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HUMAN RIGHTS PROTECTION

PROVINCIAL PROTECTOR OF CITIZENS - OMBUDSMAN

FROM CHILDHOOD TO THE RIGHT TO A DIGNIFIED OLD AGE
HUMAN RIGHTS AND INSTITUTIONS

NUMBER 5
NOVI SAD, 2022

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

Institute of Criminological and
Sociological Research

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CONTENTS

FOREWORD

The Provincial Protector of Citizens - Ombudsman and the Institute of Criminological and Sociological Research from Belgrade, with support from the Ministry of Education, Science and Technological Development of the Republic of Serbia, organized The 6th International Scientific Conference on Protection of Human Rights: From Childhood to the Right to a Dignified Old Age - Human Rights and Institutions in Novi Sad, Serbia, on 27-28 October, 2022. This year conference is jubilar, since it marks 20th anniversary of the Decision on the Provincial Protector of Citizens - Ombudsman. Conference papers and presentations have been compiled in the 5th Yearbook of the same subtitle, and they are divided into four chapters: general issues, children's rights, rights of older persons and institutional protection of other human rights. Around 50 authors from 13 countries (Serbia, North Macedonia, Belarus, Russian Federation, China, Spain, Bosnia and Herzegovina, Japan, Romania, Croatia, Italy, Austria and Hungary) brought together diverse results and conclusions in 39 original scientific and expert articles. The text below offers a short overview of papers presented at the Conference. Hopefully, this publication will answer at least some of the numerous current questions concerning human rights' protection.

The first thematic chapter deals with the key concepts presented in this Yearbook. Articles collected in this chapter go far beyond legal analyses by offering ethical, philosophical, sociological and historiographic insights concerning human rights, institutions and relevant policies.

In the article *Ethical dimension of Human Institutions*, PhD Aleksandar Stevanović, assistant professor at University business academy in Novi Sad - Faculty of Law, analyzed the ethical dimension of the Human Institutions, which is seen as the necessary condition for their formal establishing. The introduction gives a broad definition of the Institution as the social phenomenon. In the second part, conditions of life and metaphysical dimension as the reasons for the creating of the Institutions are explained. The question about relation of the human Institutions and inherent capacities for Human development is explained in the third part of the paper. The fourth part deals with the interrelation between constant change of social conditions and weakening of the Institutions. In the final part, the connection between the dominant value system in

modern civilization and the instrumentalization of the Institutions is explained and solution defining interdependence of Institutions with their ethical and metaphysical dimension is given.

Academician Vlado Kambovski from Macedonian Academy of Sciences and Arts contributed article *"New constitutionalism" and its reflections on the reform of the Constitutional Court*. Author defines the main concept from the title as a reflection of the understanding of natural human rights as the basis of the constitution, which calls into question the presumed legitimacy of positive law and represents the product of the arbitrary legislative power of the assembly and even greater arbitrariness and executive power in its application. The authoritarian experiences in the transition period have confirmed the notion that the principle of majority, which prevails in the field of legislation and executive power, does not have sufficient potential, without constitutional obstacles and guarantees, to fulfill the notion of democracy, rule of law and human rights protection with real human content. The essence of the "new constitutionalism" is to raise the universal character of human natural and inviolable freedoms and rights to the level of distinguishing between "constituent power" and "constituted power": the first as original, absolute and self-sufficient, because it is implanted in human dignity, freedom and rights; and the second, which derives from the first and is therefore necessarily constituted by the constitution and laws, and functions as a public authority in the general interest of all citizens. Thus, the basic postulate of constitutionalism implies the emphasis on two basic functions of the constitution: as the highest legal act, it should guarantee natural human freedoms and rights and the consistent realization of the principle of separation of powers. In the light of this basic postulate, the boundaries of public authority set by the legal system do not only mean precisely defining and internal delimitation of competencies of three authorities (assembly-government-judiciary), but its primary purpose is to limit the "depth" of power in relation to individual freedoms and rights, through legally established guarantees arising from moral and legal values. The main role in achieving this goal should be played by the Constitutional Court as the "guardian of the constitution".

The third article, *Human Rights Protection: From Populism to the Evidence-Based Policy Making*, brings together key concepts of this Yearbook. PhD Milica Kolaković-Bojović, Senior Research Fellow at the Institute of Criminological and Sociological Research in Belgrade explored different modes of policy making and their impact on beneficiaries. Perceived consequences in terms of the political accountability of the decision makers for the impact made by the public policy influence their attitudes when create a public policy to the great extent. Being of the crucial importance, author underlines that human rights

protection as a subject of the public policies opens the floor for the significant variations of those attitudes, from the evidence-based policy making, as an ideal approach, to the populism driven policy making, as the hidden monster which undermines the basic values in the contemporary world, presenting itself as a modern hero and the protector of ordinary people. Taking into account these strongly opposed approaches, the author presented the main material and procedural elements that makes a public policy based on evidence. With this aim, the very nature and diversity of evidence is analyed, the sources where they can be found, but also the mechanisms to incorporate them into the public policies, against the idea of choosing the most popular solutions. Within this context, the author also analyses recent practices in penal policy, with the focus on the penal legislation and the policy planning in the process of the transposition of the international standards on the fundamental rights.

PhD Vadim Vladimirovich Khilyuta, associate professor at Yanka Kupala State University of Grodno wrote article *Human and Criminal Law*. His article considers the issue of the place of criminal law in the modern contour of human development of society. Author paid attention to the shift in paradigms and the place of man in society, by analyzing the modern state of society and the purpose of man in the era of globalization and total digitalization. Under these conditions, criminal law acquires special features and undertakings, since there is a rethinking of the essence of the concept of "crime" and "punishment". During the period of global instrumentalization of criminal law, it is important to identify the patterns of development of criminal law and analyze the trends that we may face tomorrow.

Article *Mechanism of Scientific Information Turnover Between Criminology and Criminal Law* follows, written by PhD Mikhail Matfeyevich Babaev, Chief Researcher of the All-Russian Research Institute of the Ministry of Internal Affairs of the Russian Federation and PhD Yury Evgenevich Pudovochkin, Professor of the Department of Criminal Law of the Russian State University of Justice. Authors state that optimization of the criminal legal impact on crime necessarily involves taking into account significant criminological information in the process of legal regulation. Furthermore, this requires a high-quality and effective mechanism for the circulation of scientific information between criminology and criminal law. The paper attempts a differentiated analysis of such a mechanism: a) at the level of turnover of information in the scientific environment; b) at the level of turnover of scientific information in law-making and law enforcement activities.

PhD Zorica Mršević, professor at the Faculty of European Legal and Political Studies, and the retired principal research fellow of the Institute of Social Sciences, explores interesting field of history of legal ideas in her paper *Ksenia Atanasijević' Concept of Human Rights.* The subject of the article is the basic principles of human rights defined by the philosopfer Ksenija Atanasijević as concepts of free personality, equality of all people, and the rejection of all violence and oppression of others. Author notes that the institutionalization of Ksenia's concept of human rights was not part of the university program of her time, but it was not a living intellectual scene of her time. Paper shows that by publishing in newspapers and magazines, lecturing at public forums, she had a significant impact on the human rights awareness of her contemporaries. The modern academia is institutionally much more open to human rights than in the time between the two world wars, so today it is not only possible but also necessary to continue where Ksenia stopped.

In his paper titled *Contribution of Scientific Institutions to the Promotion of Human Rights: Case Study of the Institute of Criminological and Sociological Research in Belgrade*, MA Andrej Kubiček, a research associate at the Institute of Criminological and Sociological Research in Belgrade presented results from his sociological case study. It's subject is the corpus of recent publications of researchers from the Institute, as a example of the scientific institution dedicated to the study of various aspects in this topic. Special focus is placed on the exploration of different analyzed fields of human rights, as well as on specific disciplines from which human rights are viewed (legal disciplines, psychology, sociology, anthropology, special education, ecology, etc.), and on detecting multidisciplinary approaches. In addition to the description of scientific publications, the article presents various types of cooperation with other actors in this field, both scientific and state institutions and bodies, independent institutions, educational institutions and non-governmental organizations.

Article Access to *Justice and Unequal Treatment*, brought fourth by PhD Marina Matić Bošković, senior research fellow at the Institute of Criminological and Sociological Research stresses that it is essential for Serbia, as a country aspiring for EU accession, to identify the barriers and difficulties experienced by citizens and especially vulnerable groups in accessing justice and upholding their rights, to ensure the full implementation and effective enforcement of national and international laws and meet the requirements for EU accession. From a rights-based perspective, access to justice is often seen as a gateway to the enjoyment and protection of other fundamental human rights and promotes social inclusion, while barriers to access to justice reinforce poverty and exclusion. Moreover, the author implies that inability to resolve legal problems may diminish access

to economic opportunity, reinforce the poverty trap, and undermine human potential including ability to enforce own economic and social rights, including property and labour rights. The paper analysis the barriers to access to justice in Serbia and grounds for discrimination of citizens in the judicial system. The author elaborates practice of the European Court of Human Rights and EU Court of Justice and their interpretation of the violation of access to justice right.

PhD Srđan Starčević, assistant professor at Military Academy, University of Defense, Belgrade and PhD Dragan Stanar, Associate Professor at Faculty of International Politics and Security, Union Nikola Tesla University, Belgrade presented next paper, *Society of Right Claiming and Transformation of War and Military at the End of The 20th and Beginning of the 21th Century.* Authors argue that civil revolutions expanded the boundaries of human and civil rights, simultaneously marking the outset of the rise of nations, as a new and stronger form of political unity. This form of political unity is one of the three causes — with economic and military power — of the irresistible spread of the Western way of life over the past two centuries. For almost 200 years, national consciousness was the most powerful means of states for military service, which did not cause friction between it, the right to freedom and the right to life. The situation changed radically at the end of the XX century, when developed countries faced resistance of their own population. The subject of this paper is transformation of democratic society into a "society of right claiming" and the impact on the change of war and armed forces. The paper determines whether the right to liberty, connected with the obligation to defend the conditions that guarantee rights, has been neglected in the discourse of human rights, read in the matrices of the "society of right claiming".

In the following article, *The Model and Perfection of Chinese Legal Aid System*, PhD Ye Qing, professor and PhD Cheng Yan, an associate professor of East China University of Political Science and Law described China's three modes in which legal aid is operated in: assignment mode, application mode and duty lawyer mode. In practice, the three modes have their own values but also have defects. The operation mode is directly related to the realization of the value of legal aid system and the embodiment of the legitimacy of criminal procedure. Under the mode of assignment, the implementation dilemma of staged division of criminal defense is harmful to the effect of litigation, so the operation mode of staged assignment should be gradually canceled, and the same assigned lawyer should be responsible for all the time; under the mode of application, the standard of legal aid qualification recognition is single and rigid, and multiple dynamic standards should be formulated; the design of duty lawyer system is too efficiency oriented, and the case information is not enough. Authors underline this particular case, in which it is difficult

for lawyers to provide effective help. It is necessary to distinguish the types of cases and establish a compulsory file-reading for lawyers on duty.

PhD Aleksandar Todorović from Vojvodina Bar Association raised awareness to the following question in the title of his article: *European Court of Human Rights – Beyond pilot judgements: Is the ECtHR introducing a new judicial policy?* Author claims that the European Court of Human Rights had introduced pilot judgments in order to establish a mechanism that would resolve systemic and structural issues regarding the respect of human rights that the Court identifies in the legislative framework of a member state. The idea behind pilot judgments is that by making one, the Court creates the necessary conditions for the member states to resolve the identified systemic violations at the national level, by undertaking the appropriate actions, which negates the need for the Court to deal with future violations on which it has essentially already taken a stance. According to the Court's assertions, pilot judgments have mostly provided positive results by reducing the number of pending applications. Author inspects the arguments that were utilized by the Court when it refused to examine the 12,000 applications in the case study of the current Burmych case and notes why he believes that these arguments are justified from the perspective of the mechanism for the protection of human rights that is established by the Convention. Afterward, by presenting post-Burmych case law, author attempts to determine whether this was an exception or an indication of new judicial policy.

Next contribution in this Yearbook is the article *Why is there no formal right to be happy?*, by PhD Dragana Ćorić, assistant professor at The Faculty of Law, Novi Sad. In this paper, it is stressed that the international and national legal documents have enlisted all sorts of human rights. But there is a little notion about human right to be happy. The UN resolution, adopted by the General Assembly on 28 June 2012., established International Day of Happiness. It also identified the pursuit of happiness as "a fundamental human goal" while promoting a more holistic approach to public policy and economic growth – one that recognizes happiness and well-being as important pieces of sustainable and equitable development. Author explores what is happiness at all, according to theorists from different areas of science and from different periods of time, and what should/could/must institutions do in order to help the individual to exercise his/her right to happiness. Or else, is the pursuit for happiness an individual, personal matter of each individual, and that the state has no authority to do anything in that pursuit?

The second part is dedicated to the rights of the children in various contexts. This theme is analyzed from global perspective, with addition of articles treating local issues from different regions of the world. Apart from more general, theoretical approaches concerning children's rights, following chapter includes concrete themes as well, such as right of the unborn child, threats to children in cyberspace, rights of children without parents and challenges which they face in medical and educational institutions.

PhD Lorena Velasco Guerrero, assistant professor at the University Francisco de Vitoria in Spain, presented the paper *Dignity: a pending concept in the protection of the human rights during childhood*. She claimed Human rights, as well as the institutions that sustain them, from childhood to old age, are based on the intrinsic dignity of every person. The modern theory of human rights affirms this dignity as its origin, purpose, legitimacy, and key for its interpretation. However, this foundation is blurred in the national and international instruments for the protection of childhood. Dignity is not included in a general and major way, being replaced by related and comparable concepts. This contribution seeks to address the place that the dignity of the child and the minor occupies in the treaties dedicated to childhood and, to what extent, its absence or substitution has implications for their human rights. To achieve this, firstly, the term dignity in international treaties and political texts is going to be analysed. Secondly, other main concept – "the best interest of the child" – is going to be considered. Finally, the deficiencies and difficulties that the current situation may entail for the protection of human rights during childhood is going to be addressed.

PhD Yang Chao, assistant Professor at the Beijing Normal University, College for Criminal Law Science wrote the article *The Development of Right Protection for Juveniles of China.* Author addresses the fact that, during these years, right protection for juveniles presents more and more important in the law system of China. This paper provides the outline developments of protection for juvenile by law in China, by introduced the specific article and mechanism in the criminal law of China and criminal procedure law of China, improved the law of protection for juveniles, consisted the professional, scientific and specific protection system for juveniles by law.

PhD Zoran Pavlović, Full Professore at University, presented the paper *Protecting the Rights of the Unborn Child.* He argued that unborn or future children require wider legal protection compared to the one they have today. Basic human rights, starting with the right to life, the right to dignity, the right to health protection and other rights, such as protection from all forms of violence, are tied to the concept of legal subjectivity, which, by carefully reading international and regional documents, today has a different

dimension than before . Unborn children are recognized as a category that should be given a chance for equal treatment and protection from harmful influences, based on the law. This is increasingly indicated by medical science that the rights of the fetus should be protected, in accordance with the scientific achievements of perinatology. This certainly does not exclude but rather supports the right and freedom of women in deciding whether to have children. The civilizational heritage of the new age does not exclude achievements won long ago in national legislation, namely the right to abortion. It is about the fact that the law must also protect other rights and relevant legal interests of the unborn child, not only the inheritance rights established by Roman law.

PhD Marina M. Simović, associate professor at the Faculty of Law, University Apeiron Banja Luka and PhD Vladimir M. Simović, full professor at the Faculty of Security and Protection at the Independent University in Banja Luka contributed Yearbook with an article *Protection of the Right to Birth in the Light of the Right to Life in Bosnia and Herzegovina*. Authors underlined in the induction that the right to life guarantees not only the right to a dignified life, i.e. aging and death, but even more the right to birth of man in general. This right, in addition to medical and health regulations in Bosnia and Herzegovina, is regulated and specially guaranteed by criminal legislation. In addition to a precisely regulated procedure for preventing or allowing abortion (in order to protect the human fetus), a newborn child is also protected. After the discussion about theoretical and legislative aspects, authors conclude that the right to birth was given the basis for enhanced criminal protection of the newborn child through the incrimination of murder of a child at birth (infanticide).

Adnan Baćićanin, deputy public prosecutor and Lejla Hubić Nurković, assistant of the public prosecutor at The Higher public prosecutor's office in Novi Pazar wrote a paper *Children as Subjects of the Criminal Justice System*. The article primarily deals with the term "child", with a special emphasis on the position of the child in the criminal justice system of the Republic of Serbia, starting from legal frameworks that guarantee the immediate application of the child's rights and the special protection of the child as a victim in criminal proceedings. Also, the authors deal with the position of children with delinquent behavior, with a statistical presentation of the representation of such acts in the previous period in the jurisdiction of the Higher Public Prosecutor's Office in Novi Pazar, with a brief overview of the criminal (ir)responsibility of children and its justification.

PhD Shin Matsuzawa, Professor at the Waseda University, Tokyo, presented the paper *A Study of Omission Crime Involving Children as Victims in Japan.* This article discusses

the issue of omission crimes in Japan, focusing on cases in which children are the victims. Omission crimes are often committed by the dominant person in the power relationship, such as guardians, supervisors and parents. As a result of power imbalance, children are often the victims. When considering the protection of children under criminal law, consideration of omission crimes cannot be avoided. A number of theoretical problems exist with omission crimes. The purpose of this paper is to examine these theoretical issues and to contribute to comparative law on the issue of omission crimes involving children as victims.

PhD Laura Maria Stănilă, associate professor at the West University of Timișoara, Faculty of Law and Director of the Center for Research in Criminal Sciences of the Faculty of Law, presented the paper *Children's Protection in Cyberspace. New Types of Threats against Sexual freedom and Sexual Integrity*. She argued that Children are delicate human beings and their physical, intellectual, emotional and moral development should be carefully monitored by their families and by the State institutions. They are easy victims for which cyberspace looks like the Pinocchio's Land of Toys where temptations and the illusion of freedom and escape from the family rules blind their senses and their developing judgment. A whole set of dangers is lurking at every step in the virtual realm, sexual predators being the common threats. In the present article, the author seeks to reveal the new types of cyberthreats against sexual freedom and sexual integrity of the minors and to examine if the Romanian Criminal Law is successfully facing the new types of sexual dangerous conduct in the online environment.

Following contribution, article titled *A Child as a Participant in a Clinical Trial of Medicines* is composed by PhD Ranka Vujović. In the introduction, author explains that the child's right to protection from medical experiments, due to the lack of consensus at the international level, has not yet found its place in the catalog of children's rights, which is why scientific research related to the participation of children in these experiments is still current and provocative. The aim of this paper is to review the level and mechanisms of protection provided in domestic legislation to children who participate in the clinical trial of a drug for human use, considering a number of essential rights guaranteed by the Convention on the Rights of the Child, the exercising and protection of which are directly linked to these examinations, such as the right to life, survival and development, rights related to health, the right to protection from exploitation, from inhuman and degrading treatment, the right to dignity and bodily integrity, and, in particular, the right to participation and protection of the best interests of the child. The research showed that the national medical law in the part related to children participating in clinical trials is largely harmonized with the international regulations valid in the European legal area, but

that the protection mechanisms provided by both international and domestic regulations, especially with regard to the right on participation in decision-making and protection of the best interests of the child, are neither sufficient nor comprehensive, and that there is room to eliminate certain inaccuracies and shortcomings and improve the protection of minor participants.

Academician PhD Miodrag N. Simović vice-president of the Constitutional Court of Bosnia and Herzegovina, full professor at the Faculty of Law of University of Bihać and full member of the Academy of Sciences and Arts of Bosnia and Herzegovina, professor emeritus and MA Jelena Kuprešanin, freelance social welfare and criminalistics expert wrote the paper *Challenges of Deinstitutionalization in Bosnia and Herzegovina – Towards Improving the Lives of Children without Adequate Parental Care.* In it, authors have pointed out that children without adequate parental care need special attention and support on the path to growing up and independence. Bosnia and Herzegovina is facing a slow pace of change due to a lack of human and material resources in the field of social protection. Certain activities have been started related to the processes of transition from institutional care to community support services, but this path will require continuous commitment of national and local authorities, as well as the support of the international community. Authors have concluded that, despite the many difficulties the country faces in this field, a valuable resource for future action is the existence of civic solidarity and social sensitivity.

PhD Jelena Kostić, Senior Research Associate, Institute of Comparative Law, Belgrade, Serbia, presented the paper *The Role of the School in the Prevention of Peer Violence*. She argued that the school has a very important role in the education of students. At the same time, all children should have equal chances to realize their right to education without discrimination. In addition, they have the right to be protected not only from discrimination, but also from any form of violence, abuse and neglect. Today, a special problem is peer violence, which has different forms and can manifest itself in different environments, both in the physical and in the digital environment. Therefore, it seems that today's education system requires a different approach. In the paper, she firstly poinedt out the rights of the child, which are guaranteed by both international documents and national regulations, as well as the role of the school in their realization. Bearing in mind that we deal with the subject of peer violence in our work, our research is limited to pointing out the importance and role of the school in the prevention of peer violence, bearing in mind that one of the rights of the child is protection from any form of violence. In the first part of the paper, we will first point out the international documents that guarantee these rights, and then the content of national regulations. In the second part of

the paper, we will point to the results of the author's research from the previous period, and then to the research we conducted in June 2021, on a sample of about 500 students from the territory of different cities in the Republic of Serbia, which concerns digital peer violence. In this way, we would like to point out the need for a more active involvement of the school in the process of preventing peer violence even in those situations when it does not take place physically in the school, but its participants are students of the school.

Marijana Šego, advisor to the Croatia Ombudsman for Children in regional office Osijek and Danijela Žagar, advisor to the Croatia Ombudsman for Children in regional office Rijeka presented the paper *Climate change and children rights to live in healthy environment.* They argued that our health and quality of life depend on clean air, safe water, sustainably produced food, a stable climate, healthy biodiversity and ecosystems. About 20 years ago the worlds political elite actually began to take in consider the dangers of climate change more seriously, although many scientists had previously warned of the possible consequence of this way of life. Right to a healthy environment is a human right and climate change has a negative impact on the enjoyment of human rights and big impact on children right to live and grow in healthy environment. There is relationship between climate change and the full effective enjoyment of the rights of the child. In that regard, the paper provides an analysis of the relevant provisions concerning at healthy environment the level of the UN, the Council of Europe, the European Union and the Republic of Croatia but also provides analyze of work of ombudsman for children. The Office of the Ombudsman for Children of the Republic of Croatia deals with this important topic in the framework of complaints of violations of children's rights to grow up in a healthy and safe environment.

MA Aleksandar Stevanović, Research Associate at the Institute of Criminological and Sociological Research in Belgrade, Serbia, presented tha paper *Employment: the Socio-Economic Link Between the Youth and the Old Age.* The aim of the paper is to discuss some issues related to the employment as a link between youth and old age. It was pointed out that labor per se is a crucial socio-economic activity for the individual and the whole society. In this sense, it was underlined that not only the current existence is ensured through work, but also that it represents a form of investment in the old days through the social insurance system. It was stated that workers' rights, as a set of important socio-economic rights, actually belong to the category of basic human rights since the rights of the so-called first generation human rights cannot be enjoyed without the existence and adequate protection of workers' rights. The historical background of the development of political-economic deliberation on work in general, as well as reflections of dominant production models in practice, were presented in the paper. After that, the importance of

employment was discussed with a special focus on several basic issues. In this regard we discussed the potential impact of (un)employment on deviant behavior, working in the informal economy with inhumane working conditions, as well as the correlation between technology and education with employment.

PhD Silvia Signorato, Associate Professor in Criminal Procedure, University of Padua (Italy), presented the paper *Strengthening Investigative Cooperation Between States as a Tool to More Effectively Combat Cybercrime Against Children and the Elderly.* She claimed that The number of cybercrimes committed against Children and the elderly is constantly increasing. However, the fight against these crimes is characterized by significant problems. This is not only because many victims do not report these crimes, but also because there are various aporias affecting the investigations. Investigations for the fight against cybercrime often require the collection of evidence in another State. However, this requires investigators experienced in digital evidence and requires cooperation instruments between States which, often enough, imply periods of wait time incompatible with investigative needs. Furthermore, if the principle of double criminality is not satisfied, States do not cooperate. All this highlights the need to rethink the very concept of investigation. It is necessary to be aware that, just as the head is part of the human body, so national investigations are part of a largerinvestigative body. Hence, the need to reach criminal law and criminal procedures that are the same in all States is urgent. Even if this objective may appear utopian, it is not impossible to achieve and it is necessary to work towards its realization in order to reach a more effective fight against crimes.

In **the third part**, the debate has centred on the position of the elderly. Collected papers cover most important problems of older people in their families, nursing homes and with their informal caregivers, in prison and before to law, including the right to dignified death.

PhD Elena Tilovska-Kechedji, associate professor at the Faculty of Law, University "St. Kliment Ohridski" - Bitola, contributed article titled *International Human Rights Law and Older Persons.* The aim of this paper is to present gaps in the international human rights law in regards to older people and propose solutions in order older people rights to be presented and respected as any other human being rights. Author explains that in today's world where young people strive more towards their careers than concentrating on their families, the generation of older persons is expanding. But with this expansion come many challenges especially in regards to protecting human rights of older people.

PhD Milana Ljubičić, Professor, Faculty of Philosophy, University of Belgrade, Serbia and PhD Đorđe Ignjatović, Professor, Faculty of Law, University of Belgrade, Serbia presented the paper *(On) Life in an Institutional Care: the Nursing Home for Elderly – Residents' Perspective.* Paper analyzes the narratives of the nursing home residents with respect to their life in the institution. In order to investigate how the elderly, see their life in nursing home, we have dealt with topics that include their lived-through past, experienced present and anticipated future. In our in-depth interviews with eight residents of a private nursing home in the suburbs of the capital-they talk about the reasons for moving to nursing home, practices of adapting to a new milieu, and expectations both before and after arriving to the nursing facility. An additional topic- how to design life in the institution came along. The findings indicate that moving into such an institution is rarely an option that our interlocutors have chosen independently. Despite the fact that everyday life is routinized, the nursing home life is praised. In fact, the introspection and self-negotiation about the positive aspects of life at nursing home are key elements of the strategy for designing a uniform present and exactly the same future.

Following article deals with *The Role of Informal Caregivers in the Fulfilment of The Right to a Dignified Old Age in Serbia,* and is composed by PhD Ana Batrićević, senior research fellow at the Institute of Criminological and Sociological Research. After brief observations about the definition of the old age in the introduction, as well as the right to a dignified old age and demographic trends in Serbia, the author of this paper defined informal caregivers and their main tasks when it comes to taking care of elderly persons. The author also explained the importance of the role, which informal caregivers have in the fulfilment of the right to a dignified old age. Furthermore, the author have presented key problems and challenges, which informal caregivers are facing in Serbia, and made suggestions for the improvement of their position as well as the position of elderly persons that they are taking care of.

PhD Slađana Jovanović, Full professor at Faculty of Law, Union University in Belgrade, presented the paper *Elder Abuse in Domestic Settings.* In the introduction, author cites that elder abuse is a significant public health problem, predicted to increase as many countries are experiencing rapidly ageing populations. Although Serbia is undoubtedly one of those countries, the problem of elder abuse has not yet been given as much attention (as it does when it comes to women and children as victims of violence). The National Strategy on Ageing, in which one of the goals is action against elder abuse, particularly domestic violence, expired in 2015, and new one has not yet been adopted. There are no surveys at the national level on the issue of elder abuse (in domestic settings), even though the Strategy has raised that topic. Therefore, the author analyzes the available

data on the elder abuse prevalence, and response to it, adding the results of her own research (conducted through questionnaires filled out by older respondents, and interviews with professionals from the social welfare system, prosecutor's office and courts from Belgrade). Paper pays special attention to economic violence against the elderly and criminal offenses - family violence and violation of family duty. The factors of non-reporting of abuse and inadequate reaction are also addressed, as well as the possibility of a better social and institutional response to the problem.

Article *Ageing of the Prison Population – Characteristics, Issues And Perspectives* is brought forth by PhD Milena Milićević, senior research fellow and PhD Ljeposava Ilijić, research fellow at the Institute of Criminological and Sociological Research. Authors have offered the literature review, which presented distinctive characteristics of this population and key research issues and perspectives, relying on the findings of the prison studies. As a result of a comprehensive search, 1256 publications were identified. The selection process resulted in 46 studies published in the last two decades. A wide range of issues was confirmed, primarily those related to the specific needs of health care and treatment, special preparations for release, challenging contact with family and the outside world, and the infrastructure that does not meet the movement restrictions or reduced functional mobility. Examples of good practice include specific interventions and resources, with future perspectives on the needs of convicts and possibilities of adapting the prison conditions and provided content.

PhD Veljko Turanjanin, associate professor, Faculty of Law, University of Kragujevac, presented the paper *Right to Dignified Deathand the European Convention on Human Rights and Fundamental Freedoms.* He argued that the right to life is one of the fundamental human rights, guaranteed primarily by the European Convention on the Protection of Human Rights and Fundamental Freedoms. The legalization of compassionate killing is a spectrum of issues that have been dealt with in very different ways from state to state. Legislators very rarely dare to complete decriminalization, so this solution is represented in the Benelux countries, while in the highest percentage of countries this form of deprivation of life is viewed as a privileged form of murder. In recent years, the question has been raised more and more frequently, both before the national and the European Court of Human Rights, whether the right to life can be derived from the opposite right, that is, the right to die. As a result, proceedings were conducted before the European Court on the issues of alleged violations of the state against the applicants. The author based his considerations in this paper on the positions of the European Court, expressed through several decisions, primarily through judgments in

which he decided on the merits, but also in those cases in which he rejected petitions as inadmissible.

The final chapter is focused on multiple diverse and dynamic fields of human rights. Authors of presented articles offered valuable insights into rights of disabled people, victims of sexual offenses, patients and migrants rights, right to healthy environment and energy, as well human rights in contexts of public traffic and finances.

