rights Team in Serbia and Ipsos Strategic Marketing, indicate the perception of the right to health as the most endangered human right in 2020, which is considered quite expected in the conditions of global battle against the corona virus.

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**Ralf Thomas Heberling\***

## **RIGHT TO LIFE – RIGHT TO DEATH?**

*The right to life is widely asserted and acknowledged. Life's boundaries, birth and death, are more obscure and disputed. My concern is the 'good death' in various forms; the termination of a life in pain at the will of the person dying.*

*This text explores the question if sick persons have the right to die when and how they wish to. And is it permissible to help others put an end to an insufferable life, actively or passively? The debate on euthanasia and assisted suicide intensifies as populations grow older and medical progress enables physicians to prolong the lives of seriously ill patients.*

*This paper will look at definitions of terms used and at ethical questions surrounding the issue, present common arguments for and against assisted suicide and euthanasia as well as give a short review of medical aspects and an overview of public opinion and policy on the issue.*

**Keywords:** *Voluntary euthanasia; assisted suicide; physician-assisted suicide; mercy-killing; patient-autonomy; bioethics;*

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## Introduction

The right to life is often and widely asserted, in weighty conventions and solemn declarations. Birth and death have always been surrounded by both moral and religious considerations as well as secular norms and rules of law. Much attention is given to the beginning of human life. The fetus is protected by conventions and legal rules; abortion is a perennial topic of debate. But what about the end of human existence? Is there a right to die, at a time chosen by one-self? Who should be allowed this right? Is it morally wrong to assist in such an undertaking?

My concern is the termination of life when death occurs at the request of an individual who wishes to die. There is a growing awareness of this issue of 'a good death'. Still, information is fragmented, complex and sometimes confusing. This text is not aimed to be an exhaustive examination of the phenomenon. Rather I intend a cursory overview introducing the issue and systemizing essential information, to facilitate further studies.

### **On terminology, definitions, and delimitations.**

Key terms used in debates on the ending of a life in suffering are euthanasia and assisted suicide. How those words are defined and delimited is essential to understanding the matter at hand.

The word euthanasia derives from the Greek *ευθανασία*, from *ευ*, 'good' and *θάνατος*, 'death'. Euthanasia is the 'good death'. What does the phrase imply?

An entry in the Lexicon of *Deutsches Ärzteblatt* 5/2005 differentiates between four forms:

1. Passive euthanasia: dispensing with life-prolonging measures (...).
2. Indirect euthanasia through pain-relieving treatment ....
3. Aiding and abetting suicide, e.g. by procuring and providing the lethal agent.
4. Active euthanasia: intentional and active acceleration or induction of death.<sup>1</sup>

An essential point is that this 'good death' is restricted to cases of terminally ill patients and those experiencing unsufferable pain, as a deliverance from a life vegetating in a

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<sup>1</sup> Klinkhammer 2005; translation by the author

hospital bed. Thus ‘person’ and ‘patient’ will be used interchangeably in this text, the underlying assumption being that the person whose life is terminated has access to medical care. One can imagine this not always being the case; but that the patient’s lifespan could be prolonged is a presupposition of both ethical, medical and juridical discussions on euthanasia.

Suffering and pain thus become relevant considerations. The notion is integrated in the definition of euthanasia given by the *Oxford English Dictionary* as “The painless killing of a patient suffering from an incurable and painful disease or in an irreversible coma”. This approach is common and found e.g. in a declaration by prominent scientists, thinkers and religious leaders in defense of euthanasia, where it is defined as “a mode or act of inducing or permitting death painlessly as a relief from suffering” (Larue 1988/89).

These definitions, although clarifying, ignore the issue of consent. Jovanović (2020:543) sees euthanasia as “deliberate deprivation of live of an incurable patient, at his/her valid request”. Peter Singer (2011:156) wants to “empathize that it is the patient who takes the step of ending her own life”. He categorizes euthanasia according to whether the patient has given consent. In medical ethics the term ‘informed consent’ is used; the American Medical Association (AMA), in its Code of Medical Ethics, Opinion 2.1.1, defines informed consent such: “The process of informed consent occurs when communication between a patient and physician results in the patient’s authorization or agreement to undergo a specific medical intervention”.

Voluntary euthanasia can be divided further into passive and active variants. Passive voluntary euthanasia is when a person dies after refusing or withdrawing consent to lifesaving medical intervention. Active voluntary euthanasia generally is performed by administration of deadly doses of medication to a consenting patient.

Involuntary euthanasia means ending the life of a person who did not ask for or consent to this. The deed is done out of a conviction that the person would wish to die if able to reason and express herself. A term often used to describe this act is mercy-killing, signifying premeditated murder committed out of pity and for the sake of the deceased and no one else. Without consent by the victim this act is seen by authorities as homicide and prosecuted accordingly.

A further distinction Singer makes is between involuntary euthanasia, involving a patient not resisting life-ending measures, and non-voluntary euthanasia, when a patient is unable

to consent to such measures. This may be a young child or a person in a persistent vegetative state.

Both actions are illegal everywhere. But there is a dispute whether the non-voluntary and involuntary killing of patients can be regarded as a 'good death'. Arguments either hinge on the perpetrator's intent or on the patient's circumstances. However, most voices in the debate see voluntary consent as the essential precondition to accepting and implementing euthanasia.

Euthanasia, death at the hands of another person, is clearly distinguished from assisted suicide. The term suicide denotes a person intentionally committing an active lethal act against himself with a successful outcome. Terminally ill patients often will do this by self-administration of drugs provided by an assistant. When a patient is provided with means to end their own life, the term commonly used is assisted suicide; this also includes physician assisted suicide (PAS), where a medical professional administers the medication.

In the USA assisted death is defined as a practice by which terminally ill persons who are believed to be of sound mind and have a prognosis of living six months or less, may request, obtain, and self-administer barbiturates to end their life.

Because in many cultures the term 'suicide' carries negative connotations, use of euphemisms such as 'death with dignity' is common. That and similar expressions are rather vague, as Singer (2011:156) points out: "It could refer to acts that make a dying person more comfortable, without shortening life, ... or it could refer to giving a patient, on request, a lethal injection".

This assessment leaves me with two distinct acts to consider: active euthanasia, that is intentionally causing a person's death at the persons voluntary and competent request. And assisted suicide, that is helping someone to commit suicide, at the person's voluntary and competent request. The key difference lies in who performs the act, the patient or someone else.

Further treatment of the subject will be based on the preconditions advanced by Young (2020): The person to die is seriously or terminally ill; there is no chance for improvement or recovery. He or she suffers intolerable pain or has available only a life that is unacceptably burdensome. The person to die is of sound mind; the decision to die is taken voluntarily and competent and it is enduring. The person is unable to end life without

assistance. These are premises for debate. But how did we come to consider if causing death can be legalized and institutionalized?

### **An intellectual history**

Death is universal to mankind. The end of life and a 'good death' concerns every one of us; approaches to suicide and euthanasia have developed in many cultures, at all times. A number of traditional societies have practiced euthanasia of unwanted children, usually by exposure. And "the intentional hastening of death in agonizing patients had an accepted place in pre-modern popular culture" (Stolberg, 2007).

As for the philosophers, suicide in general is widely discussed in Antiquity. Socrates himself is renowned for voluntarily drinking his cup of hemlock. Epicurus taught that death is the end of both body and soul, hence it should not be feared. This perspective is supported by his contemporary Diogenes of Sinope, elaborated by the roman philosopher and poet Lucretius. The obscure philosopher Hegesias, the 'Death-Persuader', is said to have recommended suicide because a wise person's goal ought to be freedom from pain and sorrow. He is quoted in the first book of the *Tusculan Disputations*, where Cicero aims to refute that death is an evil.

The Stoics are often taken to be advocates of active euthanasia. A wise person "lives as long as he ought, not as long as he can", Seneca famously writes in Letter 70 of his *Letters to Lucilus*. First usage of the term itself is ascribed to the roman historian Suetonius, who states that the Emperor Augustus "dying quickly and without suffering in the arms of his wife, Livia, experienced the 'euthanasia' he had wished for" (quoted in Letellier, 2003).

While the philosophers do not scrutinize the issue of euthanasia further, the question of suicide is a persistent theme in ethical thinking. Many cultures, from ancient Rome to traditional Japan, considered suicide to be honorable under certain circumstances. Maybe too honorable for the common man in feudal societies, where farmers often lived in serfdom and slaves were mere possessions of their betters. In Europe, until the Age of Enlightenment, it was the prerogative of rulers to take life; suicide and attempts at it were punishable. This was in harmony with the rules of religion and the Catholic church.

In Prussia, under Frederick II. suicide was decriminalized in 1751, attempted suicide in 1796<sup>2</sup>. The philosophers of the age, such as Immanuel Kant, were preoccupied with the concept of autonomy and struggled to establish the right to self-determination over one's own body. Meanwhile doctors of medicine since the 17<sup>th</sup> century increasingly discussed active euthanasia. By the midst of the 19<sup>th</sup> century medical science had developed the remedies needed to provide death without pain and suffering; the debate about 'a good death' intensified.

Between the World Wars the concept of social hygiene was established, to stimulate the growth of a healthy population. In analogy to the individual citizen, the nation was conceived as a body, one that had to be kept healthy and clean. Increasingly harsh measures were taken to prevent the reproduction of 'bad genetic material', including sterilization, castration and internment of the 'unworthy' and the 'morally inferior'. A paternalistic hygiene program turned into the malicious racial hygiene of fascist ideology.

At the time Nazi Germany dominated Europe the word euthanasia was used as euphemism for the systematic murder of the handicapped, the retarded and unwanted. In some places eugenic policies towards minorities, at times with lethal outcomes, continued until the 1960's.

Today euthanasia is not anymore about the state ending the life of people that do not fit in a scheme of racial health. Rather it is about the autonomous decision of a person willing to die. The significant development of recent years is connected to medical advances, leading to more people reaching older age. Severely malfunctioning patients can be kept alive for longer than ever before. Thus, the issue of euthanasia and assisted suicide has become an acute challenge.

### **Ethics and arguments**

Any treatment of such a grave issue must address important moral and ethical considerations. How can one be better off dead? Have some patients a right to die and to get help in doing so? Who has the right to decide? Should society permit a right to kill others at their request?

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<sup>2</sup> On attitudes towards suicide, criminalization and decriminalization see Jovanović & Simeunović-Patić (2006)

These are normative questions, and they crave normative answers. The conventional approach to normative dilemmas is to refer to major ethical theories, i.e. consequentialism, deontology and virtue ethics, eventually utilitarianism. Those grand theories are highly developed but are of little help on the matter under debate. Their general scope and abstract discourse tends to reduce gritty reality to pure metaphysics, offering us little tangible guidance. Meanwhile in health care vital and often heartrending dilemmas are faced every day by patients, relatives, medical personnel. For them there is no need to cover all theoretical bases, the obligations, virtues, consequences, or permutations thereof; what is required are ethical norms for action.

Applied philosophy, according to the Aristotelian tradition, concerns itself with ethics, law, politics, and economics. It is directed at exploring praxis, to supply arguments and guidelines. Such it bridges the dichotomy between descriptive and normative, tells us what should be done.

Since the 1970's the term bioethics is used to denote the rapidly growing interdependence between advances in biotechnology, medicine and human societal values. Bioethics is situated at the crossroads between values and practical application. It is here philosophy and politics, law and theology meet and interact. This is by necessity an interdisciplinary field of enquiry.

A bioethicist will attempt to assist medical and legal professionals to examine the moral issues involved in our understanding of life and death. The purpose is to identify and resolve ethical dilemmas. And there are plenty: abortion, surrogacy, organ donation, genetics - and euthanasia. Bioethical issues evoke strong emotions in the public and the press. But the science involved is complex and little understood; and opinions are strongly divided, e.g. concerning 'good death'.

In the following I will consider some of the arguments advanced in the debate for and against euthanasia and assisted suicide.

***'Thou shall not kill!'***

The religious appeal to the sanctity of life is deeply rooted in Western thinking about ethics. It probably was the introduction of the mosaic religions that put an end to practices of euthanasia. Christianity, Judaism and Islam are all staunch defenders of the value of life as God's creation. The Catechism of the Catholic Church states "Intentional euthanasia, whatever its forms or motives, is murder. It is gravely contrary to the dignity

of the human person and to the respect due to the living God, his Creator” (CCC 2324)<sup>3</sup>. Like the Vatican, the vast majority of Christian churches and congregations take a firm stance against euthanasia and assisted suicide.

The Torah denotes God as the only one who “causes death and creates life” (Deut. 32:39). Jewish tradition therefore rejects active euthanasia, but at the same time it supports the removal of an ‘obstacle to death’. There appears to be much debate on the topic in present Judaic theology, ethics and in general opinion, in both Israel and the United States.

In Islam, euthanasia is a complex issue, but in general assisted suicide and euthanasia are considered contrary to Islamic law. However, if the patient has a terminal illness, withholding or withdrawing ‘futile’ medical treatment may be considered permissible. Assisted suicide and euthanasia (al-qatl al-raḥma) are crimes in almost all Muslim countries (Madadin et al 2020).

All this might be valuable considerations, always presuming one is among the believers. But it cannot be argued rationally that an action is ethical wrong because it says so in someone’s holy writ. One might also point out that most religious authorities accept and even may encourage killing in other circumstances, in wars where ‘God is on our side’. Does the fifth commandment of Moses apply always? If not, why make exceptions in some circumstances but not in others?

### ***Human rights and the harm done.***

The right to life is the result of a long emancipatory struggle born of the Age of Enlightenment. It led to the Universal Declaration of Human Rights which declares in Article 3: “Everyone has the right to life, liberty and security of person”. The European Convention on Human Rights, signed 1950, makes a similar statement, asserting the human right to life in Article 2. However, any consideration of a ‘good death’ is absent in these or similar humanitarian declarations. The matter is not addressed by the UN, nor by its subsidiary organizations or similar institutions. Neither does the European Court of Human Rights “engage in confronting the right to life with other fundamental human rights” (Jovanović 2020: 535).

The American philosopher Thomas Nagel (1937–) initiated the interest of contemporary thinkers in death. His seminal article ‘Death’ (1970) opens with a simple statement: “If

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<sup>3</sup> There is a ‘Declaration on Euthanasia’ by the Sacred Congregation for the Doctrine of the Faith, dated 1980.



death, as many believe, is the unequivocal and permanent end of our existence, then the question arises whether it is evil to die”. Nagel thought the answer to this question was yes. The state of being dead may not be an evil in itself, but it deprives us of all good life offers, such as perception, activities, desires and thoughts (Nagel 1970: 74).

In the later debate, this view is called the “loss theory”. Death is evil because by dying we lose something valuable in the future. “Typically, those who value life accept *the harm thesis*: death is, at least sometimes, bad for those who die, and in this sense something that ‘harms’ them” (Luper, 2019). Nagel himself was unclear whether the loss of future benefits could be offset by evils avoided.

A related argument advanced against assisted suicide is that it shortens the natural span of life. We must accept life’s way, not decide our time of death, but wait for it. This is a rather weak position, considering that we affect the time of our death in many ways, by our actions and daily decisions such as diet and habits. And it is difficult to argue that an act is ethically wrong because it interferes with the course of nature. All of medicine intervenes in natural processes.

### ***Medical ethics***

Medical ethics is part of bioethics, application of moral norms and values to medical practice. Since the fifth century BC physicians swear the Oath of Hippocrates, proclaiming solemnly “I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect” (Shiel, n.d.). The traditional view of medical ethics is that euthanasia and assisted suicide fundamentally violate these norms and ideals. Health professionals ought to save patients' lives and improve patients' health, not kill them, the argument goes.

Interestingly, in a modern version of the Hippocratic Oath the relevant section is changed to “If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness” (*ibid*).

Given this perspective, the understanding that euthanasia and PAS violate professional medical norms only indicates that present professional ethics are too narrow and need to a greater extent consider the patient's dignity and right to self-determination. The physician's duty to care for patients should be understood as enhancing the patients' autonomy and well-being, it is said.

Consequently, it would be appropriate for a physician to assist suicide or even perform euthanasia when these actions are wanted by and do benefit the patient. In modern bioethical thinking this emphasis on the right to self-determination is strongly increasing.

### ***The slippery slope***

Adversaries of legalization claim that to permit voluntary euthanasia will ultimately lead to allowing non-voluntary and involuntary euthanasia. Some give the Nazis' euthanasia-program as example. Once the state permits killing there is no telling when the killing will stop.

The slippery-slope argument is a well-known logical error. It is a continuum fallacy, as it assumes a transition from one action to another and ignores the possibility of middle ground. This argument puts the burden of proof on the opponent and is not appropriate in rational debate.

Young (2020) argues against the fallacy in his analysis of objections against euthanasia. He points to numerous studies of its practice in The Netherlands between 1991 and 2010. "The findings from these national studies have consistently shown that there is no evidence for the existence of such a slippery slope" (Young 2020).

There may be temptations, though. When access to care is limited and its cost critical, lack of medical and financial assets may contribute to slippage toward a more lenient attitude to the ending of patients' life. The right to die all too easy may become a duty to die. Patients may feel pressured to consent to euthanasia when their care is expensive or burdensome to others. Such an attitude could even be supported by the utilitarian argument that to keep people alive past the point where they contribute productively is a burden to society and waste of resources.

Among those in favor of legalizing assisted suicide many see little distinction to euthanasia. Both practices rest on a responsibility to stop suffering and respect autonomy. Along these lines, proponents provide arguments in favor of an ethical right to end life and to get help to do so.

### ***Suffering and dying.***

To be forced to live on, not able to end suffering that feels endless and unbearable, is inhuman. The technological advances of modern medicine have prolonged the time it

takes to die, but biotechnology cannot in all cases ensure adequate palliative treatment. Suffering without hope of redemption, augmented by loss of dignity, the despair that results from loss of bodily functions and a constant need for help: a life without meaning or purpose. What is there to lose?

Epicure famously says: "When we exist, death is not; and when death exists, we are not. All sensation and consciousness ends with death". Dying can be good or bad; our death is nothing to us, because we have ceased to be. How much of an evil is our demise, really?

True, death robs us of future goods, and the more life there is to live, the bigger the loss. But if there is only pain and misery to expect in the future, is this a valid argument to live? Or rather, if there is no future worth living, may this not be an argument for suicide and even euthanasia?

### *Autonomy*

The central argument advanced by proponents is about respecting a person's autonomous will. It is the individual who must live (or die) by its own decisions and their consequences. The term autonomy deals with a person's ability to control his or her own destiny. Individual autonomy as a basic moral and political value developed during the Age of Enlightenment and is at the core of the Kantian conception of practical reason. For Kant, we are autonomous selves, and we are obliged by reason to act out of respect for the autonomy of ourselves and others. As a result of his ideas, modern secular societies tend to believe that humans are both able and should aspire to make autonomous decisions regarding their life, their body and soul.

The conception of the autonomous individual is central to liberalism. Here, autonomy often is understood as the basis for individual political rights, and it is the state's purpose to protect and facilitate the individuals' self-determination. A liberal society must respect autonomous choices as long as those choices do not result in harm to others.

Opponents argue that to end one's life intrinsically contradicts the value of autonomy. Like the 'freedom' to sell oneself into slavery, the freedom to end life must be limited. While liberalism focuses on the individual, they are worried about the effect on society's values, the lessening of respect for human life if barriers to killing are lowered. Empathy for individuals cannot justify fundamental changes to society's moral code, with potentially disastrous consequences.

### **The practice of letting die.**

But how stable is this moral code? Biotechnology increasingly tests the limits of life and ethics. To implement a 'good death' has become a practical challenge as well as a theoretical one. Patients who suffer excruciating pain in a terminal stage of illness can be helped with narcotics and sedatives. Sedation can persist until death occurs. If the measure is requested or consented to by the patient, this is referred to as palliative or terminal sedation. The practice seems quite common and rather uncontroversial in most of Europe and Northern America. Still, this procedure is impossible to discern from PAS, which is performed in a similar way.

Defining euthanasia in its practical clinical application is as difficult, confusing and complex. The thin line between withholding external life supporting measures as switching off a patient's ventilator and active euthanasia or assisted suicide at times seems arbitrary. Often, decisions about withholding treatment are made for patients who are unable to decide for themselves. Involuntary euthanasia is a dilemma common in geriatrics and terminal care.

Medical and ethical limits are volatile and ever changing, especially at the frontiers of medicine, when it comes to matters of life and death. Stopping treatment in a patient's best interest can be seen as part of palliative care. Withholding and withdrawing life-prolonging treatment, and pain and symptom treatment that could shorten life may be considered 'normal medical practice'. It is well-known that passive euthanasia is widely practiced, by intent, or due to lack of resources, even negligence by staff taxed beyond capacity. Usually this is met with tacit acceptance.