MA Lazar Stefanović, researcher at the Vienna Forum for Democracy and Human Rights contributed this publication with the paper *Trans-institutionalisation of Disabled people: A Critical Appraisal of Some Deinstitutionalisation Strategies in South Africa and Europe.* Author claims that countries around the world have applied various strategies to deinstitutionalise some of the assessed 1.7 million children with disabilities and an unknown number of adults. International human rights law rules and standards obligate and guide state parties to ensure the realization of life in a family, within the community for children and independent living for adults with disabilities, which is commonly operationalized through a process of deinstitutionalisation (DI). "Life Esidimeni" is a case of attempted transition of children and adults with disabilities from a large institution to smaller residential care and homes, which ended with the tragic death of 144 people. The presented article critically addresses the issue of small residential care as part of DI reforms. Also, the case illuminates some systemic issues in the approach to the protection of rights of persons with disabilities and the regulation of care in South Africa.

Next paper, *Protection of Victims of Sexual Offenses* is written by PhD István László Gál, full professor at PTE ÁJK Department of Criminal Law. In it, sexual freedom and sexual morality are counted among the legal objects that the legislator has included in every era some level of protection, from the advent of criminal law to the present day. The common legal object of the crimes classified in the XIX. chapter is sexual freedom, which is part of human freedoms, and the order of sexual relations adopted in society. Grouping these crime, author has formed the following criminological categories: violent sexual crimes: sexual exploitation and sexual violence; crimes related to paedophilia: sexual abuse, exploitation of child prostitution, child pornography; crimes based on prostitution: pandering, procuring for prostitution or sexual act, living on earnings of prostitution; crimes that violate the order of sexual relations adopted in society.

PhD Aleksandar R. Ivanović, associate professor of Faculty of law in Lukavica, PEM University Banja Luka and Msc Ivan Petrović, deputy of Local ombudsman of city of Kraljevo have presented the paper *Patient rights and Standards of Human Rights*

Protection in the HealthCare System in the Republic of Serbia. Starting from the fact that citizens have a need for health care from childhood to old age, the authors deal with the issue of protecting patients' rights in the Republic of Serbia, presenting and analyzing in detail the provisions of the Law on Patients' Rights. The authors pay special attention to their compliance with the European Charter on Patients' Rights and the recommendations of the Council of Europe in this area. The aim of the paper is to, through the consideration of de lege lata provisions in this area, point out the existing ambiguities, as well as the shortcomings of the law, and offer de lege ferenda solutions for the improvement of legal provisions concerning the protection of patients' rights and standards of human rights protection in the health care system of the Republic Serbia.

Authors PhD Mario Caterini, associate professor at University of Calabria and PhD Diana Zingales, research fellow at University of Calabria presented the paper titled *The Fundamental Rights of the Migrant in Crimmigration Law: Interpretation Favorable to the Migrant in Italian and American Perspectives*. They have noted that a legal framework often lacks clarity, which is the result of choices in criminal law policy whose trend is geared to the removal of the 'undesired' alien, the courts should resolve doubts on the law in favor of the migrant, choosing the more favorable construction, thus implementing the principle of legality and the favor rei. Especially when the judge orders removal, and this affects the fundamental rights of the migrant, Crimmigration laws inspired by constitutional principles should lead the judge toward constructions respectful of the principle of legality understood also as a guarantee of the migrant against arbitrary powers. This paper examines the reasons that support the interpretation favorable to the migrant in the light of the American experience, which shows how constitutional principles, with respect to Criminal Law, should lead to the interpretation of ambiguous laws that provide for the non-criminal sanction of removal.

The paper *Protection of the Environment as a Human Right: The Impact of ECHR Decisions on the Italian Environmental Criminal Law* by MA Giulia Rizzo Minelli from the Department of Legal Studies at University of Bologna examined the role that the European Court of Human Rights has exercised and still exercises on domestic criminal system, highlighting how the protection of the environment through criminal law has become one of the main objectives of the Community legislation. The author emphasized that the development of a close interrelation between humans and the environment has allowed the beginning of legal reflection on the need to protect it within the broader framework of the protection of human rights – precisely because of the close instrumental relationship between the first and the second one – it is also undoubted that a primary role in the fight against environmental degradation – as a form of protection of the human

being – is covered by the European Court of Human Rights which, although starting with a restrictive approach, has progressively given – in an anthropocentric key – an increasing consideration to the issue of the protection of natural resources and has stating the existence of a human right to a healthy environment.

PhD Vojin Grković, retired professor at the University of Novi Sad, presented the paper *On Human Right to Energy* in which an overview of all the main categories from the field of energy, which are essential for the analysis and consideration of specific issues of human rights to energy, is given. The types of energy were especially considered according to their place in the process of transformation from energy raw material to the final effect of energy consumption. In accordance with the Universal Declaration of Human Rights from 1948, the concept of the human right to energy is presented; as a civilized right of the human race as a whole, but also as a right of each individual. A reasoned proposal was made to specify the human right to energy as the right to final energy. Certain limitations for the establishment and realization of the human right to energy, which arise from current international relations, are considered.

PhD Dragan Obradović, Judge, Higher Court in Valjevo, presented the paper *Violation of Individual Rights of Traffic Participants in Serbia by the Competent State Authorities*. He claimed that in the last few years, every day on the streets and roads, in the world and in Serbia, the appearance of electric scooters driven by people of both sexes, of different ages, is becoming more and more common. There have already been traffic accidents with various consequences involving drivers operating electric scooters. The increase in the number of electric scooters in traffic in Serbia is not accompanied by adequate legal or by-law regulations, because they are still not legally regulated. The paper points out the danger to safety, which for other traffic participants is represented by persons who use electric scooters in traffic in their daily life in the event of a traffic accident, considering the currently valid position of the Ministry of Interior of the Republic of Serbia. It was also shown through examples from practice how the human rights of those other road users are violated. This is also important for the judicial authorities who have begun to encounter electric tricycles, i.e. their drivers, in practice in connection with traffic accidents.

PhD Ping He, professor at East China University of Political Science and Law wrote an article titled *The Background, Significance and Legal Application of Self-money laundering in China.* In it, the author introduces the international and domestic background of the criminalization of self-money laundering, demonstrates the theoretical basis and practical significance of the criminalization of self-money laundering, presents

a comprehensive description of, and comments on the difference between the article 191 and its similar articles, namely article 312 and article 349 of the Criminal Law of China, to put forward solutions to some controversial issues in judicial practice, which would be beneficial to theoretical researchers and judicial professionals.

Andrej Kubiček
Aleksandar Stevanović

Adrian Fabian

PROLEGOMENON

The elaboration and declaration of human rights (Universal Declaration of Human Rights, 1948) is doubtless a magnificent legislative achievement of the international community.

In the case of the universal declaration of human rights, the more difficult task is their universal enforcement, this could be realized only at the cost of many challenges, difficulties and struggles. It would be naive to consider human rights and their enforcement as a natural condition and to think that, like air, it is freely accessible anywhere and anytime. Unfortunately, world events show the opposite.

Especially nowadays, when many people, including many children, become vulnerable, defenceless and disenfranchised due to social and economic influences, or they live in danger and hardly have the opportunity to assert their rights or are directly deprived of their fundamental rights.

Legal science and scientific research play an outstanding role in the effective enforcement and development of human rights. Nowadays, it is known that researching human rights affects almost all areas of law.

The volume the reader holds in the hands is remarkable for several reasons. First of all, it pays attention to several issues related to the enforcement of human rights: children's rights, patient rights, the jurisprudence of human rights, social welfare, access to justice, the right to freedom connected with the obligation to defend, and protection for minors of law.

On the other hand, in the papers, we can find the aspects of constitutional law, international law, and criminal law, as well as theoretical and practical points of view, and in addition to the legal ones, sociological and political aspects also arise in the articles. This volume is therefore interdisciplinary in nature.

Both older and new trends appear in the research and interpretation of human rights appear in the volume: the question of the right to happiness, the institutionalization of conscientious objection, the right to energy, the operation of legal aid, and the question arises whether, like the child, it would be time to include the elderly in enhanced human rights protection. The enforcement of human rights in extraordinary circumstances, such as prisons, also requires special attention. Significant correlations can be pointed out also between a healthy environment and the enforcement of human rights.

This book successfully presents many recent results of the scientific research of human rights, valuable analyses can inspire new research, therefore the yearbook contributes to the development of human rights and, hopefully, indirectly to their more effective enforcement, worldwide.

Aleksandar Stevanović*

"ETHICAL DIMENSION OF HUMAN INSTITUTIONS"

The text analyzes the ethical dimension of the Human Institutions, which is seen as the necessary condition for their formal establishing. The introduction gives a broad definition of the Institution as the social phenomenon. In the second part, conditions of life and metaphysical dimension as the reasons for the creating of the Institutions are explained. The question about relation of the human Institutions and inherent capacities for Human development is explained in the third part of the paper. The fourth part deals with the interrelation between constant change of social conditions and weakening of the Institutions. In the final part, the connection between the dominant value system in modern civilization and the instrumentalization of the Institutions is explained and solution defining interdependence of Institutions with their ethical and metaphysical dimension is given.

Keywords: *Institutions, ethics, eternal values, selfism, values, change.*

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1. Introduction

In this paper concept of Human Institutions will be understood in the broader sense. That means that every expression of social habit having temporal stability and functional purpose in human life could be seen as an Institution of a certain kind. That means that, not only formally established Institutions, as Governmental Institutions, NGO-s, Corporations etc., but for e.g. language, games, cultural values or even tools for production could be seen as Institutions.[1] Such definition will allow us to create immediate connections between formal and informal Institutions capable to explain their interdependence. In our effort to understand relation between Institutions, Human Person and inherent Personal Rights we have to create medium capable to connect seemingly incompatible elements.

Such medium will be created on the assumption that the Human being is influenced by the idea of certain purpose or have to be seen as a purposive being. That means that his acts are directly influenced by his understanding of the certain reasons. As the biological being the Human Person is naturally subdued to certain needs that provide its capability to live. Not breathing, not eating and not drinking in normal situation will lead to certain extinction of the Person. That means that the Human is naturally directed to create certain Institutions (of eating, drinking, and even breathing[2]) which help him to survive. Different cultures have strong differences in their manner of forming these Institutions, with special habit, customs and reasons.[3] On a wider scale, these Institutions are intercourse creating multiplicity of social life.

Besides his biological needs (that Human being shares with all other beings), the creating of the Institutions lies on his spiritual capacities, especially capacity of the Free Will. Under spiritual capacities and products we will understand non-material facts created by Human, as the Truth, Beauty, Goodness, Law, Justice etc. Some of the most important of these facts are based on certain values, especially moral ones, as a basic reason for creating of certain Institutions.

[1] Personification of working instruments as the symbols of civilisation was characteristic for early stage of human civilisation. (see "The debate between Hoe and Plough" The Electronic Text Corpus of Sumerian Literature https://etcsl.orinst.ox.ac.uk/cgi-bin/etcsl.cgi?text=t.5.3.1#)

[2] "Pranayama and other breathing exercises have gained more importance these days due to its definite role in improving blood oxygenation and utilization of the greater capacity of lungs, thereby helping in the prevention of many diseases." Dhaniwala et al. 2020: 3326

[3] Expansion of fast food restaurants was directly related to a growing fast-paced lifestyle. ("83% of American families eat at fast food restaurants at least once a week." https://thebarbecuelab.com/fast-food/)

Human, as the social being is impossible without his capability to coexistence with other Human beings and in basic accordance with them. These capabilities for social life continually develop through the process of growing from the beginning of life, first on biological, and late on spiritual needs. To understand existential basis for establishing of Human Institutions we have to explain basis of development of Human life itself, considering not only its individual, but social plan as well. In some cases, existence of certain Institutions directly collides with interests and wellbeing of individual person, and sometimes, paradoxically, sociality as a whole.[4] We will now try to find out which factors have important role in the establishing of Human Institutions.

2. Conditions of life and metaphysical dimension as the reasons for the creating of the Institutions

Conditions of life create an important element in establishing of certain Institutions. The climate, geographical features, quality of soil are some substantial agents determining Human life, both personally and socially. Sometime different types of cultures were directly influenced by natural circumstances.[5] Differences between cultures of cold and tropical climates are substantial. Lack of resources produces more active and utility oriented way of life. Massing of large number of people in one place brings necessary conditions for the establishing of strong and hierarchically defined organizations.

We could say that natural conditions were one of the basic reasons for the differentiation of cultures in human history which brought to multiplicity of different socialites and consequently multiplicity of different Institutions. Phenomenon of Human life stretched through different natural conditions, time of personal life and history of the society produce elements of the coordinate system we need to understand reasons for the creating of Institutions. Personal interests are sometimes in collision with the interests of the society. Institution of the Justice for e.g. leads directly to the capability of the society to create preconditions for the punishment of the individual willing to break social rules. Continuity of life depends on the Institution of the Marriage as the basic prerequisite for the establishing of the connection of different sexes. Social attitude toward elder (or young people) is generated through certain Institutions, creating stance of the society as

[4] "Eugenicists viewed continued immigration as an unending source of debasement of America's biological quality. Sterilizing thousands of the nation's socially inadequate was seen as a mere exercise, that is, fighting "against a rising tide," unless eugenicists could also erect an international barrier to stop continuing waves of the unfit." Black 2012: 235

[5] "The principle of intra-communal inter-dependence is reflected in all Eskimo folkways of material property. Land is not property in any form. Nor is there local group sovereignty applied to territory." Hoebel 194: 665

a whole. It is too complicated even to number all preconditions for the creating of the Institutions but it is important to emphasize complexity of Life as their primal source. Institutions are answers on the problems that Life itself puts before one society. Lack of food, undefined property, or relation problem between some members of the society could be reason for creating of the Institutions of certain kind. But most important (and permanent) of the Institutions are not directly dependent on sole existential problems. They lean toward eternity.[6]

In our search for the genesis of the human Institutions of extreme importance is understanding of human as the metaphysical being. Capacity to transcend present moment, interests and aims that lean toward eternal values, makes human different of all other beings. Although some animal species have capacities of planning, good memory and sophisticated interrelations, reasons for their acts lie basically in the existential frames. It is interesting that animals in cohabitation with Men develop certain capacities not immanent for members of their species living in the wild.[7]

To understand prerequisites for creating of the Institutions we have to find certain reasons defining problem that an Institution have to solve. Most reasons for creating of the Institutions in every Human society transcend sole purpose of a pure survivor. The most important in their existence lies in the fact that they establish certain value as a proof of an eternal dimension. For example Institution of the Court directly embodied idea of Justice, as an eternal category. Complete and perfect idea of Justice directly imposes certain values as basis for establishing of the Court as the human Institution. Some could object that some contemporary Theories of Justice oppose such stance, but analyzing Institution of the Law in different cultures we inevitably come to the conclusion that from ancient time capacity to formally Judge over human deeds lies in the authorization of the God and his representatives.[8] We could find the same fact analyzing institutions of

[6] "Where there is death, there is no real truth and justice and love. Only the one who conquers death and frees the human race from death has true love. What kind of love is it to me: not to free the beloved from death? That is why the Lord Jesus is the Only Lover of Man. And the all-love is all-love in that it contains in itself all truth, all justice, and all that is the most sublime, the most perfect, the most immortal, the most logos and the most divine." Popovic 1987: 75 (translation A. S.)

[7] "Natural instincts are lost under domestication: a remarkable instance of this is seen in those breeds of fowls which very rarely or never become 'broody,' that is, never wish to sit on their eggs. Familiarity alone prevents our seeing how universally and largely the minds of our domestic animals have been modified by domestication. It is scarcely possible to doubt that the love of man has become instinctive in the dog." Darwin 1861: 190

[8] "From our survey of the religious position occupied by the king in rude societies we may infer that the claim to divine and supernatural powers put forward by the monarchs of great historical empires like those of Egypt, Mexico, and Peru, was not the simple outcome of inflated vanity or the empty expression of a groveling

marriage, war, family conformation, hospitality etc.[9], which means that dimension of the sacred represents basic reason for establishing some of the most important Human institutions. Positioning of human as purposive and creative being was directly connected with the dimension of his metaphysical aims.

We can conclude that origin of the Human Institutions have to be examined on various levels. Firstly, their utilitarian, existential dimension in obtaining the survival of certain society. This dimension includes different ways of producing goods, use of tools and other elements necessary for life. Second is ethical dimension that establishes possibility of certain way of life, inter-relation between the members of the society and existing of different social roles. Third dimension is the metaphysical dimension providing reasons and values as an eternal validation for the other two.

We will now present chart of different dimension of human Institutions giving emphasis on the original reason of their establishing. It would be, however, a mistake, to take this formal division as a decisive one, because many Institutions (for e.g. education) contain all of these dimensions, but will help us determine different influences in their establishing. What is most important, this differentiation allows us to take separate investigation on different levels of the structure of the Institutions without risking to make false interpretation making one of these dimensions subordinate to the others. Only on the basis of their explicit coordination one Human society is able to provide its undisturbed and prosperous existence.

Utilitarian dimension	**Ethical dimension**	**Metaphysical dimension**
Production techniques	Social life	Religion
Survival	Interpersonal relations	Eternal values

Chart 1 *Different dimensions of establishing of the Institutions*

Now we will try to make detailed analysis of exact functioning of different Institutions in their influence on the life of the humanity.

adulation; it was merely a survival and extension of the old savage apotheosis of living kings." Frazer (2003): 114

[9] Ibid.

3. Human Institutions as multidimensional functions of Human development

Relying on Aristotle's definition, Human can be described as the "being of the community".[10] That means that only among other people someone can develop his immanently human qualities. Meaning of human life cannot be simply described only as survival. Biological existence is only one of the conditions to call someone's life meaningful. Goodness, developing of talents, good social relations, obtaining of certain values, participation in profound activities, happiness, and dignity are some of the qualities giving human life sense and meaning.

We are now able to understand that all these qualities can be obtained only through participation in the certain Institutions. Capacities for Beauty, Truth and Goodness are socially developed, and somebody has to participate in certain Institutions to be able to inherit them. Idea of Justice could not be formed as the value in human personality, without its social dimension. All basic capacities for development of human talents, customs, culture etc., could not exist without previous existence of social Institutions, which create functional prerequisites for their implementation.

We are now before an interesting presumption: Human Institutions must not be seen as separate and distinguished entities. They have to be taken as a whole, as prerequisites of forming specific totality called human society. Through Institutions all elements of certain culture are applied creating specific habitus for individual human life. We can see constant interaction between needs, ambitions and acts of the individual and Institutions of the society creating specific capacities for articulation of his activities.

There is certain ambiguity in effort to explain Institutions as a solid and inactive. Human Institutions, like Human beings, are in constant process, although providing certain stability and predictability. Problem with their explanation lies in the fact that it is extremely difficult to take objective stance out of reach of their immediate influence. Every Human person, from the very beginning of his life exists in a direct connection with certain Institutions which create medium for his further development. Family pedagogy, education, system of social values directly impact certain capacities of the person, creating inevitable impact on his future activities. But it is not possible to make

[10] "And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state." Aristotle (1991): 4

direct and irreversible connection between Institutions and individual in a way human person could be totally predetermined by the society.

Sometimes social instability imposed by individuals directly brings existence of certain Institutions to their end.[11] Coercion imposed by Institutions sometimes paradoxically brings to their direct destruction[12] and sometimes Institutions dissolve in some kind of social oblivion, like many customs and social rules. With change of social habitus, capacities of human development change too. Many Institutions providing stability and continual development of the Person in certain societies were irrevocably destroyed in collision with outer, more powerful influence.[13] Static and unchangeable Institutions based on Religious beliefs, characteristic for most of human history, undergo substantial change from the beginning of the XVI century.[14] Idea of modernity presupposes constant change and redefinition of present Institutions in the name of progress, which means putting Institutions in process that imply constant improvement of present state. This fact directly influences our examination of present Institutions, putting before us one specific claim. The Idea of constant Personal development and freedom of choice, characteristic for modern civilization, requests adaptability and flexibility of Institutions and their continuous transition to the new and (often) unpredictable state of affairs. That capacity to change and be changed presents basic characteristic of Institutions of our time.[15]

4. Social change as the cause of dysfunction of contemporary Institutions

From the beginning of the Industrial Revolution through the entire XIX and XX century, especially after the end of the Second World War, Humanity exists in the conditions of constant change. Clash of alternative political forms of governments with the induction of numerous wars characterize this period along with the technological progress,

[11] Thomas Carlyle description of the beginning of the French Revolution "What a Paris, when the darkness fell! A European metropolitan City hurled suddenly forth from its old combinations and arrangements; to crash tumultuously together, seeking new. Use and wont will now no longer direct any man; each man, with what of originality he has, must begin thinking; or following those that think. Seven hundred thousand individuals, on the sudden, find all their old paths, old ways of acting and deciding, vanish from under their feet. And so there go they, with clangour and terror, they know not as yet whether running, swimming or flying, headlong into the New Era." Carlyle :126

[12] Unsuccessful Coup in USSR in august 1991

[13] Like in the case of Polynesian taboos

[14] Number of the protestant denominations at the end of '80 exceed 23.000 (Schaeffer: 15)

[15] "As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them." Mill 1963: 181

continual expansion of the free market and growing capacities for monetary transactions. This rapid and unpredictable change brought traditional Human Institutions, especially Public moral in the state of constant crisis. Idea of Progress based on the scientific and technological development (formulated sometimes in almost religious manner)[16] creates constant gap between unrestrained and deliberate use of force and moral capabilities of its restraint. Paradoxically, parallel with near extinction of the Public moral under the constant pressure of the individualism, (especially in the Protestant cultures), appears phenomenon of politically justifiable Moral Wars[17] or Humanitarian interventions as the vindicating reasons for military action. Institution of War, with the appearance of the weapon of the mass destruction became almost unrecognizable, bringing Idea of Total War that covers all dimensions of Human existence.

With the development of the communications, connection and influence of different cultures on one another become constant and irrevocable. Idea of "Globalization" and "The end of History"[18], dominant at the end of XX and the beginning of the XXI century, brought the substantial crisis to the most of the Institutions that existed thorough Human history. Religion, education, intersex relations, Art, became uncertain under the pressure of constant change of the conditions of Human life. New Institutions arise. Virtual reality with social platforms, computer games, on-line market and innumerable ways of unbounded communication and spread of information collide with new and more powerful instruments for the unconditional control of individual liberties.

Well recognizable and historically justified Institutions came into crisis. Traditional family, formal education, employment politics, system of Justice, social values and beliefs suffer rapid changes under the demands of new circumstances.[19] Social solidarity declines under the mass spread of individualism which puts Public moral in the constant crisis.[20] Formal Authority of the State meet security vacuum on many fields.[21]

[16] "Technology has introduced a new methodology in the creation of physical wealth. It is now able to substitute energy for man hours on the parity basis that 1,500,000 foot pounds equals one man's time for eight hours. National income under the Price System consists of the debt claims accruing annually from the certificates of debt already extant. Physical income within a continental area under technological control would be the net available energy in ergs, converted into use-forms and services over and above the operation and maintenance of the physical equipment and structures of the area." (Scott 1933: 27)

[17] Amstuc 2008: 49

[18] Fukuyama : 355

[19] Giddens: 67

[20] Williams: 230

[21] Pavlovic, Paunovic: 181

With present COVID 19 pandemic, ongoing war in Europe and following economic crisis totality of social life with all its Institutions will be put on the severe trial. It seems Humanity is standing before total uncertainty unable to rely to any of previously historically proved Institutions. Paradoxically – idea of progress and everlasting improvement of all segments of human life, based on freedom of choice and liberal market, technical innovations, scientific validation, careful planning and expansion of Human Rights and individual possibilities, brought to the downfall of traditional Institutions, fragmentation of the society, loss of confidence in State authorities and total existential uncertainty of the Person before systematic destruction of all elements of his community. Idea of Progress with the imperative of constant improvement brought change that violate functional stability of the Institutions in all their dimensions – existential, social and metaphysical leaving an individual without basic capacities to form a successful community. Is there any solution?

5. Protection of the individual and reaffirmation of the Institutions

In conclusion of this paper we would like to give an answer to the question above. I hope we were able to explain vicious circle that brought to the downfall of the historical Institutions. Constant change of the way of life under the idea of perpetual progress created gap between the capacities of the Institutions and ever-changing existential situation of the individual. Request for the change of the Institutions brought almost to their dissolution and dissolution of the community as a whole. Recently (in the historical framework) formed Institutions like UN and other formal and informal political, economic and security associations were unable to fill that gap. International order nearly collapsed bringing Humanity in the state of total uncertainty. Some of the seemingly plausible ideas, like the Human Rights or ecological agenda, became severely misused for the sake of the political interests.[22]

Explanation of such conditions is not so complicated if we take in the consideration different dimensions for the creating of the Institutions mentioned above. Main reason for present social dissolution, including the permanent Institutional crisis and individualization lies in the fact that utilitarian dimension overwhelmed social and metaphysical one. Almost all social interaction we have today performs under the imperative of perpetual increase of goods (military power, economical wealth, scientific knowledge, improvement of social status etc.). Applied on the individual level that imperative means that almost single social value we have today is expansion of capacities

[22] Stevanovic, Grozdic 2018: 92

for personal enjoying of life.[23] Under the imperative of selfism other social and metaphysical values degraded. And if such selfish standpoint in one society becomes ruling, entire community will inevitably dissolve into mass of mutually competitive individuals. In such state of affairs it is naive to expect that anyone will take care about someone else or sacrifice personal capacities for other's good. It is enough to analyze phenomenon of infanticide and indirect geronticide in developed societies to understand full scale of such occurrence.[24] If we try to transfer burden of social care from Personal obligation to the state Institution (like Elderly Homes and Orphanages) we will miss the point. Idea of community presupposes common care one's for another, common sense and common aims bringing the common good. Personal duties cannot be transferred to impersonal Institution, because Human Institutions embody the deepest meaning of human personality. Values of Goodness, Sincerity, Truth, Justice, Beauty, and Health are embodied by the Institutions of Family, Religion, Education, State, Art, and Medicine. These Institutions represent a social task that every man personally should fulfill. But all these values and Institutions become secondary if the highest value presents individual success and personal gain. Then "State of demons" described in Kant's Eternal Peace becomes only feasible solution for the contemporary Humanity.[25]

No matter how impossible it sounds, solution is simple: We have to affirm other two dimensions necessary for the proper functioning of the Institutions: ethical and metaphysical. These two dimensions include prerequisites for the establishing of common goals: generally accepted values and more altruistic, non-selfish relations one human to another. That means that social life cannot be based on plain survival. It must have higher and ultimate values capable to establish Institutions of Goodness, Generosity and Mercy – deliberate suppression of our own Freedom for the sake of the others. If we want society to care for someone, we must first of all care for it ourselves. Existing Institutions should be embodiment of our own virtues not vices. Without these substantial inherent personal

[23] Brooks, D. The morality of selfism, New York Times (2019. December 5th) https://www.nytimes.com/2019/01/03/opinion/self-care-individualism.html

[24] Brogden 2001: 43

[25] "The problem of the institution of a State, however hard it may appear, would not be insoluble even for a race of devils, assuming only that they have intelligence, and it may be put as follows: 'A multitude of rational beings all requiring laws in common for their own preservation, and yet of such a nature that each of them is inclined secretly to except himself from their sway, have to be put under order, and a constitution has to be established among them so that, although they may be antagonistic to one another in their private sentiments, they have yet to be so organized that, in their public relations, their conduct will have the same result as if they had no such bad sentiments.' Such a problem must be capable of solution." Kant 1995: 66

capacities, all formal Institutions are only an empty shell. We have to make choice – would we strive to survival or to eternity?

Insisting on the unbound use of Personal freedom as the mean of creative change of common matters and values led to the state near to Hobbesian "bellum omnium contra omnes".[26] Human selfishness becomes moral imperative of the present moment. Contemporary state of mind correspond to idea: that demolition of the house we live - will bring more space for all of us. That could be, but that space would be no more shelter for our lives but wild and hostile environment. To make communion feasible we have to build, not to destroy. Our Institutions are bricks made for common good, not stones we throw to harm each other.[27]

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[26] Hobbes 1961: 108

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Vlado Kambovski*

"NEW CONSTITUTIONALISM" AND ITS REFLECTIONS ON THE REFORM OF THE CONSTITUTIONAL COURT

The "new constitutionalism", which is a reflection of the understanding of natural human rights as the basis of the constitution, calls into question the presumed legitimacy of positive law, which is the product of the arbitrary legislative power of the assembly and even greater arbitrariness and executive power in its application. The authoritarian experiences in the transition period have confirmed the notion that the principle of majority, which prevails in the field of legislation and executive power, does not have sufficient potential, without constitutional obstacles and guarantees, to fulfill the notion of democracy, rule of law and human rights protection with real human content. The essence of the "new constitutionalism" is to raise the universal character of human natural and inviolable freedoms and rights to the level of distinguishing between "constituent power" and "constituted power": the first as original, absolute and self-sufficient, because it is implanted in human dignity, freedom and rights; and the second, which derives from the first and is therefore necessarily constituted by the constitution and laws, and functions as a public authority in the general interest of all citizens. Thus, the basic postulate of constitutionalism implies the emphasis on two basic functions of the constitution: as the highest legal act, it should guarantee natural human freedoms and rights and the consistent realization of the principle of separation of powers. In the light of this basic postulate, the boundaries of public authority set by the legal system do not only mean precisely defining and internal delimitation of competencies of three authorities (assembly-government-judiciary), but its primary purpose is to limit the "depth" of power in relation to individual freedoms and rights, through legally established guarantees arising from moral and legal values. The main role in achieving this goal should be played by the Constitutional Court as the "guardian of the constitution".

This is the framework of the discourse focused on the question in which direction the reform of the Constitutional Court should go in order to correspond to such a guarantee function of the constitution.

Keywords: *new constitutionalism, natural human rights, constitutional guarantees, reform of the Constitutional Court*

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Human rights and the transformation of modern law

The issue of the human rights and their protection cannot be considered outside the context of the transformation of modern society, which in the process of globalization and technological development is faced with constantly new challenges of totalitarianism, consumerism, corporativism, the emptying of democratic forms of state organization of human content, ecological catastrophe and, today, the Third World War that has already begun. Just as after the Second World War, human consciousness was pressed by the question - does poetry and all forms of artistic creation have any meaning "after Auschwitz", so today we are all opsessed by thought - are there human dignity, natural rights and lofty ideals of human justice after the Russian aggression on Ukraine, wars in the Middle East, all-out nuclear hell that can occur with the outbreak of a war in the Far East with China?

In the light of that crisis perspective, it is a complex question whether modern law, and to what extent, can fulfill its functions as the most rational means of reasonably establishing a balance between the idea of natural and innate human rights, the absolute values of law, such as freedom, justice, equality and legal security, and the needs of society's development, based on the principle of the rule of law. Is it, in its inability to deal with new sources of danger for human freedom and dignity, increasingly reduced to a system of norms as an abstract "meta-social" world, which on paper acts in a unique way, while in real life its action is manifested quite differently (*Fridmen*, (2014):9)?

Today, more than ever before, the interest in human rights and their protection is stimulated by the demand for the establishment of the rule of law, as a new value paradigm that rises above the international solidarity in the fight against the aggressive wars, international terrorism, environmental crime, organized crime and endemic corruption, which, on the other hand, faces a growing economic and social differences between developed and underdeveloped countries, and intensifying conflicts on civilizational, political, economic and other utilitarian grounds. The enormous differences in economic development and the inertia of authoritarianism in the national states represent great real obstacles to realizing the postulate of the universal concept of human rights in their entirety. This refers primarily to the "third generation" of "positive rights" (the right to work, social security, sustainable development, the rule of law, a healthy environment, etc.), the observance of which has a decisive influence on the quality of human life.

The advancement of human rights in such conditions implies a commitment to the dominance of the principle of the rule of law, which is understood above formal legality as an essential condition for limiting political and any other power over their nature as inherent and inviolable rights. The realization of this requirement is complicated by the fact that national law is becoming more and more transnational, and on the other hand, the international legal order, which affirms the universal concept of human rights, does not sufficiently include the postulates of national systems in its goals, and neglects the facts about the actual scope of such understanding in the economic, social and cultural context of the particular society.

Today, there is almost universal consent that the deterioration of the rule of law has become a global problem, spreading across all countries, underdeveloped and developed. According to the VJP Rule of Law Index 2021, which as a leading source of independent and objective indicators presents a picture of the rule of law in 139 countries, for the fourth year in a row there has been more decline, rather than improvement, in the overall performance of the rule of law. In the year dominated by the global COVID-19 pandemic, 74.2% of observed countries experienced a decline in rule of law performance, while only 25.8% of countries improved. It is particularly significant that 74.2% of the countries that experienced a decline make up 84.7% of the world's population, or approximately 6.5 billion people. The decline did not occur in the countries that are among the first ranked in the list of countries (Denmark-1, Norway- 2, Finland- 3, Sweden- 4. Germany- 5, Netherlands- 6 Luxembourg- 7 etc.). Among the countries from our region, only North Macedonia, Albania and Serbia progressed, while Croatia and Slovenia remained in the same position in the ranking list.

In EU circles, the deterioration of the rule of law is causing increasing concern, because according to the WJP Rule of Law Index for 2021, there was a decline in 14 member states. Compared to the previous year, the decline in certain segments that are the basis for evaluation was most significant in Poland, Hungary, Bulgaria and Croatia, but also in Romania, Slovenia and some Western European countries, including Austria, France and Portugal. To the question - what went wrong, the answers are mainly focused on the independence of the judiciary, which is still one of the key challenges to the rule of law, as confirmed in the Commission's Report on the rule of law of the EU. According to the Report, the independence of the judiciary and access to justice were particularly reduced in Poland and Hungary, and problems remained in Romania, Bulgaria and Slovakia. Eurobarometer surveys conducted among the general public also showed that in Croatia, Poland and Slovakia the level of perceived independence of the judiciary remained very low (below 30%). It is admitted that the resurgence of authoritarianism in the EU itself

was unexpected and that the European Council, the Council of Ministers of the EU and the European Commission did not recognize the problem or allowed it to be suppressed by strong rhetoric and failure to take real actions. Only in the last two or three years has this problem been put on the table with the adoption of special regulations that enable the initiation of proceedings on the violation of EU law, in accordance with Articles 7 and 2 of the Treaty of Lisbon (EU Treaty), with the adoption of decisions of the EU Court of Justice in the cases of Poland and of Hungary and adoption of (negative) reports on the rule of law in Romania and Bulgaria by the European Commission and the European Parliament. In its Resolution on the rule of law and fundamental rights in Bulgaria dated October 8, 2020, the European Parliament expresses (in item 1) "deep regret" over the fact that the development of events in Bulgaria has led to a significant deterioration in respect for the principles of the rule of law, democracy and fundamental rights, including the independence of the judiciary, the separation of powers, the fight against corruption and freedom of the media (s. *Resolution*, (2020): 1). At the same time, it is noted that EU institutions did not react in time and did not apply appropriate instruments on the rule of law due to bias and economic interests (see *Pech*, (2022: 124).

On the other hand, the EU has not spared and does not spare the strict rhetorical requirements it sets to candidates for EU membership, raising the postulate of achieving the rule of law to the level of the first condition in the new negotiation framework in the enlargement process, especially in relation to the Western Balkans. For our region, the stigma remains that the rule of law is developing unevenly. While the substantive legality and capacity of the judiciary have improved significantly, formal legality and judicial impartiality have generally regressed. The laws are harmonized with European and international standards, but remain unstable and incoherent and have weak implementation. Overall, the respect of the human rights has not improved despite externally imposed reforms and financial assistance from the EU and other international organizations, which have more "pathological" than "transformational" powers. The pathological effect of externally initiated and guided reforms is explained by the wrong combination of structural, procedural and factors related to the implementation of reforms, which acted in a vicious reform cycle (*Mendelski, (*2015): 341).

There is general agreement that this basic principle of modern society is related to the substantial requirement of natural human rights in limiting state power. The principle of the rule of law is especially emphasized in the UN Agenda 2030 on the Global Sustainable Development Goals (especially goals 5, 11 and 16). That position introduces the question of the relationship between constitutionalism and the political power, that is, its limitation in relation to the natural human rights through the highest guarantees in the constitutional

order of the state, into the center of the discussion. It would be perfectly acceptable, if the modern law, whose function is the protection of human freedoms and rights, does not become more and more transnational and does not come into increasing contact with international human rights law. The tendency of transnational transformation of the law in general has reached such a level that many legal theorists ask the question - what is the law today, that is, what is the content of its concept: supranational, national (state), subnational, and finally self-regulatory norms. The norms of the international law on human rights are today interpolated in all the legislations of civilized countries. If we accept such a factual situation, what does the constitutionalization of human rights and guarantees for their realization and protection consist of? And at what level, is it only at the national level, or at the supranational level, is the principle of the rule of law a paradigm that sets a limit to any power over human rights, demanding that laws rule, not men?

The answers to these questions are complicated in the light of the claim, which is difficult to refute, that hegemony and constitutionalism are the two dominant global trends in today's world. Although the structure of the international community is based on interstate *Westphalian* logic, the main part of global political, social and economic processes takes place within the framework of the architectural setting of the world after the Second World War and horizontal relations between states and international organizations. During the last decades, especially with the increase in violence, local wars, international terrorism, the global economic crisis and, finally, today's Russian aggression against Ukraine, with the increasing risk of starting a third world war (a nuclear one is not excluded), the dynamics of international relations is developing in the direction of the dominance of the most powerful opposing factors. Larger states or regional blocs, such as the United States, Russia, China, have become more determined to pursue their interests in the international arena, intending their positions as hegemony over other states.

In parallel with such a tendency, it strengthens the process of constitutionalism, which calls for the respect and protection of universal human rights. This tendency is supported by the expansion of the scope of international organizations and bodies for the protection of human rights, international tribunals (the European Court of Human Rights, the ICC and ad hoc international criminal courts), as well as the incorporation into national legislation of international norms and standards whose non-fulfillment by states entails international liability and possible sanctions (up to "humanitarian intervention"). The existence of these tendencies signals that the world is entering major changes in the ruling paradigm, its replacement by a new global paradigm whose outlines are very unclear.

Will the future international order be a world in which the most powerful states will rule, through the establishment of rules and prohibitions, binding on all states, and declaring the end of the liberal international order? Or will the aspiration towards the constitutionalization of human rights and their protection prevail, as the main postulate which dictates that the international legal order is based on the rule of law, limiting the power of large and powerful states. The problem of defining new global relations stems from the paradox that hegemony and constitutionalism do not have to be in conflict, but that their mutual relationship is more a relationship of antinomy than opposition. Hegemony cannot survive without the stability offered by constitutionalism, while constitutionalism cannot function without the dynamism created by hegemony (*Zidar*, (2019): 29). The processes of international hegemony and international constitutionalism are innovative in that both are expressions of political power, elevated above the horizontal structure of the international community. Therefore, while we await the establishment of a new emerging global paradigm of human rights law, we are forced to live in a hegemonic-constitutional world.

The modern international order was created under the strong influence of the great world powers - the victors in the Second World War, as a peace project, based on the rule of law and the recognition of natural and universal human rights, as essential postulates of modern constitutionalism. This is the general context in which the foundations of international human rights law as a system of supranational *jus cogens* norms were laid, starting with the Statute of the Nuremberg Tribunal and its judgments, the founding of the UN, the adoption of the Universal Declaration of Human Rights (1948), numerous conventions that paved the way for the development of international human rights law (on European soil - from the European Convention on Human Rights (1950) to the Charter of EU fundamental rights (2000). The development of the conventional human rights law follows the progress and continuous expansion of the universal corpus of human rights, constantly increasing the circle of international prohibitions.

In such a context of international constitutionalism, one of the main goals of the international rule of law should be the protection and further development of the already acquired positions of the status of human rights and their protection, as well as individual and state autonomy from the arbitrary interference of powerful states, through constitutional rules that determine the scope of international norms and standards into the internal legal system of the state (*Pavel,* (2020): 332). The border of the international rule of law understood in this way must be set as wide as natural human rights require when they find themselves in conflict with the national state in which citizens strive to realize and protect them. The state autonomy does not have its own internal value or moral status,

but they are derived from the role it plays as the most effective means of realizing human rights.

Beyond this general explanation, it should be emphasized that the relationship between the strengthening of the hegemony of the most powerful countries and the sovereignty of the other states in the protection of human rights remains very complicated in the light of the knowledge that their universality and protection count precisely on the strengthening of international guarantees (see *Cryer*, (2005) 985). First of all, international law on human rights affects the sovereignty of the state with prohibitions that are outside the scope of national law (genocide, war crimes, etc.), but undermine the interest of the international community for peace and security with their "shocking the conscience of humanity". It is a "positive" limitation of state sovereignty, because it is related to the universal content of inviolable human rights. However, the prevention of serious violations of human rights must be based on the recognition of the sovereignty of states and its role as a guarantor of their protection. And the creation of international institutions of criminal justice, such as the permanent ICC, is an emanation of the sovereignty of states, because no other entity except states has the authority to form such institutions ("par in parem non habet judicium").

The protection of human rights in the light of the "new constitutionalism"

A special exploratory potential for the scientific basis of the postulates of the rule of law derived from the concept of human natural and inherent rights is the starting thesis of modern constitutionalism that the power (*ius gladii*, "right of the sword") of the government should be subordinated to the demand for the essence of its functioning as a "constitutional democracy" (*Colón-Ríos*, (2012): 17; *Arjomand*, (2007):6; "constitutional rule of law", "democratic constitutionalism ", s. *Bliznaski*, (2019): 266). The lessons of the past with fascism, Nazism and the dictatorships of the first half of the last century, as well as the recent authoritarian transitional experiences that came about using the very forms of democracy, in order to annul it themselves, have a key role in realizing the need for the constitutional and guarantor paradigm of modern democracies. The concept of constitutional democracy intersects with the misconceptions from the beginnings of political pluralism and the idea of "rule by the majority", that is, the "majority will of the people" expressed in parliamentary elections as an elementary condition for effective democracy. It is shown, as in the case of the deformations of the political system in the states in transition, that the "rule of the majority" does not always have to strive for justice and freedom, moral values and public interest, and that majoritarianism does not claim the exclusive right to determine the meaning of democracy (*Bačić*, (2000): 28). Therefore,

there must be substantial limits for the government and additional guarantees for the legitimacy of its rule, as well as for the correctness of the laws with the help of which it rules. The illusion of law as an "expression of the will of the people" has been tragically shattered by the horrors of totalitarian systems (*Ferrajoli*, (2012), 15).

The current phase of reform of modern legal systems is broadly covered by the third global wave of democratization of society, which culminates in the so-called "new constitutionalism" (see *Arjomand*, (2007): 4). It is a conception that derives the universal character of human natural and inviolable rights on the level of distinguishing between unlimited "constituent power" and limited "constituted power". The first is original, absolute and self-sufficient, because it is rooted in human dignity, freedom and rights. The second is derived from the first, and therefore must, with the constitution and laws, be limited, rational and to function as a public authority in the general interest of all citizens (see *Bliznaski*, (2019): 45). Hence, the basic postulate of constitutionalism is the guarantee, which implies highlighting two basic functions of the Constitution: as the highest legal act, it should guarantee human natural freedoms and rights and the principle of separation of powers, as well as its effective implementation. In the light of this basic postulate, the limits of public authority are not reduced only to the precise definition and internal delimitation of their competences (assembly-government-judiciary), but first of all to the setting of substantial and precise limits for the "depth" of public power in relation to the rights of the individual, through legally fixed guarantees that stem from moral and legal values. Thus, the guarantee function of the Constitution and the law as a whole aims at reconciling the opposition between democratic pluralism and the constitutionalization of rights on which the postulate of the rule of law is based. That opposition springs from the clash between individual natural freedoms and popular sovereignty as the source of the legitimacy of law. Instead of maintaining a counterproductive conflict between them, it is necessary to connect the two demands through the prism of interdependence of constitutionalism and democracy (*Habermas*, (2001), 766).

The first step in the inauguration of constitutional democracy must be the rigorous constitutional and legal review and narrowing of the too widely conquered areas of the executive power and state administration, so that the situation with the rule of law can return to a normal track, on which the principle of separation and mutual coordination of the three powers can function. Today, the imbalance of the executive and others two powers (the parliament and the court) is visible on all sides and must be brought to a state of formal and essential equilibrium. It would first of all refer to limitations of the Government in the disposal of budget funds. On the other hand, the limitation of the

competences of the Government in other areas (economy - the system of subsidies, aid to companies; health, education and other activities), requires a review of all the laws that regulate the competences of the executive power and their transfer to independent institutions, or institutions formed on the principle of tripartism (government, business community, representatives of the special areas).

The next step is the demystification of the meaning of the principle of the majority, and therefore of the "people's will", with all the reflections on the understanding of the correctness of the laws (are they correct only because the parliamentary majority stands behind them, which in turn represents the will, and conditionally, of the electorate?), based on the liberal thesis that the state is nothing but a community established for the purpose of protecting the freedom of the individual. Hence the postulate of constitutional democracy is aimed at the search for constitutional foundations and forms for the implementation of such a concept. One of them is, for example, the request for the independent status of the elected members of the parliament that is an unimaginable undertaking (Soltvedt, (2018): 255). Such a practice in our entire environment is defended with the argument that the party has an irreplaceable role in reducing the set of viewpoints to collective attitudes, necessary for effective political decision-making (for these viewpoints see *Marković,* (2006), 306). But other constitutional solutions are also possible, not by displacing it from the position of legislative power, but by joining it with a separate body, of the type of the State Council (following the example of Slovenia or France), composed of representatives of the state, the business community, civil, scientific-educational and other institutions, with constitutionally defined functions.

As an essential component of modern constitutional democracy, the goal of constitutionalism is the prevention of the monopolization of power and the emergence of an authoritarian government. The rule of law on the other hand incorporates the standards that define the basic characteristic values of the legal system as such and of its application (s. *Reynolds,* (1986): 74). The function of the rule or the supremacy of law is to ensure the effectiveness of the constitutional guarantees for the separation of powers and other postulates of constitutionalism, limiting the space of political decision-making as an activity whose "limits of the possible" are determined by the postulate of equal, natural and inviolable individual rights. The public interest served by the legal system, which sublimates the goals of political decision-making by providing for effective institutional procedures and balancing arrangements that prevent abuse of laws ("precautions", *J. Madison*), is defined on that basis. In that sense, according to *Hayek* the Constitution is more a superstructure of norms and standards set up to ensure the maintenance of the law than the source of all other laws, so that a democratic government should accept legal

limitations on its powers, just as the legislator himself must be limited by the principle of the rule of law ("the law is older than the legislator", see *Hajek*, (2002): 72). The idea that the main purpose of the Constitution is to guarantee the natural and inviolable individual rights that precede it is associated with the early century documents for limiting the power of the monarch, such as "Magna Carta Libertatum" from 1215, as well as with the constitutional proclamations that precede modern constitutionalism - the American Declaration of Independence and the French Declaration of Rights from the end of the 18th century (*Reynolds,* (1987): 90).

In that sense, constitutionalism has an important function of mutual control of the authorities and their coordination, without which they could not exercise their powers and duties in a constitutional and legal way (*Hardin,* (2003): 34). The principle of separation of powers also requires precisely arranged and developed constitutionally guaranteed requirements: institutional separation of the power that enacts laws from the power that applies them; that every individual has equal rights before the law; the government should be subject to periodic approval by the citizens, transparent and responsible; and that judicial protection of citizens against abuses of power before an independent court is guaranteed.

Given that the guarantee function cannot be realized by the Constitution itself without a detailed elaboration of the basic postulates of the rule of law in the legal system, constitutionalism as a postulate incorporates also the basic laws that regulate the various aspects of respect and protection of the human natural rights. Such are, for example, the criminal and civil codes which are pillars of the legal system and have constitutive significance, in some countries with a long legal tradition even older than their constitutions (Napoleon's Code civil and Code Pénal, which outlived several constitutions of France), or the basic laws on the judiciary (the Law on Courts) and the laws on criminal and civil procedure.

The constitutional tradition and modern constitutions in the states in transition in our region are not harmonized with the postulates of modern constitutionalism and democratic consolidation, which is reflected first of all in the weak guarantees for the consistent implementation of the division of power, the limitations and mutual control of the three powers, as well as in the even weaker constitutional guarantees for the limitations within all three authorities. It is characteristic of the constitutions in our region that they contain only rare general provisions for the otherwise metastasized state administration and public services, which do not provide any guarantees for the basic principles of "good governance" and the consistent application of the merit system,

transparency and accountability, respect for the ban for political action and for judicial control over the legality of their acts and actions. The constitutional proclamation for judicial control over the legality of administrative acts (thus the Macedonian Constitution, art. 50 paragraph 2 of the Constitution) is disavowed by the laws on administrative disputes which, instead of providing judicial protection of the rights of citizens and legal entities before an independent court, puts the administrative judiciary in the role of protecting the arrogant administration and covering its abuses.

The necessity of a constitutional reform, which should lay the foundations for a substantial reform of the legal system, must bear in mind that the transition of the states of our region to the principle of constitutionalism with the collapse of socialism was carried out "from the roof down": the Constitution is the basic axis of normative integration and reconstruction of the new order (see *Podunavac*, (2015): 20). Its basic function is the establishment of constitutionality, but also the efficiency of the legal system, which brings a strong dose of utilitarianism and the use of law as an instrument of transitional changes to the system. That component of the new constitutionalism, faced with the continuous obstruction of the ruling political structures of establishing essential (natural law) constitutionalism, appears as the main obstacle to a thorough reconstruction of the legal system. Functioning for years on the edge of political instability, the legal system does not have the internal strength and institutional capacities, captured by the parties in power, to mobilize more significant factors of change, which would be legitimized as real constitutive power. Hence, all attempts to conceive and implement reform strategies in key social spheres, such as the judiciary or public administration, end ingloriously. It happens that the inertia of the past, in most ex-socialist countries, keeps alive the "rule of myths" and not of law (*Varga*, (2008): 9).

In such a state of affairs, a key question, on whose answer depends the possibility of conceptualizing a legal system based on the principles of constitutional democracy and the rule of law, is the question: who has the constitutive power for its essential reform? Constitutive power implies the power to enact a Constitution or constitutional amendments as well as to correct basic laws that are in contact with human rights and their protection for the purpose of achieving the goal - limiting the power with the natural rights of the individual. But who is the bearer of such power in our countries today? Political parties, citizens, non-governmental organizations, science and the academic community, the business community, the people (demos), or different national communities in a multi-ethnic society (ethnos)?

The constitutive power of the social structures that initiate and lead the changes of the constitutional and legal system and which, therefore, should be considered as "first movers", consists in the power to create the political and legal order *ex nihilo*, or to advances the existing one on the postulates of constitutionalism (see *Podunavac*, (2015): 21). The acceptance of a democratic form of constitutionalism is considered equivalent to the mechanisms for the participation of the people in constitutional changes (*Colón-Ríos,* (2012):3). In that sense, the contemporary teaching on constitutionalism, relying on the acts of the American and French revolutions from the end of the 18th century, refers to the people or the nation as subjects that have sovereignty, which also implies constitutive power (see *Škarić*, (2015):360). More modern constitutions follow that path of determining the constituent power, locating it in the nation (so the French constitution, art. 3 - national sovereignty belongs to the people, who exercise it through their representatives or through a referendum; the German constitution, art. 20 paragraph 3: all state sovereignty derives from the people; also the Bulgarian constitution, art. 1, the Italian constitution, art. 1, the Albanian constitution, art. 2, etc.). Under the influence of the doctrine of constitutionalism, in the newer constitutions, especially of the former socialist countries, the citizen appears as the subject of sovereignty (the Serbian constitution, art. 2: sovereignty originates from the citizens; the Montenegrin constitution, art. 2: the bearer of sovereignty is the citizen with Montenegrin citizenship, etc.). Interesting concepts are incorporated in the Austrian constitution (art. 1: Austria is a democratic republic. Its law originates from the people) and the Croatian constitution, which locates sovereignty with the people, but as a demos (art. 1: in the Republic of Croatia, power originates from the people and belongs to of the people as a community of free and equal citizens). Some constitutions (Belgian, Polish, etc.) do not contain explicit provisions for the holder of sovereignty. The Macedonian Constitution in the Preamble and Basic Provisions contains confusing provisions for the bearer of sovereignty, from which the general conclusion cannot be drawn - who is the bearer of the constituent power (see in more detail *Škarić,* (2015): 377). The preamble (Amendment IV) determines as the holders of the constituent power: the citizens of the Republic of North Macedonia (Amendment XXXIII), the Macedonian people, as well as the citizens living within its borders who are part of the Albanian people, the Turkish people, the Serbian people etc. (according to *Škarić* "multinational sovereignty"). In the Basic provisions (art. 2 paragraph 1), the citizens of the Republic are defined as the bearers of sovereignty, therefore of the constituent power: "sovereignty derives from the citizens and belongs to the citizens". It can be concluded that the Constitution stopped halfway in the attempt to reconcile two different concepts - the people's (national) and the civil sovereignty, through the construction of an impossible divided sovereignty. With such

impotence for essential changes, the Macedonian political and legal system presents itself as "weak constitutionalism", which does not count on the strong constitutive power of the citizens and does not see it as a threat to the factors that prevent faster social development, reducing it to an opportunity for partial episodes of constitutional changes (for the phenomenon of "weak constitutionalism" see *Colón-Ríos*, (2012): 7).

Contemporary critical legal thought puts all the mentioned constitutional concepts under review, pointing to the appearance of the new medievalism, which against the people and the state resurrects corporate forms of sovereignty, the transnational limitation of state sovereignty and legal pluralism in the arrangement of economic, religious or other groups. These are spheres that exist without the principle of hierarchy or public authority that can resolve inevitable conflicts or ensure democracy, justice and equal individual rights within the relevant areas or between them (see *Arato, Cohen*, (2018): 4; *Zolo* (2097): 49).

In contrast to these approaches, we can consider the position that only the citizen and the citizen's sovereignty should have constitutive power, as the only one consistent with the concept of the new constitutionalism and natural human rights.

Reform of the Constitutional Court

In the increasingly heated debate about the need to reform constitutional courts, numerous legal and political controversies about the performance of *Kelsen*-type constitutional courts in democratic systems have been highlighted. One reason is that the design of these institutions cannot easily respond to the simultaneous but conflicting demands for strong protection of democracy and human rights, judicial independence, and constitutional restraints. Questioning the dominant approach to the design of modern constitutional courts, there is a growing number of supporters of the position that a new way of balancing these three values should be sought through structural reforms of *Kelsen's* institutions. The proposal aims to institutionalize the constitutional limitation, incorporating it into the internal rules of the constitutional court functioning, while at the same time emancipating constitutional judges from political control through the reform of appointment procedures. It is argued that the combined effects of these two reforms will produce constitutional courts that are more independent and better able to protect key elements of the democratic political community, while at the same time increasing constitutional respect for the democratically elected legislature (s. *Castillo-Ortiz*, (2020): 617).

In the countries in transition, the deep reforms of the economic, political and legal system have penetrated deeply into the reforms of the judicial system, through constitutional changes and the adoption of new legislation (*Stebelski, (2016): 407*). But in all of them, more or less, one of the key links of the legal reforms remained insufficiently developed. An element that gives such reforms the material force of the movers of wider changes in the foundation of the political and legal system on the principle of the rule of law is the reform of the Constitutional Court. Thus, in North Macedonia, since the adoption of the Constitution in 1991 until today, several changes were made to the Constitution, and none of them changed anything in its functioning, except for Amendment XV, which regulated the method of electing the judges of the Constitutional Court. Two attempts, carried out with a formally initiated procedure for constitutional changes, remained unsuccessful (see *Prešova*, (2018), 6). The first, from 2005, as part of the then judicial reform, as an initiative to adopt an amendment that was supposed to create a constitutional basis for the legal regulation of the matter related solely to the type of decisions of the Constitutional Court, their effect and execution, ended with the cancellation of the proposer (the Government). The very important issue of legal regulation of its functioning has not been raised again in the debates on judicial reforms, so the Court has always functioned on the basis of the constitutional provisions and the Rules of Procedure since 1992. Such regulation of the functioning of the constitutional judiciary, otherwise, is unknown in the constitutional systems of neighboring countries, in which special laws have been passed for the constitutional court (Slovenia, Albania, Serbia, Croatia - constitutional law), as well as in European countries (Germany, etc.). Leaving, apparently, a wide space for the affirmation of the Court as a strong "guardian of the Constitution" results in its complete unrecognizability and marginalization in the time of severe and continuous crises of the state.

The subject of long discussions, in addition to the general question of the position of the Constitutional Court between the three authorities, its independence, the method of selection of constitutional judges, the legal regulation of the procedure and the implementation of its decisions, is especially the scope of its competence in the protection of basic human rights and the relationship between that authority and the powers of the regular courts (especially the Supreme Court), which defines its position in the system of separation of powers as "sui generis" or "fourth power".

Unlike the countries of our region, in which special laws have been passed for the constitutional court and a constitutional lawsuit is foreseen for the rights guaranteed by the Constitution, the Macedonian Constitution provides that its procedure is regulated by the Rules of Court, while in terms of the protection of rights, its competence is limited to

only a few rights (according to art. 110 para. 3 the Constitutional Court "protects the freedoms and rights of man and citizen that refer to freedom of belief, conscience, thought and public expression of thought, political association and action and the prohibition of discrimination of citizens on the basis of gender, race, religion, national, social and political affiliation"). It shows that in the entire thirty-year period since the independence, Macedonian Constitutional Court remained a marginalized institution, without a greater influence on the consistent implementation of the Constitution. This is also shown by the results of functional analyzes related to the volume of the Court's activities, which amounts to about 150 resolved cases per year. According to the last functional analysis (year 2020), specifically in the five-year period, from January 1, 2015, until December 31, 2019, the Court had a total of 1298 cases, or an average of 260 cases per year, and decided on average 154 subjects (s. *Risteski,* (2020): 41). A particular weakness in the functioning of the Court is its reluctance to assert itself as a guarantor and protector of basic freedoms and rights, placed under its jurisdiction in a restrictive scope (Art. 110 para. 3 of the Constitution), which disavows the general provision (Art. 50 of the Constitution), according to which every citizen can invoke the protection of the rights established by the Constitution before the courts and before the Constitutional Court, in a procedure based on the principles of priority and urgency. ccording to the data from the functional analysis, the first decision establishing a violation of rights was made by the Court in 2010 (19 years after the independence of the Republic), and in the period from January 1, 2010. until December 31, 2019, he decided on 121 requests for the protection of rights, of which he accepted only three (one in 2010, the second in 2018 and the third in 2019). In the remaining 118 cases, the requests were either rejected as unfounded or rejected on various grounds (ibid.: 37).

An insight into the reasons for the non-fulfillment of the function of the Constitutional Court as a guarantor of the rule of law in the periods in which it could have played such a role points first of all to the negative influence of political factors, the manifest form of which is the established system of partocracy and the party's "capture" of institutions, including judicial ones. There is a high degree of consent that in a state of prolonged political and constitutional crisis, it is unlikely that the constitutional court could play a major role in overcoming it. However, there are examples of countries in which the Court has acted as an influential political actor, even achieving some success with its decisions, especially in terms of establishing the principle of separation of powers (see *Brown, Waller*, (2016): 817). It is rightly pointed out that it is a real puzzle how the constitutional courts can shape the political landscape, with limited resources and no direct powers to execute their decisions; it is obvious that they have to rely on the willingness of the

executive and legislature to accept their decisions and to conform laws and other regulations to them (*Wanberg,* (2015): 167).

Reduced to the minimum level of exercising its constitutional competences, the Constitutional Court could not, without the necessary reforms, justify the expectations as an institution that should represent a symbol of democracy and the rule of law. Contemporary debates about the role of the constitutional judiciary according to *Kelsen's* model of centralized control over constitutionality and legality in the state, are aimed at explaining the basis for their legitimacy that is determined by the relationship to three value postulates: protection of democracy and human rights, independence of the judiciary and constitutional restraint. The Constitutional Court should represent an institution that realizes those postulates, related to the general principles of liberal constitutionalism. Furthermore, when the Constitutional Court fails to contribute to the realization of those postulates, citizens lose confidence in it, and political factors gain space to bring it under their sphere of influence (see *Castillo-Ortiz,* (2020): 620).