### **Public opinion**

Public opinion in the West has been aware of the issue since the infamous case of Dr. Kevorkian in the 1990's (Wikipedia 'Jack Kevorkian'). In the USA now a broad majority of 72% believe that physicians should be permitted, at the patient's or family's request, to end a terminal patient's life by painless means (Brenan 2018). In Norway help to die is accepted by a majority of the population; a poll conducted 2019 shows 77% of respondents are positive to active euthanasia, either unconditional (25%) or under certain circumstances (52%) (Andersen & Skogrand 2019). Regarding Serbia, Jovanović

(2020:545) refers to an informal survey by Mondo (2020) showing 76.96% of respondents in favor of legalizing euthanasia in Serbia<sup>4</sup>.

These numbers are symptomatic of a growing trend toward popular acceptance in secular states. A poll conducted by The Economist and Ipsos/MORI in 2015 showed majorities for assisted death for terminal patients in 13 out of 15 countries<sup>5</sup>. Only in Poland and Russia less than 50 % of respondents were positive to euthanasia or PAS (Economist 2015).

Worldview seems to correlate with opinions on these matters. Surveys indicate that religious believers are more restrictive than secular persons; weekly churchgoers are far less likely to support euthanasia and assisted suicide than secular persons. But attitudes also differ by gender and politics. Men support euthanasia and assisted suicide to a larger degree than women do, liberals more than conservatives (Moore 2005). The role of culture and ethnicity for views on the issue seems yet unexplored and would deserve scholarly attention.

### **Politics and the law**

Politicians find the matter hard to handle. As Jovanović (2020: 533) points out “states (...) and international organizations keep on avoiding clear answers”. Most societies have not yet arrived at a consensus on the issue and no general political acceptance is found. Public debate centers on the individual’s autonomy to choose time and manner of death. But assisted suicide and euthanasia are social and communal acts, so social, moral, and legal norms must be considered.

Only the last hundred years have seen concerted efforts to make legal provision for euthanasia. Now, amidst strong moral and religious traditions, and warnings about potential abuse and the harm done by abetting or causing a person's death, there is a growing social acceptance of some practices. A symptom thereof may be the increase in relevant cases versing in courts and the numerous verdicts given by constitutional courts on the matter. In several jurisdictions the situation is not regulated by proper laws but by

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<sup>4</sup> Access on 1.7.2021 shows slightly changed results: ‘Yes’ 77,05% and ‘No’ 22,95% of respondents.

<sup>5</sup> These 15 countries were Australia, Belgium, Canada, France, Germany, Great-Britain, Hungary, Italy, Japan, The Netherlands, Poland, Russia, Spain, Sweden and USA

exemption-clauses and high-court rulings. This indicates the fragmented state of legislation across the globe and the uncertainties involved.

In most liberal societies it is now well-established that competent patients are entitled to make their own decisions about life-sustaining medical treatment. What is controversial is whether suffering patients also should have the right to ask for assistance to die. The great divide seems to be between countries that tolerate passive euthanasia, either tacitly or explicitly, and those that in addition do not persecute active assistance to suicide, or even permit voluntary active euthanasia, all under strict conditions and restrictions.

In the whole of Scandinavia and large parts of Western Europe passive euthanasia is accepted by default of more permissive attitudes. In contrast to this the laws of many countries in Central- and Eastern Europe do not permit any shortening of life, neither active or passive euthanasia nor any form of assisted suicide. The situation in Serbia is discussed by Jovanović (2020).

Germany, Italy, and Switzerland permit assisted suicide under certain conditions, while in Austria the paragraph prohibiting assisted suicide will be abolished by end of this year, 2021.

In the United States physician-assisted suicide now is legal in eleven jurisdictions: Washington D.C. and the states of California, Colorado, Hawaii, Maine, New Jersey, New Mexico, Oregon, Vermont and Washington. Its status is disputed in Montana, where, since there is no law, it is currently authorized by the Montana Supreme Court's ruling.

In Australia three federal states have legalized assisted suicide. In Victoria an assisted suicide program is in place; a similar plan is in effect in Western Australia by July 2021. This state also permits active euthanasia, in addition to assisted suicide. In Tasmania, legislation on voluntary assisted dying is expected to go into effect in October 2022. In all other states and territories of Australia euthanasia and assisted suicide are illegal. However, Queensland announced in May 2021 that legislation on voluntary assisted dying would be introduced to the state parliament.

The number of countries that, under certain conditions, permit or do not prosecute active euthanasia, is small. In Belgium, Canada, Colombia, Luxembourg, The Netherlands, Peru, and Spain helpers to a 'good death' are not held criminally responsible. In New Zealand the 'End of Life Choice Act' will come into force on 6. 11. 2021, giving people

with a terminal illness the right of receiving ‘assisted dying’. The term refers to both euthanasia and assisted suicide<sup>6</sup>.

### **Final words**

The implicit topic of this sketchy presentation are liberal societies where moral decisions no longer are made by religious or medical authorities but, ideally, by informed individuals. This limitation partially is due to lack of information and of space. Beyond that, the question is most acute and debated where populations are aging, typical in secular Western countries.

There is a clear development in public opinion towards assessing policies and laws anew. However, once we accept euthanasia and assisted suicide as a feasible option, we face more doubts and numerous queries. Legalization will have intended and unintended consequences.

In practical terms there is urgent need for standards, especially in law and medical procedure. Authorities must stipulate which medical condition gives access to ‘a good death’. How should criteria be identified, established, implemented? Whom to count in and whom to count out? And who will make the authoritative decision? What are sufficient safeguards? Should there be a board of authorities, a system analogous to handling abortion? Who will implement death and how? The attending physician, state health services or perhaps private, even commercial actors? This is of course not an exhaustive list; it merely serves to illustrate the complexity of the issue.

Above and beyond practical aspects, clear ethical positions are essential, so as not to leave creating norms to the vagaries of public opinion and biological engineering. Biotechnological business will not take responsibility for changes in ethic values, nor will the media or the public.

Hence politicians and lawmakers cannot remain in limbo while societal boundaries are moving.

The issue of the ‘good death’ relates to basic legislative, administrative and jurisdictional matters. Politics must take the initiative towards a comprehensive assessment of the issue.

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<sup>6</sup> For a detailed and extensive list by country see [https://de.wikipedia.org/wiki/Sterbehilfe#cite\\_ref-169](https://de.wikipedia.org/wiki/Sterbehilfe#cite_ref-169)

A major goal is to establish social consensus, so to provide a moral basis for normative rules and conventions.

To resolve the tension between society's ethical values and individual autonomy may require forming new principles, finding a new balance between individual want and societal needs. Attempts to find solutions will be successful only if society engages in a moral learning process. Most useful would be a treatment in international and supranational fora, debating varying attitudes, approaches and experiences. Such collective processes, guided by discourse ethics as advocated by Habermas and Apel, will help us address Kant's basic question: What shall we do, and why? While discourse ethics reason in extension of Kant's ideas, in contrast to his deontology these ethics are based on discussing norms in a genuine dialogue with others.

It's simple, really. We must think and talk about 'a good death', on an individual, national and supranational level. These issues concern all of us, as persons, as societies and as human beings.

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**Lazar Stefanović\***

## **IMPLICATIONS OF ANTI-PANDEMIC MEASURES OF SERBIAN AUTHORITIES ON THE RIGHT TO LIFE FOR PERSONS WITH DISABILITIES LIVING IN INSTITUTIONS**

*The Covid-19 pandemic has exacerbated an already tough situation of institutionalized people with disabilities in Serbia. This article examines the actions of the Serbian government, in the circumstances of the Covid-19 pandemic, that had arguably resulted in a failure to protect the right to life of disabled people living in social care institutions. Although derogations of human rights can be imposed under the Constitution of the Republic of Serbia, the issues of appropriateness, duration and scope are highly questionable in this case. The restrictions imposed on the people in institutions have been longer and more intensive than those imposed on the general population, eventually not succeeding to prevent an outbreak of infection in these institutions. This paper seeks to answer the question: could have the right to life and other human rights of people with disabilities been protected to a higher degree, had the Government complied with international standards of human rights?*

**Keywords:** *disabilities, institutions, CRPD, Covid-19, pandemic*

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### **Introduction and terminology remarks**

The pandemic outbreak and anti-pandemic measures in Serbia have exacerbated the vulnerability of people living in institutions and uncovered a systemic lack of preparedness to deal with emergencies effectively. The paper explores the preparedness of Serbian authorities to emergency response by evaluating measures that were implemented, as well as the compliance with the international standards directly related to emergency response and standards that are seemingly unrelated but can have a large impact on the State's ability to protect rights and lives of PWDs.

The first part of this paper contains a description of the position of PWDs in Serbian social welfare residential institutions before the outbreak of the SARS-COV-2 pandemic in Serbia in March 2020. In the second part, the author briefly describes the relevant domestic legal rules and their inconsistencies with the Convention on the Rights of Persons with Disabilities (hereafter CRPD). In the third section, despite the lack of official information on the part of the state authorities, the author explores the compliance of the state's practices and rules imposed during the pandemic that directly affected people living in institutions, with obligations arising from ratified international human rights instruments. The main question of this paper is - Could the State protect the rights and lives of PWDs in social care homes to a higher degree had it complied with ratified international human rights instruments, and had it implemented policies directly and indirectly related to the emergency response in risk situations and to the improvement of the position of PWDs in Serbia?

An empirical legal methodology is applied, using secondary quantitative data to analyze the function and effects of legal rules on the lives of citizens. It encompasses an evaluation of domestic laws and practices against the rights and obligations set out in the CRPD, and non-binding international standards.

For the purpose of this paper, residential social care institutions for PWDs are public and non-public establishments for the placement of children and adults with disabilities, in accordance with the Law on Social Protection. This excludes all other similar establishments that may be operated under the Ministry of Health and the Ministry of Education.

Deinstitutionalization (DI) is a process of transition from institutional to family and community-based living and care for children and adults with disabilities. DI considers the development of a broad range of support and services in the community in order to

prevent the placement in institutions and enable the transition of people who already live in institutions into communities.

### **The situation of people with disabilities in Serbian institutions before the pandemic**

The number of PWDs living in institutions is annually published by the Republic Institute for Social Protection (hereafter RISP), a body for research, training and professional supervision in the social care system<sup>1</sup>, operated by the Ministry for work, employment, veteran and social affairs (hereafter MSA). RISP annual reports provide statistical data about users of residential institutions of social care, however the data is often not properly disaggregated and prevents high-quality analysis, which was also acknowledged by the Committee on the Rights of Persons with Disabilities (hereafter CRPD Committee) (CRPD Committee 2016: par. 63). However, for the purpose of this paper only the aggregate numbers will be used, therefore the deficiencies of the annual reports will not significantly affect this analysis. The latest RISP annual report covers the period from 1<sup>st</sup> January to 31<sup>st</sup> December of 2019, hence the data extracted from it will show the numbers of PWDs in institutions shortly before the Covid-19 outbreak. According to the report, the total number of children living in institutions was 634, of which 73.9% were children with disabilities (RISP, 2019; 63). This number positions Serbia among the countries with the rate of institutionalization of children under 100 per 100.000 citizens (Desmond et al. according to Nowak, 2020: 503). However, the high share of children with disabilities indicates an uneven DI process, where children without disabilities are prioritized. In another annual report that focuses on adults, we find that the number of adults with disabilities living in residential care on the 31<sup>st</sup> December 2019 was 16.651, of which 68% in the institutions for adults and elderly, and 24.5% in institutions exclusively for the care of PWDs (RISP, 2020: 36). It should be noted that some institutions are designated for people with physical disabilities only, others for people with intellectual and multiple disabilities, while the institutions for older people can accommodate both the persons with intellectual, multiple and physical disabilities as well as people who due to old age cannot take care by themselves.

In the following paragraphs, a brief overview of the position of children and adults in Serbian social care institutions is presented, with a focus on the aspects relevant for an assessment of potential violations of their rights during the pandemic, as observed by the UN treaty bodies and special procedures who conducted monitoring visits, issued

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<sup>1</sup> <http://www.zavodsz.gov.rs/sr/o-zavodu/funkcije/>, accessed on 17.08.2021.

observations and reports in the past several years. Their reports are hereby revisited in regard to aspects such as the living conditions, treatment, respect for personal liberty, freedom from torture, inhuman and degrading treatment, respect for privacy and family life.

Apart from the abovementioned transnational bodies, different state and non-governmental organizations (hereafter NGOs) have reported on the situation of human rights and the situation of children and adults with disabilities in these institutions. The first report by NGOs appeared in 2007 and uncovered grim circumstances with alleged grave and systemic violations of human rights, such as the widespread practices that amount to inhuman and degrading treatment, but also the lack of privacy, violations of the right to health care, exclusion of children from education, widespread application of restraints against adults and children, use of barred cells for isolation, overuse of the antipsychotics, the lack of contact and stimulation of children etc. (Ahern, Rosenthal, 2007). In the years after that report, numerous visits to these establishments were carried out by the National Mechanism for the Prevention of Torture, an independent monitoring body created under the Optional Protocol to the Convention Against Torture (hereafter OPCAT) and operated by the Protector of Citizens<sup>2</sup>. Other national and one international NGO have published monitoring reports in the coming years, all uncovering highly disturbing living conditions and sometimes dubious treatments or the lack of treatment and care (Ćirić Milovanović D. et al, 2013; Human Rights Watch, 2016; Rosenthal E. et al. 2021).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited Serbia in 2015 and subsequently published a report on the situation in different places of detention, inter alia, in Veternik social care home. The CPT reported on the problems of overcrowding, having more residents than the number of beds, understaffing, the lack of DI, deprivation of legal capacity of virtually all residents in Veternik social care home, widespread use of psychotropic medication for chemical restraints etc. (CPT, 2015). A new periodical visit of CPT to Serbia was conducted in March 2021, but unfortunately, a report following this visit had not been published before the submission of this paper.

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<sup>2</sup> NPM reports are available at:  
[https://npm.rs/index.php?option=com\\_content&view=category&layout=blog&id=113&Itemid=117](https://npm.rs/index.php?option=com_content&view=category&layout=blog&id=113&Itemid=117), accessed on: 15.08.2021.

In 2016 the CRPD Committee published its first Concluding observations on the implementation of the CRPD in Serbia, expressing views on the compatibility of state practice and laws, and recommendations for further implementation of the CRPD. Commenting on the implementation of article 11 of the CRPD<sup>3</sup>, that sets out an obligation for state parties to develop strategies, plans, protocols and tools to protect and assist persons with disabilities in situations of risk and humanitarian emergencies, the CRPD Committee expressed concerns over their inexistence and called for the adoption of these documents (CRPD Committee, 2016: par 19-20). The CRPD Committee emphasized the necessity of evacuation plans that in the COVID19 pandemic were particularly important, which is discussed in the last chapter of this paper. Further, it condemned the forced institutionalization of children and adults with disabilities and recommended the abolishment of such practices in paragraph 26 of the report<sup>4</sup>. The CRPD Committee also expressed concerns over the number and share of children with disabilities living in institutions, the continuing institutionalization of infants and the lack of community-based services and support for children with disabilities and their families (CRPD Committee, 2016: par. 13). Another worrying issue were the reports about the forms of treatment that may amount to cruel, inhuman and degrading treatment, so the CRPD Committee called for the prohibition of all coercive treatments and the improvement of independent monitoring mechanisms especially in regard to their availability and effectiveness (2016: par. 30).

In the Concluding observations of the CRC Committee from 2017, the problem of the still high number of institutionalized children with disabilities was emphasized as well as the persisting placement of infants and inadequate living conditions in these institutions. The CRC Committee recommended the State to implement the provision of the Law on Social Protection that limits the number of children to 50 per institution (2017: par. 40) and concluded that despite this legal provision five institutions in Serbia accommodate a lot more than 50 children each. The failure of the State to implement the abovementioned recommendations of the CRPD Committee and the CRC Committee to a higher degree may have influenced the readiness to cope with the Covid-19 pandemic in social care institutions.

In 2017 Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, visited Serbia and Kosovo, and on that occasion two

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<sup>3</sup> Art 11 Convention on the Rights of Persons with Disabilities, UNTS vol. 2515.

<sup>4</sup> The question of involuntary or forced institutionalization of persons with disabilities, a highly debated issue among professionals and academics, will not be further examined in this paper to avoid digression.

residential social care facilities on the territory of the Autonomous Province of Vojvodina. In the report adopted in 2019, some of the observations were that these two institutions provided “modest but acceptable” living conditions and that they suffered from serious understaffing which resulted in the lack of attention and appropriate treatment for the residents (Nils Melzer, 2019: par. 38). Melzer also emphasized the issue of forced institutionalization and recommended the State to replace it with “services in the community” (2019: par. 107(f)). According to the law and by-law, the purpose of residential social care for adults is to sustain and improve quality of living, to improve the independence of a person and to prepare them for independent living, and in the case of children the provision of temporary and stimulating surroundings<sup>5</sup>. It is important to note that the forced institutionalization on the basis of disability does not exist *de jure* in the Serbian legal system, but it is a factual consequence when a person is appointed a legal guardian who decides and consents to such placement<sup>6</sup>, even against the person’s will. The forced institutionalization of people deprived of legal capacity results in the impossibility of them to challenge such a decision, unless the guardian complies with it. Therefore, as Special Rapporteur Melzer correctly concludes, such institutionalization often results in life-long factual deprivation of liberty in a social care institution (2019: par. 44). The lack of safeguarding procedures that should protect a person deprived of legal capacity in the process of institutionalization indicate the arbitrariness of the process, while the lack of treatment and the absence of perspective for reintegration in the community renders the institutionalization of persons with disabilities in Serbian institutions potentially unlawful<sup>7</sup>. This was noted in the CPT report on Serbia from 2015, that recommended introduction of safeguards that will enable institutionalized persons to challenge the lawfulness of their placement, and also to introduce the involvement of courts in each process of placement (CPT, 2015: par. 204). The European Court of Human Rights (hereafter ECtHR) in its decision on the case *Rooman v. Belgium*<sup>8</sup>, refined the case-law by expressing that there is a close link between the lawfulness of the detention

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<sup>5</sup> Art 52(4) Law on the Social protection (Official Gazette RS, No.24/2011); Art. 23 Rulebook on closer conditions and standards for the provision of social protection services (Official Gazette RS, No. 42/2013, 89/2018 i 73/2019).

<sup>6</sup> Art 125(3) Family Law (Official Gazette RS, No. 18/2005, 72/2011, 6/2015).

<sup>7</sup> For a more exhaustive description of the process of deprivation of liberty in social care institutions in Serbia see: Janković M. (2019) *Lišavanje slobode u ustanovama socijalne zaštite, Crimen*, 10(3), pp. 278-298.

<sup>8</sup> In this case the Court considered the lack of psychiatric treatment in the German language, which was the only language the applicant spoke, in a detention unit of a social protection facility in Belgium. The lack of proper treatment rendered prospects of his release in the future negligible, which led the Court to find the violation of Article 5(1). European Court of Human Rights, *Rooman v. Belgium*, *Application No. 18052/11*, judgement of 31 January 2019.



in a social protection facility and the treatment provided there<sup>9</sup>. If this treatment is inappropriate or completely missing, and it fails to provide a resident with “at least the prospect of release in the future” then it should be considered unlawful.

### **Description of the situation of persons with disabilities since the COVID19 outbreak**

Now that the situation of persons with disabilities living in social care institutions prior to the outbreak of the Covid-19 pandemic in Serbia, and the promulgation of the state of the emergency, has been roughly described, the paper proceeds with a description and an analysis of human rights restrictions in these establishments during the pandemic.

The state of emergency was declared on 15<sup>th</sup> of March 2020, in accordance with the Article 200 (5) Constitution of the Republic of Serbia, by the President of the National Assembly, President of the Government and the President of the Republic of Serbia. The reason for the application of this alternative procedure for the promulgation of the state of emergency was a view that the National Assembly sessions are impossible to hold due to a higher risk of infection by Covid-19 during gatherings. The joint decision to declare the state of emergency was confirmed by the decision of the National Assembly on its first session<sup>10</sup> held during the state of emergency on 29<sup>th</sup> April 2020, in accordance with Article 200 (8) of the Constitution. According to Article 200 (6), due to the impossibility of the National Assembly to hold a session, derogations from human rights can be prescribed by the Government of Serbia with a co-signature of the President of the Republic. The Decree on measures during the state of emergency was adopted on the 16<sup>th</sup> March 2020<sup>11</sup>, and discontinued the day of the cancellation of the state of emergency on the 6<sup>th</sup> May 2020 by the decision of the National Assembly<sup>12</sup>.