The resent practice of the constitutional courts in our region in dealing with constitutional lawsuits points to an encouraging strengthening of their role in the protection of fundamental rights, based on the standards contained in the European Convention on Human Rights and the practice of the European Court of Human Rights, especially in regarding the right to a fair procedure (thus the Serbian Constitutional Court s. *Beljanski et al.,* (2019): 50; the Croatian Constitutional Court s. *Krapac*, (2014):80). In the long-term reform debates, the main reform directions have been identified, which include: organization of the Court, refinement of its authority in the interpretation of the Constitution in the area of human rights protection in accordance with international norms and standards and EU law (Euroconform interpretation); assessing the compliance of laws and other regulations with ratified international conventions, expanding the jurisdiction of the Court in the protection of basic freedoms and rights, proclaimed by the Constitution, legal regulation of the court's actions and the execution of its meritorious decisions, and specifying the conditions for the election of constitutional judges.

At the center of those debates are the ideas of decentralization of the model of control of constitutionality, through redistribution of competences between the Constitutional Court and regular courts (primarily the Supreme Court), with which the Constitutional Court evaluates the conformity of laws with the Constitution, while the regular courts evaluate the compliance of the by-laws with the laws as a prejudicial question in regular proceedings (*Stojanović,* (2018): 34). Such a solution would fill an obvious gap in relation to the solution provided for in the laws on courts (including the Macedonian Law on

Courts, Article 18 para. 1 and 2), according to which the regular court submits an initiative to start a procedure for evaluating the consent of the law with the Constitution when a question is raised in the procedure about its compliance with the Constitution, which is immediately reported to the higher court and the Supreme Court; when the court considers that the law to be applied in the specific case is not in accordance with the Constitution, and the constitutional provisions cannot be directly applied, it will stop the procedure until the decision of the Constitutional Court is made. These provisions govern the action of the court when the question of compliance of the law to be applied with the Constitution is raised before it, but not the case when a question is raised about the compliance of a by-law with the law. It should not be considered that such a gap is overcome by the general principle that courts judge only on the basis of the Constitution, the laws and the ratified international agreements (art. 98 para. 3 2 of the Constitution), and not on the basis of by-laws.

The question of expanding the jurisdiction of the Constitutional Court in the protection of basic human rights by introducing the institution of a constitutional lawsuit is also complex, which necessarily implies a review of the relationship between the Constitutional Court and the regular judiciary. Its complexity is indicated, in the Macedonian case, by the existing state of non-functioning of constitutional solutions for specific control of constitutionality and legality initiated by regular courts and for constitutional appeals for possible violations of basic freedoms and rights. Namely, since 1991, the Constitutional Court has not received a single initiative with a preliminary question on the constitutionality of a legal act submitted by a regular court.

One of the most sensitive issues on which the reform of the Constitutional Court should be focused is the issue of the distribution of power at the supreme judicial level. Since constitutional law permeates the entire structure of the legal system, the strict demarcation between the functions of the Constitutional Court and those of the ordinary courts becomes problematic, sharpening that issue especially on the relationship between the Constitutional Court and the Supreme Court (*Garlicki*, (2007): 44). The reform of the constitutional judiciary, especially with the introduction of a constitutional lawsuit for the protection of fundamental rights, must also take into account the fact that the postulate of constitutionalism implies the expansion of the judge's freedom in the interpretation of laws and the direct application of constitutional principles and norms, as well as the standards and norms of the ECHR in the protection of human rights.

Also, the Constitution should provide for a clear authorization of the court as the "guardian of the Constitution" to perform its Euroconform interpretation *ex officio* (in

some constitutions, such as the Brazilian one, even a general prosecutor has been established, who as a "defender of the Constitution" has the task to initiate proceedings for any act of parliament that it considers unconstitutional). As a leading idea of law, the idea of justice (*iustitia regnorum fundamentum*), implies a position of the Constitutional Court elevated above the legislator in evaluating laws, relying on the evolutionary interpretation of constitutional principles, international norms and standards for human rights and general legal principles (s. *Lauc* (2016), 63). At the same time, as a barrier against its politicization and the establishment of the so-called "rule of judges" with the control of the material constitutionality of laws, the principle of self-limitation of the court in relation to political issues remains, which however does not refer to the consistent application of the principle of the rule of law from the aspect of the protection of basic rights (*Sokol,* (2000): 21).

The effective protection of fundamental rights before an independent and impartial court, in addition to the institutional guarantees for the position of the court in the system of separation of powers, problematizes the traditional position that the judge is "the mouth that pronounces the laws". The principled ordering of the will of the legislator and the binding to the law, which is required by the principle of separation of powers, prevents the judge from transforming into a "co-legislator" who creates new legal rules (*ius facere*). But emphasizing the role of the judge as the main protagonist of the rule of law implies a significant change, which, according to *Dworkin*, turns him into a figure similar to one of the many authors (that is, besides the legislator) who write a novel together, so that each writes a separate chapter: each is tied to what was previously written by others, but in his section for the same characters he develops a special narrative (s. *Timsit*, (2000), 83).

The sharpening of the demand for the legitimacy of the laws, as well as the view of the court as a central institution that is the guarantor of the protection of individual rights, imposes the need to strengthen its role in the application of the law. In order to transform into an arbiter between citizens and the state, the court must grow into an independent public service of justice that has the power to exercise control over the acts of the executive power and even oppose unjust laws. The idea of the judge's commitment to the principle of the rule of law (*Rechtsstaatsprinzip*) in continental law is the subject of theoretical debates related to the question of the breadth of the judge's authority to suspend a legal norm, the application of which he finds leads to an unjust verdict in the specific case. The German constitution (art. 20 para. 3), for example, explicitly determines that the legislator is bound to the constitutional order, and the executive power and the judiciary to the laws (*Gesetz)* and the law (*Recht*), which is an emanation of the

conception of the legal system as autopoietic system and the independent position of the court.

On the other hand, the critical remarks that "ruling by judges" is not always better than "ruling by politicians" have been sustained. Whether there will be a situation where the arbitrariness of the legislator will be replaced by the arbitrariness of the courts, depends on whether the constitutional guarantees of independence, independence and impartiality will not only be formally declared, but also consistently applied in practice, which should be a special concern of the Constitutional Court. Today, those guarantees are not fulfilled at an optimal level, for which some constitutional and legal solutions appear as an obstacle, such as those on the composition and functions of the Judicial Council and on the position of the Supreme Court. Hence, the laws in the area of the judiciary must be subjected to rigorous normative control by the Constitutional Court in terms of the essential postulates of the new position of the regular courts as the main protagonists of the rule of law.

Conclusion

The protection of human natural rights is faced today with the key challenge of establishing them as a barrier to the contemporary global crisis, expressed as a crisis of values, an economic and political crisis and negative global tendencies that bring the world to the edge of a devastating world war. The answer to those challenges cannot be sought in any alternative that would mean deserting the concept of the ideology of human natural rights as the only reliable vision for the development of modern society.

Defending that position implies strengthening the guarantees for the protection of human rights, for which the most argued conceptual framework is offered by the new constitutionalism, which imposes the demand for constitutional reforms and for the reform of the Constitutional Court.

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Milica Kolaković-Bojović*

HUMAN RIGHTS PROTECTION: FROM POPULISM TO THE EVIDENCE – BASED POLICY MAKING

Triggered by the golden question: "What works?", policy makers around the world are struggling to find solutions that make a real change/impact in a subject area. Their struggle is as greater as the more important the subject of the protection is. The same goes for the possible positive or negative impact that a subject policy can have on the beneficiaries. Finally, the perceived consequences in terms of the political accountability of the decision makers for the impact made by the public policy influence their attitudes when create a public policy to the great extent. Being of the crucial importance, human rights protection as a subject of the public policies opens the floor for the significant variations of those attitudes, from the evidence-based policy making, as an ideal approach, to the populism driven policy making, as the hidden monster which undermines the basic values in the contemporary world, presenting itself as a modern hero and the protector of ordinary people. Taking into account these strongly opposed approaches, the author is looking for the main material and procedural elements that makes a public policy based on evidence. With this aim, the author analyses the very nature and diversity of evidence, the sources where they can be found, but also the mechanisms to incorporate them into the public policies, against the idea of choosing the most popular solutions. Within this context, the author also analyses recent practices in penal policy, with the focus on the penal legislation and the policy planning in the process of the transposition of the international standards on the fundamental rights.

Keywords: *evidence-based policy making, human rights protection, public policy, penal policy, evidence informed policy, populism, transparency, inclusiveness, public debate*

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1. Human rights protection as a never-ending task of decision makers

"All human beings are born free and equal in dignity and rights" (UN, 1948), sounds so loud, clear and simple, only to the point where you are the policymaker in charge and tasked to ensure this in practice. As the contexts and the modalities of the human rights violation evolving through the time, the same trend should be followed in taking efforts to protect those rights at the international and the national level. The second one is to some extent preconditioned by the first one, since the international law, whether through the universal or the regional instruments frames and shapes the national legislation. However, a need to make those frames applicable in various contexts around the world, usually require leaving them vague enough to fit "various sizes". At the same time, this lives enough space for the national legislators to fill that space with the provisions of the national legislation in order to establish, more precisely, legal and institutional guaranties to protect a human right in practice. A way a legislator will do that is defined, to the significant extent, by its dedication to address the real needs of citizens and to do that in a way which guarantees the maximum possible impact on the protection of their human rights, but also to achieve an ideal balance in the protection of the (potentially confronted) rights of various social groups. Contrary to this approach, the legislator can opt to follow completely different approach, namely, to disregard the real needs and to put the human rights protection in service of following the "vox populi" aimed at personal promotion in the political market through the fight against "constructed enemies". While the first approach is more demanding in terms of the procedures to be followed and mechanisms to be established, its outcome, even being beneficial for citizens and the society as whole, can lead to the loose of political points for the policy makers who applied it. Contrary, *ad hoc* interventions of populist leaders ensure them fast and easy political points regardless the impact-less or sometimes even harmful consequences they have on the human rights protection.

Given like this, it is impossible to avoid the question: Whether and how we can identify which policy is made based on evidence and which one is result of the populist intervention? To answer this question there is a need to identify the main elements of both approaches. Namely, to see what make a policy evidence-based or populist.

2. Evidence based policy making

The narrower meaning of the term *public policy* 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. (Kambovski, 2021, p. 36)

Kambovski considers the value as a 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. (Kambovski, 2021, p. 37) 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, p. 890)

Undoubtedly, the main purpose of a policy policy development and implementation is to produce change/impact, namely, to ensure that the policy "works". Therefore, evidence-based policy is dominated by one question: "What works?" (Pawson, 2006) A more illustrating, an issue of evidence-based policy making has been perceived by Carwright and Hardie like- from "It worked there" to "Will it work here?" (Cartwright & Hardie, 2012) So, the first step when thinking about what can work is to learn what works somewhere, which means to find evidence on that. Furthermore, there is a need to explore whether it would work there.

This brings us to the evidence as a buzzword of the whole issue- to understand what evidence is and how to it to develop a public policy. The term 'evidence-based policy' is based around two sets of related assumptions, 'one referring to the way in which policy is made, the other to the evidential nature of social science itself' (Marston & Watts, 2003). Therefore, there is a question whether it is appropriate to consider 'evidence-based' and 'evidence-informed policy' as synonyms. It seems the answer is negative, having in mind that evidence informed process of developing policies does not necessary mean that policy makers will develop an evidence-based policy. Some authors even arguing that policymaking is inherently political and prefer the term 'evidence-influenced' or 'evidence-aware' as a more realistic view of what can be achieved. (Nutley, et al., 2002) For Latham, evidence-based policy represents tool or metaphor for going beyond political ideology. He treats evidence-based policy as a neutral concept where 'hard facts' will speak for themselves in addressing 'human tragedy' and politicians and policy makers will act accordingly based on the best available evidence. (Marston & Watts, 2003) As well recognized by Davies, evidence is not a single one to influence the policy. It competes with a political expediency, effectiveness, resources, values and a policy context, choice of goals, side effects and costs & benefits. (Cartwright & Hardie,

2012) In its more extreme form, knowledge-driven (really expert-driven) policy examples the abdication of political choice. In the problem-solving model, in contrast, research follows policy, and policy issues shape research priorities. From the point of view of government, the expert is (Laski again) 'on tap', but not on top. (Young, et al., 2002) The interactive model contrasts sharply with both in positing a much more subtle and complex series of relationships between decision makers and researchers. It portrays research and policy as mutually influential, with the agenda for both research and policy decision shaped within `policy communities' which contain a range of actors (Young, et al., 2002)[1]

The late XX and early XXI century brought on the table an intensive discussion and the growing interest in evidence-based policy-making mostly in the United Kingdom, but also in USA and Australia (Marston & Watts, 2003) It could be said that the biggest steps and the main moves forward were made in this regard in the field of health care[2]. However, as of the second half of 20th century, many states also decided to establish and/or to engage scientific institutes specialized in various field in order to get evince-based inputs to feed their policies. One of such steps was made in former Federal People's Republic of Yugoslavia in 1960 through the establishing of, among others, the Institute of Criminological and Sociological Research (hereinafter: Institute, ICSR).[3] The aim of establishing the Institute was to ensure a comprehensive and clear inputs in public policies the field of social sciences, namely in the field of prevention and combating the crime and social deviation. This approach is grounded on the application of scientific approach/methods in developing and monitoring penal policies.

What is the purpose of such an approach? There are two main forms of evidence required in this approach to improving governmental effectiveness. The first is evidence to

[1] There is also the concept so called "knowledge brokering" which explains initiatives needed to facilitate interaction between researchers and policy-makers to foster greater use of research findings and evidence in policy-making and to narrow the "know–do" gap. (Van KammenI, et al., 2006) Characteristics of knowledge brokering • Organizing and managing joint forums for policy-makers and researchers • Building relationships of trust • Setting agendas and common goals • Signaling mutual opportunities • Clarifying information needs • Commissioning syntheses of research of high policy relevance • Packaging research syntheses and facilitating access to evidence • Strengthening capacity for knowledge translation • Communicating and sharing advice • Monitoring impact on the know–do gap. (Van KammenI, et al., 2006)

[2] E.g. in the early 1990s with the establishment of the Cochrane Collaboration, with a centre in the UK, to bring evidence from reviews of the effects of healthcare interventions to bear upon decision making. In 1999 this initiative was emulated in the fields of social and educational policy with the launch of the Campbell Collaboration (Sanderson, 2002)

[3] The Institute of Criminological and Sociological Research (in the further text the Institute) founded by the Regulation the Federal Executive Council No. 112 from 31. 05. 1960. (published in the Official Gazette – "Sluzbeni glasnik FNRJ" - No. 24 from 15th of April 1960). See more at: https://www.iksi.ac.rs/, last accessed on August 20th 2022.

promote accountability in terms of results – evidence that government (and their policies) are working effectively. The second is evidence to promote improvement through more effective policies and programmes – evidence of how well such policies and programmes 'work' in different circumstances.

Therefore, the evidence-based policy making should be perceived as the only way to properly address the objective issues and the real needs as well as to define appropriate, achievable goals to be achieved through the relevant activities, in realistic deadlines, supported by adequate resources, accompanied by the observation of risks and ways to address them by proper remedies.

The major benefits of the evidence-based policy making are associated as to the policy content as to the quality of the process of how a policy has been developed. Among others, this is the way to achieve that:

- Ensure inclusiveness of the process for all relevant actors
- To go beyond political ideology and avoid populist driven and populist-based policing
- Prevent abuses and favouritism of the individual/group interests
- Ensuring that a progress is measurable, based on the clear, precisely identified starting benchmarks

Evidence matters for public policymaking, but the misuse of evidence matters as well since there is a risk of the potential for cherry-picking, obfuscation or manipulation of pieces of evidence, done to serve political goals. (Parkhurst, 2017)

This leads to the always-living debate on various understandings of what the evidence-based policy means, but also to what extent an evidence can influence the policy. The above-mentioned trend has expanded from the scientific circles to the international organizations and national authorities, resulting in the several main questions: What kind of findings/data/information can be considered as evidence, especially in social sciences? Consequently, this opens an issue of the relevant sources of evidence, including possible hierarchy among available evidence and their sources. Finally, of the appropriate and the most efficient mechanism to collect and take them into account.

So, what the evidence is? As interpreted by Maston and Watts, whether a naturally occurring phenomena or a research artifact, the stuff of the world only becomes

'evidence' when 'it' is constituted and inserted into a research practice and then deployed in the framework of an argument.[4] In determining what is to count as evidence and the 'discovery' or selection/presentation of evidence, assumptions about the nature of the social world play a fundamental role. (Marston & Watts, 2003) It is interesting that the same authors question the objectiveness of the evidence in social sciences, pointing out that no evidence claim underpinning evidence-based policy arguments can be considered detached, value free, and neutral. They argue that not all empirical social scientific argument is 'empirical' in the conventional sense of the word, in which 'empirical' mean a knowledge claim that refers to whatever is real. (Marston & Watts, 2003) We cannot agree upon this approach since it undermines the value of the scientific research methods in social sciences, inherently claiming that scientific evidence in natural science are kind of non-human and therefore perfect products. Obviously, humans accompanied with all their values and prejudice were perfect enough to build labs, computers and other machines, and to interpret findings collected using them, but not good enough to conduct empirical research in social sciences.

In terms of the variety and the potential hierarchy of evidence, it could be useful and interesting the classification given by the UK Cabinet Office, which sees evidence as: Expert knowledge; published research, existing research; stakeholder consultations; previous policy evaluations; the Internet; outcomes from consultations; costings of policy options; output from economic and statistical modelling (1999, p. 33) (Marston & Watts, 2003) In terms of the hierarchy, the priority question is (non)existence of formal hierarchies in policy communities. Namely, a formal hierarchy can be established through the law or other legal act aimed at ruling the policy making process. Even in the absence of such formal hierarchy, some authors, like Marson and Watts considers ministerial advisers, senior public servants, and other 'insiders' or 'policy elites' to have greater access and authority in decision-making processes than members of the public or service users/policy beneficiaries (Marston & Watts, 2003). However we would rather call evidence coming from them "hierarchy based" or "hierarchy originated" than to consider them as a formally and naturally superior over the other evidence.

In 2001 the European Commission recognized and expanded the ground for use of the evidence-based policymaking, underlining that scientific and other experts play an increasingly significant role in preparing and monitoring decisions. From human and

[4] Marston & Watts with a certain dose of irony ask: whether the evidence is the text of a poem, the files of a newspaper, the data from a carefully designed psychology experiment or clinical trial, or a massive data base assembled from a social survey. (Marston & Watts, 2003)

animal health to social legislation, the institutions rely on specialist expertise to anticipate and identify the nature of problems and uncertainties that the Union faces, to take decisions and to ensure risks can be explained clearly and simply to the public. (European Commssion, 2001)

3. Populism-driven policy making

Despite all theoretical developments, clear benefits from it and the positive proven experiences in practice, it seems that evidence-based policy making is still struggling for predominance over the completely opposite concept- populism-driven policy making.

In 21st century it is expected to have the growing appreciation of the authorities both for the quest to derive reliable social knowledge to guide policy action and for approaches to governance. However, it seems that economically, culturally or religiously driven populist backlash, which is still widely present across the world, including Europe, devaluing an importance of such an approach in a policy making. Resistant to any kind of an evidence, populist policy making ignores and even sometimes despises scientific and professional evidence, perceiving it as a politically derived product of social elites. Deaf for the voice of the academic community and professionals hey strive to construct the imaginary world driven by *vox populi*.

There've been lot of attempts to define populism itself and therefore populism-driven approach in developing public policies. In order to do that, the authors actually tried to start from the conceptual departure from an ideal model of policy making in liberal democracies, as in terms of the policy content/substance as in relation to the procedural aspects of policy making. Therefore, this approach is based on the "ideal type" as conceptualized by Max Weber. Weber himself wrote: "An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct..." (Stanford, 2017)[5]

[5] See more in Stanford Encyclopedia of Philosophy, Max Weber, at: https://plato.stanford.edu/entries/-weber/#IdeTyp, last accessed on February 27th 2021. An ideal type is formed from characteristics and elements of the given phenomena, but it is not meant to correspond to all of the characteristics of any one particular case. It is not meant to refer to perfect things, moral ideals nor to statistical averages but rather to stress certain elements common to most cases of the given phenomenon. It is also important to pay attention that in using the word "ideal" Max Weber refers to the world of ideas (German: Gedankenbilder, "mental images") and not to perfection; these "ideal types" are idea-constructs that help put the seeming chaos of social reality in order.

According to Barth et. al. (Bartha, et al., 2020, p. 72) one implicit assumption of policy making models in liberal democracies is that relatively coherent system of ideas shape policy positions: ideas play a key role in the policy content and 'can explain crucial aspects of policy development' (Béland, 2009a: 704). At the same time, though majoritarian preferences have a pivotal role, they are substantively constrained by the protection of minority rights. In addition, policy content is heavily influenced by area-specific technocratic expertise (Weible, 2008; Lundqvist and Petersen 2010) and mainstream policy paradigms (Hall, 1993) that tend to create policy monopolies (Baumgartner et al., 2009). As a result, the content of policies is mostly stable and policy changes are mainly incremental (Hayes, 2006) (Bartha, et al., 2020, p. 72)

The main elements of the populist policy making in terms of the policy content are that this kind of policy is ideologically multifaceted and diverse; presence of the heterodox policy elements with frequent policy innovations challenging mainstream policy paradigms; policy content reflecting majoritarian preferences, hostility against unpopular minorities and radical and paradigmatic policy reforms. (Bartha, et al., 2020, p. 75)

In terms of the populist policy process, the same authors identify the following main elements: Circumventing established institutions and downplaying veto players; Limiting participation of technocratic policy experts, opposition parties and civil society actors while directly communicate with the electorate.

Finally, in terms of the populist policy discourse, (Bartha, et al., 2020, p. 75) there is an extensive use of discursive governance followed by tabloid, highly emotional communication style, recurrent crisis framing and Dominance of Manichean discourses.

3.1. Populism in penal policy: (re)humiliation of victims

As the more important is object of the protection and as much as high the gravity of the violation, as serious are the consequences of the populist driven policies.

Therefore, one of the most sensitive fields, (together with economy, social policy and family life) is penal policy. As Andrew well notices, today, some of the good examples on the evidence-based policy making debate could be found also in the field of the penal policy related issue, as from the legislative point of view (…) as in terms of the enforcement of penal sanctions. (Andrew, et al., 2016) These debates are frequently associated to populist, *ad hoc* intervention in penal policy.

Law-and-order punitive measures in criminal justice policy, negation of extending LGBTQ rights (Pappas, et al., 2009) or perceiving gender equality as jeopardizing the idea of the traditional family (Korkut & EslenZiya, 2011; Szikra, 2019) can be deduced from right-wing nationalism of the respective political parties and not from their populism.

The same goes for criminalization of activities of human rights defenders, who are frequently marked as enemies or kind of social evil which hampers traditional national values.

Life prison, limitation (or exclusion) of parole, enormously high sentences for particular groups of crimes, (Jovanović, 2021) like sexual violence (especially when committed against children) (Kolaković-Bojović, 2021) are also frequently used by populist leaders to gain an additional support, especially during pre-election campaigns and/or for the purpose of covering and bridging different types of political crisis e.g. affairs associated to high corruption, abuse of public resources etc. Presenting their own actions like a victim oriented, but also themselves like those who speak on behalf of the victims, populists don't hesitate of media exposure of the victims' suffer. (Kolaković-Bojović, 2020) (Kolaković-Bojović, 2018) This leads to disrespectful treatment of victims and their stigmatization, revictimization and humiliation, directly violating their right to dignity and privacy, (Kolaković-Bojović & Grujić, 2020) which is of the particular importance for child victims. (Kolaković-Bojović, 2017)

Above-mentioned populist actions are frequently associated to media demonization of expert and/or academia members who are struggling not just to criticize, but to explain the content of the policy and/or the procedure of its development. This make an atmosphere where everyone is forced to "choose the side", namely, to support populist regime/leader as a great protector of the nation/people or to be declared as "one who support enemies"- therefore, to choose the side of evil. This atmosphere constitutes an environment where fear and pressure cumulate a silence of those who should provide the milestone of the public policy- to provide evidence. This practice is especially harmful for judges, prosecutors and law enforcement agents who need to apply those policies in practice. Formally independent in performing judicial and prosecutorial functions, obliged to comply with the Constitution and laws, they are struggling to create as much as possible adequate jurisprudence as a corrective to the bad or wrong penal policies of the legislators. See: (Kolaković-Bojović, 2017) (Kolaković-Bojović & Tilovska Kechegi, 2018)

4. The Guidelines for evidence-based policymaking: how it should work in practice?

Having in mind an ideal model of the evidence-based policy making as defined by (Bartha, et al., 2020, p. 73) assumes the policy content which is embedded into a relatively coherent system of ideas where there is a central role of mainstream policy paradigms supported by area-specific policy expertise. In addition to this, majoritarian policy preferences constrained by the protection of minority rights Incremental policy changes dominate. With regard of the policy process, the same authors emphasize the role of formal and informal institutions, plurality of participating actors in each stage of the policy process, but also the involvement of the public discussion on proposed policy alternatives. (Bartha, et al., 2020, p. 73) Finally, the policy discourse should include the limited use of discursive governance, but also competing discourses and policy frames. It also involves dominant policy discourses with high and mainly positive valence.

Starting from this ideal model, if we attempt to translate it into the practical guidelines on how to develop an evidence-based policy, it is of the great importance to address following issues:

- The possible sources of information/evidence
- The procedural modalities and forms of analysing and digesting evidence to make it a proper input for future policy
- Inclusion of relevant stakeholders in the process of developing the policy
- Utilisation of evidence through their incorporation in the policies

While addressing the each and every of the following points, there is a need to take into account the specific contexts which frames the human rights policy making. Namely, the need for transposition of the relevant international standards, especially when the policy making process is conduced in order to fulfil international obligations in the process of achieving the membership international organisations or in accessing European Union, which is highly relevant for Serbia[6] and other countries recently went through the transition. (Ciolan, 2006)

[6] For more on the EU accession processes in Serbia see: Kolaković-Bojović, Milica (2018) *Organizacija pravosuđa u Republici Srbiji: reformski okvir i EU standardi.* Institut za kriminološka i sociološka istraživanja, Beograd; Kolaković-Bojović, Milica and Petković, Bojan (2020) *Položaj pravosuđa u Srbiji - između vladavine prava i samovlašća.* Institut za kriminološka i sociološka istraživanja, Beograd.

Therefore, in terms of the potential sources of evidence [7]

- The variety of perspectives needs to be ensured (historical, comparative, normative, institutional, administrative capacities, economic, etc)
- All relevant sources should be collected, made available to all relevant stake holders, discussed, and analysed
- In case of contradiction between available evidence, the decision to give the advantage to one over the other(s) must be supported by explanation.

Considering above presented principles, the main role in informing policy documents play ex-post and ex ante analyses.

The main objective of the ex-post analysis is to comprehensively assess the impact of public policies in the previous period.

Contrary to the ex-post analysis, the very purpose of ex-ante analysis is to assess the current state of play in a filed which is subject to the regulation by the planned policy. This assessment is not limited to the impact of the previous policy (if any previously existed in the field), but rather aims to provide for a clear, comprehensive picture on the situation in the field, to identify the positive developments, the main issues, gaps and challenges, but also to give the overview of the possible solutions already applied elsewhere, including estimation of their applicability in the domestic context concerned.

Finally, ex-ante analysis should identify different approaches to addressing identified issues and to compare their estimated impact on the following aspects: Effectiveness , efficiency, coherency, sustainability and coordination level.[8]

[7] As previously discussed, there is a variety of evidence that could be used to inform public policy: Expert knowledge (through the direct interaction with an expert or based on the published research); reports of the various treaty bodies and specialised institutions/organisations, whether with universal or regional competence; reports on work of the relevant institutions; stakeholder consultations; previous policy evaluations; outcomes from consultations; comparison of policy options; output from economic and statistical modelling, etc.

[8] Effectiveness – the extent to which the general goal is achieved; Coherency – the extent to which the Government's policies are mutually consistent, i.e. which option contributes to the highest level of consistency among the Government's policies; Implementation costs – what are the costs of implementing the option; Sustainability – the probability of the selected model resulting in sustainable progress; Coordination level – the efficiency of monitoring the implementation, i.e. which option provides the best coordination mechanism.

As an outcome, ex-ante analysis should inform the policy makers as on the main issues to be addressed, the possible approaches to do so, as on the most suitable form of policy to be developed and adopted.

In terms of the quality of the consultative process,[9] this process shell precedes the work on drafting the policy document.[10] It shell provide for opportunity for all interested parties to submit their analysis and proposals to the authority which coordination of the policy making process. It is of the great importance to ensure inclusiveness and the transparency of the consultative process. In this sense, the following issues need to be addressed:

- The composition and the role of working group
- The role of external experts
- The role of civil society
- Transparency of the consultative process

The size/inclusiveness composition of the working group in charge of drafting the policy document affects the quality of the document and the process itself to the great extent. Aware of this, the institution in charge of coordination of the preparation of the policy

[9] The notion of consultative process is being frequently misunderstood and misinterpreted, especially in those countries with not so long tradition of inclusiveness and transparency of the policy making processes. Usually, this notion is perceived as a synonym to the public debate, which is strictly ruled, official procedural stage aimed at discussion of the final draft of a public policy. Differently, consultative process is broader concept, and it includes collection of inputs starting from the early stage of the process, prior to drafting any text of the policy. Its very purpose is to comprehensively inform the policy makers on the relevant perspectives of the expert community, various interested parties and the general public.