Measures that were adopted during the state of emergency had a large impact on citizens' rights to liberty and security of a person, freedom of movement, freedom of gathering, the right to a fair trial, rights of accused persons<sup>13</sup>, property rights, freedom of

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<sup>9</sup> Rooman V. Belgium, *Application No. 18052/11*, par. 222.

<sup>10</sup> Decision on confirming the Decision on declaring the state of emergency (Official Gazette RS, No. 62/2020).

<sup>11</sup> Decree on measures during the state of emergency (Official Gazette RS, No. 31/2020-30).

<sup>12</sup> Decision on lifting the state of emergency (Official Gazette RS, No. 65/2020).

<sup>13</sup> For the impact of the state of emergency on the right to a fair trial in Serbia see: Bošković A. (2020), Questioning the defendant via a video link – the violation of the defendant's rights or not?. In: Pavlović Z. (eds.) Yearbook Human Rights Protection: The Right to Human Dignity. Novi Sad: Provincial Protector of Citizens – Ombudsman and the Institute of Criminological and Sociological Research in Belgrade, pp. 201-215.

entrepreneurship (Belgrade Centre for Human Rights, 2020: 40). Due to the specific position and living arrangements of PWDs living in the social care institutions the impact of measures was different and arguably more severe than for the general population, which will be described in the remainder of this chapter.

The first restrictions of rights of people living in institutions were imposed on the 13<sup>th</sup> March 2020, by prohibiting all visits and prohibiting residents to leave institutions in homes for the care of the elderly by an order<sup>14</sup>. On the same day, the MSA issued an instruction to the directors of all residential social care institutions to recommend their users not to leave facilities. This instruction, although setting an obligation to the directors of the institutions, did not impose the restriction on the users of the accommodation *per se*. However, the people living in these institutions were factually deprived of the possibility to leave the premises and meet their family members in the upcoming months. The practice of movement restrictions on the residents of these institutions, although not legally grounded, is a typical measure, regularly imposed on the users by the staff of the institutions not only during the Covid-19 pandemic, which has qualified these establishments to fall under the scope of places where people are factually deprived of liberty according to the Article 4 of the OPCAT<sup>15</sup>. On 18<sup>th</sup> March 2020, the Decree on the restriction and the prohibition of movement of persons on the territory of the Republic of Serbia was adopted<sup>16</sup>, imposing intermittent restrictions of movement for the entire population. Hence, the restriction imposed on the people living in institutions started earlier than the restrictions for the general population, which can be explained by the intention of the authorities to mitigate the increased risk of the Covid-19 infection in social care homes, due to large numbers of people living in one place, often underwhelming standards of hygiene, and understaffing, the conditions that were described in the first chapter of this essay. On the 28<sup>th</sup> March 2020, the MSA issued an order to all social care institutions, prohibiting “stay and movement” to persons who are not part of the system of social protection (except medical personnel)<sup>17</sup>. This order impacted the work of the National Mechanism for the Prevention of Torture by virtually forbidding any monitoring visits during the crisis time. On 29<sup>th</sup> March the MSA issued

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<sup>14</sup> Order on the prohibition of visits and restrictions of movement in facilities for the accommodation of elderly persons (Official Gazette RS, No. 28/2020).

<sup>15</sup> Art. 4 OPCAT, UNTS vol. 2375, p. 237.

<sup>16</sup> Decree on limitations and prohibitions of movement of persons on the territory of the Republic of Serbia (Official Gazette RS, No. 34/2020).

<sup>17</sup> Ministry for work, employment, veteran and social affairs, 28.03.2020, available at: <https://www.minrzs.gov.rs/sites/default/files/vanredno-stanje/2020.03.28.%20Nalog%200001.pdf>, accessed on: 11.08.2021.

another instruction to directors of the social care homes with a request to further restrict movement of the residents out of their rooms and between wards<sup>18</sup>. Such a severe restriction had radically limited the right to personal liberty of the residents, virtually confining them to the space of their sleeping rooms, that are sometimes shared by more than a dozen other residents.

In the upcoming months, the restrictions of movement and visits were loosened and tightened again several times. However, the residents were not allowed to leave the premises of the institutions even during the periods when the movement restrictions were repealed for the general population. Eventually, the visits were allowed in a very restricted manner, only in courtyards of these facilities, for the duration of 15 minutes, and when the weather was stable (no wind or rain)<sup>19</sup>. Therefore, the measures to prevent the spread of Covid-19 in the social care institutions were severe and impacted the human rights of the residents drastically.

Parallel with these developments in the Republic of Serbia, inter-governmental bodies published guidance and recommendations to the state parties on how to handle the crisis in regard to the institutions for people with disabilities, prisons and other establishments where large numbers of persons are deprived of liberty. Among other recommendations, United Nations bodies and officials requested immediate actions aimed at releasing and discharging people with disabilities from institutions, whenever this is possible (United Nations, 2020: 12; UN OHCHR, 2020: 3; Michel Bachelet, 2020). This and other related recommendations are based on the appalling findings on the rate of death in such institutions around the world and good practices of virus infection prevention. The assessments for Europe, in April 2020 showed that residents of care homes accounted for between 42% and 57% of deaths related to Covid-19 in five countries that made this data publicly available (Comas-Herrera, Zalakain, 2020). In the upcoming months, this percentage dropped with the spreading of the virus in the general population, hence according to some sources, the deaths in care homes accounted for 41% of all Covid-19-related deaths in 22 countries that reported their data on average (Comas-Herrera et al., 2021). Reasons for drastically higher mortality in institutions are in the characteristic of functioning and living in such places – overcrowding, dissatisfying hygiene, lower

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<sup>18</sup> Ministry for work, employment, veteran and social affairs. 29.03.2020, available at: <https://www.minrzs.gov.rs/sites/default/files/vanredno-stanje/2020.03.29.%20Instrukcija%20009.pdf>

<sup>19</sup> Ministry for work, employment, veteran and social affairs. 09.06.2020, available at: <https://www.minrzs.gov.rs/sites/default/files/2020-06/2020.06.09.%20Instrukcija%20025.pdf>

standards of health protection, compromised immune responses in PWDs due to some types of disabilities and diseases, older age and others.

Taking into account that the Serbian authorities hadn't revealed numbers of deaths related to Covid-19 in social care homes up to the date of submission of this paper, the conclusion of researchers that the share of all care home residents who had died in connection with Covid-19 was highly correlated to the number of deaths among the general population who lived in the community (Comas-Herrera et al. 2021), is a very significant one. Also, the MSA meticulously published numbers of residents and staff infected with the virus that fluctuated from a few to several hundred of cases<sup>20</sup>. Considering the availability of numbers of infected persons in institutions and the numbers of infections and deaths in the general population in Serbia, researchers can develop assessments on the number of deaths of people living in social care homes in Serbia by applying appropriate quantitative analyses methods. Considering that the author is not versed in quantitative science, such analyses stay outside of the scope of this paper, with the hope that other researchers will take on the job of performing them.

### **Conclusion**

The fact that the social care homes, and other establishments where large numbers of people live together, present particularly dangerous places in times of pandemic, possesses a question of the appropriateness of measures that Serbian authorities imposed to prevent infections in those facilities. Although the reduction of contact with the outer world is expected to reduce the risk of contagion, it is virtually impossible to hermetically close these institutions, thus the virus unsurprisingly penetrated despite those measures. At the same time, the Serbian authorities have failed to prepare social care homes to adequately respond to situations of emergency and crisis, in spite of the comments and recommendations issued by the CRPD Committee to Serbia, specifically. Furthermore, the Republic of Serbia has largely failed to conduct DI of adults and children with disabilities<sup>21</sup>, which eventually resulted in having a larger number of people living in institutions at the beginning of the pandemic in Serbia than it would be the case if Serbia had invested more efforts in DI. Once the pandemic started, the authorities received recommendations from international human rights bodies to reduce the contact of social

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<sup>20</sup> Statements in regard to the numbers of infections in social care institutions are available at: <https://www.minrzs.gov.rs/srb-lat/aktuelnosti/vesti>, accessed on: 15.08.2021.

<sup>21</sup> The number of adult people with disabilities living in institutions had increased between 2015 and 2019 (Republic Institute for Social Protection, 2020: 37).

care homes with the outer world, increase hygiene, but also to discharge people living in these homes whenever that is possible. The MSA and the institutions had also refrained from this life-saving action, and thus potentially endangered dozens and hundreds of PWDs who could have been transferred to families and non-group settings with appropriate support. Similar measures had been taken throughout the world, suggesting an overall low preparedness and inclusion of PWDs in emergency response planning (Siobhan Brennan, 2020).

The Covid-19 pandemic has uncovered systematic failures of the Republic of Serbia to protect the lives and human rights of persons with disabilities in crisis. Although the authorities could not predict the disaster of such a scope, several actions should have been taken to improve preparedness for any type of emergency and crisis. In this paper it was shown that the authorities could have protected the lives and rights of PWDs better had they complied with the ratified international rules by developing and implementing emergency-related preparations such as the development of strategies, action plans, protocols and tools. Secondly, human rights and policies that are seemingly loosely related to an emergency and crisis response can have a decisive impact on the protection of lives and health of PWDs, such as DI and the realization of the rights to personal liberty, and to live in the family and community instead of residential institutions. Moreover, although generally unpredictable, the pandemic had started in the rest of the world and Europe before it was officially declared in Serbia, which gave the authorities time to prepare urgent responses that were recommended by United Nations bodies, such as discharge of PWDs from institutions whenever this was possible. Unfortunately, the authorities didn't resolute to such measure before nor during the pandemic, instead strict measures of isolation from the outer world were imposed, that did not efficiently prevent the spreading of the virus in the residential institutions, but had severely restricted various human rights of PWDs.

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**Elena Tilovska-Kechedji\***

## **VACCINATION AND THE RIGHT TO LIFE**

*During the past year of the COVID 19 pandemic we realized how fragile and precious life is. With the given possibility of vaccination there is a chance for protecting life itself. But there are questions that arise from this theme and I will try to elaborate on few of them. First, there is the question of choice, some people want to be vaccinated others don't, some people want to be vaccinated with one brand others with another, how does this affect the right to life. Secondly, we have the possibility of vaccination but that possibility is not represented equally to all the states and all the people, there are not enough vaccines to be distributed equally to everyone in the world. These are few of the questions that will be analyzed and elaborated in the paper.*

**Keywords:** vaccines, right to choose, and right to life

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## I Introduction

In the past year and a half, we learned a couple of precious lessons, first how precious our lives are and second how fragile and insecure our health system is especially in regards from the perspective of the state as an institution that should govern morally and ethically this branch. In order to protect our selves and our families, and to continue with the new version of normal life science in a very fast paste created the Covid-19 vaccine. Now that we have the vaccine there are the questions: Whether or not this vaccine is safe? Was it tasted enough? Are there going to be many negative side effects from it? Which brand is good? Why some vaccines work better than others? Why some people even though they are vaccinated are infected again? Are we truly protected by the vaccines? Why are the Sputnik and Sinofarm vaccines not recognized by the EU and other countries, is this a geopolitical strategy of states or something else? Or is there some truth in the theory that through the vaccine we will receive a chip to track our existence or worse are we someones experiments? These and many other question arise in peoples minds when they think about the vaccines and their use. But in some parts of the world especially in third world countries people are struggling with other questions of whether or not they will receive the vaccine at all. Professors M. Solarević and Professor Z. Pavlović have asked a significant question:

*“Have we, as a society, been brought to a paradoxical situation, where, the efforts of all societal factors have led to the extension of the human lifespan, progress of medicine and healthcare, but also to a more emphasized infringement of basic human rights and the rights to use those benefits in the very stage of life which those factors have enabled us?”<sup>1</sup>*

Therefore, human rights in today’s society are usually used to justify a political action, instead of moral or ethical action. The essence of this problem lies in the fact that the state presents a political agent, that can never be moral or ethical.<sup>2</sup> But on the other hand, States have a duty to protect human life, and the right to health is part of the right to life. The pandemic has tested States’ ability to protect these rights.<sup>3</sup> And as we can see further in

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<sup>1</sup> Milica Solarević, Zoran Pavlović. “AGING AND HUMAN RIGHTS: HUMAN DIMENSION OF STATISTICS AND LEGISLATION IN SERBIA”. YEARBOOK HUMAN RIGHTS PROTECTION “FROM UNLAWFULNESS TO LEGALITY”. 2018

<sup>2</sup> Aleksandar Stevanović, Borislav Grozdić. THE IDEA OF HUMAN RIGHTS AS A MEANS OF CHANGE OF THE PUBLIC MORAL. YEARBOOK HUMAN RIGHTS PROTECTION “FROM UNLAWFULNESS TO LEGALITY”br. 1 Novi Sad 2018

<sup>3</sup> Elena Tilovska-Kechedji. HUMAN RIGHTS IN TIMES OF PANDEMIC. YEARBOOK HUMAN RIGHTS PROTECTION THE RIGHT TO HUMAN DIGNITY. Novi Sad 2020.

the text States need to change policies and priorities in order to properly respect and apply human rights.

## **II The choice of vaccination and the right to life**

### ***II.A. Vaccination and governments hesitancy***

Now that the vaccines are here, the questions that circulate are not anymore of when, rather the questions are: What are the potential side effects of the vaccine, are they safe...? These questions and many more arose due to the fast production of the vaccine and due to the undermined testing period. Also there are the issues of failed health care systems, as well as the information's shared by governments. Therefore, the question is what can be done to prevent hesitancy and acknowledge the right to life? First, let's explain why the hesitation appeared in the first place. Vaccine development is a long process, that needs years to move from laboratory testing to clinical testing and then to production and licensing. Its safety is confirmed after testing it on animals and finally testing it on humans. To show its efficacy cases need to be compared in thousands of people. COVID-19 vaccines were developed in around six months and other vaccines are developed in a period from three to nine years. But the Covid 19 fast production was also due to several other factors like:

- prior knowledge of the role of spike protein in the pathogenesis of the coronavirus and evidence that neutralizing antibody against spike protein is important for immunity;
- the evolution of nucleic acid vaccine technology platforms that enable the creation of vaccines and the prompt manufacture of thousands of doses once a genetic sequence is known;
- and developmental activities that can be performed in parallel, rather than sequentially.<sup>4</sup>

Also we have to bare in mind that the technology today is much more advanced then few years ago which helps the laboratory testing to be much faster. But still we have to agree that the minimizing and overlapping the phases of the development, in order to produce results in a short period and pursuing vaccine manufacturing before regulatory approval

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<sup>4</sup> Sebastián Ospina Henao, Alejandro Marín Mora, Fanny Chan Solano, María L. Ávila-Aguero. "Bioethical Implications in Vaccine Development, a COVID-19 Challenge" September 8, 2020 Retrieved from: Cureus | Bioethical Implications in Vaccine Development, a COVID-19 Challenge

presents a huge dilemma.<sup>5</sup> The Covid-19 vaccines were launched under an ‘Emergency Use Authorization’. The process of production was new, the vaccine was rushed for development, and its safety and quality were maybe slightly undermined, so all of these has contributed even more to vaccine hesitancy.<sup>6</sup> And from here comes the hesitations towards governments. Did governments and health care systems prove reliable during this period of the pandemic? Did they take care of their people or restrictions and sanctions were imposed on them? The answer to this questions is probably negative, but the hesitations towards governments can be overcome by informing the people of the reality, giving precise statistics, presenting the benefits and safety and discussing the concerns that exist about the vaccines. And this step can have a positive effect on people. Also, people need to be assured that their governments will protect them and it will provide a vaccine that is distributed on time and is effective.<sup>7</sup> Research conducted in December 2020 by the Vaccine Confidence Project with ORB International, found out that in 32 countries the acceptance of the Covid-19 vaccine was very low due to the lack of confidence in government’s.<sup>8</sup> The hesitancy in vaccines is nothing new it existed even before Covid 19, but now the WHO believes that it represents one of the leading threats to global health. It is assumed that at least 67% of the population on a global level needs to be vaccinated to achieve the herd immunity but due to the skepticism and the conspiracy theories this goal will be difficult to achieve. For example the hesitancy in Italy is high as 40.1% and this is a country that was severely heat by the pandemic.<sup>9</sup> Thus, in order the vaccines to be trusted they should be available, safe and effective and there is no proof of that. To improve the vaccine acceptance, it is imperative to have evidence-based strategies to increase vaccine uptake and discuss the hesitancy. It is also imperative

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<sup>5</sup> Sebastián Ospina Henao, Alejandro Marín Mora, Fanny Chan Solano, María L. Ávila-Aguero. “Bioethical Implications in Vaccine Development, a COVID-19 Challenge” September 8, 2020 Retrieved from: Cureus | Bioethical Implications in Vaccine Development, a COVID-19 Challenge

<sup>6</sup> Majdi MSabahlzain, Kenneth Hartigan-Go, Heidi JLarson. “The politics of Covid-19 vaccine confidence”. Current Opinion in Immunology 2021, 71:92–96 Retrieved from: The politics of Covid-19 vaccine confidence - ScienceDirect

<sup>7</sup> Era Dabla-Norris, Hibah Khan, Frederico Lima, Alexandre Sollaci. “Who Doesn’t Want to be Vaccinated? Determinants of Vaccine Hesitancy During COVID-19”. IMF Working Paper Retrieved from: <https://www.bing.com/search?q=Era+Dabla-Norris%2C+Hibah+Khan%2C+Frederico+Lima%2C+Alexandre+Sollaci.++“Who+Doesn’t+Want+to+be+Vaccinated%3F++Determinants+of+Vaccine+Hesitancy+During+COVID-19”.+IMF+Working+Paper&form=ANNT11&ref=f32d5b9ef2bd44739d0e02c89dde2cb2>

<sup>8</sup> Majdi MSabahlzain, Kenneth Hartigan-Go, Heidi JLarson. “The politics of Covid-19 vaccine confidence”. Current Opinion in Immunology 2021, 71:92–96 Retrieved from: The politics of Covid-19 vaccine confidence - ScienceDirect

<sup>9</sup> Waleed Burhamah, Abdulaziz AlKhayyat, Melinda Oroszlányová, Ahmad AlKenane, Hana Jafar, Mousa Behbehani, Abdulrahman Almansouri. “The SARS-CoV-2 Vaccine Hesitancy Among the General Population: A Large Cross-Sectional Study From Kuwait”. July 08, 2021. Retrieved from: Cureus | The SARS-CoV-2 Vaccine Hesitancy Among the General Population: A Large Cross-Sectional Study From Kuwait

to adopt best practices in hospitals at the interpersonal, individual, and organizational levels.<sup>10</sup>

### ***II.B. The choice of a vaccine and the choice of vaccination***

Everyone is free to get vaccinated according to the principle of informed choice, which means that you will be given the necessary information, like advantages and disadvantages of a certain vaccine which is stated in the Patients' Rights Act. But, you do not always have the choice to choose which vaccine to receive, usually due to vaccine shortage, or governments expenses for a certain vaccine, or some vaccines are given to certain age or risk groups.<sup>11</sup> For example, in North Macedonia in the beginning of the vaccination period people were given only certain brand of vaccine, due to shortage and expenses of vaccines, some were donated by other countries or by the COVAX mechanism. So, people did not have much of a choice to get vaccinated with the vaccine of their preference. Vaccines are usually purchased in tenders and governments usually buy the cheapest vaccine. But we have to understand that vaccine efficacy, safety, type, shots, and price are relevant factors that influence people choices.<sup>12</sup> And people want to choose what is best for them and their families.

Furthermore, there is the question whether the injection of the vaccine should be voluntary or obligatory. This raises the question to what extent "individual freedom should prevail over the community good". It is one thing to be given the choice to receive the wanted brand of vaccine but it is different when the vaccine is obligatory. Here, we can discuss few questions: First, does the government or a company have the right to force you to make a decision to get vaccinated. And the second question or point of thought is that we live in a social society, and human beings need to socialize, work, communicate and so on. So how can we make a decision not to get vaccinated if we know that this way we can prevent the spread of the various and protect the people who can not receive the vaccine at this moment. This are also questions that can be part of community

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<sup>10</sup> Lila J.Finney RuttenPhD, MPH XuanZhuPhDAb Aaron L.LeppinMD Jennifer L.RidgewayPhD Melanie D.SwiftMD, MPHdJoan M.GriffinPhD Jennifer L.St SauverPhDabin,ash, VirkMDDeRobert M.JacobsonMD. Elsevier. "Evidence-Based Strategies for Clinical Organizations to Address COVID-19 Vaccine Hesitancy". Mayo Clinic Proceedings Volume 96, Issue 3, March 2021, Pages 699-707 Retrieved from: Evidence-Based Strategies for Clinical Organizations to Address COVID-19 Vaccine Hesitancy - ScienceDirect

<sup>11</sup> "GUIDE TO MAKING AN EXPLICIT INFORMED CHOICE TO GET THE JANSSEN VACCINE" 16 JUNE 2021. Government Corona Commission Retrieved from: Guide to making an explicit informed choice TO GET the Janssen vaccine (itfglobal.org)

<sup>12</sup> Rafael Dal-Ré, Richard Stephens, Nadarajah Sreeharan, PlumX Metrics. "Let me choose my Covid vaccine". Retrieved from: "Let me choose my COVID-19 vaccine" - European Journal of Internal Medicine (ejimne.com)

values and beliefs for example in the USA, the value of the sovereignty and autonomy of the individual is deeply rooted but we also have the notion of public health. Compulsory vaccine regulation would pass as required by the international agreements signed by states seen in the European Convention on Human Rights.