[10] In terms of the timeline/schedule of the consultative process, the two main scenarios are possible: 1) To initiate the consultative process based on the earlier prepared ex-ante analysis (usually prepared by the independent experts); 2) To initiate consultative process as the first step in conducting ex-ante analysis, in order to ensure the comprehensiveness of the situation overview and to provide variety of inputs of the ex-ante analysis. Both approaches have their own weaknesses and advantages. Previously prepared ex-ante analysis helps to streamline the inputs within the consultative process and to make the other inputs better structures and more focused on the priority issues. However, the second approach is usually associated with the number of not-so-good-structured inputs but enables the expert(s) in charge of the preparation of the ex-ante analysis the more comprehensive (and/or in some issues, the more in-depth approach). In addition to this, the second approach enables them to analyse, digest and incorporate inputs in the ex-ante analysis. Differently, within the first approach the integral version of the proposals received in the consultative process are just submitted to the working group in charge of drafting the policy documents, which significantly hampers the efficiency of its work.

document should involve the representatives of all the institutions that have a predominate/significant, but also specific competences in the field.[11]

Beyond the involvement of the institutions, specific attention should be paid to the involvement of the external experts and professionals coming from the academic community, NGOs and professional associations. Inclusion of the external experts is of the prerequisites to ensure evidence-based policy making approach, with the particular attention to the stage of their involvement,[12] the level of their influence,[13] and the compensation for the work done.[14]

Considering the potential, comprehensiveness and the importance of their expertise, experts from academia should be included in the policy assessment and policy development processes from the early beginning. They should be granted with the decision-making potential at least equal to those granted to the representatives of the institutions. If not included in conducted ex-ante analysis, namely if ex-ante analysis was prepared exclusively by institutions, experts need to be included in the working group in order to do the cross-check and kind of validation of the ex-ante analysis, but also to

[11] The level of the representation is always challenging issue since there is a need to ensure both: specific expertise in the field and the authorization of the decision makers. Depending on the concrete situation, this could mean two scenarios: a) To involve the high-level decision maker who is going to accompany him/herself with a professional who is in charge for the specific issue(s) in the institution; b) To directly involve a professional who is in charge for the specific issue(s) in the institution who is going to consult a decision maker prior to give his/her inputs to the working group.

[12] In terms of the procedural stage of the expert involvement, it is of the great importance to involve the experts at the earliest point, namely in conducting ex-ante analysis. In this sense, the institution in charge of coordination of the development of the policy document, can invite/engage/hire the external expert(s) to produce ex-ante analysis as an input for the work of the working group (the starting point of their work). Their involvement in the process can stop here, but it is preferable to have them involved in the entire process. This is important for the several reasons: 1) This ensures that findings of the ex-ante analysis are properly understood and addressed, including avoiding a malicious misinterpretation of findings and their abuse in political purposes. 2) This also ensures a better matching between issues identified and measures planned to address them.

[13] This also raises the second issue- what is the nature/role/influence of the external experts in the working group? This can vary from the full fledge membership and voting hand by hand with the representatives of institutions to the only consultative role, while their opinion and/proposal(s) are equally valued as any other inputs received in the consultative process.

[14] Namely, pro bono engagement could sometimes demotivate the hight quality experts to take part in working groups, due to the time-consuming nature of such engagement and the obvious income lost while working on the policy document. At the same time, providing financial compensation to external experts from the state budget can put their impartiality (but also the choice of particular expert) under the question. Finally, when the possibility to support the external expert work through the donor projects/programmes, this can ensure doble benefits: 1) Hight quality experts (due to the clearly defined standards for their selection); Impartiality from the authorities; Competitiveness of the process based on the compensation offered/possibility to engage international and/or the most experienced local experts.

provide additional inputs for the development of the policy document. They should be also properly compensated for their work.

Beyond the role of particular experts mostly coming from academia, or individual consultants, civil society in a broader sense plays an important role in consultative process and contributes to the quality of the policy. A following issues appear to be relevant when it comes to the inclusion of CSOs in development of new policies:

- Who should be perceived as CSO?[15]
- What are the modalities of their inclusion?
- What is the time frame of their inclusion?

Civil society is widely understood as the space outside the family, market and state (WEF, 2013). In this space, citizens follow, discuss, and address a various topic of the common interest for the community as a whole or for the particular subcommunities. This activism can be individual or through the associations. Therefore, CSO comprises of the variety of organisations and individual activists. Some of them possess a significant expertise in a filed, while some are just interested in particular issues, but their expertise does not go beyond the activism. Being in continuous and direct contact with citizens, some CSOs can provide policy makers with specific evidence on how the previous policy has worked in practice, but also to make them aware of the newly appeared issues that need to be addressed by a new policy.

In terms of the modalities of CSO inclusion, the two main modalities are possible:

- direct participation in working groups- although potentially more fruitful in terms of the possibility to explain and discuss, it raises two concerns, namely, how to select CSO participants in the working group among all interested parties and how to ensure confidentiality of the process in those stages when document

[15] Civil society roles include: service provider (for example, running primary schools and providing basic community health care services); advocate/campaigner (for example, lobbying governments or business on issues including indigenous rights or the environment); watchdog (for example, monitoring government compliance with human rights treaties); building active citizenship (for example, motivating civic engagement at the local level and engagement with local, regional and national governance); participating in global governance processes (for example, civil society organisations serve on the advisory board of the World Bank's Climate Investment Funds). (Cooper, 2018, p. 2)

is not mature enough to be public or e.g. when the working group deals with some confidential inputs. [16]

- participation through the public calls to submit suggestions and proposals which ensures the wider inclusion of CSO and ensures comprehensive inputs for working group. However, without possibility to discuss those proposals, they may be wrongly interpreted or disregarded by policy makers.

- combined model based on written proposals and the periodical debates/consultations - corrects the weaknesses of the second one through the inclusion of the elements of direct participation.

When it comes to the procedural stage in which CSO needs to be included, the same arguments stand as for the inclusion of experts- therefore at the earliest convenience.

The public debate as the final stage of the consultative process which directly preceding the adoption is largely dependent from the quality of the previous consultative process. Namely, it all relevant interlocutors have been consulted on time and their inputs properly addressed, the public debate is usually reserved for the so-called fine tuning of the document, in order to improve its technical aspects, to correct the factual mistakes etc, prior to get an official consent of the main institutions to submit the policy document for the adoption. [17]

Timely prepared, comprehensive, detailed and publicly available reports on the results of the public debate are one of the milestones of the transparency. They should include at least:

[16] The first question can be properly addressed through the definition of the clear criteria that CSO organization needs to fulfil in order to be directly included in the working group. Those criteria should be published together with the call for the expression of interest for participation on the working ground they need to refer as to the general track record and the capacities of the organization as to the specific expertise in the field. Upon receipt of the application, they need to be reviewed by the commission of the mixed composition, to ensure the integrity of the process. The results of the evaluation should be made available to any of applicants upon their request. The issue of confidentiality is more sensitive, but the possible solutions depend on the level of confidentiality. In principle, for *limite* it is possible the problem is not so big, and it can be overcome through the signing the confidentiality statements, but for the higher levels of confidentiality, e.g. "secret" this cannot be done.

[17] Contrary, if the document has been prepared in the absence of the consultative process or that process was failed to include the relevant actors or their inputs have not been taken into account and/or properly addressed, there is a serious concern that the major weaknesses of the draft policy documents are going to show up during the public debate, therefore at the very late procedural stage when any major interventions appear to be extremely complicated and time consuming.

- Information on the working group (the date of establishing, composition, and the number of the meetings)

- Information on the process, including step by step description, dates, participants (including all inputs received during the public debate publicly available together with the report)

- Point by point report on which proposal, to what extent and in which way have been addressed (for those proposals that are not accepted, the reasons should be given)

All above-mentioned information should be available on the website of the authority in charge of the coordination of developing public policy document and/or the institution in charge of coordination of public policies. This finalizes the whole process as fully transparent, strengthening the trust in institutions and the decisionmakers.

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ЧЕЛОВЕК И УГОЛОВНОЕ ПРАВО

В статье рассматривается вопрос о месте уголовного права в современном контуре человеческого развития общества. Уделяется внимание смене парадигм и места человека в социуме. Автор анализирует современное состояние общества и предназначение человека в эпоху глобализации и тотальной цифровизации. В этих условиях уголовное право приобретает особые черты и начинания, поскольку происходит переосмысление сути понятие "преступление" и "наказание". В период глобальной инструментализации уголовного права важно выявить закономерности развития уголовного права и проанализировать те тенденции, с которыми мы можем столкнуться завтра.

***Ключевые слова**: человек, преступление, наказание, уголовное право, государство.*

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1. История человечества наполнена различными идеями и откровениями, и так получается, что эти идеи движут миром и заполняют умы многих людей. Так было всегда, и всегда какая-то мета-идея доминировала, была главной предтечей различных событий, будь то революции или мировые войны.

Стоило только человеку внушить, что определенная социальная реальность является нормой и правильным основанием общественного бытия и, казалось бы, еще вчера немыслимые и запретные вещи становились данностью. При этом все это происходило не только с самим человеком, но и с теми ценностями, благами, стандартами, которые его окружали. Не избежало этой участи и право. Вообще XX век оказался в глубоком кризисе, кризисе который ниспроверг человеческую сущность и гуманистическую натуру. Отказ от божественных начал и откровений в пользу гуманизма и справедливости на самом деле не сделал мир чище и свободнее. Зло по-прежнему окружает многих людей, а принцип человеколюбия стал ненавистным, ибо равнодушие заполнило человеческие сердца. Плоды этого равнодушия мы пожинаем сегодня.

Все устремились к господству, тотальному доминированию, идея сверхчеловека нашла свое воплощение в умах многих людей, но эти же многие забыли о том, что стать таковым можно только лишь посредством подчинения себе подобных, по сути, сделав их рабами своих устремлений. Конечно, в прямом смысле мы сегодня такого не обнаружим, все имеет гораздо другие очертания и заретушировано демократическими принципами и идей защиты прав человека, но суть этого процесса предельно ясна и вполне очевидна.

Глобальная трансформация общества и его социальных отношений рефреном отражается на человеке, его сущности и предназначении. Очевидно, что в пылу научно-технической революции и все новых достижений в науке и технике сущностное предназначение человека коренным образом изменилось. Человек стал “заточен” на своих правах и свободах, их реализации, защиты и гарантиях, что непременно имеет своей основой материальную составляющую. Успешность сегодняшнего человека соизмеряется только через один критерий: материальный достаток, приумноженный на то социальное положение и статус, которое занимает человек (своеобразное место в кастовой иерархии). Деньги, статус, карьера – вот бог нынешнего человечества. Получение благ и удовольствий, хорошее и веселое времяпровождение это еще одна составляющая, которая лежит в основе современного мироздания и целеполагания человека.

При этом, как бы мы не говорили, но это тот фундамент, на котором фактически основывается процесс негласного воспитания молодого поколения. Конечно, об этом никто прямо не говорит, но эти ценности произвольно и непроизвольно навязываются, общество подталкивают к тому, что отдыхать и получать удовольствие от жизни всегда приятнее, чем работать, заниматься делом и отдавать себя ближнему, а не очередному гаджету.

Вообще, человек как никогда живет вместе со своим гаджетом, он напрочь проникнут им и поглощен. Электронные средства полностью контролируют человека. Мир телесных вещей уступил место вещам бестелесным. Виртуальная реальность стала данностью и духовным миром (а порою и мерилом) современного человека. Все это говорит о том, что у каждого человека есть теперь свой собственный виртуальный мир и этот индивидуальный мир человека находится в простом техническом устройстве, которое практически заменяет ему все. Этот миникомпьютер стал олицетворением XXI века. И если век XX был веком книги, то без преувеличения XXI век можно назвать веком мобильного телефона.

Если мы говорим о гаджетах, то они непременно заменили собой человека. Люди предпочитают свое свободное время посвящать своему любимому телефону, беспорядочно просматривая новости, сообщения, видеоролики, послания и т.п. вещи. Притом, что если ранее люди больше читали художественную литературу, то теперь в большинстве своем они читают самих себя, свои опусы и ошибки, которыми пестрят всевозможные социальные сети. Люди снимают видеоролики, делают клипы, сэлфи и выставляют это все на всеобщее обозрение. Задача здесь очень простая. Каждый хочет набрать побольше голосов, просмотров, лайков и т.д. В общем, каждый хочет стать успешным и знаменитым. И этот успех измеряется только одним показателем: сколько людей оценили тебя. Может эти люди и не одобряют твой поступок или сделанный экстравагантный сэлфи, но это уже не так и важно.

Сегодня мы уже практически не найдем молодого человека, у которого не было бы личной странички в социальных сетях. На такой страничке можно узнать очень многое о его персонаже, о его связях, предпочтениях, увлечениях, друзьях, мыслях и т.д. Для чего все это делается? Какой заложен смысл в этих действиях? На наш взгляд ответ очевиден: речь идет о своеобразной самореализации человека. Притом, что в этом процессе каждый решает свои задачи. Кто-то увлечен своей внешностью и выставляет ее напоказ, кто-то рассказывает о своих делах и любимых занятиях, кто-то снимает ролики о животных, в конечном итоге всего

этого многообразия не перечесть. Но все стараются что-то делать и непременно придавать все это виртуальной огласке. Оказалось, что стало все это возможным по той причине, что у многих отсутствует элементарная возможность заявить о себе, показать свою самость. А главное, многие утратили веру в объективность оценки своих возможностей. Отсюда становится понятной логика всех этих действий и желаний тотальной самореализации.

Сегодня гаджет способен на многое и этой его возможностью также пользуются многие. У каждого свои намерения и цели. Однако гаджет заменил собой человека и как ни странно человеческого общения становится все меньше. Люди предпочитают просто послать смс-ку, перепостить картинку, чем просто набрать номер и пообщаться вживую, не говоря уже о личных встречах[1]. А зачем? Ведь человек экономит время. Можно лишний раз с использованием телефона, который всегда под рукой, посмотреть видеоролики, фильмы, поиграть в карточные игры, послушать музыку, виртуально посетить любую лекцию и т.д. Все это стало доступным и реально достижимым. Человек стал экономить время, но что он делает с сэкономленным временем? Ответ на данный вопрос повисает в воздухе.

Как видно, в этой виртуальной реальности, которая уже давно стала данностью, отсутствует живое существо, человечество утрачивает визуальный контакт и нет никакого чувства ответственности за свои действия. Это отражает грани должного поведения в такой парадигме, где попросту моральные устои общества становятся фантомом.

Плохо ли это? На самом деле не так уж все выглядит пессимистически, как это может показаться. Во всем этом есть много рациональных вещей, и с этим, пожалуй, бессмысленно спорить и бороться. Однако важно в этой связи совсем другое. Человеку стал ближе не человек, не живое существо, а гаджет, функциональное техническое устройство. И не более того. С развитием прогресса и научных достижений в пропорционально обратном направлении движется человеческая сущность, обычная нравственность и мораль сменяется иными “правилами игры”. И если христианской морали больше нет, то есть совсем иная. Это место не может быть не заполненным. И это нравственная основа – идея прав человека. Фактически сегодня человек поставил себя на место бога и заменил его

[1] Stănilă L. (2019) Children’s rights: between UN convention on the children’s rights and ECHR towards a new international court?.*Yearbook human rights protection/ Protection of the rights of the child “30 years after the adoption of the convention on the rights of the child”*,Number 2, (pp. 27-45). Novi Sad: Provincial Protector of Citizens – Ombudsman; Institute of Criminological and Sociological Research in Belgrade.

собой. Сверхновый человек, о котором некогда писал Ф. Ницше, уже появился. Этот человек верит исключительно в себя, в научно-технический прогресс, основой его существования и бытия является идеология прав человека. Осталось дело только за малым – постичь феномен бессмертия!

Таким образом, современный человек замкнулся в себе, живет только для себя и в свое удовольствие и эта идеология нарциссизма стала проникать в право, с его тотальным и императивным значением и доминантой прав человека.

Наряду с этим и “ячейка общества” – семья – утратила свой статус. Она не нужна человеку. Если раньше семья была связана с определенными смысловыми ценностями и скорее в некотором роде являлась элементом выживания, то теперь она просто превратилась в рудимент современного человечества.

Для того, чтобы удовлетворить свои инстинктивные потребности, современному человеку не обязательно заводить семью, нет такой нужды в приготовлении пищи, услугах быта, домашнем хозяйстве и т.д. Сегодня все это можно сделать и обрести одному человеку и для этого вовсе не требуется искать вторую половину. Человечество создало массу возможностей, чтобы существовать одному: сегодня человек может без труда удовлетворить свои любые желания, не рассчитывая отдавать что-то взамен и при этом он никому ничем не обязан.

Самость человека и его самостоятельность обнажило проблему одиночества, но это одиночество теперь легко заполняется различными гаджетами и интернет-развлечениями. Попросту современный человек боится остаться на едине с самим собой, прислушаться к себе и понять тот смысл и предназначение, ради чего он существует. Однако нужно ли ему знать этот смысл?

2. Каковым же будет право в этой парадигме, какова роль уготована ему: обслуживанию интересов господствующих классов и элит или же борьба за справедливость и человеческое достоинство?

Нас этот вопрос интересует в плоскости его главного дамоклова меча в руках государства – права уголовного и дилеммы о том, что считать преступлением. Не секрет в этой связи, что уголовное право достаточно консервативно и оно не столь изменчиво в своих основных институтах, как иные отрасли права. Могут меняться формулировки различных составов преступлений, криминализироваться или декриминализироваться определенная область общественных отношений,

вводиться новые положения в устоявшиеся институты, виды наказаний и т.д., но сущность того, что именовать преступлением уже долгие годы остается неизменной.

В настоящее время уголовное право позиционируется сменой парадигм и теоретических концепций. Уже нет того классического уголовного права, которое существовало в XX веке. Сегодня уголовное право характеризуется плюрализмом взглядов, разнообразием концепций и теоретических построений новых институтов, отрицанием базовых постулатов, которые ранее казались незыблемыми (понятия преступления и уголовной ответственности, состава преступления и др.). Уголовное право все чаще предлагают рассматривать именно в широком смысле, наподобие западноевропейских стандартов в триаде преступление-проступок-правонарушение, в результате чего уже становится невозможным избежать реформирования охраны публичной сферы общественных отношений (Хилюта, 2020).

Все это стало возможным благодаря тому, что общество вступило в век информационных технологий и свое дальнейшее развитие получили процессы глобализации. Эпоха постмодернизма навязывает новую методику исследований, в том числе и в уголовном праве, а критика современности, наряду с методом деконструкции, является базовым толчком для проведения масштабной модернизации общественных отношений в постиндустриальную эпоху (Хилюта, 2016 : 21). Такое положение дел имеет как положительные, так и отрицательные черты.

По этой причине вопрос о понимании того, что такое преступление приобретает особые формы. И дело даже не в том, должно ли данное фундаментальное понятие отражать общественную опасность и противоправность, проблема состоит в сущностном понимании того, что мы именуем самым опасным деликтом в государстве, каковы аспекты его соотношения с иными правонарушениями и каким образом наполняется содержание самого понятия “преступление”. Отсюда и вытекают вопросы о понимании того, что же представляет собой деяние как базовый признак преступления, должно ли преступление содержать указание на виновность и наказуемость, а если это так, то тогда в чем отличие преступления от состава преступления и каково предназначение последнего института в общем посыле о том, что мы именуем преступлением.

Более того, введение института административной преюдиции в уголовное законодательство подымает на новый уровень вопрос о качественных признаках преступного деяния и необходимости его рассмотрении в широком смысле (в трилогии преступление – проступок – правонарушение). Понимание вины и виновности указывает на возможность привлечения к уголовной ответственности корпоративных образований, соответственно, при такой постановке вопроса, смещаются акценты в значении данного признака для общего понятия "преступление", а наказание сменяется мерами уголовно-правового воздействия. Если это так, тогда наказание уже не может являться тем признаком преступления, о котором мы сегодня говорим и на который указывает законодатель (Пудовочкин, Щербаков, 2020 : 630).

Сказанное говорит о том, что классические каноны школы уголовного права подвергаются не просто корректировке, но фундаментальному слому. Важно только попытаться разглядеть, на что произойдет замена. Такая замена не может состояться в одночасье, этого не произойдет. Но сегодня мы можем видеть тенденции и некие общие закономерности в формулировании основ понимания того, что мы будем именовать преступлением.

Сегодня преступление – это всегда деяние, которое обладает рядом признаков. Вопрос может состоять только в том, какое значение имеет тот или иной признак, может ли он поглощаться другим, целесообразно ли давать развернутый перечень этих признаков и т.д., но то, что преступление – это определенное опасное поведение, которое и подлежит наказанию, по сути своей остается неизменным. Означает ли сказанное, что уголовное право оказалось вне эпохи и вне времени и понятие того, что именовать преступлением оказалось фундаментальным? Неужели уголовное право и его базовые институты о преступлении и наказании так и останутся неизменными и устоят под натиском тотальной цифровизации и глобализации?

В этой плоскости можно сказать, что уголовное право пока держит оборону и пока его центральные понятия не подвергаются существенной верификации. Однако на самом деле это не совсем так, и сквозь призму законодательных новелл и постоянно меняющейся правоприменительной практики можно увидеть первые закономерности преобразования института о преступлении, формулировании идей о том, что наказанию подлежит не только деяние, но и сам деятель, свобода воли больше не является краеугольным принципом личной виновной ответственности,

и уголовной ответственности должны подлежать не только физические лица, но и лица юридические (корпоративные образования).

Происходит диверсификация уголовного права (Pavlovic, 2020 : 34).

3. Парадигмальная концепция сегодняшнего мира, развивая новые формы неолиберализма, старается низвергнуть государство, отодвинуть его на второй план, вынося на первый – рынок и его саморегулирование. Здесь процесс саморегуляции является главной доминантой во всех сферах общественной жизни и во всех отношениях, включая право. Это обусловлено плюрализмом взглядов и идей, постмодернистской методологией проведения научных исследований и разработкой основ тотального реформирования законодательства. Данные тенденции характерны и для продолжающего сохранять свою консервативность – уголовного права (Khiluta, 2021).

При этом, если современное государство продолжает держать уголовное право в своих руках, то идеология неолиберализма стремится к диверсификации этого процесса, потому как государство не должно выступать той скрепой, которое бы удерживало общество и сохраняло монополию на насилие, управляя процессом определения того, что есть преступление, и выбора мер воздействия на лицо, допустившее отступление от соблюдения установленных правил и выход за “пределы закона”.

Глобальная смена существующих парадигм пока еще не наступила, однако уже сегодня очевидны определенные тенденции и закономерности развития самого уголовного права. Вот здесь и возникает вопрос о роли уголовного права при смене концепции общественного развития, перехода к информационному обществу. А именно, будет ли оно оставаться публичной отраслью или больше вбирать в себя диспозитивные элементы и частноправовые начала? При такой постановке вопроса фундаментальный признак преступления для постсоветских стран – общественная опасность – больше не будет диктовать формирование сущности и содержания центрального института для уголовного права – преступления, и определять формы развития уголовного права.

По сути говоря, общественная опасность – это, в некоторой степени, идеология проявления марксистских идей в уголовном праве, как и отношения собственности – это марксистская идея материальности или присвоенности вещи. Но если мы говорим об общественной опасности причинения вреда (или угрозе его

причинения), то непременно возникает вопрос: кому (или чему) в таком случае причиняется вред или существует угроза его причинения? Общественным отношениям? Но в основе таких общественных отношений лежат диаметрально противоположные интересы различных субъектов, и вполне понятно, что если мы разрываем эти отношения и начинаем их делить, то во главе лежит идея плюрализма уголовно-правовой охраны общественных отношений нетождественных социальных групп, классов, коллективных образований и т.д. Очевидно, что в этой ситуации акцент не просто смещается с публичной в частную сферу, а указывает на фундаментальный уход от единого концепта разрешения уголовно-правовых конфликтов и передачи данной функции иным публично-корпоративным образованиям. А в таком случае и понятие того, что представляет собой преступление, должно быть пересмотрено.

Однако если мы говорим об иных субъектах публично-правовой сферы, помимо государства, то возникает еще один вопрос: в чьих интересах будут действовать такие организации или публично-корпоративные образования? Понятно, что не в интересах всего общества или государства в целом, а узкой группы лиц, которая, практически, и будет решать, что преступно, а что – нет, облекая это в различные форматы, в том числе и законодательного регулирования общественных отношений уголовно-правовыми средствами.

Таким образом, идеология неолиберализма непременно ставит вопрос о либеральной – многоуровневой уголовной ответственности различных типов общественных отношений. И в первую очередь это касается базовых для либерализма ценностей – собственности и экономической деятельности. Отсюда становятся понятными попытки развести уголовную ответственность для должностных лиц государственных и негосударственных корпоративных образований, предусмотреть особые формы привлечения юридических лиц (или их руководителей, сотрудников и т.д.) к уголовной или административной ответственности и т.д.

В частности, в настоящее время либертарианство все настойчивее старается диктовать для национальных правопорядков условия особого свойства наступления уголовной ответственности для должностных лиц организаций негосударственной формы собственности. Эта идея покоится на канонах неприкосновенности частной собственности и интереса собственника, как такового. Она не может не привлекать внимания и расширять ряды своих сторонников, т.к. в этом случае именно сам собственник решает, нарушены

(ущемлены) его права и законные интересы или же нет, стоит ли лицо привлекать к ответственности или не стоит. Данный ряд можно продолжить и далее.

Однако в этой ситуации нельзя не обратить внимание на то, что эти постулаты разрывают монополию государства на применение насилия – в данном случае привлечения лица к уголовной ответственности, допускают все более глубокое проникновение частных начал в публичную сферу. В принципе, наверное, так и должно быть, но важно в этой связи видеть рамки этого процесса и его границы.

Вполне понятно и то, что в обсуждаемом контексте собственник будет всегда заботиться о своих частных интересах, но никак не о государственных. В случае конфликта интересов приоритет будет отдаваться частным, но никогда не государственным интересам. Тем не менее, в данном случае очень важно найти баланс, потому что, с одной стороны, государство не может быть “судьей в своем собственном деле”, но, с другой стороны, чрезмерное расширение частных начал подрывает классические основы уголовно-правового воздействия.

Это связано с простой аксиомой. В настоящее время транснациональные корпорации все более активно заняты проблемой поиска новых источников сбыта продукции и получения сверхприбылей. Это требует уменьшения затрат, избегания рисков и возможных негативных последствий в виде вероятности быть привлеченным к уголовной ответственности за различного рода злоупотребления и экономические правонарушения. Решение подобной задачи требует проведения политики постепенного смягчения монополии государства в сфере уголовного судопроизводства, передачи этих функций иным корпоративным образованиям. Надо сказать, что эта тенденция характерна для многих стран, однако в большей степени она характерна для стран с развивающейся экономикой. Печально, что на эти рельсы сегодня становимся и мы.

Вместо того, чтобы сделать исключения из правил и обозначить дополнительные условия привлечения должностных лиц частной сферы к уголовной ответственности по сравнению с государственными должностными лицами (лицами, занимающими должности в государственных учреждениях, предприятиях и организациях), мы полностью начинаем смещать приоритеты в сторону непонятной либерализации управленческой сферы. Понятно, что в этой ситуации не следует бросаться в крайности и допускать известные перегибы в данном вопросе, что может выражаться в тотальном господстве государства во всех областях и сегментах общественной жизни. Однако следует избегать и другой

крайности – чрезмерной либерализации экономики и сферы управления. Это, в конечном итоге, приведет к хаосу и неспособности государства разрешать уголовно-правовые конфликты.

Очевидно, что собственник никогда не будет инициатором возбуждения уголовных дел в своей компании (против своих сотрудников) или же, более того, становиться на путь привлечения самого себя к уголовной ответственности. Это абсурдная ситуация. Коллективные органы такого юридического лица не примут подобных решений, если при этом не будет затрагиваться чей-либо интерес и личная выгода. В такой ситуации вывод напрашивается сам по себе. Кто владеет компанией (контрольным пакетом акций) или является собственником имущества организации, тот и определяет судьбу не только предприятия, но и конкретного человека в этом предприятии. А в данном случае всегда будет существовать конфликт интересов, и на этой почве возможны различного рода злоупотребления, подкуп и т.д.

В таком случае государство окажется бессильным и фактически устранится от возможного разрешения уголовно-правовых конфликтов и защиты интересов, как субъектов хозяйствования, так и частных лиц. Вряд ли это сформирует стабильность и здоровую конкуренцию. Крупные компании-монополисты фактически окажутся теми субъектами, которые будут на своем уровне разрешать существующие публично-правовые конфликты в управленческой и экономической сферах, т.к. доминирования государства в уголовно-правовой области больше не будет. Но это не так страшно, на самом деле, по сравнению с тем, что в данном случае ни о какой свободе и конкуренции речи уже больше идти не будет. Транснациональные компании в таком случае превратятся еще больше в сверхмонополистов и никогда не допустят на рынок других субъектов. По сути дела, национальное законодательство будет развиваться только в одном направлении, и корректироваться в сторону защиты глобальных игроков и их интересов.

Этих крайностей нужно избежать, как, впрочем, и тех, которые существуют сегодня. Чрезмерное засилье государства во всех сферах общественной жизни превращает его в монстра с “дамокловым мечом” в виде возможности любого быть привлеченным к уголовной ответственности. В этом случае, как мы уже говорили, важно найти разумный баланс частных и публичных интересов в управленческой (служебной) деятельности и грамотно расставить приоритеты в заданном направлении.

4. Открывая и перелистывая книги, по которым учились наши родители и старшее поколение, нередко ловишь себя на мысли, что с тех пор ничего не поменялось. Причем во всех отношениях. И в праве тоже. Меняются только декорации и конъюнктура, одни идеологические штампы сменяются другими. Вспоминаете, что это было за время? Советская пропагандистская машина нещадно разоблачала буржуазные порядки и правовые устои, клеймила их позором и показывала античеловеческую составляющую права, сводящуюся к борьбе классов и классовому господству одних слоев населения над другими.

Позволим привести себе одну цитату: “Буржуазное государство ведет борьбу с посягательствами на личность и имущество лишь постольку, поскольку это необходимо для обеспечения буржуазного порядка. Во имя поддержания незыблемости частной собственности буржуазный закон свирепо карает безработного, которого нужда, отчаяние и голод толкают на совершение преступления. Чудовищные преступления самой буржуазии против жизни, здоровья и имущества широких трудящихся масс остаются безнаказанными” (Пионтковский, 1961: 14).

Конечно, сегодня такого уже не встретишь, ибо вся идеологическая составляющая “канула в лета”, но законы продолжают жить, и порой они напоминают те аналоги, которые открыто противопоставлялись и выдавались как чуждые советскому обществу. Сказанное вполне касается и сегодняшнего уголовного права.

Фактически настоящее уголовное право является инструментом в деле разрешения не только всевозможных конфликтов, проводимой политики в экономике и социальной сфере, но и глобальным регулятором международного порядка. То есть уголовное право используется и как внутренний и как внешний инструмент для реализации узкокорпоративных и конъюнктурных интересов определенных лиц и глобальных игроков. В принципе, так было всегда, однако, сегодняшняя парадигма говорит о другом.