- Article 8.2 states: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security or public safety ...” For emergency situations,
- Article 15 is applicable: “Derogation in time of emergency: in time of war or other public emergency threatening the life of the nation, any high contracting party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.<sup>13</sup>

Therefore, governments can and have the right to pass compulsory vaccination due to common global public health and good. But we also have to have in mind that in today’s democratic systems the freedom and independence of the citizens to decide is fundamental, and compulsory vaccination for sure would change the idea of freedom and democracy. A compulsory vaccination needs to be legally sustained and to become part of the medical practise. It, needs the support of citizens, and the only sensible approach to COVID-19 compulsory vaccination is to promote it as a civic duty, an individual health benefit, rather than to be intended and pushed as mandatory.<sup>14</sup> The mandatory vaccine are involuntarily, they lack consent of the people and intrusion in peoples physical body.<sup>15</sup>

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<sup>13</sup> Julio Emilio Marco-Franco, Pedro Pita-Barros, David Vivas-Orts, Silvia González-de-Julián, David Vivas-Consuelo. “COVID-19, Fake News, and Vaccines: Should Regulation Be Implemented?”. IJERPH Dec, 2020 Retrieved from: IJERPH | Free Full-Text | COVID-19, Fake News, and Vaccines: Should Regulation Be Implemented? | HTML (mdpi.com)

<sup>14</sup> Julio Emilio Marco-Franco, Pedro Pita-Barros, David Vivas-Orts, Silvia González-de-Julián, David Vivas-Consuelo. “COVID-19, Fake News, and Vaccines: Should Regulation Be Implemented?”. IJERPH Dec, 2020 Retrieved from: IJERPH | Free Full-Text | COVID-19, Fake News, and Vaccines: Should Regulation Be Implemented? | HTML (mdpi.com)

<sup>15</sup> Sambhav Sharma and Ramayni Sood. “Do Compulsory Covid-19 Vaccinations Violate the Rights to Privacy and Livelihood”. . August 2, 2021. National U. of Advanced legal studies, IN Retrieved from: Do Compulsory Covid-19 Vaccinations Violate the Rights to Privacy and Livelihood? - JURIST - Commentary - Legal News & Commentary

Furthermore, in the US and UK a survey showed that 9 out of 10 employers will require vaccination for their employees to keep going to work or they will lose their jobs. But we have to keep in mind that these countries are libertarian and value individual freedom. So the question is where is the line drawn between individual freedom and the rights of others? For example, a person can choose not to be vaccinated and he/she needs to return to work, but this means that this person may get infected which threatens his/her life but he/she chooses not to get vaccinated so it is their risk to bear. But this person can also spread the virus to others. So this way this person did not put only himself/herself at danger but he/she put others at danger, so what about their rights. Therefore, this example needs to be further discussed, which rights do we pursue our own or the rights of all. In order to stop previous spread of disease some countries made regulations for compulsory vaccination. The US and Australia have compulsory vaccination for entry into schools. France and Italy faced a measles infection, and they made childhood vaccinations mandatory.<sup>16</sup> Many governments so far have passed vaccine policies, requiring people to get vaccinated in order to go to work, go to restaurants, cultural events, and to travel. Human rights are outlined in the Universal Declaration of Human Rights, and Civil rights, are rights given by the constitution. Professor M. Hall, says that civil liberties focus on freedom to do what you want and Human rights include rights to be protected. People who do not want to be vaccinated are referring to the freedom to refuse the vaccine for personal, ideological, or religious reasons but they overlook the factor that the virus poses a public health risk not only for the non vaccinated, but to those who cannot get vaccinated, (children, people with other health issues), people that lack health supplies and to those who received the vaccine.<sup>17</sup> Therefore, Governments have the right to pose mandatory vaccination and in the process respecting human and civil rights of its citizens but also of all human beings.

### ***II.C. Vaccine nationalism***

Laws can have a positive or negative impact on health, equality, and justice. There exist a lot of barriers to equal access of vaccines, due to vaccine nationalism. Governments use laws to prioritize access to vaccines through Advance Purchase Agreements (APAs) contracted with vaccine manufacturers. These agreements can be in a nation's interest, but they can also be a gamble and disrupt countries collaboration with each other. Such

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<sup>16</sup> Melinda Mills. "Why Suggesting Mandatory Covid vaccination is an ethical minefield". 22 June 2021, Retrieved from: Why suggesting mandatory Covid vaccinations is an ethical minefield | Melinda Mills | The Guardian

<sup>17</sup> Sarah Todd. "Do mandatory vaccines violate human rights?". August, 5, 2021 Quartz. Retrieved from: Do mandatory vaccines violate human rights? — Quartz (qz.com)

agreements lead to inequalities and can prolong the pandemic. In order to avoid this nationalism and inequalities between states, governments can construct multilateral agreements for global health security and justice and establish norms of international solidarity, and global vaccine distribution, which will create an era on multilateralism and cooperation.<sup>18</sup> Therefore, it is better to choose multilateral cooperation and health stability rather than nationalism and prioritization which leads to mutation and spread of the virus even in vaccinated countries. The Delta type spread in Europe from India due to the fact that India did not have the chance to receive the vaccine on time and stop the spreading and its mutation.

### **Equal distribution of vaccines**

Opposite, to what we discussed so far, health is a right and COVID-19 vaccines should be a global public good, they should not be a privilege of the rich. Vaccines, medicines, health technologies, therapies, medical products are an essential part of the right to health, the right to development and scientific progress.<sup>19</sup>

The uneven and unequal distribution of vaccines globally can be seen through the statistics, up till January 18, 2021, more than 39 million doses of vaccine had been administered in 49 high income countries, whereas only 25 doses had been administered in one low income country. Developing countries have been struggling with diseases for years which can be prevented by vaccines but they can not excess them. This nationalistic approach leaves the weak countries at risk, but also has a counter effect on the rich countries and in the process of ending the pandemic.<sup>20</sup>

The COVAX mechanism estimates to deliver more than 2 billion vaccines in 2021, and 1,3 billion are for the LMICs. Canada, France, Norway, and the UK agreed to donate some vaccines.<sup>21</sup> But countries that rely on COVAX cannot expect to vaccinate more than

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18 Alehandra L Phelan, Mark Eccleston-Turner, Michelle Rourke, Allan Maleche. "Legal agreements: barriers and enablers to global equitable COVID-19 vaccine access". September 7, 2020. Retrieved from: Legal agreements: barriers and enablers to global equitable COVID-19 vaccine access - The Lancet

19 "HUMAN RIGHTS AND ACCESS TO COVID-19 VACCINES". United Nation human rights. 17 December 2020. Retrieved from: COVID-19\_AccessVaccines\_Guidance.pdf (ohchr.org)

20 Imaduddin Sawal, Shoaib Ahmad, Waleed Tariq Muhammad Junaid Tahir. "Unequal distribution of COVID- 19 vaccine: A looming crisis". Journal of Medical Virology · April 2021. Retrieve from: <https://www.researchgate.net/publication/350954431>

21 Talha Khan Burki. "Challenges in the roll out of COVID-19 vaccines worldwide". The Lancet Respiratory MEDICINE. 5 March 2021 Retrieved from: Challenges in the rollout of COVID-19 vaccines worldwide - The Lancet Respiratory Medicine



20% of the population. The supply of vaccines are constrained due to the unneeded supply for the rich and the majority of LMICs will not start the vaccination at all.<sup>22</sup> The WHO and UNICEF pointed that there are 130 countries, with population of 2.5 billion, that have not received a single dose of the vaccine.<sup>23</sup> COVAX has about 700 million doses, which is just 10% of the population in the 67 LMIC.<sup>24</sup> Around 11 billion doses are needed to fully vaccinate 70% of the world's population and only 3.2 billion doses had been administered. At this paste around six billion doses by the end of 2021 will be produced.<sup>25</sup> Overall, between February and May, African countries received only 18.2 million and they were promised 66 million doses.<sup>26</sup>

Many LMICs have low socio-economic status with poor economies, education, income, and occupation. These factors affect the vaccine-purchasing, but also the geographical factor is a challenge especially for the vaccine distribution. People from rural areas do not have access to immunization facilities. Also, COVID-19 vaccines need to be transported and stored at special conditions which do not exist in this areas. And also the hesitancy, fear, and confusion have been raised in these countries too. So due to all of these reasons it is not easy for a developing nation to decide to spend a considerable amount of money to purchase a vaccine.<sup>27</sup> We have to realize that advanced countries will have been vaccinated by mid-2022, middle-income countries by late 2022 or early 2023, while poorer countries, will be in 2024, if it happens at all.<sup>28</sup>

Therefore, given this estimated statistics, an effective response to the pandemic will require policy makers to adopt more appropriate approaches on vaccination. This consists of more effective and efficient multilateral co-operation, close co-ordination with

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<sup>22</sup> Ibid

<sup>23</sup> Krishna Prasad Acharya, Tirth Raj Ghimire & Supram Hosuru Subramanya. "Access to and equitable distribution of COVID-19 vaccine in low-income countries". 14 April 2021 Retrieved from: Access to and equitable distribution April of COVID-19 vaccine in low-income countries | npj Vaccines (nature.com)

<sup>24</sup> Owen Dyer. "Covid-19: Many poor countries will see almost no vaccine next year, aid groups warn". Thembj 11/12/2020 Retrieved from: Covid-19: Many poor countries will see almost no vaccine next year, aid groups warn | The BMJ

<sup>25</sup> "Covid vaccines to reach poorest countries in 2023 - despite recent pledges". 5 July 2021. Nature. Retrieved from: COVID vaccines to reach poorest countries in 2023 — despite recent pledges (nature.com)

<sup>26</sup> Ibid

<sup>27</sup> Krishna Prasad Acharya, Tirth Raj Ghimire & Supram Hosuru Subramanya. "Access to and equitable distribution of COVID-19 vaccine in low-income countries". 14 April 2021 Retrieved from: Access to and equitable distribution April of COVID-19 vaccine in low-income countries | npj Vaccines (nature.com)

<sup>28</sup> OECD Policy Responses to Coronavirus (COVID-19)."Corona virus (COVID-19) vaccines for developing countries: An equal shot at recovery". 4 February 2021. Retrieved from: Coronavirus (COVID-19) vaccines for developing countries: An equal shot at recovery (oecd.org)

developing countries', as well as bigger efforts to strengthen health systems.<sup>29</sup> Because vaccine unequal distribution can lead to distrust in global and national systems.<sup>30</sup> The International Covenant on Economic, Social and Cultural Rights -ICESCR requires States to accept the Covenant rights, including the right to health, through individual and international assistance and co-operation. States should provide economic, scientific, technical, and other assistance to developing countries.<sup>31</sup>

In 2005 the International Health Regulations were established to help in an effective public health response to stop the spread of diseases. Its objectives were confirmed in 2018 in the Declaration of Astana where States committed to cooperation, sharing knowledge and practices in order to prevent, detect and respond to infectious diseases. Furthermore, the 2030 Agenda for Sustainable Development aims of reshaping of the global partnership for sustainable development, including regional and international cooperation on science, technology and innovation, as well as fighting inequality, solidarity, cooperation and partnership. In order to achieve these goals, the implementation of the principles of the UN Declaration on the Right to Development is required. COVID-19 vaccines should be affordable and accessible to all which is opposite of the real scenario at the moment. Therefore to remove the barriers of discrimination and ensure equality, efforts are needed from governments so human rights will be protected.<sup>32</sup> Because the chance that billions of people will not receive the vaccine before 2023 is real and this will cause further spread of the virus and disruption of life.<sup>33</sup>

### **Conclusion**

To conclude, the COVID 19 pandemic made us realize how fragile and precious our lives are. So technology provided us with a cure - a vaccine. We received the possibility to get vaccinated but people begun to hesitate about the vaccine partly due to the fast production and development of the vaccine but also due to the non trust in governments. Governments are here to protect our civic but also our human rights therefore in order to

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<sup>29</sup> Ibid

<sup>30</sup> Majdi MSabahlzain, Kenneth Hartigan-Go ,Heidi JLarson. "The politics of Covid-19 vaccine confidence". Current Opinion in Immunology 2021, 71:92–96 Retrieved from: The politics of Covid-19 vaccine confidence - ScienceDirect

<sup>31</sup> "HUMAN RIGHTS AND ACCESS TO COVID-19 VACCINES". United Nation human rights. 17 December 2020. Retrieved from: COVID-19\_AccessVaccines\_Guidance.pdf (ohchr.org)

<sup>32</sup> Ibid

<sup>33</sup> A. Cioffia, and F. Cioffi, "COVID-19 vaccine: Risk of inequality and failure of public health strategies". Ethics Med Public Health. 2021 Jun; 17: 100653. 2021, 19 March. Retrieved from: COVID-19 vaccine: Risk of inequality and failure of public health strategies (nih.gov)

protect those right locally, nationally, regionally and globally they have to pass some policies and regulations, like mandatory vaccination. They can do so by assuring the people with the safety of the vaccine as well as the good that it will produce for all humanity, for example returning to our normal lives, restoring the economies, education, health and so on. Also, globally governments should change their nationalistic stands on vaccination and start thinking more multilaterally in order the human rights to be respected and enjoyed by all and not by few.

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## THE RIGHT TO LIFE AND QUALITY OF LIVING OF WOMEN SUFFERING AND RECOVERED FROM BREAST CANCER IN SERBIA<sup>1</sup>

*The analysis of normative framework regulating health insurance and retirement as well as the findings of a qualitative empirical research confirm that women suffering and recovering from breast cancer in Serbia are facing a series of legal, social and practical obstacles that affect not only the quality of their lives, but their right to health as the essential aspect of the right to life too. In this paper, the aforementioned issue is addressed from two aspects: by analysing relevant national legal provisions pertinent to this field and by shedding the light on the experiences of women who passed through this struggle, with special focus on their problems and the providers of their support. As the result, suggestions are made regarding potential changes on legislative and practical level, which would improve the extremely vulnerable position of these women and strengthen the protection not only of their right to health but also of their mental and physical well-being.*

**Keywords:** *the right to life, the right to health, health insurance, breast cancer, life quality*

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## 1. Introduction

The right to life, as a fundamental and indisputable human right, guaranteed by numerous international and national legislative sources, is inevitably related to a series of emotionally charged questions (Jovanović, 2020: 534). This particularly comes into focus in the context of the right to health as one of its crucial aspects and preconditions for its full enjoyment. Even more so, the right to health profoundly affects individual's quality of life not only on the medical but also on mental, social and economic level, which is the reason why it should be observed from a holistic perspective. Right to live and to health are intrinsically connected, and together with rights to physical and mental integrity, freedom, honor, reputation and personal identity form the basis of human dignity (Ljubičić, 2020: 406).

Unlike the medical conditions that have fatal outcome or those that do not leave permanent consequences on patient's physical and mental well-being, there are some diseases that cause long-lasting effects on various aspects of person's life throughout as well as after the treatment. Moreover, chronic diseases, such as cardiovascular diseases, cancer, diabetes and chronic respiratory diseases, tend to be the most frequent health issues in the modern society, especially in the developed world (World Health Organisation, 2020). Among these diseases, breast cancer represents the most common case in which patients survive, while still facing other obstacles affecting their full enjoyment of the right to live a life of good quality.

Being the fifth most frequent cause of cancer death, breast cancer is the most prevailing form of cancer and the primary cause of cancer-related mortality of women worldwide (Akram *et al.*, 2017; McPherson *et al.*, 2000). Latest World Health Organisation statistics show that there were 2,3 million women diagnosed with breast cancer and 685 000 deaths worldwide in 2020 (World Health Organisation, 2021). By the end of 2020, there were 7,8 million women alive who were diagnosed with breast cancer in the past 5 years, making it the world's most prevalent cancer (World Health Organisation, 2021). Breast cancer occurs in every country of the world in women at any age after puberty but with increasing rates in later life (World Health Organisation, 2021). Although breast cancer mortality rate did not vary significantly between the 1930s and the 1970s, the improvements in survival started in the 1980s in those countries that had early detection programmes together with various treatment modes designed to eliminate this disease (World Health Organisation, 2021). Nowadays, breast cancer stands for both - the cause of death as well as the factor that determines the quality of life of women.



The difference in breast cancer survival rates around the world, with an estimated 5-year survival varies between 80% in developed countries and below 40% in developing ones (Coleman *et al.*, 2008: 744-745). This indicates that there are many different factors contributing to the chance of survival, including, for example: social and economic circumstances, the general state of health system, the level of public awareness, education and sensitivity about this issue, the (un)equal position of women in a particular society and/or culture etc. Moreover, the rate of suicide among cancer patients is estimated to be twice higher than in general population, due to depression and feeling of hopelessness, which is particularly relevant in the context of the right to life (Anguiano, *et al.*, 2012: 14).

The quality of life is not a novel concept since it emerged at the beginning of the 20<sup>th</sup> century. It represents a complex multi-dimensional phenomenon that encompasses physical, mental, social and behavioural components (Čanković *et al.*, 2011:1). Health Related Quality of Life stands for a more specific concept that is focused on medical aspects (preventive health protection and medical interventions) of the aforementioned domains (Čanković *et al.*, 2011:1). The quality of life can be assessed from two different theoretical approaches: 1) standard one - based upon the needs, that perceives the quality of life as the level of fulfilment of universal needs; 2) psychological one - that dwell upon individual's evaluation of key personal aspects of life (Čanković *et al.*, 2011:3).

There are several studies comparing the quality of life of the breast cancer survivors on the one side, and general population on the other, confirming that the first have lower quality of life than the former (Lee *et al.*, 2011; as cited in: Lee *et al.*, 2012: 449; Schou *et al.*, 2005 as cited in: Lee *et al.*, 2012: 449). There are several reasons for such discrepancy and that is why the purpose of this paper includes: identifying main factors that contribute to lower quality of life of breast cancer patients; highlighting key obstacles that breast cancer patients in Serbia are facing nowadays; mapping the most important sources of support that breast cancer patients receive throughout their diagnosis, treatment and recovery; holistic insight into respondents' quality of life from their personal perspective, which represents a sublimation of challenges, obstacles and sources of support. Finally, the purpose of the research also included making suggestions and guidelines that are intended to contribute to the improvement of current situation in this field in Serbia.

## 2. Methodology

The complex and multi-faceted nature of the issue that is analysed in this paper required a multi-disciplinary approach to its various layers and aspects. For that reason, several methods were applied including the following: 1) doctrinal or “black letter” method; 2) case study; and 3) focus group interview.

Doctrinal or “black letter” method (Smits: 2009: 46) was used for the purpose of the analysis of relevant international and national legislative provisions (including international declarations, constitutional norms, laws, bylaws and strategic documents) relevant to the protection of the right to health in the Republic of Serbia with particular focus on the rights of breast cancer patients.

Focus group interview, as a qualitative research method refers to moderated group discussions of participants that are gathered around similar characteristics and experiences with the intention to discuss the issues relevant to the research topic (Đurić, 2007: 22). Focus groups include group discussions about a broader topic, problem or issue, which are guided and directed by a moderator (Ignjatović, 2020: 52).

Case study approach was used with the intention to highlight specific characteristics of patients’ association “Let’s be together”. Namely, the sample of this qualitative research includes only 7 women all of which are the members of the aforementioned association. That is the reason why it provides qualitative findings that are supposed to be interpreted solely as examples, without pretensions to be used as premises for any kind of generalisations or predictions in this field. Patients’ association “Let’s be together” was established in December 2010 as a humanitarian non-governmental and non-profit organisation that gathers individuals who have been affected by breast cancer as well as their family members, friends and other interested persons. The purpose of the association is to provide information and psychological support to women who have been diagnosed with breast cancer in order to facilitate their prompt return to normal life as well as to their families. The association actively promotes breast cancer prevention and education of women about the necessity of preventive and regular medical examinations.<sup>2</sup>

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<sup>2</sup> For further information see: <https://budimozajedno.rs/o-nama>, accessed on 31.07.2021.

### 3. Identity and Narratives of Breast Cancer Patients

Concerning the specific identity of breast cancer patients, it is crucial to note that dichotomies are an important factor in socio-genesis of any kind of identity in general. Drawing symbolical boundaries between “Us” and “Them” or “normal” and “deviant” tend to produce stable sense of belonging to one group, together with feelings of solidarity towards its members and, under particular conditions, of hostility towards outsiders (Elias, Scotson, 1997).

Difference between the state of “illness” and “health” is on the other hand, much more dynamic in its nature (Ljubičić, 2016: 59-61). As it was already mentioned before, chronic diseases such as the breast cancer are considered as permanent, even in cases where patients have managed to overcome its consequences. Some female patients reproduce this notion by accepting this part of their self<sup>3</sup>, while others tend to see themselves as former patients. Third group, as it was reported, reject the very fact that they have cancer, and try to hide their health status (“I was trying really hard to appear as perfectly healthy women”), or even to persuade others that they don’t have this particular disease, or that they have some other (unknown) disease different than cancer (“A woman came here who underwent chemotherapy, radiation therapy, surgery... And she said: I don't know what I'm suffering from. How this can be possible!? She doesn't want to accept it - she won't, she refuses”; “Women don't feel ready to face this problem... They don't want to hear about it... As if you have... plague”).

Although stigmatization of medical patients (from leprosy to AIDS), especially those who suffer from non-contagious conditions like cancer seems to belong to past centuries and pre-modern social conditions, women report that stigma is present to some degree:

*“While I was undergoing chemotherapy, I experienced situations like this - when my neighbour saw me in front of her door, she grabbed her child and ran inside her apartment to avoid me. This really hurt my feelings... As if I was contagious. So, I told her - listen, darling, I am ill, but I am not infectious. If I was, I would have kept my own child away from me”*

Unfortunately, this is not an isolated experience. Other respondents have confirmed that they have faced similar unpleasant reactions of random individual, particularly while

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<sup>3</sup> Sometimes with slight, but revealing semantic variations in discursive reproductions “I simply can’t say that I have *rak* (meaning literally cancer or crayfish in Serbian). It sounds so terrible. I prefer to tell that I have cancer - I feel that this is more acceptable”.

participating in public events for breast cancer awareness raising campaigns: “When we go out on public spaces - and she (passer-by) says - Shoo, shoo, don’t put a hex on me. I might get it from you! Keep it for yourself!”. This impression is even more evident in the following words: “When we present ourselves as women who were being cured, and hopefully healed from breast cancer, they (passers-by) return the flyers to us, as if they could get infected”.

Part of explanation why the identity of cancer, and especially breast cancer patients, is partially generated by an external stigma can be explained in the framework of Elias’ theory presented in his late study *The Loneliness of the Dying* (Elias, 2001, first time published in 1983). Elias proves, based on extensive historic and literary data and in the broader theoretical context of civilizing process, that in the past people were much more in direct touch with dying individuals, and with the very notion of death itself. Even though medically incompetent family members and friends were unable to offer adequate help, they still were deeply involved in the process and would do everything they could to save dying individual. In the case of failure, funeral and other rites were again performed primarily by relatives and close individuals. Development and specialization of medical profession, although drastically enhancing chances of survival, also has one latent and unforeseen consequence as well. Individuals have become more and more excluded from offering help to their close dying ones and the topic of death is more frequently considered a taboo. Lacking everyday familiarity with it, individuals tend to avoid other people who are in the risk of dying, regardless of the risk of infection. This altogether generates the rejection and the feeling of loneliness for the people who are (stigmatized as) dying. Like some of the respondents have confirmed in their own words:

*“People are convinced that cancer means death. Like, you know, that cancer is not a curable illness, but death. That is where patients’ fear of rejection comes from. And that is mostly the reason why they hide their medical condition. Their families could reject them, and colleagues as well. Reasons are taboos and the lack of information”*

*“People are so fed up with their own sad lives, that they don't want to hear another sad story from some Vesna out there, who survived the hell of chemotherapy, surgery...”*

Having in mind the fact that breast cancer is predominantly considered a female illness and life condition, some gender related issues should be tackled in this context. Some respondents reported that they are familiar with the cases where husbands rejected their

wives. Some of them left their partners, while others tried to deter them from surgery, or even suggested them to wear bra implants immediately after the surgery.

Since the majority of breast cancer patients are middle aged or elderly women it is important to draw a differentiation between health issues that are related to patients' age on the one hand and breast cancer as their primary disease, on the other. Two respondents pointed out that their quality of life is negatively affected by their general health issues, which appear as a consequence of their age, and not of breast cancer as their primary disease. On the other hand, some respondents intuitively and immediately relate their other health problems (headaches, spine and bone ache, fatigue, swelling, drastic weight and appetite variations etc.).

The fact that the majority of breast cancer patients are elderly women may produce ambivalent consequences on the quality of their lives. While some of them are close to an end of their professional carrier, have grown up and employed children, grandchildren as motivation and the source of everyday joy and so on, others lack this kind of material and emotional support. In some cases, cancer patients have to take care of their family members or to share their already insufficient incomes, which is the reason why they have to keep working, despite their disease. One respondent reported that she is familiar with the cases where women who receive chemotherapy go to work straight after the treatment, and give their best to look healthy, so that their colleagues would not notice that they are ill.

Besides the problems generated from the linear passing of time (women's biological and social life phases) certain problems arise for particular temporal circles, which are shared by all patients with chronic diseases, especially those with high risk of remission. In the case of breast cancer patients passing through regular medical examinations after the treatment (every six months at the beginning and annually later on) requires extensive engagement and sometimes serious financial expenses. Besides that, these time frames between one medical check-up and another generate a constant feeling of fear and uncertainty. As one of the respondents describes: *"We all live from one check-up to another. And we all have fear inside ourselves and she who says that she doesn't have it, doesn't tell the truth. The most important thing is not to allow this fear to take control over us, to overpower us, because then we have a problem."*

#### 4. The Rights of Cancer Patients in the Republic of Serbia – Normative Framework and Practical Challenges for its Implementation

##### *4.1 International Standards regarding Health Protection and their Implementation in the Republic of Serbia*

Adequate, comprehensive, detailed but at the same time sufficiently flexible, normative framework regulating health protection represents the first step towards full enjoyment of the right to health and appropriate life quality that comes within. In the Republic of Serbia, normative framework regulating the right to health should be observed and analysed within a broader context, i.e., having in mind the obligation that our country has in accordance with ratified international agreements and as one of World Health Organization's (hereinafter: WHO) Member Countries<sup>4</sup>. However, one should also consider the fact that despite the normative framework there are some practical issues that the respondents tackled within this research, which undermine legislator's best intentions and actually represent obstacles for the application of essential normative standards in this field. For that reason, some of their statements are cited after the analysis of relevant legal provisions as a contrast between the normative and the practical aspect of the same topic - the right to health and quality of life.

As one of the most essential components of the right to life and, the right to health is proclaimed in several international documents, including **Universal Declaration of Human Rights** adopted in 1948<sup>5</sup> (hereinafter: UDHR). This fundamental and inalienable human right is also confirmed by numerous activities conducted under the auspices of the UN General Assembly directed towards its worldwide promotion (Čiplič *et al.*, 2010: 771). According to Article 25 of UDHR:

*“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in*

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<sup>4</sup> WHO Office in Belgrade, Serbia was first established in 1992 as a humanitarian aid office providing public health advice to United Nations agencies and humanitarian aid to vulnerable groups during the conflicts in the former Yugoslavia. On the grounds of a formal agreement between Ministry of Foreign Affairs of the Republic of Serbia and WHO, made in 2002, this office became a full country office and the focal point for all WHO activities in Serbia, WHO Regional Office for Europe, Serbia, <https://www.euro.who.int/en/countries/serbia>, accessed on 30.07.2021.

<sup>5</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), <https://www.refworld.org/docid/3ae6b371c.html>, accessed on 12.05.2021.

*the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”*

In this provision of UDHR, it is actually proclaimed that the right to life is inseparable not only from the right to health (in the sense of being provided with adequate medical care) but also from the right to well-being, as a much broader concept, prescribing higher standards than mere „survival “and „health maintenance”. In the context of breast cancer patients, this is of crucial importance since it actually represents an international guarantee of their right to maintain or even upgrade the quality of their life, both - during as well as after their medical treatment, not only via means that they are given as the necessary minimum in compliance with the laws, but also in other disposable and recommended ways. To be more exact, this international legal provision provides space for breast cancer patients to claim support from relevant stake holders throughout the entire process of diagnosis, treatment and recovery, particularly in the spheres where the decline of the quality of their life is most strongly felt. For example, if interpreted broadly enough and in the favour of breast (as well as other) cancer patients (which, of course is in compliance with the very essence and the purpose of UDHR) the right to well-being should include their right to be provided with adequate, professional, continuous and free psychological support throughout the entire healing process and even after their recovery in purely medical sense.

#### ***4.2 The Right to Health as a Constitutional Right in the Republic of Serbia***

The broader interpretation of the aforementioned international legal document is in accordance with Article 8 Paragraph 3 of the **Constitution of the Republic of Serbia**<sup>6</sup> (hereinafter: CRS), prescribing that the provisions pertinent to human and minority rights are to be interpreted in the favour of the improvement of the values of a democratic society, in harmony with international human and minority rights standards as well as in accordance with the practice of international institutions in charge of their application (Article 8, Paragraph 3, CRS).

When it comes to constitutional guarantees of the right to health on the national level, it should be mentioned that Paragraph 1 of Article 68. of CRS proclaims that everybody has got the right to the protection of their physical and mental health (Article 68, Paragraph 1 CRS). Paragraph 2 of the same Article contains the list of the categories of citizens who are provided with health protection from public incomes unless they are accomplishing it

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<sup>6</sup> Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/2006.

otherwise, in accordance with the law. This refers to: children, pregnant women, mothers during their maternity leave and elderly citizens (Article 68, Paragraph 2, CRS). Moreover, in Paragraph 4 of the same Article, it is emphasized that the Republic of Serbia supports the development of health and physical culture (Article 68, Paragraph 4, CRS). Although these constitutional provisions are rather broad and do not explicitly mention cancer patients, they are crucial for appropriate interpretation of all other legal document pertinent to the protection of health and the promotion of patient's rights not only in the process of diagnosis and treatment but also within and after the period of recovery.

#### ***4.3 Law on Health Protection as Umbrella Law for the Protection of the Right to Health in the Republic of Serbia***

The organisation of health protection system of the Republic of Serbia, citizens' health protection, general interest in the field of health protection and other issues related to the organisation and accomplishment of health protection as well as the monitoring of legality and regularity in this area in the Republic of Serbia are all regulated by the **Law on Health Protection**<sup>7</sup> (hereinafter: LHP) (Article 1, LHP). In that sense, LHP proclaims key principles and standards in the area of health protection in our country and sets fundamental organizational framework for the functioning of medical institutions. In Article 3, LHP admits the right to the protection of health in accordance with the law to all citizens of the Republic of Serbia, as well as to foreign citizens and stateless persons with temporary or permanent residence in our country, obliging them at the same time to maintain and improve their own and other citizens' health and the appropriate conditions of living and working environment (Article 3, LHP). Again, although this provision might seem rather general and does not address directly the rights of breast cancer patients, it is worth mentioning due to its importance for the correct interpretation of all other legal provisions (contained in laws or sublegal documents such as bylaws, instructions, decisions etc.) regulating these issues.

Another general provision of LHP is very important for the promotion of the right to health, especially when it comes to cancer and particularly breast cancer patients: Article 8 of LHP prescribing the obligation of the Republic of Serbia, autonomous province and municipal units to provide so called "social care for citizens' health". According to Article 8 of LHP, "social care for citizens' health" includes a series of explicitly enumerated measures and activities such as: 1) health maintenance and improvement, prevention, revealing, suppression and control of risk factors contributing to the emergence of

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<sup>7</sup> Law on Health Protection, Official Gazette of the Republic of Serbia, No. 25/2019.



illnesses, 2) education of citizens about healthy lifestyle, 3) prevention suppression and early detection of diseases, 4) prompt diagnostics, timely, efficient and effective treatment, health care and rehabilitation of ill and injured persons, 5) informing citizens about the facts that are necessary for their responsible conduct and accomplishment of health care protection.

Some of these measures, which are supposed to be applied on the level of the Republic of Serbia are of particular relevance for cancer patients, not only in the phase of treatment but also in the period of recovery, since they include: (Article 9 and 10, LHP) 1) making priorities, planning, adopting special health protection programs and legal documents regulating this field, 2) application of measures within tax, economic, educational and cultural policies that are aimed to enhance the development of healthy living habits; 3) providing preconditions for the adoption of knowledge about and the practice of healthy lifestyle; 4) enabling the development of integrated healthcare information system in the Republic of Serbia; 5) developing scientific research in the field of health protection and 6) facilitating additional expert education of medical professionals.

Finally, Article 11 of LHP is also worth mentioning in the context of breast cancer patients' health protection since it emphasizes that social care for health is fulfilled through providing health protection for the citizens that are exposed to higher health risk, prevention, suppression, early detection and treatment of the diseases that are of greater relevance for public health as well as through health protection of socially disadvantaged citizens under equal conditions on the territory of the Republic of Serbia (Article 11, Paragraph 1 LHP). Moreover, is of particular importance to highlight that this type of health protection is guaranteed for the citizens who are more than 65 years old as well as for the citizens who have to be provided with special preventive medical examinations such as screening in accordance with appropriate national programs such as National Breast Cancer Early Detection Program, which is discussed in the section dedicated to future development of health protection in the Republic of Serbia.

Despite legislator's intention to regulate the area of health care in a precise and comprehensive manner, the experiences of the respondents who participated in this research indicate that there are still some practical issues that undermine full accomplishment of its key standards and principles. According to their statements, the most vulnerable point is the moment when therapy is over and the woman stays alone. As one of them said: *"When you finish with hospital treatment, you are transferred to the ambulance level. And then, you can't do any analysis at your local health care centre although you need to undergo a medical check-up every three months at the beginning.*

*As soon as you finish with one control, you have another. That is the moment when you feel completely helpless. Until then, someone used to take care of you, and what now?"*

#### ***4.4 Law on Patients' Rights as the Ground for Guarantees of Patients' Rights Protection in the Republic of Serbia***

**Law on Patients' Rights**<sup>8</sup> (hereinafter: LPR) promulgates a series of general patients' rights, some of which are of particular relevance for breast cancer patients, including the right to: 1) accessibility of health protection (Article 6, LPR), 2) relevant data (Article 7, LPR), 3) preventive measures (Article 8, LPR), 4) health service quality (Article 9, LPR), 5) safety (Article 10, LPR), 6) being informed about the fact that are necessary for decision making about the application of a proposed medical measure (Article 11, LPR), 7) freedom of choice (Article 12, LPR), 8) second expert opinion (Article 13, LPR), 9) privacy and confidentiality (Article 14, LPR), 10) decision-making (Article 15, LPR), 11) insight into medical documentation (Article 20, LPR), 12) confidentiality of data related to his/her medical condition, 13) leave medical institution on his/her own responsibility (Article 27, LPR), 14) relief of pain and suffering (Article 28, LPR), 15) respect of his/her time (Article 29, LPR), etc. On the other hand, LPR also stipulates some duties and obliges the patient to maintain a responsible approach to his/her health, other medical services beneficiaries, medical workers and other employees in public or private medical institutions, as well as to respect relevant normative acts regulating the conduct in this field (Article 32, LPR). In addition, LPR suggests that a patient should play an active role in the process of the accomplishment of his/her health protection by: 1) actively participating in the protection, preservation and improvement of his/her health, 2) providing medical workers in charge with complete and accurate information about his/her health condition and 3) following the instructions and implementing the measures prescribed by relevant medical experts (Article 33, LPR).

Apart from promulgating general rights and duties of patients, LPR also provides a mechanism for their protection, by prescribing that patients' rights are provided on the level of local administration units (Article 38, LPR) through the activities of patients' rights counsellors – jurists who passed necessary exams for working in state administration bodies, who are familiar with legislative framework regulating the area of health protection and who have at least 3 years of working experience in the field (Article 39, LPR). It is also important to note that LPR prescribes adequate administrative offences

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<sup>8</sup> Law on Patients' Rights, *Official Gazette of the Republic of Serbia*, No. 45/2013 and 25/2019.

and appropriate punishments for the activities that represent the violations of patients' rights (see for example: Article 44, 45, 46 and 47, LPR)

#### ***4.5 Disability Pension and its Challenges for Breast Cancer Patients in the Republic of Serbia***

**Law on Pension and Disability Insurance**<sup>9</sup> (hereinafter: LPDI) is also relevant for the protection of health and life quality of breast cancer patients, particularly having in mind the fact that the majority of them have to leave their employment and go to disability pension due to their medical condition.

In accordance with Article 21 of LPDI, disability emerges when an individual's complete lack of working capability is determined due to the changes in his or her medical condition caused by: injury at work, professional illness, injury that was not caused at work or illness that cannot be cured by medical treatment or rehabilitation (Article 21 LPDI).

According to Article 25 of LPDI, it is possible to receive disability pension up until the age required to realize the right to old age pension. In cases where complete lack of working capability is determined, provided that: 1) the reason for disability is injury at work or professional disease, regardless of the length of pensionable service 2) the disability is a consequence of disease or injury unrelated to work, in which case at least five years of pensionable service are required. However, in accordance with Article 26 of LPDI, the aforementioned requirements are not applied to individuals who became disabled before the age 30: 1) for individuals aged 20, at least one year of pensionable service is required; 2) for individuals aged 25, at least two years of pensionable service are required and 3) for individuals aged 30, at least three years of pensionable service are required.

The procedure for the accomplishment of rights on the basis of disability is initiated upon the request of the individual, based upon the proposal made by his or her chosen doctor for the determination of disability and in accordance with the law (Article 94, LPDI). Nevertheless, an individual who is entitled to receive disability pension may lose this right if the circumstances on the basis of which he or she obtained this right changed. The changes that affect the right to disability pension are determined in a special procedure

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<sup>9</sup> Law on Pension and Disability Insurance, *Official Gazette of the Republic of Serbia*, No. 34/2003, 64/2004, 84/2004, 85/2005, 101/2005, 63/2006, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019, 86/2019 and 62/2021.

that can be initiated either upon the request of the individual who this right was given to or *ex officio* (Article 96, LPDI; see also: Article 115, LPDI).

The fact that the patient may lose his/her right to disability pension depending on the circumstances might also cause some serious problem in practice. The respondents who participated in the research the results of which are presented in this paper, agreed that once their disability is confirmed, they have to quit their job, which is logical since they start receiving disability pension. However, if the circumstances change after some time and they manage to fully recover, they might lose the right to receive disability pension. But, at the same time, if they lose the right to disability pension, they are not automatically returned to their former employment, which actually means that in such cases, they might remain without any sources of income. As one of the respondents described: “At one moment, you are officially declared as disabled, and then, in a couple of years you are not disabled anymore”.

According to respondents’ impressions, disability pension has got both – advantages as well as disadvantages, depending on individual’s overall economic, social, marital and family status. One of key disadvantages of disability pension that breast cancer patients have to face is the decrease in their monthly incomes. This becomes particularly challenging if one takes into consideration the expenses of treatment and recovery of breast cancer patients, as well as the fact that a significant number of them are left on their own, without family members who could provide them with financial support. As one of the respondents reported:

*“Disability pensions are really small and most women barely make ends meet. Plus, there are medical examinations... I don’t have this problem, since my family members provide me with financial support, but I give my best not to take advantage of that.”*

On the other hand, some of the respondents saw numerous advantages in disability pension, primarily due to the fact that it provided them with a lot of leisure time that they could dedicate to themselves, their physical and mental recovery and personal growth. One of the respondents described this in the following manner:

*“I am really satisfied. I am very active in various fields, not to mention all the things I do. I practice rowing and shooting sport. and I attend our association’s meetings twice a week. I also go out, as much as it is possible due to COVID situation. But all that is possible thanks to the fact that I have disability pension. And I have taken disability pension thanks to my*

*illness. It sounds strange but it is true. I can thank to my illness for disability pension and the abundance of time that I have now, for all the activities I'm interested in. And I find that rather pleasant."*

#### ***4.6 Future Prospects of Health Protection of Breast Cancer Patients in the Republic of Serbia - Program and Strategic Documents***

One of national programs for social health protection is the ***National Breast Cancer Early Detection Program*** (hereinafter: NBCEDP), announced by a special Regulation in 2013<sup>10</sup>. NBCEDP introduces a series of guidelines and instructions for the implementation of activities aimed at the improvement of health, minimization of mortality caused by breast cancer and enhancement of life quality of women (Article 1, Regulation on NBCEDP). Key goal of NBCEDP is the minimization of mortality caused by breast cancer in the Republic of Serbia, whereas its specific goals include: 1) raising awareness of women on the importance of regular medical examinations and early breast cancer detection as well as on the importance of screening; 2) strengthening the capacities of medical institutions for the application of screening in the terms of sufficient number of trained professionals and adequate equipment; 3) establishing a system of data collection and management during the screening process; 4) providing services' quality control throughout the screening process; and 5) including local self-government units and citizens' associations in the application of screening (NBCEDP, Sections 3.1. and 3.2.).