Кризис глобализации 2001 и 2020 г. и тотальная пандемия 2020 г. только обострили проблему самоидентификации личности и прав человека, а точнее выявили глубокий кризис данных институциональных формирований. Это отчетливо стало видно в 2022 г. Очевидно, что в настоящее время происходит переосмысление ценностей и базовых конструкций построения общественных отношений, потому как во главу угла ставится не личность, а безопасность общества и государства в целом. Следовательно, и уголовное право со своим арсеналом мер и средств борьбы

с социально опасными проявлениями должно будет учитывать данные изменения. А они заключаются в том, что человечество смещает акценты с тотальной глобализации всех сфер общественной жизни на региональное развитие, защите и безопасности государства. И уголовное право как ни кстати здесь должно отражать интересы своего социума и территории, принимая во внимание ментальные и субъективные предпочтения конкретных государств и лиц, их населяющих. Отсюда неизбежны институциональные преобразования, суть которых будет заключаться не в обеспечении защиты интересов транснациональных корпораций и наднациональных организаций, подстраивания во всем и унификации права и его стандартизации, а в преломлении собственных интересов, их защиты и понимании того, что есть преступление и наказание, какие меры воздействия являются оптимальными и эффективными, каковы пределы уголовно-правового регулирования и сферы действия уголовного права.

Дело в том, что глобализм как четко сформулированный экономический проект не основан на культурологических и этических ценностях и представлении о построении общества “социального благоденства”. В данном случае за фасадом прав человека и развитием демократии скрываются совсем иные цели всеобщей унификации и отражения скрытых интересов определенных социальных групп. В такой ситуации право является лишь придатком этой глобальной идеи и служит лишь средством обеспечения и реализации наднациональных проектов. Такая же роль отведена и уголовному праву как своеобразному инструменту реализации практических возможностей тотального экономического, политического и социального правопорядка. Это не отвечает принципам национальных и суверенных государств. Очевидно, что в ближайшем будущем мы столкнемся с дилеммой переоценки принципов развития международного уголовного права и переформатированием его классических основ в цифровую эру – институтов о преступлении и наказании. В этом смысле глобальная инструментализация уголовного права только начинается. И она пройдет в духе безопасности национальных интересов государства и его граждан, где речь будет идти о деглобализации права и его инструментов.

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HUMAN AND CRIMINAL LAW

The article considers the issue of the place of criminal law in the modern contour of human development of society. Attention is paid to the shift in paradigms and the place of man in society. The author analyzes the modern state of society and the purpose of man in the era of globalization and total digitalization. Under these conditions, criminal law acquires special features and undertakings, since there is a rethinking of the essence of the concept of "crime" and "punishment". During the period of global instrumentalization of criminal law, it is important to identify the patterns of development of criminal law and analyze the trends that we may face tomorrow.

Keywords: person, crime, punishment, criminal law, state.

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МЕХАНИЗМ ОБОРОТА НАУЧНОЙ ИНФОРМАЦИИ МЕЖДУ КРИМИНОЛОГИЕЙ И УГОЛОВНЫМ ПРАВОМ

Оптимизация уголовно-правового воздействия на преступность с необходимостью предполагает учет в процессе правового регулирования значимой криминологической информации. Это требует наличия качественного и эффективного механизма оборота научной информации между криминологией и уголовным правом. В работе предпринята попытка дифференцированного анализа такого механизма: а) на уровне оборота информации в научной среде; б) на уровне оборота научной информации в правотворческой и правоприменительной деятельности.

Ключевые слова: *теория уголовного права, теория криминологии, взаимодействие уголовного права и криминологии, оборот научной информации.*

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Информационный обмен между криминологией и уголовным правом

В рассуждениях о взаимодействии криминологии и уголовного права, об обмене информации между этими сферами социальной практики, а следовательно и о криминологическом обосновании уголовного закона следует учитывать несколько значимых обстоятельств.

Во-первых, объем информации, которую производит криминология, и объем информации, необходимый для обоснования процессов принятия и реализации уголовного закона, далеко не совпадают. Определенная часть информационного продукта криминологов для уголовного права и уголовного закона объективно является инрелевантной. К примеру, известные суждения о социальном характере преступности, о порождающих ее социальных противоречиях, о территориальном распределении массива преступлений по стране, о невысоком уровне образования большей части преступников и т.п., по большому счету, не имеют значения для уголовного права, хотя и сохраняют ценность для познания самой преступности и организации дела ее профилактики. С другой стороны, криминологическая информация – это не единственное знание, которое лежит в основе уголовного закона. Он базируется, как известно, на более широком информационном фундаменте, включающем сведения из области политической, экономической, международной жизни, данные философии, психологии, собственно уголовно-правовые доктринальные положения и т.д. Криминологическая информация – лишь часть информационного основания уголовного права. В связи с этим информационный оборот между криминологией и уголовным правом должен мыслиться в известном отношении как обмен ограниченным объемом информации.

Во-вторых, значимая для уголовного права криминологическая информация, которая производится криминологами, и которая в действительности необходима для обеспечения качества уголовного закона и уголовно-правового регулирования, далеко не всегда совпадают в содержательном отношении. Различающиеся внутренние приоритеты, интересы, методологические возможности отраслевых наук в ряде случаев приводят к тому, что “криминологический спрос” уголовного права и “уголовно-правовое предложение” криминологии не совпадают. Один, но весьма показательный пример такого несовпадения – отсутствие на настоящий момент в России надлежащей криминологической информации для построения моделей риск-ориентированного правосудия[1]. Еще одним примером может

[1] См. об этом подробнее: Бабаев М.М., Пудовочкин Ю.Е. Очерки криминальной рискологии. М., 2021.

служить крайне слабо разработанная тема криминологических особенностей, преступлений, совершаемых в цифровом пространстве. Причем эти пробелы наблюдаются на фоне, к примеру, откровенного переизбытка (правда, тоже не всегда актуальной) информации об организованной преступности или преступности несовершеннолетних. Дисбаланс “спроса” и “предложения” лишь подчеркивает, что информационный обмен между криминологией и уголовным правом может существовать лишь как обмен не просто ограниченной по объему, но содержательно ценной, востребованной, актуальной информацией. Переадресуя криминологам слова известного сатирика, скажем: мало знать себе цену, надо еще и пользоваться спросом.

В-третьих, даже в тех ограниченных по объему и содержанию ситуациях, когда информационный обмен между криминологией и уголовным правом возможен и необходим, он не должен развиваться ни по линии “слепого”, некритичного восприятия, ни по линии тотального игнорирования. История отечественного права, между тем, дает нам примеры и того, и другого механизма воздействия криминологии на уголовное право. В качестве примера приведем небезызвестный проект УК РСФСР 1930 года[2]. Основанный всецело на идеях социологической школы уголовного права, он был, по сути своей, прямой рецепцией криминологических новаций своего времени, прежде всего, о “криминологическом понятии” преступления, лишенного формального признака уголовной противоправности, и о реальной и потенциальной общественной опасности лица как основании применения к нему мер профилактического и карательного воздействия. Проект разрывал с формальной догмой и превращал закон в примерную инструкцию по применению целесообразных профилактических мер в ситуациях наличного вреда или грозящей опасности. Судьба проекта, равно как и судьба его идейного вдохновителя Н.В. Крыленко хорошо известна. Но нам важно подчеркнуть в рассматриваемом случае иное – вне идеологического налета проект являл собой подчеркнуто криминологический документ, документ в котором криминологическая информация была возведена в ранг нормативного акта напрямую, без согласования с собственно правовыми основаниями уголовного закона. В современной истории проявление подобного рода прямой рецепции криминологической информации можно наблюдать, на наш взгляд, в содержании ст. 210.1 УК РФ, устанавливающей наказание до 15 (!) лет лишения свободы за один факт занятия высшего положения в преступной иерархии. Не только сама

[2] Текст проекта см.: Проект Уголовного Кодекса РСФСР // Советская юстиция. 1930. № 19 (10 июля). С. 16 – 27.

идея усиления ответственности “воров в законе”, но и каждое слово в диспозиции этой статьи (“занятие”, “высшего”, “положения”, “преступной”, “иерархии”) наполнены исключительно криминологическим содержанием и, по сути, лишены содержания собственно правового.

Таким образом, еще раз подчеркнем: информационный оборот между криминологией и уголовным правом имеет свои строго определенные (не значит, что неподвижные) границы, которые заданы целевой направленностью этих областей науки и социальной практики.

Механизм криминологического обеспечения уголовно-правового нормотворчества и правоприменения предполагает, что уголовное право в той или иной степени опирается или учитывает криминологическую информацию, причем разумеется, не в виде исходных данных криминологических исследований, а в виде определенных идей, концепций, теорий, рекомендаций.

Однако, в этом взаимодействии есть одно немаловажное обстоятельство, которое требует отдельного упоминания. Речь идет о том, что оно строилось и строится, как представляется, в отсутствие отлаженного системного механизма. По большому счету, криминология самостоятельно продуцирует те или иные теории и рекомендации, в то время как законодатель так же самостоятельно и по своему усмотрению выбирает те из них, что, по его мнению, достойны внимания и отражения в законе. Но важно обратить внимание, что даже в отсутствие системных начал и организационных рамок взаимодействие осуществляется. Следовательно, в нем есть интерес со стороны, прежде всего, законодателя как единственного творца уголовного закона. И как только и если такой интерес появляется и реально осознается, теоретическая идея взаимодействия криминологии и уголовного права обретает практическое воплощение.

Учитывая разноплановый характер информации, которая вращается в сфере взаимодействия уголовного права и криминологии, а также принимая во внимание отмеченную выше специфику субъектного состава такого взаимодействия, есть все основания утверждать, что механизм оборота криминологической информации, ее производство и восприятие, имеет свою специфику и свои особенности в зависимости от того, о каком уровне структурного взаимодействия криминологии и уголовного права идет речь. Здесь можно выделить, как представляется, два различающихся аспекта: оборот информации на уровне идей и оборот информации на уровне принятия и реализации правовых решений.

Механизм оборота криминологической информации в научной сфере

В интеллектуальном пространстве современной России преступность и противодействие ей, как некий обобщенный предмет исследования, выступает центром притяжения различных, как принято считать, относительно самостоятельных наук – уголовного права, криминологии, уголовной социологии, уголовной политологии. Каждая из них под своим углом исследует феномены преступления и наказания, производя значительный объем информации, межотраслевой оборот которой выступает одной из значимых (если не самой значимой) составляющей межнаучного осмысления проблем противодействия преступности и обеспечения безопасности.

Общая схема такого оборота представляется следующим образом.

Анализ общественных отношений, основанный на применении социологических методик, с целью выявления криминогенных девиаций в том или ином экономическом, социальном, политическом, а также в любом другом процессе представляет собой по сути криминологическую акцию и должен рассматриваться как одна из важнейших задач криминологической науки, несомненно входящая в ее предмет. Именно криминология, решая эту задачу и одновременно выполняя свою информационную функцию, способна вместе с тем получать и предоставлять уголовному праву важнейшие сведения о тех общественно опасных видах человеческого поведения, которые (уже в законных рамках предмета уголовного права) заслуживают обсуждения и решения вопроса о публично-правовой реакции на них.

Однако такая информация должна поступать в “уголовно-правовой банк” не напрямую, а посредством уголовно-политических “транзакций”. Уголовная политика должна выступать своего рода процессинговым центром, оценивающим криминологический запрос на предмет соответствия его уголовно-политическим принципам и передающим его структурам уголовного права и законодателя.

Сказанное не только не отрицает, но, напротив, предполагает необходимость социологического анализа явлений, уже получивших уголовно-правовую оценку. Анализ этот образует содержательную область социологии уголовного права – раздела уголовно-правовой науки, который исследует реальную социальную жизнь уголовно-правовых норм и институтов, механизм их действия, результаты и

эффективность[3]. Получаемая при этом информация также должна быть подвергнута уголовно-политической оценке (и криминологическому осмыслению) и "возвращена" в науку уголовного права[4] для подтверждения правильности или корректировки существующих правовых конструкций.

Таким образом, социология уголовного права как часть науки уголовного права и криминология как отдельная юридическая наука, как бы идут навстречу друг другу: от общественных отношений - к закону и от закона - к общественным отношениям. Криминология информационно предварительно определяет, что может быть признано преступным из существующего в реальности, а социология уголовного права устанавливает, как выглядит в реальной жизни то, что официально признано преступным.

Подчеркнем, наша общая беда в том, что надежно обосновав предмет и границы криминологии и уголовного права, специалисты фактически выстроили "железный занавес" между сопряженными отраслями знания. Однако мы гораздо ближе и гораздо нужнее друг другу, чем большинство из нас думает. Эта близость не предполагает устранения границ с целью формирования "супернауки"; это невозможно, не необходимо и нежелательно. Но что требуется непременно, так это "уголовно-правовой и криминологический шенген", свободная зона обращения

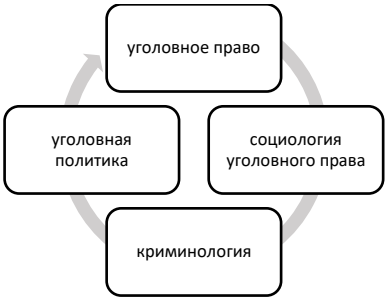
[3] Полагаем важным отметить мнение Н.Ф. Кузнецовой, которая писала: «Не существует самостоятельного предмета, а тем более особой отрасли «социология уголовного права». Социологические уголовно-правовые проблемы (которые лишь для краткости и условно можно именовать социологией уголовного права) есть та область научно-практических изысканий в уголовном праве, которая разрабатывается путем конкретно социологических методов с целью: раскрыть социальные истоки, содержание и последствия действия уголовного права в его взаимосвязи с регулируемыми им и смежными общественными явлениями» (см.: Кузнецова Н.Ф. Социологические проблемы уголовного права // Проблемы социологии права. Вып. 1 / отв. ред. В.Н. Кудрявцев, А.Я. Чяпас. Вильнюс, 1970. С. 120). Эта позиция, вне сомнений, заслуживает внимания, поскольку постулирует невозможность вычленения в уголовном праве особого предметного раздела – социология уголовного права, но акцентирует внимание на необходимости применения социологического метода для исследования всех компонентов предмета уголовного права. Она корреспондирует позиции Л.И. Спиридонова, который считал возможным выделить предмет социологии уголовного права лишь как частной социологической теории (а не раздела уголовного права) и не видел (в отличие от С.А. Маркунцова) перспектив выделения социологии уголовного права в отдельную отрасль науки.

[4] Вряд ли можно поддержать Д.А. Шестакова в суждении о том, что социология уголовного права – это часть раздела криминологии о противодействии преступности, отражающая карательную реакцию на преступления со стороны государства. См.: Шестаков Д.А. Криминология: Новые подходы к преступлению и преступности. Криминогенные законы и криминологическое законодательство. Противодействие преступности в изменяющемся мире: учебник. 2-е изд., перераб. и доп. СПб., 2006. С. 20.

научного знания, не ведающая внутри себя границ и препятствий процессам взаимодействия.

Такой “шенген” надо начинать выстраивать, как представляется, с развития буферных зон, которые в отечественной науке оказались совершенно неразвитыми. Речь идет, прежде всего, об упомянутых социологии уголовного права и уголовной политике.

В качестве одного из возможных вариантов внешнего представления связей между этими областями науки можно предложить следующую схему:



Она наглядно показывает, что между уголовным правом и криминологией есть некая “пограничная” область, в которой не просто пересекаются, но самым тесным образом переплетаются, смыкаются проблемы каждой из этих наук. Социология уголовного права и уголовная политология позволяют до известных пределов размыть границы уголовного права и криминологии, обеспечить “безвизовое”, свободное взаимопроникновение идей и конструкций, предоставляют для этого необходимый методический и терминологический (языковой) инструментарий, свободный от жесткого диктата тезауруса уголовно-правовой догматики и криминологической теории.

Социология уголовного права и уголовная политика, если переходить на язык синергетики, являют собой “зону неопределенности”, “турбулентности”, в которой нестабильное взаимодействие частиц уголовного права и криминологии может породить новый оригинальный “аттрактор”, новую идею, плавное и планомерное развитие и воплощение которой будет проходить уже в рамках отраслевых наук по установленным уголовно-правовым и криминологическим законам.

Это, если хотите, находящийся под особым управлением банк, в который “сбрасывают” все проблемные активы криминологии и уголовного права, с тем, чтобы обеспечить нормальное функционирование этих наук. Он притягивает к себе, позволяет вынести за рамки криминологической и уголовно-правовой науки “нестабильные” вопросы, острейшие проблемы, которые способны раскачать, а может и разрушить эти традиционные отрасли знания и таким образом гарантирует их безопасность.

Тем самым эта “буферная зона” гарантирует незыблемость и неприкосновенность, защиту от постороннего непрофессионального вмешательства главных, системообразующих идей и уголовного права, и криминологии (и иных наук антикриминального цикла). В первом случае – идеи квалификации преступлений и назначения наказания, во втором – идеи предупреждения преступлений.

При этом, на наш взгляд, есть три критерия, по которым можно оценивать процесс взаимодействия криминологии и уголовного права: *непрерывность* процесса, *качество* криминологической информации, ее *адекватность* потребностям и запросам уголовного права.

Если два последних момента, видимо, не нуждаются в комментариях, то о первом все же скажем нескольких слов. Поток криминологической информации (с учетом разных ее видов и разных потребителей) не должен прерываться, в нем статика должна отсутствовать в принципе. Таково непременное условие, проистекающее из особенностей функционирования всех блоков данного процесса: перманентны многоэтапная законотворческая работа, правоприменительная, и, прежде всего, судебная практика. Непрерывно идут профессиональная подготовка юристов, которым предстоит трудиться в сфере применения уголовного права. То же самое относится и к повышению квалификации кадров, занятых в этой сфере. Неостановимо развитие науки уголовного права. Соответственно, таковой должна быть и криминологическая поддержка каждого из перечисленных направлений работы. Здесь всякий сбой, временный разрыв связей, любая, даже краткая, остановка механизма передачи криминологической информации будут неизбежно и существенно сказываться на качестве/эффективности функционирования уголовно-правового комплекса.

Механизм оборота криминологической информации в сфере правотворчества и правореализации

Правотворчество и правоприменение – те области социальной практики, в которой любое передовое научное знание, в том числе и криминологическое, с одной стороны, и может и должно внедряться, с другой стороны, требует осторожного обращения и предварительного подтверждения эффективности и безопасности. Здесь возникают вопросы, аналогичные тем, с которыми сталкивается медицина при внедрении новых лекарств или экология при внедрении технологических новаций. Эти вопросы вполне осознаются самими криминологами: "Является ли криминология достаточно зрелой наукой, особенно по сравнению с биохимией, чтобы вообще руководить государственной политикой? Сколько криминологических исследований достаточно, чтобы поддержать или опровергнуть ту или иную политическую рекомендацию? Следует ли принимать уголовно-политические решения до того, как будут опубликованы результаты криминологических исследований? Должны ли криминологи сообщать только о среднем воздействии уголовно-правовой политики, или же они должны также изучать любые систематические различия в воздействии наказания на различные типы людей? Достаточно ли первоначальных результатов криминологических исследований для внедрения научных рекомендаций в жизнь или же необходимо получение выводов контрольных криминологических исследований?"[5]. Иными словами, насколько подлинно научными являются выводы криминологических исследований, учитывая относительный и оценочный характер любого общественного знания, и насколько эти исследования обязательны для дела организации и реализации уголовной политики, какова роль криминолога в принятии и реализации уголовно-политического и уголовно-правового решения. На эти вопросы необходимо иметь ответы, принимая во внимание, что криминолог все чаще оказывается не только производителем и потребителем криминологических знаний, но и поставщиком этих знаний за пределы академического пространства – политикам, практикам и широкой общественности, которые теперь позиционируются как основные потребители криминологического знания.

Каковы в этих условиях наиболее эффективные способы и каналы взаимодействия криминологов и политиков. Западные специалисты по-разному оценивают роль

[5] Lawrence W. Sherman (1992). Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence. The Journal of Criminal Law & Criminology,Vol. 83, № 1.

криминологов в их взаимодействии с политиками. Обзор сформировавшихся по этому поводу позиций приводит Лесли МакКара[6].

Так, Саймон Уинлоу и Стив Холл (2013) утверждают, что современная криминологическая теория обречена на провал до тех пор, пока ученые не признают, что "построение более справедливого и равноправного мира" требует дестабилизации капиталистических режимов производства и что какая-то форма трансформирующего события необходима, чтобы выявить "абсурдность нынешнего порядка". Соответственно, роль криминолога должна, по их мнению, быть разрушительной, а не улучшающей, конфронтационной, а не совместной. От себя добавим: криминолог в таком случае должен выступать в роли обличителя власти, указывая на ее промахи, ошибки, выявляя и способствуя минимизации любых властных решений, которые так или иначе могут приводить к нагнетанию, активизации криминогенных факторов и произвольному конструированию области преступного.

Сама Лесли МакКара, напротив, склонна полагать, что взаимодействие криминологов с политикой должно быть основано на линейном и иерархическом потоке между политическим командованием, институциональной реализацией и положительными результатами. Роль криминолога заключается, по ее мнению, в том, чтобы сотрудничать, а не вступать в конфронтацию, быть хранилищем объективных и воспроизводимых знаний, которые должны использоваться правительством для проведения эффективной и действенной политики.

Ян Лоудер и Ричард Спаркс (2010) предлагают более тонкую повестку взаимодействия криминологии и власти. Они разработали пятикратную таксономию идеальных типов криминологов: научный эксперт, политический советник, игрок-наблюдатель, теоретик/активист общественного движения и одинокий пророк. Исследователи приходят к выводу, что криминология как дисциплина должна воспринимать себя в качестве "разнорабочего" (сплав некоторых основных элементов идеальных типов исследователей на основе принятия методологического плюрализма), который производит "надежное знание", а ученым необходимо смиренно признать ограниченность своего влияния. В развитие этой мысли Н. Кристи (2011) предостерегает от тирании эксперта,

[6] McAra, Lesley (2017) Can Criminologists Change the World? Critical Reflections on the Politics, Performance and Effects of Criminal Justice, British Journal of Criminology, Vol. 57, Issue 4, July 2017, pp. 767- 788.

который оторван от “жизненного опыта других”[7]. Криминолог, пишет Лоуренс, не может контролировать способы, которыми участники политического процесса используют (или искажают) результаты криминологических исследований. Он не может гарантировать, что его рекомендации будут услышаны или что его выводам поверят. Он не может говорить с оценочными суждениями о “справедливости”. Он не может гарантировать, что его выводы будут резонировать с преобладающим этосом эпохи. Криминолог может предоставить фактическую информацию об уголовном праве и последствиях его применения. Это все, что он может сделать[8].

Признавая безусловную ценность этих подходов для определения “чистой роли” криминологов и криминологии, думается все же, что в реальной жизни эти идеальные конструкции должны быть не противопоставлены, а интегрированы. Ведь очевидно, что подчеркнуто конфронтационная роль криминологии, хотя и соблазнительна, и важна, но, по большому счету, социально безответственна. Криминология не может быть исключительно обличителем власти, снимая с себя всю ответственность за разработку позитивных шагов в деле предупреждения преступлений и оптимизации уголовного правосудия. В равной степени ей должна претить и исключительная роль некритичного научного сопровождения принимаемых властью решений. Она имеет прогнозируемые негативные последствия, о которых пишет сама Лесли МакКара, отмечая, что опасность таких механизмов кроется в самоподкрепляющем характере модели взаимодействия криминологов и политиков по типу “заказчик-подрядчик”, при которой правило ввода в эксплуатацию результатов исследований работает лишь в интересах ученых, которые придерживаются доминирующей концептуальной и политической платформы, а результаты заказанных исследований служат укреплению целей существующих институтов.

Акцентированное внимание на той или иной роли (конфронтация или подчинение) угрожает и самой криминологии. МакКара это вполне отчетливо показывает. Как только и если академическая криминология становится дистанцированной от политических дискуссий и дебатов, правительственные министры приобретают устойчивость и иммунитет к исследованиям, которые бросают вызов их популистским предубеждениям и политическим настроениям. Они будут

[7] McAra, Lesley (2017) Can Criminologists Change the World? Critical Reflections on the Politics, Performance and Effects of Criminal Justice, British Journal of Criminology, Vol. 57, Issue 4, July 2017, pp. 767 – 788.

[8] Lawrence W. Sherman (1992). Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence. The Journal of Criminal Law & Criminology,Vol. 83, № 1.

полагаться на советы и наставления не “больших ученых”, а “маленького человека” - специальных советников, чья независимость от повестки дня центрального правительства и способность оспаривать основные политические принципы не являются прозрачными. В то же время ученые, стремящиеся оказать влияние на политику, тесно сотрудничающие с политиками, государственными служащими и руководителями учреждений, входящих в систему уголовного правосудия, все реже вступают в контакт с практиками на более низких уровнях внутри этих учреждений, с реальной жизнью. И в том, и в другом случае последствия для криминологии не вполне утешительны. Ей грозит либо замена долгосрочных научных стратегий кратковременными нападками на сиюминутные политические решения, либо разрыв теоретического и эмпирического знания внутри самой науки.

Таким образом, взаимодействие криминологов и политиков должно быть в равной степени и дружески тесным, и уважительно дистанцированным. Криминологи – это не просто нейтральные наблюдатели, а криминология – не “чистое” научное знание, - заключает МакКара. “Криминолог” - это уже культурно насыщенная роль, предполагающая специфическую борьбу за признание властью. Это означает, что мы должны быть как разрушителями, так и созидателями, и рефлексивно относиться к политике производства знаний в наших собственных научных и институциональных условиях. Криминолог должен видеть системное функционирование в его целостности, стоять над политикой и культурной динамикой, быть вовлеченным в диалог и взаимодействие с группами практиков и понимать особенности и результаты их повседневных встреч.

Иными словами, криминолог и политик – равновеликие субъекты общения, а потому их взаимодействие не может выстраиваться по линейной схеме “заказчик – исполнитель”. Такое взаимодействие в организационном плане требует некоей самостоятельной и независимой площадки для обсуждения и выработки совместного решения. В науке предложения о ее создании уже неоднократно озвучивались. Предлагалось, в частности, в целях совершенствования организационных основ уголовно-правовой политики в качестве консультативного органа при Президенте Российской Федерации создать Совет по совершенствованию законодательства о противодействии преступности, с возложением на него функций по обеспечению взаимодействия между федеральными органами государственной власти, органами государственной власти субъектов Российской Федерации, общественными объединениями, научными учреждениями и организациями при рассмотрении вопросов, связанных с совершенствованием уголовного и иного законодательства о противодействии

преступности[9]. Предлагалось также создать самостоятельный научно-исследовательский центр, который мог бы непрерывно и систематически изучать реальные криминологические и уголовно-правовые тенденции, изучать эффективность практической деятельности системы уголовной юстиции и своевременно прогнозировать возможные предупредительные меры[10]. Предложения эти так и остаются по сей день невостребованными.

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MECHANISM OF SCIENTIFIC INFORMATION TURNOVER BETWEEN CRIMINOLOGY AND CRIMINAL LAW

Optimization of the criminal legal impact on crime necessarily involves taking into account significant criminological information in the process of legal regulation. This requires a high-quality and effective mechanism for the circulation of scientific information between criminology and criminal law. The paper attempts a differentiated analysis of such a mechanism: a) at the level of turnover of information in the scientific environment; b) at the level of turnover of scientific information in law-making and law enforcement activities.

***Keywords**: theory of criminal law, theory of criminology, interaction of criminal law and criminology, turnover of scientific information*

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KSENIA ATANASIJEVIĆ'S CONCEPT OF HUMAN RIGHTS

The subject of the paper is the basic principles of human rights defined by the philosopfer Ksenija Atanasijević as concepts of free personality, equality of all people, and the rejection of all violence and oppression of others. The research goals are to point out the essence of her philosophy and her entire commitment to human rights, because this is the only way to guarantee full freedom of development to every individual, both the most prominent and the most insignificant, and to every nation, both the most populated and the least populated ones. The institutionalization of Ksenia's concept of human rights was not part of the university program of her time, but it was not a living intellectual scene of her time. Publishing in newspapers and magazines, lecturing at public forums, she had a significant impact on the human rights awareness of her contemporaries. The modern academia is institutionally much more open to human rights than in the time between the two world wars, so today it is not only possible but also necessary to continue where Ksenia stopped. It is generally accepted that education at all levels is a necessary step towards the adoption of human rights in institutional, practical life. That is the reason why we should start from the foundations that Ksenia Atanasijević built in her time.

Keywords: *human rights, inviolability of personality, free development of the most insignificant and most prominent, institution of university education, scientific reception in the current university context*[1]

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1. Introduction

Human rights are based on the idea that all human beings have universal natural, inalienable rights. The goal of human rights is to ensure that all people have a life worthy of a human being. The basic human right to life includes, according to modern understandings of human rights, the right to human dignity (Ivanović, 221: 668). In order to protect human dignity, human rights have defined some fundamental aspects that must not be violated. Regardless of skin color, origin or gender, all people have the same human dignity. Human rights are divided into several groups - civil, political, economic, social, and cultural. What they have in common is that they are innate to every human being. They confirm the right of every individual to life, work, education, equality before the law, privacy, and many others.

Individuals have human rights independent of the state and the will of the ruler. But in a society like ours and those similar to us, human rights are still sometimes perceived as some Western, imperial pressure, which is the primary reason why they are accepted in our surroundings with certain difficulties (matić, 2020). This is further justified fact that it is necessary to observe the legacy of our past, and,since for a large number of people the doctrine of human rights has an extralegal character, it is necessary to particularly acknowledge eg., the works of prominent domestic philosophers, such as Ksenia Atanasijević. Her oeuvre is still not adequately valued, so it is necessary to analyze it through its rception and from the point of view of her advocacy for human rights.

Although Ksenia did not use the term “human rights” or other terms of contemporary human rights vocabulary, the basic principles of her work are the starting point for today’s reception from that point of view. Her thought was fouded on a holistic, humanistically based equality of all human beings, including of course women and men, and she advocated as a matter of principle against any persecution of people because of their personal characteristics, which is an eloquent human rights message to modern time. Equality can and must be based on knowledge and enlightenment and it unavoidably implies the idea that every human being is inviolable, and has the right to develop onself fully and disturbedly. Hence, through advocacy for the advancement of women, and directly with it she worked very actively on the advancement of all humanity, building, so to speak, a new ethical doctrine. She worked to achieve “a better and nobler relationship between people that would exclude any physical and moral abuse of the other” (Atanasijević, 1931: 2), which is currently perceived as an ideal of democratic society, exactly related to human rights in the modern age.