***Public Health Strategy of the Republic of Serbia 2018-2026***<sup>11</sup> (hereinafter: PHSRS) mentions breast cancer in the context of prevention and suppression of diseases and leading health risks (Section 4.3. PHSRS). To be more exact, PHSRS stipulates continuous improvement of health protection programs in several areas, including prevention, suppression and early detection of colorectal, cervical and breast cancer (Subsection 4.3.3.3. PHSRS). PHSRS is also familiar with screening and considers it a measure of secondary prevention directed towards early detection of disease, together with self-examinations and preventive medical examinations (Section 1. PHSRS).

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<sup>10</sup> Regulation on National Breast Cancer Early Detection Program, *Official Gazette of the Republic of Serbia*, No. 73/2013.

<sup>11</sup> Public Health Strategy of the Republic of Serbia 2018-2026, *Official Gazette of the Republic of Serbia*, No. 61/2018.

## 5. Key Sources of Support for Breast Cancer Patients in Serbia

Apart from institutional (at first place medical) support which is regularly conducted within the norms prescribed by previously described legislative framework, another kind of support appears to be crucial for breast cancer patients – throughout the treatment as well as within the recovery process: the emotional support of persons around them including: family, friends, colleagues, neighbors as well as the entire community.

The majority of respondents agreed that they received the strongest support from their family members. However, this statement should be interpreted with certain limitations. First of all, all members of patients' association "Let's be together" who participated in the research (apart from one participant) have families and have been receiving their support throughout the entire process of breast cancer diagnosis, treatment and recovery. Moreover, according to the statements of the respondents, the support provided by each family member was of a different kind and sometimes it did not appear to be as helpful as it was genuinely intended to be.

For example, one of the respondents described the response of her family members to the fact that she was undergoing breast cancer therapy in the following way:

*"My husband used to close himself in the bathroom and cry when they told him I had cancer. Because we all had this scenario in our heads, because we all watch movies, when she receives chemotherapy, she gets bold, loses weight and dies. For the first month or so, my husband was crying all the time. I could not rely on him at all. On the contrary, my daughter was very strong. When I lost my hair, she used to call me 'messy-haired', she accompanied me to chemotherapies, medical check-ups... she went everywhere with me. Of course, my whole family supported me – parents, brother, entire family."*

In certain cases, however, the respondents perceived the fear and anxiety of their family members as a burden. As one of them said: *"I had to fake that I'm OK in front of my mother. After finding out that I had cancer, we spent two hours at a coffee shop, trying to figure out how to tell my parents about it. I was more focused on the intention to protect them."* Similarly, one of them explained: *"We are the ones who had to stay in our position. We got what we got, so let's fight it. And those around us had only fears and the question – What will happen?"*

On the other hand, exaggerated care and attention of family members was perceived as almost offensive by some respondents. For example, one respondent described that she

perceived the offers of her relatives to help her with house chores as too assertive or even pushy and that it made her feel as if she was incapable of doing anything by herself. That was the reason why she kindly rejected them, with the excuse that she would call them if necessary. Like she said: *“When my relatives offered me their help, to bake something, I told them – don’t make a disabled person out of me. I will call you in case I cannot make it.”*

In some situations, the support of close persons or family members was missing, which deeply affected the respondents, making them feel disappointed and offended. For example, one of them described with sadness and disbelief: *“When I was making plans for the holidays, my best maid told me – Keep quiet and stay where you are – you don’t know if you will survive until summer and you are still planning vacation.”*

The respondents agreed that, apart from their family members, the greatest source of psychological and emotional support for them was (and still is) their association “Let’s stay together”. As they said: *“A woman enters the room and you can see that she’s completely lost... The woman who enters the room and the one who leaves it is not the same person.”* One of the respondents described, the most inspirational moment for her at the association was when she met a woman who was undergoing chemotherapy 14 years before. It really encouraged her and inspired her to help other women and when they asked how much time has passed from her chemotherapy, she proudly says – 18 years.

One respondent emphasized the importance of sharing the same experiences with other members of the association, but without the obligation to constantly discuss their medical conditions: *“It was a revelation for me to realise that we don’t talk about the disease here. And I learned so many positive things and some new skills and hobbies. You come back to yourself.... We got closer, became friends. Like a family. Nobody can understand you as well as the one who has passed through all that stuff.”*

Another significant source of support are the sports activities, i.e., dragon-boat rowing that some of the respondents attend together. Apart from being beneficial for their physical condition, these activities offer possibilities for establishing new and strengthening existing social bonds among breast cancer patients, which larger contributes to their mental and emotional recovery as well. Team spirit and the support of the community boost their self-esteem and increase their motivation for further progress. As some of the respondents said:

*“There (at the rowing club) we get everyone’s support. There are children who are less than 10 years old, but also those who are over 70. We really found warm welcome there. Not only by the club, but also by the rowing federation. We won gold medals, which for us... We received carbon paddles, which aren’t too heavy for us, free trainings, training kits, hanging out together, nature... Beautiful”.*

The following suggestions made by respondents clearly depicts how much this kind of support means from the perspective: “This truly is a positive example that should be followed by other sports as well. And not only sports, but... Psychologists as well, like we discussed”. Other similarly good examples include free entrance to the Botanical garden, river cruising, free concert tickets, donations in basic cosmetic products, especially those that are safe for oncology patients etc. Another important source of support highlighted by respondents encompasses free individual and group session with a professional psycho-therapists. This is of particular importance since the official health system does not provide the scope of psychological assistance that is suitable for persons in this kind of life situation, and the patients often can not afford the services of private psycho-therapist.

One of the decisive moments within the process of breast cancer patients’ inner healing definitely is the point at which they start setting personal boundaries and claim their emotional autonomy. For example, one of them said: *“This disease has taught us to say - I don’t want to do that. Not to say - I can’t do that, but - I won’t do that. And to put ourselves first”*. Furthermore, they confirm that this insight has inspired them to introduce some profound changes into their everyday patterns of behaviour and thinking. As one of the respondents thoroughly explained:

*“For me, leisure time is the most important thing. Not in the sense that I have given up life, but that I have the priorities that I find acceptable. I carefully weigh what suits me - where I stand in the entire situation. Before, I used to put myself on the last place. Now, I give my best to do what suits me, I adjust myself to my own possibilities and not to other persons’ aspirations. I don’t train endurance any more, like I used to and then I would collapse, but I also don’t give up easily. For me, time is the key thing after taking care of my health”.*



## **6. Conclusions and Recommendations - Physical and Emotional Recovery as an Effort to Fully Enjoy the Right to Life**

Despite the fact that both - academic community as well as general public are usually focused on its medical aspects, the consequences of breast cancer undoubtedly reach beyond the borders of medicine, making it a complex multi-faceted phenomenon that deeply affects all spheres of patients' lives and seriously threatens not only their survival, but also the quality of their everyday living. Physical, mental, emotional, social, financial, legal, gender and family issues all emerge as the repercussions of this disease, requiring a holistic approach not only to its medical treatment, but also to its general perception on individual and public level.

Timely, adequate and comprehensive support provided by relevant medical state institutions throughout the entire process of diagnosis, treatment and recovery of breast cancer patients represents a key precondition for the accomplishment of their constitutionally and legally guaranteed right to health, as one of the most important aspects of the right to life. However, although the analysis of current normative framework relevant to health protection indicates that this area is fully regulated and organised, the results of qualitative research that are presented in this paper show that there are some obvious lacks and discrepancies between the normative and the practical, causing serious problems for breast cancer patients and deeply affecting their quality of life on several different levels. Such situation requires a series of synchronised activities that would bring positive changes in all sectors relevant to this issue, including: health care centres and institutions, bodies in charge of the rights of patients, state institutions in charge of pension and health insurance, as well as other relevant stakeholders such as public health policy makers, the media, non-governmental organisations and, finally the entire community. Although such activities are planned within strategic documents that have been analysed in this paper, practical experiences of the respondents of this research suggest that they still have not resulted in some radical improvements.

The results of qualitative research presented in this paper imply that key source of problems in this area comes from the lack of knowledge and information about the problems and needs of breast cancer patients. Namely, ignorance raises fear and the feeling of discomfort, particularly among the members of the broader community. In some cases, this fear may induce prejudice, discrimination and stigma, all of which additionally decrease the quality of life of an already vulnerable group. In that context, the media should be considered a suitable channel for the distribution of relevant information and sensitisation of the broader public about this topic. That the reason why

raising awareness of all relevant subjects is of utmost importance for overcoming the aforementioned obstacles on their road to full recovery and (re)claiming the right to live their lives.

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## **BUILD BACK BETTER - PRINCIPLE OF SAVING LIVES**

*The principle “build back better” means striving to strengthen the resilience of communities, societies and states against the consequences of extraordinary situations by correcting previous organizational, political, social and physical shortcomings. The goal of resilience in accordance with the “build back better” principle is to improve, rather than repeating a pre-existing condition and thus to contribute to more effective protection of lives. The principle has been formulated in international documents stipulating that effective recovery and reconstruction globally should be recognized as an imperative for saving lives and further sustainable development. To be successful, “build back better” programs require a high degree of political will, strong institutional frameworks and intensified international cooperation. The authors analyzed the “build back better” principle in regard of “black swan” unpredictable damaging situations, natural disasters and manmade situations such as armed conflict.*

**Keywords:** *build back better, saving lives, catastrophes, reducing future risks, improving previous shortcomings, black swans*

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## **1. Introduction**

Emergencies are periods of increasing loss of human lives that are often characterized as enormous, unnecessary, tragic, sudden, unpredictable. When there are emergencies caused either by natural disasters or by human negligence (manmade), it begins to be very clear what were the shortcomings in the socio-organizational and technical-physical sense that have led to undesirable consequences of considerable scale. But in many cases, that's what remains, critical analysis back which often ends at dissatisfaction with what has (not)been achieved before. Unfortunately, it does not always and everywhere lead to incentives for change. However, this is also the possible turning point when dissatisfaction with the previous situations, and the realization that it led to catastrophic consequences in emergencies, can and must grow into an effort invested in repair, i.e. elimination of all perceived shortcomings.

## **2. Human lives in emergencies, risk hazards, and prevention**

Exposure of people and property to disasters in all countries is growing faster than their vulnerability is decreasing (United Nations Office for Disaster Reduction, 2009). This creates new risks and gradually increases disaster-induced losses, with significant economic, social, health, cultural, and environmental impacts during the short, medium, and long term, especially at the local community level.

Human lives are lost when measures are not taken in time to prevent and reduce the consequences of earthquakes, floods, fires, armed conflicts, infectious diseases of pandemic dimensions, economic decline, lack of vital resources, primarily food, drinking water, medicine. Lives are lost not only during emergencies, i.e. in moments of crisis but also after them due to the consequences of health risks, economic and human insecurity. This loss of human lives due to emergencies is the most serious warning of the need for prevention based on a critical analysis of previous shortcomings, the need to change them, and thus achieve previously organized resistance to their consequences. Failure to take prevention with the easiness that emergency situations will probably not happen again and that the only important thing is to normalize life by returning to the previous state, directly endangers the basic right of all people, the right to life.

With a critical look back, the activities are undertaken in the present, actually achieve the prevention of hard, even the most severe consequences in the future. It is not just about improvements of the physical and technical type, because along with noticing the shortcomings of that type, there are also shortcomings within the socio-organizational,

political domain. Non-democratic, non-egalitarian, more or less openly systematic discriminatory relations, where the respect and protection of lives, basic human freedoms and rights did not become the cornerstone of human and sustainable social development (Kambovski 2018: 32), institutional inefficiency, disorganization, unclear or often variable competencies, and responsibilities, unfair distribution of vital resources, etc., can also have a significant impact on the occurrence of extensive consequences of emergencies. Tensions between political, humanitarian, and military goals are possible as part of integrated multi-agency stabilization efforts, especially due to the increase in the number of organizations and individuals operating in the same area. Also, governmental documents are needed (and practices based on them) that regulate the reception and distribution of international aid, as well as the engagement of domestic military, police forces, and civilian resources and their mandates and coordinated action (Australian Government, Australian Civil – Military Center, 2015). Pandemic measures during 2020 indicate that there may be a need for a temporary reduction of human rights, but this should also be done in a legitimate way, through institutional procedures, while respecting, above all, the right to life. States cannot derogate some rights, such as the right to life, prohibition of torture, ill-treatment, prohibition of slavery (Tilovska-Kechedji, 2020: 627).

When it comes to natural disaster prevention (and human rights saving), the first thing that comes to mind is seismically resistant construction against earthquakes; better coastal fortifications and sewerage networks as a way to prevent the consequences of floods; an improved warning system as a way of informing all, especially remote communities, possibly affected by the tsunami; when large-scale infectious diseases occur, only a well-equipped and organized health system provides the right answers. So, at the present moment, it is necessary to build well everything that was previously not good enough to prevent loss of human lives and other catastrophic consequences of emergency situations in past cases. Obviously, it is much easier to organize and implement improvements of that type, i.e. physical and technical circumstances that have been proven as weak points in emergency situations.

Improving social relations is much more difficult, because it is not easy to achieve the consensus needed for their realization, as it always is when coming to changes in power relations and the potential redistribution and diminution of acquired privileges. Consensus on the necessity of change is, as a rule, much easier to achieve in the first type of improvement. The second type is more difficult to change due to conservative inertia based on the destructive idea that it is sufficient to return to common, familiar patterns and frameworks of social life. There is usually a refusal to realize that they may have

contributed the most to the emergencies and the resulting extensiveness of the consequences. It is not rare to hear open statements as allegedly is just not optimal to invest in “unnecessary innovations” but instead is the best to re-optimize existing relationships. (Barass, 2017: 10)

### **3. Recovery: key questions and answers**

Asking direct questions regarding recovery after the consequences of emergencies, and giving answers to them, indicates the need for adequate prevention.

Why do wars break out most often in those areas, and regions where war conflicts have taken place in the last decade? Because for good, lasting peace is necessary to be made with equal participation of all interested parties, instead of those who only partially cared about the ceasefire, withdrawal of demarcation lines, counting of weapons and ammunition, but not about the human dimension of security in those areas.

Why do members of international humanitarian organizations, without previous criminal records, become on the ground while committing tasks of repairing the consequences of emergency situations, criminal perpetrators of various types of gender-based violence, sexual, transactional, physical type? Because these organizations lacked prior enactment of strict prohibition and sanctioning rules, with prior training on the inadmissibility of such conduct, because there is still too few female staff with little authority in these organizations because gender-based violence has always been present in countries, affected by emergencies, which could provide men, both foreign and local, a false sense of impunity on all sides for acts of gender-based violence.

Why do small entrepreneurs fail en masse and poor social strata and individuals become even poorer in emergencies? Because state fiscal mechanisms are not designed to mitigate the economic consequences of emergencies. If there is a shortage of food, drinking water, and medicine in areas in times of crisis, it is not because there are real shortages, but because their safe storage and reserves are not organized before emergencies occur, and because their distribution and transport is not pre-crisis efficiently organized.

Why do disproportionately more women than men die in tsunamis (in the 2004 Asian tsunami, as many as 70% of the victims were women and children)? Because they were not involved in all phases of defending communities from disasters, they were uninformed, unauthorized, untrained, without the means necessary for protection and evacuation, without the mandate to make decisions about themselves and their families,



much less about their communities. Social hierarchies mediated by gender sometimes mean that women and girls have lower social status and face greater threats of insecurity due to the vulnerability of their status (Valasek, 2008: 125). They as children grow up in an environment that did not respect their opinion, did not have the opportunity to communicate and can fully realize their full intellectual and every other potential, and thus did not grow into independent, responsible persons who can be an example to others (Ćorić, 2019: 45).

Respect for the right to life and its protection is at the same time the main motivating factor in correcting previous shortcomings and raising the level of readiness to face future emergencies. The vulnerability of women in disasters is caused by the emergency situation, the accompanying increase in gender-based violence, various types of crime, lack of vital resources, but also the existing gender inequality in social relations. Consequently, policies, instruments, mechanisms, and tools used in response to disasters cannot be gender-neutral, and should not be formulated and implemented without considering specific gender differences (Oxfam-GB, 2011).

#### **4. Build Back Better and the Black Swans**

“Black swan” is a metaphor that describes a surprising, unexpected event with significant consequences (if you have only seen white swans all your life, it does not mean that black swans do not exist, therefore the black one appearance may surprise you). “Black Swan” is an event that has two characteristics: it is unexpected and it causes great and lasting consequences. Retroactively analyzing, there was a reasonable explanation, that the event in fact could have been predicted, but the set did not happen and the event was not expected, because the prediction was missing. The “black swans” have high-profile consequences hard-to-predict, and these are rare events that are beyond the realm of normal expectations based on history, science, finance, and technology. There are also psychological biases making people blind, both individually and collectively, to uncertainty and a rare event's massive role in social affairs (Taleb, 2010). “Black swans” are unexpected, unpredictable, and significantly comprehensive phenomena, firstly noticed and defined in technical practices, mechanical engineering, technology, and construction building, and later the term began to be applied to the domain of finance, banking, and global economy, from where it was taken by social sciences. The term was accepted for all those phenomena that were considered very difficult or almost impossible to predict, but as the later analysis found, it was however, at least partially possible to be prevented and even learning how to live with them. (Papić, 2018).

The risk of unpredictable events exists in every society, they slow down sustainable development, and their occurrence in one region can cause damage and chain consequences in other regions and vice versa (Čović, 2015: 14). In order the concept of “build back better” to function in the shadow of possible occurrences of “black swans”, the important component is predicting the risks and consequences of emergencies, which is an urgent global priority (AlJazzer, 2017), as prevention of maybe complete or at least partial surprise. Therefore, in terms of forecasting and lives saving, an important element is learning lessons from past disasters, which can significantly reduce the phenomenon called “black swans”. This indicates the importance of accepting and learning the lessons of the past that are necessary today to adequately respond to the challenges that emergencies may pose.

The negative impact of risk, in addition to depending on the characteristics and intensity of the unexpected event, largely depends on the vulnerability and capacity of people who are exposed to disasters (Todorović, Milošević, Bugarski, 2015: 58). Therefore, recovery is much more than a simple return to the pre-event state. Recovery must be approached in a cyclical way by taking action to strengthen anticipation and resilience, both before and after future disasters - instead of a linear approach that limits recovery action to post-disaster response only. e.g. to react directly to its consequences, in response to an event that has already happened. When saving lives and repairing the greatest damage is completed, communities face a long process of gradually returning all that has been lost. This recovery should be a combination of the community's efforts to simply return to normalcy as quickly as possible with the long-term goal of reducing future risks and vulnerabilities. It is also an opportunity not only to reduce the risk of the same or similar dangerous events, but also of other dangers and conditions that did not have any impact on a specific catastrophic event, but which may endanger that community in future. In Serbia, too, it is emphasized that reducing the risk of emergencies requires a strong institutional basis, which can be achieved through capacity building, good governance, promotion of appropriate program policies and legislation, facilitated the flow of information, and efficient coordination mechanisms (Čović, 2015: 14).

### **5. Build Back Better - Armed Conflict**

When war breaks out, the risk that this society will again go through future violent armed conflicts increases significantly (Peters, 2016: 55). It is worrying that precisely those states that originated from, or emerged after wars are more likely than all others to repeat conflicts. During the 2000s, 90% of conflicts were in war-torn countries, and the rate of conflict recovery has increased every decade since 1960. Empirical analysis of eight

decades of international crises shows that various peacebuilding efforts often fail to really end conflicts, being effective only in the short term. involving only short or longer ceasefires, but being unsuccessful in achieving long-term peace.

Many studies suggest that there is a direct link between women's decision-making power over peace and conflict, and the likelihood of war. For example, the results of analyzes that found that a higher degree of women's participation in parliaments reduces the risks of civil war are cited. Another analysis, using data on international crises over four decades, found that as the percentage of women in parliament increased by 5%, the state was five times less likely to use violence when faced with an international crisis. Regarding the political violence committed by the state, statistical analysis of data from most countries of the world in the period 1977-1996. indicates that the higher the percentage of women in parliament, the lower the probability that civil servants will committ crimes of human rights violations, such as murders of political oponents, political imprisonment, torture, murder, kidnapping, and people disappearances.

But just as women's empowerment is associated with a reduced likelihood of conflict, the statistical analysis also shows that strengthening women's political and social participation reduces the chances of conflict again after the end of the war. In particular, increasing parliamentary representation and women's literacy reduces the risk of the country experiencing civil war again. A study of 58 countries affected by the conflict between 1980 and 2003 found that when no women are represented in parliament, the risk of recurrence increases over time, but “when 35% of parliament is female, this relationship virtually disappears, and the risk of recurrence is close to zero” (O'Reilly, 2015: 57).

Contemporary analyzes show that in societies where women are engaged in many public spheres of life, countries are less likely to have armed conflicts with their neighbors, be in bad relations with the international community, or have significant zones of crime and violence within their society. The mechanism of that causality itself is still not completely clear, but it is obvious that gender equality is a better indicator of the peace of the state than other, already mentioned factors such as democracy, religion, or GDP. Similarly, in a number of empirical studies, gender inequality has been identified as a sure predictor of increasing possibility of armed conflict either between or within states. In particular, fourteen out of the seventeen countries at the bottom of the OECD Gender Discrimination Index have had conflict in the last two decades. War-ravaged Syria, for example, had, before the outbreak of conflict, the third most discriminatory institutions among 108 countries surveyed - women face legal and social restrictions on their freedom of

movement, only men can be legal guardians of their children in most communities, and judges can approve marriage for girls under 13 years of age.

Statistical analysis of the largest set of data on the position of women in the world today shows that the situation of women's physical security better predicts the peace of their countries than its achieved level of democracy, GDP, or level of religiosity (Peters, 2016: 14). When family law structures - such as those governing the minimum age for marriage, property and inheritance rights, or divorce and guardianship rights - discriminate against women, it is also one indicator of a country's propensity for conflict and the fragility of its peace. (Peters, 2016: 55).

Countries with a larger number of women in parliament are certainly, less involved in interstate or civil wars, and less likely to tolerate human rights violations in the family area (Nanako, O'Reilly, 2018: 16). Empirical evidence is compelling: where women's political inclusion is achieved, peace is more likely - especially when women can and influence decision-making on peace agreements (United States Institute of Peace, 2018). Strategic commitment and activities should include the transition from hazard protection to risk management by combining risk prevention and sustainable development, what is fully applicable to this type of emergency (Čović, 2015: 11).

## **6. Build Back Better - natural disasters**

In addition to the challenges of the corona virus pandemic, during 2020 the planet faced a large number of natural disasters and extreme weather events. The world was hit by 980 natural disasters in 2020, which caused the loss of at least 8,200 human lives (Al Jazeera Balkans, 2021). Not only great number of human lives were lost, floods, hurricanes, storms, torrents, fires left behind material damage estimated as 210 billion USA dollars. These extreme weather events caused by climate change are becoming more frequent, but also more intense, as a result of which the damage they cause is extremely large. The mentioned losses of 210 billion dollars are significantly greater than the material damage due to natural disasters in 2019 when it amounted to 166 billion. In addition to the mentioned material losses, which in 2020 were higher than ever before, a huge number of lives were lost, many plant and animal species lost their habitats, and many people were forced to evacuate (Stanković, 2021).

Disasters can occur suddenly (fast onset: typhoons, earthquakes, volcanoes) or gradually (slow onset: climate change, drought, desertification, gradual melting of polar glaciers). They affect millions of people (Mršević and Janković, 2018: 403). Over the last decade,

they have affected nearly 2 billion people and caused damage estimated at \$ 1.7 trillion. In addition, from 2008 to 2012, 144 million people were displaced due to disasters. Disasters, most of which have been exacerbated by climate change and which are increasing in frequency and intensity, are largely hampering progress towards sustainable development.

The steady increase in disaster risk, including increasing human and property risk exposure, combined with previous disaster experience, indicates the need to further strengthen disaster preparedness, take predictive action, integrate disaster risk reduction into response preparation, and ensure that there are capacities for effective response and recovery of both people and property.

Disasters to date have shown that the recovery, rehabilitation, and reconstruction phases must be prepared before emergencies occur, which is a critical moment for the application of the “build back better” concept, including the integration of disaster risk reduction into development measures, all of which make nations and communities resilient to disasters.

Resilience is defined as the ability of a system, community, or society exposed to hazards to resist, absorb, transform, recover and adapt to the effects of hazards in a timely and effective manner, including through preserving and restoring its basic structures and risk management function (United Nations, 2016). It is important to understand that strengthening resilience is not only achieved through better coastal fortifications and similar physical and organizational environmental improvements but also through changes in discriminatory social relations, especially undemocratic, non-transparent, and gender unequal (Mršević and Janković, 2018: 409). Namely, in agrarian societies, most often affected by disasters, women are significantly underrepresented in politics, institutions, social organizations, and all forms of activism (Đurašinović, 2019). Countries that are most positive towards women's leadership and the concept of gender equality in general, e.g. Nordic countries such as Norway, Sweden, Finland (Đurašinović, 2019), and other post-industrial countries, are in recent decades very rarely or not at all affected by disasters of catastrophic consequences and massive human lives loss, which clearly indicates that these phenomena are conditioned by nature but also by social relations.

Therefore, it is necessary to emphasize that recovery is much more than a return to the state before the event that caused the emergency situation. Recovery for disaster-affected communities should not only reduce the risk of the same or similar hazardous events, but

also to identification of other hazards and conditions that had no impact on the recent event but could endanger that community in future.

### **7. Build Back Better - messages of international standards**

Japan is considered the world's leading model regarding the disaster risk reduction - but even in this well-organized country, “black swans” occur as a deadly combination of multiple dangers, so there have happened catastrophes of enormous proportions. That is why Japan is also the leading initiator of global disaster risk reduction strategies, from the Yokohama Strategy 1994 (United Nations - Headquarters, 1994), through the 2004 Hyogo Framework to the Sendai Disaster Risk Reduction Framework 2015-2030. (United Nations Office for Disaster Reduction, 2015). Recovery from the “triple” disasters that hit Japan, the devastating earthquake, tsunami, and nuclear disaster in Fukushima 2011, represent lessons on the urgency of disaster risk reduction and the imperative inclusiveness of the process. The damage caused by these catastrophes was too great even for one of the most economically developed countries in the world. Therefore, it is not difficult to imagine how dangerous the situation is in places where people are poor and live in homes made of fragile materials with insufficient stocks of food, drinking water, medicaments and without publicly organized efficient health services. The risks are higher in poor countries for poor people - but the strategies are the same. Everywhere on earth, the risk is reduced by identifying and adequately responding to risk factors impetus (United Nations Office for Disaster Reduction, 2013).

The principle coined by international documents, as “build back better”, includes efforts to strengthen the resilience of communities, societies, and states from the consequences of disasters by correcting previous shortcomings. This principle firstly attracted global attention after the 2004 Indian Ocean earthquake and tsunami. This finding resulted in the Hyogo Framework for Action (HFA) which clearly called for “the introduction of disaster risk reduction measures” into disaster recovery and rehabilitation processes and the use of opportunities even during the recovery phase to develop long-term capacity to reduce the risk of future disasters. Effective recovery and reconstruction are now globally recognized as imperative for sustainable development. To be successful, recovery and reconstruction programs require a high degree of political will, strong institutional frameworks, and intensified international cooperation, all of which provide greater opportunities for risk reduction and resilience building, as well as a greater chance for recovery and reconstruction to be implemented effectively. a way that avoids negative consequences (UN World Conference on Disaster Risk Reduction, 2015). In Serbia, unfortunately in the official report on the implementation of the Hyogo Declaration in the

period 2013-2015. year there are no significant allegations of positive activities in the field of a gender perspective in the process of risk reduction. The report states that no measures have been applied in Serbia that would contribute to recognizing gender sensitivity in the process of recovery of the endangered community. It is clear that there still is plenty rooms for improvement the work of protection and rescue actors and other stakeholders in this area (Radović, 2015: 26).

An example of the inclusiveness of the Sendai framework that builds on the previous Hyogo is its Priority 4, Improvement of Disaster Preparedness for Effective Immediate Disaster Response as well as “Build Back Better” during recovery, rehabilitation, and reconstruction phases. Namely, the constant growth of disaster risk, including increasing exposure of people and property, combined with lessons learned from past disasters, indicates the need to further strengthen disaster preparedness in response to them, undertaking forecasting activities, integrating disaster risk reduction in response preparation and ensuring the existence of capacity for effective response and recovery at all levels. “Build Back Better”, dictates the need to empower the entire population, including the hitherto often excluded women, the elderly people and people with disabilities, to run public affairs and to promote gender equality and universally accessible response, recovery, rehabilitation, and reconstruction that are crucial.

Perhaps paradoxically, but disasters are not only moments of women’s suffering but are also an opportunity to women empowerment (Oxfam-GB, 2011). Emergencies are also an opportunity for women's role and status in the community to be changed, especially during the period of renewal and reconstruction. Just as seismically unsafe facilities are no longer built on that unstable ground after the earthquake, but instead seismically resistant facilities, with the aim the damages not to be repeated, so gender relations after disasters should be renewed and changed in order greater gender equality to be achieved.

## **8. Conclusion**

Disasters to date have shown that human lives saving, recovery, rehabilitation, and reconstruction phases must be prepared before emergencies occur, which is a critical moment for the application of the “build back better” concept, including the integration of disaster risk reduction into development measures, all of which make nations and communities resilient to disasters. Human lives are far more endangered by emergencies by increasing multiple risks than is the case when the condition is regular. Therefore, the text underlines the need to adopt and apply the concept of “build back better”, which means by noticing the shortcomings that led to human losses and other serious

consequences, necessity to work on their improvement, with a critical look back. These are activities undertaken in the present, with intention to preventing or at least mitigating, the occurrence of the consequences of emergencies in the future. It is not just about improvements of the physical and technical type, because along with noticing the shortcomings of that type, there are also shortcomings in the socio-organizational, political sense. Regarding the protection and of human lives saving, there is stressed necessity of anticipating and preventing the so-called “black swans” as the most unexpected social dysfunctions, total “jumps out from normalcy”, but also burst of armed conflicts and natural disasters of catastrophic proportions. Acceptable solutions are offered by international standards, e.g. as comprised in the documents of Hyogo and Sendai frameworks, which also emphasize the need for consistent application of the concept of “build back better”. Its application is necessary for all phases of emergency situations, during and after the events, but also, in the phase of recovery and reconstruction, with the perspective of future validity the prevention of future similar emergencies. Understanding and accepting the messages of the lessons learned are also the most valuable basis for applying the principle of “build back better” as a possible context for effective protection and human lives saving (Mršević and Janković, 2019: 288).

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Aleksandar R. Ivanović\*

**RIGHT TO LIFE IN THE CONTEXT OF QUALITY OF LIFE  
AND THE RIGHT TO EDUCATION WITH A SPECIAL FOCUS  
ON A NON-DISCRIMINATORY ACCESS TO HIGHER  
EDUCATION IN SERBIA**

*“My mission in life is not merely to survive, but to thrive;  
and to do so with some passion, some compassion, some  
humour and some style (Maya Angelou)”*

*The author discusses the right to life from a legal and philosophical aspect, promoting a broader interpretation of the right to life, which implies not only the mere protection of human life from any form of endangering, but also the protection of human dignity and quality of life. Accordingly, the author tries to point out the inseparability of the right to life from the right to human dignity, as well as the relationship of these two rights with the quality of life. The author pays special attention to the right to education, as one of the key segments of quality of life. Within this part, the author deals specifically with the issue of non-discriminatory access to higher education from the aspect of the legal framework of the Republic of Serbia.*

**Keywords:** right to life, human dignity, quality of life, right to education, non-discrimination, right to higher education.

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## 1. Introduction

The right to life is a basic human right, without the protection of which there is no realization of other rights. In science, exists narrower understanding of the right to life, which mainly implies the protection of bodily integrity, ie human life from all forms of endangerment. However, taking into account the right to human dignity, as well as the modern concept of protection of human rights, and the treatment of human rights and freedoms in general, such a restrictive position is not in line with the needs of modern man. In this regard, as a more adequate interpretation of the right to life, we emphasize the legal-philosophical interpretation, according to which the right to life includes the right to quality of life, to a life worth living. In this sense, the right to life should be seen as an inseparable whole with the right to human dignity. Because inviolability is guaranteed to both, and only by providing joint protection for the exercise of these rights, citizens can be provided with a quality life, a life worth living. In this regard, in this paper we want to point out the importance of education, ie enabling the right to education, and especially higher education in order to achieve quality of life, and thus the right to life and the right to human dignity. Accordingly, in this paper we will first explain the meaning of the right to life, the right to dignity, and then we will present the meaning of the term quality of life. After that, the paper will present the doctrinal interpretation of the right to education, as well as the legal framework of the right to education in the Republic of Serbia, while the final part of the paper will present the legal framework of the right to non-discriminatory access to higher education in the Republic of Serbia. At the end of the paper, conclusions are presented on the relationship between the right to life, the right to human dignity and quality of life, as well as the role of the right to education, with a special focus on access to higher education in achieving quality of life. Also, recommendations were given for the improvement of the domestic legal framework regarding the exercise of the right to non-discriminatory access to higher education.

## 2. Right to life

The right to life belongs to the natural human right, which person acquires by birth. It is also a right that is recognized by international conventions, as well as the domestic legal framework of many countries. International legal standards of the right to life are found in many international documents. For example, article 3 of Universal Declaration of Human Rights (G.A. Res 217 (III) A, Universal Declaration of Human Rights, art. 26 ) prescribes that: *“Everyone has the right to life, liberty and security of person”*. Article 6 of the International Covenant on Civil and Political Rights (UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations,

Treaty Series, vol. 999) prescribes that: *“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life (paragraph 1). In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court (paragraph 2). When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (paragraph 3). Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases (paragraph 4). Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women (paragraph 5). Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant (paragraph 6)”*.

Also in Article 2 of European convention on Human Rights (Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950) stand that: *“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law (paragraph 1). Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection (paragraph 2)”*.

Looking at the historical development, ie the legal recognition of this right as well as aforementioned provisions of international documents, we can conclude that the concept of the right to life was mainly related to the protection against intentional or arbitrary deprivation of human life by state agents (Ramcharan, 1985:3). However nowadays it is submitted that narrow approaches to the right to life are no longer adequate and that, indeed, the right to life as a modern concept goes considerably beyond the traditional view. Regarding this Bertrand G. Ramacharan, Special Assistant to the Assistant Secretary-General for Human rights U.N. Centre for Human Rights, 1985 emphasizes

seven specific characteristic of right to life. According to his approach, right to life characterised by following specifics:

- 1) is an imperative norm of international law which should inspire and influence all other human rights;
- 2) in its modern sense, the right to life encompasses not merely protection against intentional or arbitrary deprivation of life, but also places a duty on the part of each government to pursue policies which are designed to ensure access to the means of survival for every individual within its country;
- 3) it has been progressively developed by the General Assembly, includes protection against the use of weapons of mass destruction, such as nuclear weapons;
- 4) is closely inter-related with right such as the right to peace, right to a safe and healthy environment and the right to development;
- 5) the effective protection of the right to life is closely related to, and affected by, the implementation of human rights standards directed at regulating situations in which threats to life are particularly susceptible;
- 6) if the right to life is to be adequately protected in the future, there is a range of issues awaiting the urgent attention of international lawyers;
- 7) protection of the right to life is closely related to the promotion and protection of human rights in general (Ramcharan, 1985:6-7).

From his perspective right to life concept consists of protection of the life of every individual human being from all possible threats. The right seeks to enable each individual to: have access to the means of survival; realize full life expectancy; avoid serious environmental risks to life; and to enjoy protection by the State against unwarranted deprivations of life whether by State authorities or by other persons within society (Ramcharan, 1985:7).

In addition to this there are approaches which promote that under the right to life should be considered the right to lead one's life according to one's own preferences. The right to life is not primarily a right to a certain state, but a negative right, not to be oppressed in the self-determined conception of one's life including not to be killed and a positive right to the preconditions of the autonomous decision how to lead one's life. The latter includes the right of the embryo to enter life in a way that the later child and adult can lead it in a self-determined way (Kirste, 2017:38).

Article 24 of the Constitution of the Republic of Serbia (Constitution of the Republic of Srbija, Official Gazette of the Republic of Serbia, no. 98/2006) prescribes that human life is inviolable, that there is no death penalty in the Republic of Serbia, and that the cloning of human beings is prohibited. The word “life” is very significant as it covers of all facts of human existence. The word “life” has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally (Palmer & Robb, 2004:379). This brings us to the position advocated by the German philosopher Immanuel Kant, and according to whom the right to life and right to dignity can be understood as immanent categories (Pavlović, 2020:47). Thus, according to the understanding described above, the preservation of life and respect of human dignity are two inseparable things, because otherwise the mere preservation of life, without the protection of human dignity, would be a life that is not worth living. Article 23, paragraph 1 of the Constitution of the Republic of Serbia guarantees respect for human dignity, in such a way that the mentioned article prescribes that human dignity is inviolable and everyone is obliged to respect and protect it. As can be seen by this provision, dignity is first proclaimed as an inviolable right, followed by its protection and respect by all persons, regardless of their natural or legal characteristics (Ivanović & Sopronov, 2021:176). Besides that we can conclude that the right to human dignity is the right of every person as a human being. Young and old, man and woman, physically and psychologically health or ill, prisoner, detainee and upstanding member of society, domestic citizens or foreigner, each of them has right to human dignity. There is no requirement that the right holder be able to exercise his own right. A person in a “vegetative state” has right to human dignity (Barak, 2015:301).

We should have on mind fact that, all personal rights are in constant state of conflict with the rights of other persons or the public interest. Sub-Constitutional provisions tend to manage with this conflicts. Restrictions imposed by law might be placed upon the human dignity of one person in order to ensure another persons right or the public interest. These restrictions, which are a product of, sub-constituonal law, are constitutional if they are proportional (Barak, 2015:301). Taking into account the above, we are of the opinion that the right to life should be seen not only as a right to preserve life, ie survival, but as a right to a quality life, a life worth living. Human life in Article 24 of the Constitution of Republic of Serbia is not merely the physical act of breathing. It does not connote mere animal existence or continued drudgery through life. It has a much wider, including, including the right to live with human dignity, Right to livelihood, Right to health, Right

to pollution-free air, etc. So, the right to life should guarantee not only mere human existence, but the right to a quality of life, which brings us to the understanding of notion “quality of life”.

### **3. Quality of life**

Starting from the inherent instinct for self-preservation, in all periods of development of human society, by social groups, certain activities undertaken to achieve, maintain and develop a level of security, in order to survive (Ivanović, 2017: 160). However, the goal of every individual is not just a bare life, nor is a mere existence sufficient for a human group, and individuals and social groups seek a life worthy of a human being (Dimitrijević & Stojanović, 1996: 263). In this regard, the survival of the people of a country is important, but the quality of life is also important to them. Since the quality of life is perceived mainly according to individuals' subjective evaluation of their lives in relation to their culture, values, goals, standards, expectations, concerns and past experiences, no consensual definition thereof exists (Serfontein, 2015:2267). By quality of life we mean, above all, the standard of living, the achieved level of economic development and the possibility for further such development, as well as the achieved level of cultural and political values in a social community (Dimitrijević, 1973: 26). Thus, quality of life represents the totality of economic, cultural and political values that make up the essence of life in a country. It should be noted here that the quality of life is often equated and linked only to the standard of living, which is not entirely correct. Namely, the standard of living, ie economic development is certainly a precondition for achieving and preserving the quality of life, but on the other hand the cultural and political values of a society must not be neglected, because otherwise the quality of life would refer only to the highest possible level of economic development as simple set of consumers, deprived of cultural values and political rights and freedoms that constitute the specificity of the life of a social community. The issue of quality of life is not just a human rights issue but a security issue. Quality of life as a value is not treated in the same way in every social community. Namely, the population of economically developed countries, with a high degree of democracy and respect for human rights, in which the quality of life is at a very high level, really cares about protecting and preserving that level of quality of life, to the extent that one part of the population is completely unthinkable conditions worse than the achieved level of quality of life. In this regard, a part of the population would be willing to sacrifice some other values, such as territorial integrity or sovereignty, in order to preserve the achieved quality of life. Namely, the inhabitants of these countries, especially in the conditions of economic crisis, feel fear because of possible job loss, large influx of population from poor countries and changes in the established way of life, than because



of possible armed aggression or other forms of threat to survival, territorial integrity or sovereignty. On the other hand, the population of economically underdeveloped countries, where the standard of living is at a very low level, as well as the degree of democracy and respect for human rights, do not care at all about preserving such a quality of life as a value to be protected. They are already ready to sacrifice some of the previously mentioned values, at the cost of losing the state, in order to improve the existing quality of life (Ivanović & Soltvedt, 2016:70). Thus, for example, one part of the population may be interested in joining another state or states where the quality of life is at a higher level. So, while for economically developed countries we can say that quality of life is one of the primary values for the protection of which the majority of the population is interested, for economically developed countries we cannot say that quality of life means one of the values primarily protected, but the value sought, and for the achievement of which the majority of the population is interested. In any case, whether it is economically developed or economically underdeveloped countries, a high level of quality of life is a value that the majority of the population strives for, therefore achieving and maintaining the highest possible level of quality of life is one of the vital values of every country. Starting from the point that the right to life guarantees not only mere human existence, but the right to a quality life, bring us to the role and significance of education in achieving the latter.