2. Human rights discursive reception of the scientific oeuvre of Ksenia Atanasijević

It is important to include a critical and new reading in the study of her work (Lončarević 2020, 211), using the method of reception as a way of understanding its messages. This text is part of an effort to continue the initiation of the reception (Janićijević 2019, 117) of Ksenia Atanasijević's scientific work as an intertextual communication with her creativity to the interpretive community. Today, compared to the author Ksenia Atanasijević as an individual creator, she is an active, contemporary, collective subject in a changed social context, at the same time different but also similar to the one in which the author created.

The horizon of expectations and prior understanding (pre-understanding) is the initial elements of reception, in order to reach it at all. As such, it is applied to the theory of literary and philosophical reception, both in the academic and activist community of Serbia (Janićijević 2019, 116). Undoubtedly, there is also a corresponding horizon of expectations among the interested audience, which can be reached if the audience has a certain experience gained by getting to know those and similar texts and is thus provided with an initial pre-understanding. The combination of the messages emanating from her own texts and those appropriated by the reading public can lead to a fulfilled horizon of expectations, acceptance of the open possibility of identification, or more generally, confirmation and expansion of our experience. The realization of reception is most influenced by the horizon of expectations. Against the dominant oeuvre of the author, we now stand with our scientific history of pre-understanding, as a corrective bridge that introduces what was said before into the current social context across the horizon of expectations. Thus, what was said earlier ceases to be sealed by discursive immutability, reviving through active dialogical reception in the present. Considering everything that Ksenia Atanasijević represents, every good thing she stood for, the way she did it and explained it, we can regard her as our contemporary. On the basis of her ideas that were ahead of the time of their creation, and realizing that the issues she dealt with are still present today, it remains for us as a task of the modern age, perhaps only in a slightly different form, to conclude that the entire oeuvre of Ksenia Atanasijević is of an exceptional importance.

The horizon of expectations of today's audience is filled with her oeuvre because she actually talks about the time in which we live today, and not only about the time in which she lived. Relying on the philosophical oeuvre of Ksenia Atanasijević, e.g., we understand that the possibility of being carefree has been "radically removed" from us, yet we are

"convinced that, in the foreseeable future, what seemed like a utopia until recently will become a reality" (Atanasijević, 1929: 24).

Opposing evil is the point of initial encounter (pre-understanding) of the philosophical attitudes of our time with Ksenia Atanasijević's commitment to social changes, which she called the "revolution of good" (Atanasijević 1968, 20). The prerequisite for the reception is the understanding and acceptance of her position on the idea of the existence of a "revolution of good". It is the starting point of our receptive inspiration and our efforts to build democratic institutions, as part of her vision of a good revolution, e.g., respecting the human rights of all, that all human beings have the same essence, and that, therefore, the personality of each human being must be respected, the promotion of gender equality, security, promotion of tolerance and non-discrimination and global peace.

3. Inviolability of personality

Belief in the inviolability of the personality, in its absolute right to freedom and provision of all the needs for its development is the essence of its philosophy and its entire commitment to life (Veljak, 2020: 31). "Only in this way is it possible to guarantee full freedom of development to every individual, both the most prominent and the most insignificant, and to every nation, both the most populous and the smallest" (Atanasijević, 1927: 2, according to Vuletić, 2011: 17). "And from that comes, as a necessary logical consequence, the refutation, theoretically and practically, of the gross absurdity of the rooted belief that one sex has, by nature itself, superiority over the other sex. "Women felt this absurdity bitterly, with all the complex consequences that resulted from it" Atanasijević, 1927: 1, according to Vuletić, 2008: 22).

Just as she did not explicitly use the term human rights, she also did not use its antipode, the violation (abolition, disrespect, trampling, denial...) of human rights. But that is why she regularly and systematically used some other terms that are explicit enough, such as totalitarianism, racism, hitlerism, anti-Semitism, human wretchedness, misogyny, irresponsible behavior of political and intellectual elites, oppression, and suppression of the development of the individual, community, state, and people and as a universal term "evil". One of the greatest evils, in her opinion, is war, which is portrayed as one of the most disgusting and reckless manifestations of selfishness, blindness and all kinds of negativity, which are fatefully rooted in human nature. While in peace the negative sediments in the human soul are sometimes channeled and appeased, in war they have the opportunity to break out in all their ferocity. "That is why all justifications of war, undertaken from various points of view, which are always, consciously or unconsciously,

tendentious are immoral and blasphemous. In addition, all of them show a complete misunderstanding of the basic ethical position that the personality of every human being must be respected" (Atansijević, 1940, according to Vuletić, 201:111).

That is why for her, the fight against evil, that is, against the violation of human rights of all kinds, is a moral imperative, because "evil is not an illusion, but a real, tragic fact that destroys the value of existence, an anthropological constant, an inevitable companion of human existence. Evil, in its various forms - ontological, psychological, ethical, social, economic, or otherwise - is present in human life in massive quantities. There is neither logic nor morality in relationships between people, they are often a real hell" (Atanasijević, 1968: 18-19). As an antithesis to the violence of war, it points to the principles of love and mercy that guided people to light, truth, goodness, justice and in accordance with their human rights.

But "neither pessimism, nor defeatism, nor misanthropy are the last words of my philosophy" (Atanasijević, 1930: 79, according to Vuletić, 2011: 8). On the contrary, she advocated, both in word and deed, for an open struggle against evil in both individual and social life. "I repeat, injustice spreads faster than a vicious contagion when one bows his head in front of it, and it can be suppressed, to some extent, only by ruthless suppression." (Atanasijević, 1930: 79). That is why she strongly criticizes the Stoic doctrine of patience, and especially the starting maxim of the Stoic ethics: "Bear and renounce".

Searching for the roots of human conflict, Ksenia discovers them in the blasphemous desire to multiply property and "satanic money". She states that during the historical development, the rift between people deepened and expanded. This encourages all kinds of evil and hostile feelings, through which the desire to multiply one's property, and even more, to grab and steal, broke through constantly, and more and more steadily. She pointed out that there are "guardians of the common good" and "protectors of workers", who became multiple millionaires through the hunger and sweat of the miserable, exhausted, undernourished poor (Atanasijević: 1936: 1, according to Vuletić, 2011: 80).

Therefore, there is no greater task for living in individual freedom, mutual sympathy, and peace, until wisdom about life makes the existence of a human being more meaningful, better, more valuable, to contribute to the humanization of individual and social life. There is no better and nobler relationship between people than the one that excludes all physical and moral abuse of the other. That is why the most necessary need is to work deliberately and safely to win political rights.

4. The right to vote for women is a *sine qua non* of equality between women and men

Political rights are an area where the greatest social distinctions between men and women are based on prejudice, deception, misperceptions, and inferences, as well as all kinds of untruths. A fairer society cannot be realized until those immoral prejudices that hinder the development of all the possibilities that lie in a woman's personality are eliminated (Mršević, 2020: 46). The wmen's right to vote is based on their opposition to any kind of discrimination, taking as a starting point that men and women are by nature equal representatives of the human race (Mršević, 2020: 49). Her conception of the elevation of a woman to a free person and an equal member of society is based on ethical principles, where she paid special attention to the position and rights of women. That is why she appeals that reason, that regulative principle of the whole life, must be called to the aid, as well as that one must work tirelessly to enlighten as many people as possible.

Emphasizing her position on the inviolability of the person, her absolute right to freedom and the provision of all the needs for her development leads to the raising and revival of the level of society and all its relations, Ksenia pointed out almost a century ago that patriarchy is based on hierarchy, discrimination, and exploitation (Atanasijević, 1927: 1 according to Vuletić, 2008: 22). Reducing its influence is necessary for the sake of breaking the relationship of inequality and realizing the vision of equal, humanistically oriented and sustainable development of national economies and the world as a whole. From this comes, as a necessary logical consequence, the refutation, theoretically and practically, of the gross absurdity of the rooted belief that one sex has, by nature itself, superiority over the other sex. Women felt this absurdity bitterly, with all the complex consequences that resulted from it (Atanasijević, 1927: 1 according to Vuletić, 2008: 22). "If one should not be carried away by the delusion that in women all advantages are assigned to the human race, and in men all negativity, and if one must admit that the possibilities for both good and evil exist in both parts of humanity, - it cannot be doubted that women, due to their nature, are more sensitive, more compassionate and altruistic, and consequently, they are more determined to smooth out discord and hatred than men" (Atanasijević, 1932: 1 according to Vuletić 2011: 49-50).

She emphasizes that men and women, as members of the human race, have the same range of psychic abilities. But while men predominately ruled the states, humanity did not emerge from the darkness of conflict, hatred and willingness to shed blood. "That fact stands, in all its deplorable completeness, and no amount of counter-proving is able to smooth or nullify it. That is why there is a need to use the strengths of women more

fruitfully and in multiple ways for public life" (Atanasijević, 1932: 1, according to Vuletić, 2008: 33).

It is important to keep in mind that she published in an intellectual climate in which support for women was denied on many levels (Atanasijević, 1931: 2). She wrote about this herself on one occasion: "But as these successes are certainly large, and as women in our country play an increasingly crucial and beneficial role in raising the cultural and ethical level of our society, there is much more to be attributed to women's abilities and her conscientiousness and perseverance in work, but the support that was shown to her, to support and help her." And in writers she found invigorating imagination, which is important, because "...when our imagination is full of joyful images, then we have deceived our fate, and when our dreams are ugly, then fate has overcome us" (Atanasijević, 1929: 148).

Otherwise, she published in magazines of various profiles and had stratified readership that included both the intellectual elite and the general public. Regarding the essays on female writers, I think it is particularly important to point out the politics of the place of publication. Namely, she published articled on the topics of women's human rights even more in various representative magazines of the era. That decision was extremely important in the process of affirming women's creativity and dismantling patriarchal barriers. Finally, they testify that any ethics of feminism should be based on solidarity and mutual support, which, in her opinion, women were obliged to provide mutually selflessly.

5. Institution, human rights and Ksenia Atanasijević

The university, an institution to which she belonged with all her heart and vast knowledge, removed her from its teaching corps. Like the prominent women she wrote about in her works, she herself became a victim of patriarchal prejudices about women's inferiority. She recognized attacks against her own professional and personal dignity as forms of social pathology, as concrete manifestations of evil that should be reacted against. This made it impossible (on February 15, 1935) for her commitment to human rights to be institutionalized and transmitted to students through the university's educational science program. The institution of Uniiversity remained at a loss in the form of a multi-decade lag in systematic opposition to human rights violations.

It is necessary to invest energy in abolishing forcibly established differences and inequalities between human beings in building institutions and building understanding

between peoples (Atanasijević, 1931: 2, according to Vuletić, 2011: 46). The tradition of the so-called of just war is inadequate because it deals with jus post bellum rather than justice after war in preventing conflict and maintaining peace in other territories. It is necessary to build democratic institutions; hold free, fair, and transparent elections, promote gender equality; ensure respect for human rights, media freedom, minority rights and the rule of law, and promote ttolerance and non-discrimination.

6. Non-institutional advocacy for human rights

Ksenia's path, after being forced to leave the institution, which she lived and experienced defending the common good, the good in man, and the good for man, is interesting. Ksenia continued her public commitment to individuals and the necessity of confronting them with evil. Non-institutional advocacy for human rights was also a way for her, to earn for a living since she was unemployed. Although her post-university involvement could not be classified as human rights activism of the modern type, it could be related to the contemporary terminology of today's language intellectual advocacy for high ideals of human rights. That advocacy begins with the rejection of submissive acceptance of human rights violations. "Only weak or frightened doctrinaires recommend submission and meekness." Suffering increases evil, and weak yielding to violence brings a man down to the bottom. "Injustice spreads faster than a vicious contagion when one bows his head before it." Today we believe that her consistent attitude paved the way for future female university teachers, but also enabled a high valuation and a consistent orientation in advocacy for human rights.

In that, she widely used the possibilities of freedom of speech as one of the basic human rights in modern society (Ivanović, Stojanović, 2022: 66), which was clearly at her disposal in her time without hindrance. It is as if the provision of Article 19 of the UN Universal Declaration of Human Rights (The UN Universal Declaration of Human Rights) that everyone has the right to freedom of opinion and expression, including the right not to be disturbed because of their own opinion, was fully valid in Serbia during her time. She considered the press important for her own presence in the public, so in the twenties and especially in the thirties, after her expulsion from the University, she actively published articles in the newspapers and magazines of her time. In parallel with them, she also took part in the socio-political and cultural-artistic life of her country, in the most diverse occasions, processing them as the topics of newspaper articles, but also of her other public performances, lectures, discussion panels, public readings of newly published books.

In the first place, of course, is morality as the pivot of the only more tolerable human existence. Ksenia Atanasijević's public engagement against National Socialism and anti-Semitism as massive sources of human rights violations ranks her among the first who, in our environment and in Europe, wrote against National Socialism and condemned the persecution of Jews (Vuletić, 2011: 10-13).

She wrote newspaper's "texts of a polemical character and literary and cultural presentations that were mostly published in the newspapers *Pravda*, *Politika*, and *Vreme*, as well as in the literary magazines Srpski književivje glasnik, Misao, Život i rad, Ženski pokret, *Žena i svet,* etc." (Đurić 2020, 258), and almost as a rule on the front pages, which proves its acceptance by the media. This is an important fact because the press of its time was what the internet and social networks are today, "communication highways", as Z. Pavlović expresses it today (Pavlović, 2022: 157). By publishing in magazines of various profiles, she gained a stratified readership that included both the intellectual elite and the general public. She believed that active participation in the construction of narratives that shape contemporary culture and its values is extremely important, but also that this is done "in a calm tone, focused on the literary aspects of the work that I put before me, on illuminating its poetic physiognomy, with an ear for thematic -motivational and stylistic plan" (Svirčev, 2020: 297).

It was an opportunity that she used as the first in local scientific thought to analyze initially trivial phenomena as emerging forms of evil in society, and in essence deeply destructive and negative social phenomena such as: intrigue, lies, anonymous writing, slander, misrepresentation, plagiarism, corruption, irresponsibility. At the same time, she remained devoted to the continuous and consistent opposition to the great themes of evil of her time, fascism and anti-Semitism, the more misogynistic, patriarchal discriminatory denial of human rights, sharply and succinctly defending the universal values of academic and civic integrity. Today, the phenomenon defined as "post truth" is often mentioned in the theory of human rights and media communication, even as a phenomenon of scientific discourse. For all of us who consider it a new phenomenon of our time, it will be interesting that Ksenia also criticized the phenomenon of "manipulating words for the sake of deception and propaganda, which reduces scientific achievements from numerous social disciplines to a mere tool for demagoguery." And she talks about the creation of the "semblance of truth" and the insidious skill of its "creators", stating that such a state almost "grew" into the verbal hysteria of her era. When words are manipulated in order to create a deception that something is wanted to improve, when in fact all desires are directed exclusively in the direction of selfish interests (Atanasijević undated according to Vuletić, 2011: 115-116).

As one of the messages of her scientific oeuvre and the way to promote human rights, we point out the need to write an essay. It is necessary to write and publish not only in well-quoted scientific periodicals and monographs, because the essence of the value of science is not in that, and even less in the race for today's imperative scoring of the published. Ksenia is an excellent historical example that it is necessary to write those "smaller forms", essays, literary and artistic criticism, articles in the daily and weekly press, because this achieves the communicativeness of our scientific findings and reflection with a larger and more diverse readership, which makes much more affects the profiling of social flows. There is no doubt that such texts by Ksenia have an impact on a larger number of people and on their formation of awareness of the need to respect human rights. Agreeing with Ksenia Atanasijević regarding the necessity of essay activities, we add that writing "smaller forms" of scientific, philosophical, and artistic polemics and criticism is not a waste of precious time, but perhaps a necessary activity on our scientific scene.

Her prominent presence on the public stage affirms the view that essay writing has a role in shaping the reality we want to accept. She considers essay writing important, and she herself writes essays, articles, and critical texts about Serbian literature, weaving into my philosophical interpretations the spirituality of aesthetic utopias, an ethical orientation imbued with Christian ideals, Eastern philosophy, Platonist and Enlightenment heritage (Svirčev, 2020: 294). She tried to provoke readings of the Serbian literary and literary-critical heritage in the key of "reactualizing reception". Everything depends on what language we will agree to and for which decisions, where and how we will opt for marketing. It seeks to initiate a new, active human rights discourse in the Serbian culture, referring to the essay as a medium of expression through which one expresses one's own experience, mental abilities, views, and contemplation of the earlier and one's own reality, interpreting it.

She strove to affirm women's creative practice, thus contributing to their human rights. "With the first-person narration, characteristic of the essay, all these authors tried to get out of the figure of a woman deformed by stereotypes as a culturally immature person who is spoken of in the third person, above her head, protectively, as if she is not in the culture, even though she is immediately present" (Svirčev, 2020: 296).

7. Conclusion

All her life, Ksenia advocated for the "revolution of good". From her position, she is convinced that, in due time, what seemed like a utopia until recently, would become reality. In this way, the ground will be prepared for the ultimate supreme revolution - a revolution of good, that is, of compassion and human justice, which will establish real peace and solid harmony among people, today sharpened, enraged, divided and ready to step into inheritance, revenge, at any moment, retaliation and every moral abomination. Because where the voice of reason is listened to and human rights are respected, hostile feelings cannot be nurtured and inflamed.

You don't have to be black to condemn racism, you don't have to be Jewish to condemn anti-Semitism, you don't have to be gay to condemn the persecution of people based on their sexual orientation. It made a clear distinction between principled and subjective approaches to these problems. It is not about personal preferences, it is about principle. As a human being and a citizen of the world, she was fundamentally against any persecution of human beings because of their deep and honest emotions that do not bother anyone. And if it is impossible for people, selfish by nature, to miraculously transform themselves into benevolent creatures, full of love for others, it is certainly possible to make the truth obvious to them that it is easier and more beneficial for them to do good than evil. And that the truth has universal validity, experience confirmed at every step.

Ksenia's timeless message is also today's credo of all those (of us) who deal with science: sitting at a desk and working quietly - it seems to her that there is no greater happiness. Creative work was the only light in her gloomy reality, as a specific intellectual activism. A way to not let the element of chaotic everyday life completely overwhelm her, in the belief that we want to share with Ksenia, that in due time, what seemed like a utopia until recently, will become reality.

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CONTRIBUTION OF SCIENTIFIC INSTITUTIONS TO THE PROMOTION OF HUMAN RIGHTS: CASE STUDY OF THE INSTITUTE OF CRIMINOLOGICAL AND SOCIOLOGICAL RESEARCH IN BELGRADE

The sociological approach to science as a social field and process has a special value in its application to those areas of knowledge that are closely linked to important social issues, such as human rights. The subject of this case study will be the recent publications of researchers from the Institute of Criminological and Sociological Research in Belgrade, as an example of the scientific institution dedicated to the study of various aspects in this topic. Special focus will be placed on the exploration of different analyzed fields of human rights, as well as on specific disciplines from which human rights are viewed (legal disciplines, psychology, sociology, anthropology, special education, ecology, etc.), or on detecting multidisciplinary approaches. In addition to the description of scientific publications, the article will present various types of cooperation with other actors in this field, both scientific and state institutions and bodies, independent institutions, educational institutions and non-governmental organizations.

Keywords: *human rights, sociology of science, sociology of knowledge, scientific institutions, case study.*

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1. Institutions and human rights

Sociological explanation of emergence of the concept of human rights seems to be impossible without taking into account whole spectre of different institutions. First of all, institutions such as international organizations and bodies, national parliaments, courts, independent institutions and non-governmental institutions had crucial role in establishing rule of human rights, and still have in their implementation and development.

Secondly, broader understanding of influence of institutions on genesis and development of human rights finds these ties in much deeper socio-historical processes. Materialistic causes are found in capitalism and emergence of bureaucratic state, as Max Weber underlined in his classical study: "that the demand for formal, legal equality and economic freedom of movement paved the way for the destruction of all specific foundations of patrimonial and feudal legal systems in favor of a cosmos of abstract norms, and thus indirectly of bureaucracy, but on the other hand favored the expansion of capitalism in a very specific way" (Weber, 1978: 817). At the same time, Weber held in great esteem Rudolf Jellinek's explanation about relevance of one much older institution on development of human rights – religion. Non-material social aspects were not only important because of inherent textual content of holy scriptures which contain some of norms which will become foundation of human rights, but also because struggles for religious freedoms led to formal appreciation of all other freedoms and rights (Joas, 2006: 6).

It is interesting to note that science also represents institutionalized practise which has roots in layman (and clergy of lower rank) interpretations of religion (Ben-David & Sullivan, 1975: 204). Emerging from this very specific relation between church as an established organization and individuals seeking to fulfill their authentic spiritual and social needs, western science found firmest foundation in its orientation to political and social reforms, beginning in 17th century and gaining prominence in 18th century. Process of socio-genesis of science led to formation of institutional framework, from an early academies, to modern universities and different types of scientific institutes and research centers.

Being relatively objective, consensual evaluation of discoveries makes science as an example of institutionally regulated cultural change, which can affect many aspects of society. From sociological perspective, scientific knowledge is valued for it's technical applications, and for it's own right of better understanding of ourselves and the world around us (Ben-David & Sullivan, 1975: 203). Particularity, concerning topic of human

rights, both aspects are relevant. Norms implicit in the public conduct of scientists include universalism, emotional neutrality, rationality, individualism, communality, and disinterestedness (Ben-David & Sullivan, 1975: 204).

2. Case Study: The Institute of Criminological and Sociological Research in Belgrade

Institute was founded in 1960, originally as the *Institute of Criminological and Criminalistic Research*, and started with activities in 1961. In 1971 this institute was integrated with the *Sociological Institute of Serbia*, which led to the current form which this research institution have to this day (in Serbo-Croatian: *Institut za kriminološka i sociološka istraživanja*, abbreviated: *IKSI*) (Kron & Stevanović, 2011: 21). Main goals of the Institute include both fundamental and practical research in the following scientific disciplines: criminal law and criminal procedure, criminology, penology, psychology of crime, social pathology, victimology, environmental protection, sociology, anthropology, disability studies, andragogy, security studies etc (ibid: 11). Main scientific problems and topics which are juvenile delinquency, penal policies, penal sanctions, recidivism, suicide, study of victims, international criminal law, human rights, methodology of social sciences, domestic violence, psychological factors in genesis of criminal behaviour and measuring instruments, sociology of rural and urban settlements, professions and medicine (ibid: 25).

At the present, the Institute is a unique scientific and research organization dedicated to studying ethiology, phenomenology and prevention of criminality and social deviations. In practice, these scientific questions are opened up and cover wide variety of themes, many of which correspond with human rights. Uniqueness of the Institute in context of Serbian science is in the fact that researchers from different formal scientific backgrounds work together, rather than in specialized departments, which brings forth original approaches to concrete problems. The main goal of this article is to map diversity of research activities aimed at better understanding human rights, or to enhance their implementation.

In order to acquire needed data, two main sources of data were analyzed. First, newly established digital deposit of different scientific publications was examined with goal to determine quantity of books and articles concerning human rights, main themes and scientific disciplines. Since number of publications relevant for this paper topic is large – around 250 in total – they will be only briefly presented. More detailed approach will be applied to publications form 2017 (five years period). Second source of information will

be official Institute's website, which contains information about projects, conferences, and other research activities.

3. Themes and approaches: empirical analysis

Detailed analysis of concrete topics covered by researchers from the *Institute of Criminological and Sociological Research* before 2017 shows both diversity of themes and long-term commitment to certain problems. Human rights of the prison population (mostly in Serbia) prove to be most researched theme: 17 publications are dedicated to general rights of prisoners, 15 about minors in prison, 2 to healthcare and education and 1 was about rights of disabled and elderly people in prison (38 in total). Second most common theme are the rights of the children, minors or youth (in prison or in conflict with the law 15; general and theoretical topics 10; in foster families 1; girls 1 - 27 in total). Right to healthy environment follows with 6 publications, while 5 were about right to privacy. Rights of disabled people were the theme of 4 publications and elderly people in 3. Publications about human rights in court processes, such as right to just trial, rights of victims or witnesses were also 3 in number. Women's and migrant's rights were analyzed in 2 publications, while 1 was dedicated to health patient's rights; single parent's rights; war crimes; media reports; rights concerning religion and male rights each.

Analyze of publications during the last five years show even greater variety and quantity of texts. Articles and books about children's rights are most numerous, with 34 titles identified (Batrićević & Kubiček 2019 b; Ćopić & Ćopić, 2019; Đukanović, 2022; Glomazić & Glomazić 2022; Kolaković-Bojović; 2018; Kolaković-Bojović 2019 c; Kolaković-Bojović, Stevanović, I. & Vukićević, 2022; Kubiček & Marković, 2022; Maljković & Igrački, 2018; Milićević, 2017; Nedović 2018; Milićević, 2019; Milićević, 2019b; Milićević, 2020; Milićević, 2020b; Milićević & Nedović 2020; Milićević, 2021; Milićević, 2021b; Milićević, 2021c; Pavićević & Ilijić, 2018; Pavićević, 2019, Stefanović & Karić, 2020; Stepanović, Pavićević & Ilijić, 2022; Stevanović, A. 2022; Stevanović, I. 2017; Stevanović, I. 2017b; Stevanović, I. 2017c; Stevanović, I. 2017d; Stevanović, I. & Vujičić, 2019; Stevanović, I. & Vujić, 2020; Stevanović, I. & Kolaković-Bojović, 2021; Stevanović, I. & Kolaković-Bojović 2022;). Publications concerning rights of children in conflict with the law are counted separately, and with 6 of them, children-related publications sum up to 39 in total (Karić et al. 2020; Kolaković-Bojović 2022; Protić et al, 2020; Stevanović, I. & Vujičić, 2019; Stevanović, I. 2020).

General rights of the prisoners make the second most researched topic, with 11 in total (Batrićević, 2019; Batrićević & Stepanović 2020; Batrićević, 2021; Batrićević, 2021b;

Batrićević & Kovačević 2021; Ilijić, Milićević, & Vujičić, 2020; Ilijić, 2021; Kolaković-Bojović 2021; Međedović, Petrović & Vujičić, 2019; Pavićević, Ilijić & Batrićević, 2020; Savić & Knežić, 2019). Again, more concrete problems are counted separately: education of prisoners numbers 6 publications (Batrićević, Paraušić & Kubiček 2020; Ilijić, 2022; Knežić, 2017; Vujičić, 2019; Vujičić & Karić, 2020; Vujičić & Drndarević, 2022), so that there are 17 in total.

Human rights in the context of police and court proceedings are analyzed in 10 publications (Batrićević, 2020, Kolaković-Bojović, 2017; Kolaković-Bojović 2019; Kolaković-Bojović 2019b; Matić Bošković 2020; Matić Bošković 2020b; Milićevič, Ilijić & Vujičić, 2019; Pavićević & Ilijić, 2017; Stevanović, I. 2017c; Stevanović, I. & Vujić, 2020b), including one about the death penalty (Matić Bošković & László Gál, 2021).

Rights of the disabled were the theme of 10 publications (Milićević, 2017; Milićević & Nedović 2018; Milićević, 2019; Milićević, 2019b; Milićević, 2020; Milićević, 2020b; Milićević & Nedović 2020; Milićević, 2021; Milićević, 2021b; Milićević, 2021c). Right to privacy also saw a rise in interest with 9 articles and books (Batrićević & Stepanović 2020; Kolaković-Bojović & Turanjanin, 2017; Stepanović, 2018; Stepanović 2018b; Stepanović 2019; Stepanović 2020; Stepanović, 2022; Stepanović , Pavićević & Ilijić, 2022; Stevanović, I. 2017b). In the analyzed period, migrant rights also rose to prominence, with 8 publications about this problem (Batrićević, 2018 b; Batrićević & Kubiček 2019; Batrićević & Kubiček 2019b; Ćopić & Ćopić, 2018; Ćopić & Ćopić, 2019; Ćirić & Drndarević 2019; Knežić, 2018; Paraušić, 2017).

New topic of employee's rights emerges with 5 in number (Marković, 2019; Marković, 2020; Rabrenović, Kostić & Matić Bošković, 2018; Stevanović, A. & Kostić, 2020; Stevanović, A. 2021). With 4 in total each, there are few more themes: rights of the crime victims (Kolaković-Bojović & Grujić 2020; Kolaković-Bojović 2020b; Kolaković-Bojović 2020c; Pavićević & Ilijić, 2017); gender rights (Hughson, 2017; Pavićević & Ilijić, 2017; Pavićević, 2020, Pavićević, 2021); and media representation of human rights (Kubiček & Marković, 2022; Pavićević & Ilijić, 2017, Stepanović, 2022; Stevanović, I. 2017b). Finally, researchers from IKSI have published 3 works about ethnic minority rights (Kubiček, 2018; Kubiček, 2020, Kubiček & Marković, 2022); 3 about patient's rights (Kubiček, 2020, Batrićević & Kubiček 2021; Ilijić, 2021); 3 dedicated to mental patient's rights (Batrićević, 2019 b; Ilijić, Milićević, & Vujičić, 2020;) and 1 about disappeared persons (Kolaković-Bojović 2021b), elderly (Knežić, 2020) and the right to healthy environment (Batrićević, 2018).

Considering different scientific disciplines, law was the most common with 33 publications before 2017; followed by disability studies (14). Publications belonging to andragogy were 6 in number, anthropology 5, psychology, ecology and sociology 3 each. Multidisciplinary approaches were also noted, particularly as synergy of law and ecology 3, law and sociology and law and andragogy 1 each; while there were also 5 publications which combined 3 or more disciplines.

Again, in the last five years, most publications belonging to the law are the most numerous (38), and disability studies are next (12). Sociology follows with 8 publications, while anthropology and andragogy have 5 each. Two more publications involve psychology and 1 security studies. All multidisciplinary publications include combination of law with other disciplines: sociology 6; psychology 4; disability studies 2 and anthropology 1, while 4 are combination of more than two scientific disciplines.