#### **4. Right to education**

The right to education is in itself a human right and an unavoidable means of exercising other human rights. Education improves an individual's chances in life and helps combat poverty. Education enables individuals to get out of poverty and improve their socio-economic status. Politically and socially, education offers people the necessary skills to identify common goals, take a full and active place in community life, recognize manipulative media practices, and resist oppression (Brown, 2016: 82). All human rights instruments mainly rely on knowledge and education about their standards and goals. The preamble to the Universal Declaration of Human Rights recognized this when it noted that a common understanding of these rights and freedoms is of the utmost importance for the full realization of this promise to promote universal respect and respect for human rights. This means that human rights education is essential to creating a world where human rights are respected (Brander et al, 2012:488). The right to education is articulated in Article 26 of the 1948 Universal Declaration of Human Rights, which emphasizes the universality, equal access and role of education in promoting respect for human rights and tolerance among peoples and social groups. The Universal Declaration of Human Rights therefore stipulates that education is a fundamental human right for everyone, and

this right is explained in more detail in the Convention against Discrimination in Education (Article 26) (UNESCO Convention against Discrimination in Education, art. 4, Dec. 14, 1960, 429 U.N.T.S. 93) and then in the International Covenant on Economic, Social and Cultural Rights (Article 13-14), The Convention on the Rights of the Child (Article 28) (The United Nations. (1989). Convention on the Rights of the Child. Treaty Series, 1577.) and the European Convention on Human Rights and Fundamental Freedoms, First Protocol (Article 2).

The right to education is based on several principles: the principle of availability, the principle of accessibility, the principle of acceptability and the principle of adaptability, ie flexibility. The concept of the right to education, based on these four principles, was developed by Katarina Tomasevski, a former UN special rapporteur on the right to education. Availability implies that education is free and paid for by the government, as well as that there are appropriate infrastructures, including trained teachers. Accessibility implies that the education system is non-discriminatory and accessible to all, and that all affirmative measures are taken in order to include individuals belonging to marginalized groups in the educational process. Acceptability as a third principle of this right implies that the content of education is relevant, non-discriminatory and culturally appropriate, as well as a guarantee of its quality. Adaptability refers to the fact that education should be developed in accordance with the changing needs of society, as well as that the education system can be adapted to the local context (Brander et al, 2012:489). Education is an institution that is usually established through a collective social desire for civil and supportive societies. Also, here we should point out one generally accepted opinion, that the more education people have, the better it will be for them. With this in mind, many societies traditionally view education (at least primary and secondary education) as a true public good that adults, teachers, and the education system provide to children until they outgrow their childhood vulnerabilities and inexperience to become contributing members. As already pointed out, many existing international documents promote and protect this understanding of education, such as the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child (Lee, 2013:2). Thanks to these international instruments, sustainable legal mechanisms have been established, supported by the nation states and applicable, and which enable the assessment of the efficient social structure necessary to provide appropriate educational opportunities. Thus, the right to primary education enjoys great recognition in international human rights instruments, while the human right to higher education is not developed to that extent. Namely, the right to primary education is absolutely according to internationally recognized standards and

there is a widely accepted agreement to make it compulsory and free. On the other hand, the right to higher education is related to capacity or merit, which we consider to be completely correct, while the scope of this right is very disputed, which will be discussed more later. The right to higher education is very important and is an integral part of the right to education. While the right to higher education may sound sublime or a luxury at first glance, it is not. Although the right to higher education is a human right, not every individual should attend a higher education institution, but only those who have the capacity, ability and desire for this level of education. In this sense, denying access to those who have the capacity, ability and desire for this level of education is a violation of human rights, because education is important for human dignity (Gilchirst, 2018:664). Dignity as personal integrity, which recognizes a distinct human state of fragility and vulnerability to challenges, threats, injuries, diseases and death, requires that people be protected from state actions that may be crucial to limiting or endangering this ability (Ivanović & Sopronov, 2020:177). Namely, to deny someone who has the capacities and abilities access to higher education means to deny him his full dignity and potential as a human being. In that sense, the opinion that prestigious higher education institutions are available only to the rich is contrary to the realization of the right to higher education, but that they should be equally available to those who have only capacity and ability, but not money for tuition fees. In this regard, and in the spirit of this human right, anyone who has the capacity to successfully complete their studies should be able to attend higher education. Therefore, the right to higher education should be viewed in the context of the general right to lifelong education. Higher education in this way is just one of a series of opportunities for organized learning available to people in adulthood, along with various forms of vocational education, job-specific training, creative and artistic pursuits, personal development and the like. (McCowan, 2012:117). Taking into account the nature of this right, we can conclude that it is not guaranteed to everyone, by the very act of birth, such as the right to primary education, but only to those who have the capacity and ability to acquire higher education. So, it is a hybrid human right, which springs from the right to education. Although the term human right to higher education is often used in the literature, we believe that it is more correct to use the term human right to a non-discriminatory approach to ensuring the right to higher education, because the essence of this right, as explained above, is non-denial of access this level of education to those who have the capacity and ability and of course the desire to acquire higher education.

## **5. The right to non-discriminatory access to higher education**

Understanding access to higher education requires consideration of the historical context in which the right to access higher education originated, as well as its historical development to the present day. Namely, historically, since its inception, higher education has been provided to the “elite” or a smaller number of members of society, who were considered the richest part of society at that time. However, in the seventies of the last century, the trend of popularization of higher education began, in a way that more and more people continued their further education after finishing high school. This trend was associated with a growing emphasis on the ideology of the welfare state and the concept of social mobility. In this context, higher education has often been subsidized by the state. More recently, the concepts of the knowledge economy have led to the view of higher education as the integrity of economic growth and competitiveness. Furthermore, the growing influence of neoliberal ideology, together with the need to finance the popularization of higher education, has fueled the trend towards a market orientation of higher education. Namely, instead of state-subsidized higher education, many countries have implemented reforms that are designed to shift the cost of education to the student, ie the consumer of this level of education (Kotzmann, 2018: 4). Of course, such reforms have provoked criticism for the negative impact on access to education, ie the disrespect of the hybrid right to a non-discriminatory approach to ensuring the right to higher education.

From today's point of view, although most countries share the generally accepted view that primary and secondary education should be provided to all free of charge by the state, when it comes to access to higher education, the debate on how best to implement higher education continues. In understanding the different views on this problem, it is extremely important to take into account the purpose for which higher education is provided in a society, and thus who should be responsible for financing its implementation. Consequently, in countries where higher education is primarily considered a public good, there are stronger arguments that the state should cover the costs of higher education. Of course, then there is the problem of how to achieve this in the context of the trend of mass study. On the other hand, where higher education is primarily considered a private good, the position that individuals are expected to pay for their own education is quite justifiably emphasized. In terms of reconciling these two views, however, policy makers must consider the impact on access to higher education, inequality, vulnerability, and ultimately the impact of these factors on society as a whole.

As it was emphasized at the beginning of the work, the policies pursued by the states in the framework of providing technical support and learning in the field of higher education are in many ways significant. First of all, because policies that result in better access to higher education, as a rule, lead to access to higher education leading to improved living chances for a higher standard of living, and quality of life. In contrast, a more negative approach to higher education has a negative impact on the life chances of certain individuals who face barriers to accessing this level of education. This situation leads to an increase in the level of inequality in society and as a result undermines the cohesiveness of a given society. A higher education system that excludes or disables access based on gender, race, nationality, etc., will create a society in which these excluded groups will be further marginalized and are likely to create tension between different social groups. In addition, it is necessary to consider the consequences of the protection of this right beyond the very approach to higher education. Namely, the widely set free provision of higher education will certainly lead to the generally accepted view that higher education is a public good, ie. that which is subsidized by public funds and which will contribute to the functioning of public services, institutions, etc. On the other hand, where regulations require that higher education be provided free of charge, it may not act as a sufficient incentive for students to work hard, and the public budget will be significantly burdened. In contrast, legal systems that suggest to higher education institutions to introduce fees for the provision of these services may contribute to the perception that higher education is an investment that will primarily benefit the individual and for which the individual should pay. However, this system can also have its downsides. Namely, the imposition of fees for higher education can cause students to feel themselves as consumers, consumers who buy education, or certificates of education (ie diplomas), and not as students who should be actively involved in the learning process (study) and to that's how they get the knowledge and the deserved diploma.

Higher education also makes an important contribution to social values. In this context, higher education has an important impact on the development of individual personalities, values and behaviors. Experiences, knowledge and skills from the educational process from higher education levels are used by individuals to define their way of looking at the society in which they live and their way of behaving in it (Kotzmann, 2018: 5). Accordingly, higher education should be viewed as a microcosm of society. Policies applied in relation to the higher education system will affect that system, and that influence will be transferred to society in a broader sense. Understanding the effectiveness and implications of different policy frameworks will enable policy makers for a given

society to implement those policies that can give the best effects in terms of access to higher education.

#### **6. The right to non-discriminatory access to higher education in Serbia**

Article 21 of the Constitution of the Republic of Serbia prescribes the prohibition of discrimination in a way that prescribes that everyone is equal before the Constitution and the law, and that everyone has the right to equal legal protection without discrimination. Also, the Constitution prohibits any discrimination, direct or indirect, on any grounds, especially on the grounds of race, sex, nationality, social origin, birth, religion, political or other belief, property status, culture, heresy, age and mental or physical disability. Furthermore, Article 71 of the Constitution prescribes the right to education, paragraph 1 of which states that everyone has the right to education, while paragraph 3 states that all citizens have, under equal conditions, access to higher education (Ivanović, 2019:50). The Republic of Serbia provides successful and gifted students of lower financial status with free higher education, in accordance with the law. Serbia joined the the so called Bologna Process in 2003. By adopting the Law on Higher Education (Law on Higher Education of the Republic of Serbia ("Official Gazette of the RS", No. 76/2005, 100/2007 - authentic interpretation, 97/2008, 44/2010, 93/2012 and 89/2013). In 2005, the implementation of the Bologna Process into the national higher education system began. Among other things, Article 3 of this Law defines as one of the goals of higher education in the Republic of Serbia the provision of opportunities for individuals under equal conditions to acquire higher education and to be educated throughout life, while Article 86 of the same Law stipulates that students have the right to among other things, on equally high quality study conditions for all students. The Strategy for the Development of Education in Serbia until 2020 envisages that higher education will continue to continuously include in its work, development and behavior the principles on which the European Higher Education Area and the European Research Area are formed and will follow those principles. The continuation of the reform of the higher education system will take place with the full participation of students, teaching staff, higher education institutions, scientific and professional public and employers, and with respect for institutional autonomy, academic freedoms and equal conditions for access to higher education regardless of social inequalities. In the part concerning the strategy of achieving the vision - policy, action and measures, it is envisaged that each individual is given access to the learning process at all levels and forms of education, under equal conditions and in the way that best suits his abilities and needs. In the part concerning the vision of the system of public financing of education, it is envisaged that in secondary and higher education the system of financing must ensure quality and equality through additional financing and the system

of scholarships and crediting of pupils and students of lower socioeconomic origin. The system of financing academic and doctoral studies must provide coverage of all costs of the scientific-educational process, which ensures universal accessibility and application of the principle of excellence at the highest level of formal education. The Law on Prohibition of Discrimination should also be mentioned here (Law on Prohibition of Discrimination (“Official Gazette of RS”, No. 22/2009) which in its Article 19 (Discrimination in the field of education and vocational training) paragraph 1 prescribes that everyone has the right to pre-school, primary, secondary and higher education and vocational training under equal conditions, in accordance with the law. Also, paragraph 2 of this Article prohibits a person or group of persons on the basis of their personal characteristics, to make it difficult or impossible to enroll in an educational institution, or to exclude them from these institutions, to make it difficult or impossible to monitor teaching and participation in other educational institutions. activities, classify students by personal characteristics, abuse them and otherwise unjustifiably differentiate and treat them unequally. Finally, paragraph 3 of this Article prohibits discrimination against educational institutions that perform activities in accordance with the law and other regulations, as well as persons who use or have used the services of these institutions in accordance with the law.

Based on the above, we can conclude that the Law on Higher Education guarantees the right to equal access to higher education with general formulations, while measures to support vulnerable groups in terms of exercising the right to equal access to higher education are provided in more detail by the Law on Pupil and Student Standards. In this regard, the national legislation of the Republic of Serbia recognizes as vulnerable groups, in terms of rights, non-discriminatory access to higher education, persons with disabilities who study at higher education institutions in Serbia and who have the opportunity to receive financial support for their studies, as well as students from socially disadvantaged families, for which the possibility of obtaining a social scholarship is envisaged. The Law on Pupil and Student Standards envisages as support measures:

- a) providing accommodation with subsidized meals,
- b) student loans,
- c) scholarships for students,
- e) scholarships for talented students.

When it comes to providing accommodation and subsidizing meals, the Republic of Serbia subsidizes accommodation and meals for all students in public institutions that are

financed from the state budget. In addition, subsidized dormitory accommodation is granted to those studying outside their place of residence. There are eight student centers in Serbia that provide subsidized accommodation and food (Belgrade, Novi Sad, Nis, Kragujevac, Subotica, Cacak, Bor and Uzice). Students from private universities and those who are not financed from the state budget have the opportunity to receive accommodation in a dormitory only on the condition that there are vacancies and they can exercise that right at economical prices.

In terms of student loans, they are provided by the Government, and the benefits are intended for students who study at state universities and are financed from the state budget, while students from private universities do not have this right. Student loans are non-refundable for those who graduate on time with an average grade of 8.5 or higher (out of 10). Otherwise, students are required to repay the loan with the corresponding interest. In order to qualify for credit, in addition to having the status of “financed from the budget” at the state university as an initial condition, students are further ranked according to academic success (number of ECTS acquired during the previous level of study, or alternative high school achievement for first year students), and according to their socio-economic status.

When it comes to scholarships for students, the Ministry of Education, Science and Technological Development awards student scholarships to students of state universities “financed from the budget” with excellent results (average grade must be 9 or more on a grade scale of 5-10). There are additional affirmative action measures for obtaining student scholarships for students from vulnerable groups. These grants are part of the general competition, and the ranking of students from vulnerable groups is still based on merit, with additional needs-based criteria, such as proof of disability, certificate / proof of socio-economic status, etc.

When it comes to scholarships for talented students, they are awarded through the state budget and through the Ministry of Youth and Sports in the form of special grants for outstanding achievements to students from the Fund for Young Talents. Students funded by this program are required to remain in the country for a number of years after graduation. State universities, provincial governments and local governments of university cities provide funds to support talented and the best students. Students applying for this type of grant are not eligible to receive other grants from the state budget (such as government grants and government loans described below). The order is strictly based on merit. Many local governments that are not university centers provide students from their municipalities / local grants and loans to study in another city, as well as other types



of fees, but there is no systematic data on the scope and type of grants/loans/scholarships. In addition to the above-mentioned support mechanisms defined by the Law on Higher Education, all students are entitled to subsidized transportation in all cities in Serbia, as well as discounts for long-distance travel. Some local governments have introduced free transportation for students in their municipalities. All students in public and private institutions have the right to subsidized transportation.

Tuition fees at state universities are free for the following categories of students:

- from families with lower socio-economic origin;
- without parental care;
- from single-parent families;
- a member of the Roma national minority;
- with disabilities, those with chronic diseases and convalescents;
- refugees and displaced persons;
- returnees under the Readmission Agreement and deported students;
- from families with lower socio-economic origin and children without parental care.

In addition, students with disabilities, Roma students, and high school graduates in another country could apply for exemption from tuition by affirmative action as part of a formal call for enrollment. When it comes to private universities, the policy of supporting vulnerable groups in terms of providing free tuition or discounts on tuition is diverse and differs from one higher education institution to another.

## **7. Conclusion**

Although the Constitution of the Republic of Serbia does not recognize the term “quality of life”, we can logically conclude that the Constitution gives equal treatment in the form of inviolability to the human right to life and the human right to dignity. This leads us to the conclusion that the right to life in the sense of the provision of the Constitution of the Republic of Serbia should not be considered only merely of protection of life, or survival, but protection of life worth of living. A life worth living is a life that enables us to develop, progress and achieve our own interests, goals and intents. In this regard, education is one of the key segments, because through education we increase our capacities and opportunities for advancement in society. Primary and secondary education is available

to all and free of charge. However, the question is what is the situation with higher education, which is extremely important for achieving the desired quality of life, because higher education is the level that in most professions offers significantly greater opportunities in terms of quality of life. In this regard, we can conclude that there is a strong link between quality of life and the right to access higher education in one country. Universal and European documents concerning the right to a non-discriminatory approach to ensuring the right to higher education stipulate that states must take action to make higher education equally accessible to all and must ensure that it is provided without discrimination in full and immediately. Namely, according to international law, there is a right to education that is of a general type, ie. belongs to everyone by birth, and the right to non-discriminatory access to the right to higher education, which is limited in scope and does not automatically belong to everyone, but only to those who have the capacity, ability and desire for this level of education. In this regard, states should ensure that no one is discriminated against because they do not have the money or the conditions to study, provided that they possess the abilities, capacities and desire for higher education. Accordingly, each state should recognize that the right to non-discriminatory access to the right to higher education is a human right and carefully identify barriers to access for those from vulnerable or lower socio-economic groups and prescribe measures to overcome them. It is not enough to say that there are financial aid, scholarships and loans, but there must be an understanding of the right to non-discriminatory access to higher education as a human right and ways to ensure that all those with capacity can really take advantage of these opportunities.

In this regard, the Republic of Serbia has fully implemented in its legal framework the right to non-discriminatory access to the right to higher education in accordance with the provisions of the Universal Declaration of Human Rights, the Convention against Discrimination in Education, the International Covenant on Economic, Social and Cultural Rights, the rights of the child, the European Convention on Human Rights and Fundamental Freedoms, the First Protocol (Article 2), the European Social Charter and the Framework Convention for the Protection of National Minorities. Where there is room for improvement of the national system of protection of this right in the Republic of Serbia is equal access to this level of education for non-citizen students of the Republic of Serbia. In that sense, it is necessary to implement to a greater extent in the national legal framework of the Republic of Serbia the provisions of the European Social Charter concerning the equal treatment of non-citizenship in terms of exercising the right to access higher education. Then, when it comes to the implementation of the provisions of the European Charter for Regional or Minority Languages (Council of Europe, European

Charter for Regional or Minority Languages, 4 November 1992, ETS 148) in the field of higher education, and based on the analysis of the provisions of the Law on Protection of National Minorities in Republic of Serbia we can conclude that in this regard there is room for making university education available in regional or minority languages.

Furthermore, it is necessary to regulate more specifically in domestic legislation the equality of access to higher education when it comes to members of minority communities. In that sense, it can serve as a good example of practice from Montenegro, which the Law on Minority Rights and Freedoms of Montenegro (Law on Minority Rights and Freedoms of Montenegro ("Official Gazette of the Republic of Montenegro", No. 031/06 of 12.05.2006, 051/06 of 04.08.2006, 038/07 of 22.06.2007, Official Gazette of Montenegro ", no. 002/11 dated 12.01.2011, 008/11 dated 04.02.2011, 031/17 dated 12.05.2017) prescribes that in order to fully enjoy the rights of minority peoples and other minority national communities, higher education institutions in Montenegro, at the proposal of the Council of Minority Peoples other minority national communities, may enroll a certain number of students, members of minority peoples and other minority national communities each school year, in accordance with their acts.

Also, amendments to the national legal framework of the Republic of Serbia in terms of exercising the right to access higher education should include greater implementation of the European Convention on the Legal Status of Migrant Workers (Council of Europe, European Convention on the Legal Status of Migrant Workers, 24 November 1977, ETS 93). In addition, we can conclude that as a vulnerable group in terms of equal access to higher education, the national legislation of the Republic of Serbia does not recognize students who are parents, ie students with children. In that sense, examples of good practice from the Federal Republic of Germany or the Republic of Slovenia can be used to solve this issue, ie to recognize this category of students, which explicitly recognize this category of students as a vulnerable group, when it comes to equal access to higher education and provide special support measures for these categories of students.

In addition, additional attention could be paid to gender equality, based on the experience of good practice of the Federal Republic of Germany, which as a special field of activity in terms of exercising the right to equal access to higher education, determine the increase in women in higher education in certain scientific fields.

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