4. Thematic conferences, projects and promotion of human rights

During the last years, the Institute organized a number of thematic conferences strictly dedicated to human rights, or to themes concerning human rights. Gatherings which brought together experts in the field of children's rights were "Juveniles as Perpetrators and Victims of Crimes and Misdemeanors" in 2015; "Child Friendly Justice" in 2018 and "Children and the Challenges of the Digital Environment" in 2022. Conferences "Penal Law and Medicine" in 2019 and "Drugs and Drug Addiction: Legal, Criminological, Sociological and Medical issues" in 2020, although not primarily dedicated to human rights, encompassed many important questions concerning compulsory psychiatric treatment and confinement in a medical institution, compulsory psychiatric treatment at liberty, compulsory drug addiction treatment, compulsory alcohol addiction treatment[1].

Traditional annual scientific conferences organized with Protector of Citizens - Ombudsman of the Autonomous Province of Vojvodina, held from 2017 are closely commuted to human rights: "Freedom, Security: Right to Privacy" in 2017; "Protection of Human Rights: from Illegality to Legality" in 2018; "Protection of the Rights of the Child (30 Years after the Adoption of the Convention of the Rights of the Child)" in 2019 and "Right to Life" in 2021. All events were attended by representatives of the academic, scientific and research community from more than 20 countries, as well as representatives

[1] All presented data is collected from the website of the Institute of Criminological and Sociological Research, http://www.iksi.ac.rs/, accessed on 8. august 2022.

of independent institutions, local ombudspersons, centers for social work, judicial bodies and other institutions and organizations dealing with human rights.

In addition to listed publications, many of the most important and successful research projects in which Institute have taken part in the referred period were devoted to human rights. During 2017, the Institute of Criminological and Sociological Research, in cooperation with the OSCE Mission to Serbia, conducted a research project on the topic "Application of medical security measures in the criminal justice system of the Republic of Serbia", which referred to rights of particularly precarious segment of prison population.

Institute's researchers also took part in the innovative programs in the Correctional Institution in Sremska Mitrovica, which are aiming to contribute to better quality of life during the sentence, and an easier inclusion of convicted persons in the community after serving the punishment by offering them chance to learn how to train dogs and take care for them. During the last five years (since 2017), this method has significantly advanced, and now is applied in both semi-open and closed parts of Correctional Institution, and even includes work with horses. Researchers from the Institute gave substantial expert support to the implementation of mentioned projects, and documented their application and results.

One of the most encompassing multidisciplinary research projects undertaken in Serbia concerning prisoners quality of life, including their human rights is the *#PrisonLIFE project*, which is implemented by the Institute from 2022, with support from the Ministry of Education, Science and Technological development. Research is focusing on differences related to socio-demographic, criminological and penological characteristics and examines the relationship with different subjective indicators, assessing the possibility of its improvement, with special emphasis on criminological, penological, psychological, sociological, legal and security aspects. The result of this project is the creation of guidelines for improving the quality of prison life of convicted men and women in the Republic of Serbia, thus enhancing their human rights in practice.

Finally, most original advance made by Institute's researchers is creative promotion of scientific results regarding human rights. One such event took place at Bartselona Koncept Gallery in Belgrade in 2018, when Ana Batrićević held photography exhibition "Second Chance". The exhibition consisted of 14 photos made by the author in 2018, during her field research on the application of re-socialisation programmes that consist of prisoners' work with dogs from dog shelter within prison in Sremska Mitrovica.

Second photo exhibition, “Freedom inside the Circle”, was held at the very Institute of Criminological and Sociological Research on 18.12.2019, as part of presentation of Ana Batrićević’s book “Second Chance: Prisoner's Work with Dogs in Correctional Institution Sremska Mitrovica”.

Third exhibition of artistic photos produced as part of research fieldwork was in 2021. at Cultural Institution Stari Grad (Parobrod). This time Ana Batrićević presented photographs of convicted persons working with horses for the purpose of resocialisation gathered under the title “Closeness of freedom”.

5. Conclusion

Vast quantity of presented bibliographical and factual data reveals results worth clarifying. Even though different legal disciplines encompass human rights issues in the unified manner, their outline remains incomplete without many other social, and sometimes even natural, medical or technical sciences. Different social and behavioral scientific disciplines are intrinsically tied to specific areas of human rights which relate to their domains. Disability studies ought to be concerned with rights of people with various impairments, andragogy can give insights into rights of the elderly, ecology may explore different aspects of rights to healthy environment, while sociology is interested in the rights of specific social groups. This is something which was clearly demonstrated in the presented empirical data. Still, interest for human rights doesn't solely come from inherent structure of the scientific discipline on it’s own, or from some intrinsic epistemological causes. Projects aimed at concrete problems prove to be one of the prime motivators. In that light, Institute’s dedication is twofold: both programmatic and circumstantial. Long-term tendencies of researchers interest especially include questions concerning prisoners and children. On the other hand, it is shown that some topics became relevant because of current social situation: migrations (during the migrant crises) and health problems (caused by COVID pandemic).

Regardless of the specific scientific field or discipline, all scientific knowledge can enhance development and implementation of human rights in many different ways. (1) It offers theoretical foundation for better understanding of nature of human rights; (2) it can detect concrete legal problems, both in legislative and in its implementation; (3) It may map specific social contexts or individual cases in which concrete human right is jeopardized (4) scientific knowledge may have positive impact on policies; (5) or to bring changes trough applied research in different practical projects.

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ACCESS TO JUSTICE AND UNEQUAL TREATMENT

Ensuring access to justice and improving social inclusion are universally acknowledged global priorities, at the core of the 2030 Agenda for Sustainable Development. The European Union places access to justice a prerequisite for States wishing to join the EU. Therefore, it is essential for Serbia, as a country aspiring for EU accession, to identify the barriers and difficulties experienced by citizens and especially vulnerable groups in accessing justice and upholding their rights, to ensure the full implementation and effective enforcement of national and international laws and meet the requirements for EU accession. From a rights-based perspective, access to justice is often seen as a gateway to the enjoyment and protection of other fundamental human rights and promotes social inclusion, while barriers to access to justice reinforce poverty and exclusion. Moreover, inability to resolve legal problems may diminish access to economic opportunity, reinforce the poverty trap, and undermine human potential including ability to enforce own economic and social rights, including property and labour rights.[1] Therefore, the focus on access to justice and the protection of the law is deliberate as it transcends sectors and can provide much needed protection to vulnerable groups and also facilitate more inclusive access in the respective sectors. The 2021 Regional Justice Survey for Serbia revealed that most citizens believe that the judicial system does not treat all equally and that some forms of discrimination exist. The author analysis the barriers to access to justice in Serbia and grounds for discrimination of citizens in the judicial system. The author elaborates practice of the European Court of Human Rights and EU Court of Justice and their interpretation of the violation of access to justice right.

Keywords: *access to justice, barriers, equality, discrimination, EU accession*

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[1] Beqiraj, J., McNamara, L., (2014) *International Access to Justice: Barriers and Solutions.* Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014.

1. Access to justice as a human right

At the heart of the 2030 Agenda for Sustainable Development lies a vision of a "just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met."[2] Access to justice is at the heart of poverty reduction debate (Shami, 2022: 337). The justice gap undermines human development, reinforces the poverty trap, and imposes high societal costs.[3] Justice is a thread that runs through all 17 of the Sustainable Development Goals (SDGs) and is critical to end poverty, reduce inequality and promote peace and inclusion.[4] SDG 16, and in particular target SDG16.3 aims to ensure equal access to justice for all by 2030.[5] In 2008, the United Nations Commission on Legal Empowerment of the Poor estimated that four billion people live outside the protection of the law, and that "the majority of humanity is on the outside looking in ... on the law's protection".[6] To address this challenge, the United Nations Development Programme (UNDP) argues that access to justice is "a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts".[7]

Access to justice is institute that evaluate over the time and has remote historical origin (Cruz, Salles, 2020: 177). Access to justice is a basic principle of rule of law and a critical feature of the rule of law is the equality of all before the law. As a part of this equality, all persons are entitled to the protection of their rights by state institutions, particularly judiciary (Ghai, Cottrell, 2010: 3). The narrow concept of access to justice focuses on the courts and the process where person presents case for adjudication. Over time, notion of access to justice has broadened to access to every stage of the legal process, from the creation and implementation of laws, to dispute resolution processes (Backhouse, 2005: 113). Effective access to justice is essential right enshrined in numerous instruments within the universal human rights protection system. According to international and European human rights law, the access to justice obliges states to guarantee each individual's right to go the court to seek and obtain a remedy if it is found that the

[2] United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, New York, 2015.

[3] The World Justice Project, Measuring the Justice Gap, 2019, https://worldjusticeproject.org/sites/default/files/documents/WJP_Measuringpercent20thepercent20Justicepercent20Gap_final_20Jun2019.pdf

[4] UN Taskforce on Justice, (2019) Justice for All: the Report of the Task Force on Justice.

[5] See: https://sustainabledevelopment.un.org/sdg16

[6] UN Commission on Legal Empowerment of the Poor, (2008), *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor*, United Nations, New York, p. 3

[7] United Nations Development Programme (2004), *Access to Justice: Practice Note*, New York: United Nations, p. 3.

individual's rights have been violated, which lies at the centre of effective human rights protection.[8] Access to justice enables individual to protect themselves against infringements of their rights, to remedy civil wrongs and hold executive power accountable and to defend themselves in criminal proceedings.[9]

Access to justice is not expressly used as legal terminology in international instruments, since it includes a number of core human rights, such as the right to a fair trial and the right to an effective legal remedy. The narrow interpretation of access to justice as right to counsel, fair hearing and equality of citizens before the court are found in the constitutions of several countries, such as Germany and Switzerland (Johnson, 2000: 109).

At the global level, the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 includes several articles that highlight the importance of access to justice. Article 8 of the Declaration that states that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution of by law'. Article 10 of the Declaration states that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his right and obligations and of any criminal charges against him'. The principle of access to justice for all under international law was further strengthened by the International Covenant on Civil and Political Rights that entered into force in 1976. Article 2 of the Covenant states that each party to it will 'ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'. The Covenant also includes the obligation 'to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State'. Furthermore, UN Human Rights Committee has led the way among UN treaty bodies in interpreting concepts relating to access to justice.[10]

At the European level the access to justice concept is enshrined in Article 6 and 13 of the European Convention of Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, which guarantee the right to a fair trial and to an effective legal

[8] United Nations Development Programme, (2005) Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice, Bangkok: UNDP.

[9] European Union Agency for Fundamental Rights, (2016) Handbook on European law relating to access to justice, Luxemburg, p. 16.

[10] United Nations, (2007) Committee on Human Rights, General Comment No. 32.

remedy, as interpreted by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Core elements of these rights include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of dispute, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice.[11] Already in 1979, the European Court of Human Rights held in *Airey v. Ireland*[12] that Article 6 of the European Convention of Human Rights sometimes 'compels the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case'.[13]

However, the European Union introduced within the Treaty of Lisbon, a specific reference to access to justice. The Treaty on the Functioning of the European Union (TFEU), Article 67(4) stipulates that the Union shall facilitate access to justice, in particular through the principles of mutual recognition of judicial and extrajudicial decisions in civil matters.[14]

According to long established case law of the CJEU, access to justice is one of the constitutive elements of the European Union based on the rule of law.[15] This is guaranteed in the treaties through establishing a complete system of legal remedies and procedures designed to permit the CJEU to review the legality of measures adopted by the institutions.[16]

Access to justice must be much more than a mere formal possibility, it must also be feasible in practical terms.[17] Within the EU legal order, the right to effective legal

[11] European Union Agency for Fundamental Rights (2011) Access to justice in Europe: an overview of challenges and opportunities, Luxembourg, p. 9.

[12] Case *Airey v Ireland,* Application no. 6289/73, judgement 9 October 1979.

[13] Para 26 of the judgement.

[14] Article 81(2)(e) refers to access to justice and Article 81(2)(f) to the "elimination of obstacles to the proper functioning of civil proceedings".

[15] Reasoning for establishing the principles of direct effect (*Costa v. ENEL*, Case 6/64, 15 July 1964), as well as the concept of state liability (*Francovich and Bonifaci v. Italy*, Case C-6 and C-9/90, 19 November 1991) and the requirement that national remedies for breaches of rights derived from Community law comply with the principles of equivalence and effectiveness (*Preston v. Wolverhampton Healthcare NHS Trust*, C-78/98, 16 May 2000).

[16] Case 294/83, *Les Verts v. Parliament*, No. 25, paragraph 23.

[17] Opinion of Advocate General Ruiz-Jarabo Colomer, CJEU, *Roda Golf & Beach Resort SL*, C-14/08, paragraph 29, delivered on 5 March 2009.

protection equally covers access to the EU courts, as well as access to national courts and tribunals for the enforcement of rights derived from EU law.

According to international and European instruments and ECtHR and CJEU jurisprudence the access to justice includes several dimensions: individuals' access to courts, legal representation for those who cannot afford it, and equality of outcomes. There is no access to justice where citizens, especially marginalized groups, fear the system and so do not use it, where the justice system is financially inaccessible, where individuals lack legal representation, or where they do not have information or knowledge of their rights.

The European Commission emphasizes the importance of enhanced access in justice system reform and therefore Serbian authorities included relevant parts in the Action plan for Chapter 23 as umbrella strategic document for reform of the justice sector. To better understand where Serbia stands against access to justice standards, author analysis the barriers to access to justice and ground for discrimination of citizens in the judicial system. In the assessment, the ECtHR and the CJEU interpretation of access to justice and violation of access to justice is used.

2. Limitation to access to justice

Access to justice has both substantive and procedural components (Larson, 2015: 11). Access to justice requires procedural fairness. Without procedural fairness, courts cannot provide effective access to justice (Fawcett, Shuilleabhain, Shan, 2016: 63). Furthermore, the access to justice depends on substantive law that is capable of producing just outcomes (Goddard: 2019: 476). Although substantive access to justice have improved over time, procedural access may not have kept pace. Financial aspects are real limitation to access, as well as physical barriers for persons with disabilities or individuals living in poverty (Sandefur, 2010, 133). Institutional barriers also limit access to justice for reasons that include ponderous or bias court system, discriminatory police conduct, expense or political interference. Additionally, limited education and social custom impair access to justice.

Lack of impartiality of judiciary pose additional barrier to access to justice. Possibility of biases, whether explicit or implicit, undermine impartiality and thus access to justice. To be effective access to justice requires persons are aware of, and understand, their legal rights (Beqiraj, McNamara, 2014: 8). A widely recognized access to justice problem is limited by access to legal representation (Cornford, 2016: 39). It is difficult to identify a

lawyer who is appropriately licensed and qualified to represent party. Additionally, cost of consulting may not be affordable to some citizens or could be denied by criminal justice institutions (Matic Boskovic, 2020: 67). Lack of affordability is another access to justice problem that exist in many disputes (Cappelletti, Garth, 1978: 12). In some cases, additional costs, such as expert witness or travel costs may make access to justice even less affordable. Procedural rules can pose access to justice barrier due to restrictive rules of standing, pleading, and jurisdiction, and expansive rules of governmental immunity (Chemerinsky, 2017: 17). The difference between parties can influence outcome of judicial process for reasons unrelated to the legal strength of claims. This tendency undermines equal access to justice (Rhode, 2004: 21).

Characteristics such as socioeconomic status, ethnicity, education and gender can hinder awareness and access to formal justice procedure (Vapnek et al, 2016: 33). Some forms of social barriers are linked to formal institutional barriers. The prominent example of social inequality is often linked to gender and ethnicity that often determine the extent of usage of formal institutions (Jensen, 2011: 930).

The most usual limitation is deriving procedural conditions of access to courts, in particular time limits and prescription period. The practice of European Court of Human Rights and Court of Justice of EU recognized that states have a wide margin of discretion in laying down procedural requirements for exercise of the right of access to justice.[18] In order for such limitations to be acceptable from the point of view of effective access to justice, their length should be set in such a way as not to render the right to proceed before a court impossible.[19]

At the substantive level, restrictions on access to justice must be distinguished from the situation where the unavailability of remedies is due to the lack of legal recognition of the right claimed. In many countries the restriction exists in access to the Supreme Court through introduction of filtering criteria to ensure that Supreme Court decides only on cases of precedential value (Kolakovic Bojovic, Tilovska Kechegi, 2018: 118). True restrictions on access to justice exist when the law of the relevant state provides for a general exclusion, or certain modalities, of suits under certain circumstances of in relation

[18] ECtHR Case *Stubbings v. the United Kingdom*, application no. 22083/93 and 22095/93, paragraph 51. The CJEU *Slagterier v Germany*, C-445/06, 24 March 2009, paragraph 32; CJEU, *Aprile v. Amministrazione delle Fiananze dello Stato*, C-228/96, 17 Novemeber 1998, paragraph 19; CJEU, *Marks & Spencer v Commissioners of Customs & Excise*, C-62/00, 11 July 2002, paragraph 35.

[19] The Estonian Supreme Court held that even though the legislator has a wide discretion in deciding over the length of time limitations to complaints, these limitations could not be disproportionately short.

to a certain class of persons. In the *Lithgow* case,[20] the European Court of Human Rights upheld the British legislation requiring that all claims related to compensation for the nationalization of an entire sector of the economy be funnelled through a shareholder representative. The orderly processing of the claims, in view of their number and complexity, was considered a legitimate aim of the United Kingdom government. At the same time the restriction was considered to be proportionate to the achievement of such aim.

Restriction on access to justice with regard to certain classes or type of persons have also been accepted in the case of vexatious or frivolous litigants who may abuse the right by making repeated and unfounded claims. The legitimate aim of protecting potential defendants from undue harassment or of preventing the clogging of the judicial system with frivolous claims.

Legal standing represents the gateway for access to justice. In the area of non-discrimination law, the Racial Equality Directive[21] (article 7), Employment Equality Directive[22] (article 9), Gender Equality Directive[23] (Article 17) and Gender Equality Directive on Goods and Services[24] (Article 8) oblige Member States to ensure, in accordance with the national law, that associations, organizations or other legal entities may engage in judicial or administrative proceedings on behalf or in support of victims, with the victim's permission.

Legal costs are for many people barrier for access to justice. Although there is no absolute right to legal aid as instrument for financial access to justice, under human rights law, the European Court of Human Rights uses a different test. It looks at the importance of the right people are trying to enforce, as well as whether the denial of legal aid will stop people from having a fair hearing. The ECtHR in case *Stankov v. Bulgaria*[25] held that

[20] Case *Lithgow and Other v the United Kingdom*, application number 9006/80, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, judgement of 24 June 1986.

[21] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[22] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[23] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[24] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of good and services.

[25] Application 68490/01, 12 October 2007.

imposition of a considerable financial burden due after the conclusion of the proceeding acted as a restriction on the right of access to court.[26]

3. Access to justice in Serbia

Access to justice is not only part of the EU accession process for Serbia, but also an economic development concern, as constraints on access to justice and unequal treatment appear to create a drag on businesses**.** The judicial system remains an obstacle for the business environment. Around one-third of business sector representatives reported that the situation in the justice system negatively impacts the business environment in Serbia.[27]

At the global level Serbia ranks the low among the EU countries in terms of accessibility and affordability of the civil justice system and ranks 55 out of 139 states.[28] However, Serbia's ranking improved from 2014 to 2021 from 0.48 to 0.60,[29] as well as in comparison to non-EU neighbouring countries, since regional average is 0.59 compared to 0.60 that Serbia has.

According to the 2021 Regional Justice Survey Report for Serbia,[30] the perception of courts accessibility is high, three-quarters of citizens and business believe the court to be accessible. However, when the distinction is made between different dimensions of accessibility, more than half of citizens perceive affordability as the biggest challenge to accessing the justice system, while 38 percent of businesses believe the same.

[26] Similar position the ECtHR held in case *Kreuz v. Poland*, application no. 28249/95, 19 June 2001, in which Court found a violation of Article 6 ECHR and the ruling lead to changes in the Court Fees Act to make the fee system more efficient and transparent.

[27] Understanding Barriers to Doing Business: Survey Results of How the Justice System Impacts the Business Climate in South East Europe, World Bank, 2019.

[28] World Justice Project's Rule of Law Index 2021, available at: https://worldjusticeproject.org/rule-of-law-index/country/2021/Serbia/Civil%20Justice/

[29] The 2021 World Justice Project Rule of Law Index measures the accessibility and affordability of civil courts, including whether people are aware of available remedies; can access and afford legal advice and representation; and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers. The Survey covers 128 countries and jurisdictions, the Index relies on national surveys of more than 130,000 households and 4,000 legal practitioners and experts worldwide. Scale is from 0 to 1, and 1 is the best.

[30] The World Bank, (2021) Regional Justice Survey, Serbia Country Report, Survey Feedback on Judiciary Efficiency, Quality, Accessibility, Fairness, Integrity, Costs, and Reform Expectations, Report No: AUS00002445.

Although the legislative framework provides various possibilities for exemption from court fees, there are a number of problems in practice. Both, Law on Court Fees and Civil Procedure Code do not include deadline for submitting request for exemption of court fees nor deadline for court to decide on request.[31] Also, absence of regulation often creates problems regarding the form of the decision, whether it should be in the form of special decision or it should be part of the judgement. The lack of consolidated data on the implementation of the court fee waiver rules further complicates the assessment of this mechanism in practice.

In Serbia, the Constitution guarantees the right to legal aid. In recognition of the principle, Serbia after more than decade of preparation adopted the Law on Free Legal Aid in 2018,[32] which application started on October 1, 2019. However, there are still challenges in application of the Law.

Public awareness and knowledge about free legal aid is limited and most citizens are unaware of any free legal services that might be provided. Only five percent of the general population is familiar with the details related to free legal aid, according to 2021 Regional Justice Survey. Additional challenge is funding of the free legal aid. The costs of the legal aid provided by municipal legal aid services are covered from the local self-government budget, while costs for services provided by lawyers, notaries and mediators are covered 50 percent from the local self-government budget and 50 percent from the budget of the Republic of Serbia.[33] Effective implementation of the Free Legal Aid Law is hindered by lack of proper budget planning and a shortage of funds in municipalities' annual budgets. The only instrument for measuring users' satisfaction is a complaint submitted against a lawyer.[34]

Knowing the law and having a conception of justice are important elements of access to justice. While citizens are not expected to have the same knowledge of the law as a legal professional, their familiarity with basic provisions and key tenets of the law is a precondition for accessing justice. Access to and awareness of laws, a pre-requisite to access to justice, is still limited in Serbia. 2021 Regional Justice Survey results suggested that one third of citizens perceived access to information, including access to laws, as a

[31] Court practice assessment – application of court fee waivers rules, YUCOM, MDTF-JSS, 2018, available at: https://www.mdtfjss.org.rs/archive//file/Analiza%20sudske%20prakse%20oslobadje%20od%20troskova.pdf

[32] Official Gazette, No. 87/2018.

[33] Article 30 of the Law on Free Legal Aid.

[34] In 2020, 7 complaints were submitted against lawyers and the Bar Chamber will decide.

challenge.[35] People often do not know where to find regulations and miss practical information concerning their rights or procedures for their protection. Frequent changes of legislation undermine individuals' access to justice, an issue recognized by lawyers as significant challenge.

4. Access to justice for vulnerable groups in Serbia

While access to justice is a fundamental right to everyone in society, vulnerable groups are those that continue to face barriers in this regard. This can be a result of the lack of knowledge on the specific rights of these groups. These groups include, among others, victims of trafficking and forced labour, the LGBTI community, immigrants and minority ethnics groups, Roma, victims of gender-based violence, children in conflict with the law[36] and persons with disabilities. Importantly, individuals in these groups are not inherently vulnerable. Rather, individuals in these groups are rendered vulnerable due to social conditions. While these groups differ significantly in size and the nature of their vulnerability, they have something in common: the lack of a rights-based approach in the justice system marginalizes them and further compounds their existing vulnerabilities.

Discrimination is an obstacle that can affect all aspects of access to justice, from awareness and understanding of legal rights, to access to counsel and to dispute resolution mechanisms, and finally the achievement of fair, impartial and enforceable solutions. While de jure discrimination can be repealed through laws, elimination of de facto discrimination requires additional positive strategies.

Poverty is both a cause and a consequence of inadequate levels of access to justice. On the one hand, reduced financial and human resource allocations to justice institutions produce failures in the justice system. These failures in turn have a disproportionate impact on the poor, precisely because of their lack of individual economic resources enabling them to overcome systemic failures. On the other hand, when equal access to justice is denied, people living in poverty are less able to enforce their economic and social rights. Moreover, poverty as a barrier to access to justice is exacerbated by other structural and social obstacles generally connected to poverty status, such as reduced access to literacy and information, discrimination and stigmatization. Socially marginalized and otherwise disadvantaged people will be more seriously affected than

[35] See: Chart General Perception of Three Specific Aspects of Accessibility.

[36] More about access to justice for children in: Cerovic, I. (2019) The Role of Non-Governmental Organisations in Implementing the Rights of the Child, In: *Yearbook Human Rights Protection – Protection of Rights of the Child,* Provincial Protector of Citizens, Institute for Criminological and Sociological Research, pp. 283-300

the general population. Acknowledging the importance of access to justice as a fundamental tool for tackling poverty, the UN Special Rapporteur on extreme poverty and human rights recommended its inclusion as a standalone goal or as a target in the post-2015 development agenda (Sepulveda Carmona, 2013: 2).

Access to justice for women may be difficult due to gender inequality in society and in the justice system due to multitude of obstacles such as taboos, prejudices, gender stereotypes, customs, ignorance and sometimes even the laws.

Women living in rural areas, elderly women, women with disabilities, lesbian, bisexual, transgender women, trafficked women, migrants and women from certain social, ethnic or religious groups are structurally disadvantaged. This may be due to specific disadvantages at the socio-economic level but can also be the result of a lack of awareness of their specific needs among justice or law enforcement officials. Women from these groups are also often victims of stereotyping, which can result in bias and insensitivity on the part of the justice system, or even denial of justice.[37]

When it comes to the LGBTI community, in the past two decades, Serbia has established a strong legal and policy framework to ensure equality for LGBTI people, to prevent exclusion, discrimination and violence based on SOGI[38], and to ensure equal and unobstructed access to justice for all Serbians including LGBTI people. However, the recent World Bank research[39] revealed that gaps in implementation of antidiscrimination and hate crime legislations persist which discourages reporting by those LGBTI people who experienced legal problems and decreases confidence and trust in the justice system.

To enable women to access the justice, judicial remedies shall be accessible and effective. The case *Airey v. Ireland*[40] demonstrated that judicial remedies that allow a victim of domestic violence to escape the violent situation through, inter alia, divorce or separation proceedings must be accessible and effective to guarantee practical protection to a victim in a vulnerable position. Such effective access can require that the victim is afforded legal aid due to the complexity of the case, the victim's unfamiliarity with the court proceedings

[37] Council of Europe, (2016) Guaranteeing equal access of women to justice, Strasbourg.

[38] Equal Rights Trust (2019) Equality in Practice, Implementing Serbia's Equality Laws, London. Available at: https://www.equalrightstrust.org/sites/default/files/ertdocs/Serbia%20report_EN.pdf p. 26 et seq.

[39] World Bank (2022) Identifying and Understanding Barriers to Access to Justice for LGBTI People in Serbia, Washington DC.

[40] Application no. 6289/73, 9 March 1977.

but also from the victim's weakened capacity to represent her case due to her emotional involvement.

The Regional Judicial Survey revealed that most citizens of Serbia do not consider the judiciary equally accessible to all citizens. According to the general population, unequal treatment of the citizens is primary based on economic status and different political party membership. Almost half of citizens believe that degree of education impacts treatment by the courts, while around one third believe that ethnicity, sexual orientation and gender affects treatment. Age is mentioned as a reason for different treatment by 28 percentage of general users. Disability and religious differences are mentioned by 22 percentage of citizens.

A considerably smaller percentage of judges and prosecutors think that different categories of citizens are treated disparately. However, 27 percent of judges and 31 percent of prosecutors party membership as grounds for unequal treatment.

Members of the business sector also think that there is disparate treatment of residents and legal entities. 57 percent of representatives of business sector believe treatment of economic enterprises depends on their ownership structure and 47 percent think that treatment varies by size of the enterprise. Another 40 percent believe that treatment depends on the specific geographic location in which the business is located, while 38 percent have concluded it depends on the type of economic activity.

Conclusions

Ensuring access to justice for all requires acknowledging and overcoming a range of social, economic and social barriers and limitations. Over the last few decades, as a part of EU accession process and reform of judiciary, the legislative guarantees of access to justice for all has been improved. Despite reforms, the vulnerable groups continue to see constrains on their access to justice.

The research on barriers to access to justice in Serbia must continue to evolve and expand, however the recently conducted surveys should be used by authorities and organizations as a foundation for new approach and practice in improving of access to justice.

Serbia should make courts as a fully accessible service for citizens dispute resolutions. In addition, the program should be developed to improve legal education and increase legal literacy, especially among vulnerable groups.

Although Serbia adopted Law on Free Legal Aid in 2018, findings of the 2021 World Bank survey showed that only five percent of citizens are aware of the existence of the Law and eligibility to use it. Central authorities should conduct awareness raising media campaign to ensure increased knowledge on free legal aid among citizens, especially among vulnerable groups. Additional challenge present improper budgeting of self-government for free legal aid costs, which hinder application of the Law. In the future, focus should be on strengthening local-self government capacities to plan budget sources for legal aid and to provide this specific service.

Furthermore, the authorities should fund access to justice research to promote evidence-based policy making and promoting coherent, integrated and sustained funding strategies.

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SOCIETY OF RIGHT CLAIMING AND TRANSFORMATION OF WAR AND MILITARY AT THE END OF THE 20TH AND BEGINNING OF THE 21TH CENTURY

Civil revolutions expanded the boundaries of human and civil rights, simultaneously marking the outset of the rise of nations, as a new and stronger form of political unity. This form of political unity is one of the three causes — with economic and military power — of the irresistible spread of the Western way of life over the past two centuries. For almost 200 years, national consciousness was the most powerful means of states for military service, which did not cause friction between it, the right to freedom and the right to life. The situation changed radically at the end of the XX century, when developed countries faced resistance of their own population. The subject of this paper is transformation of democratic society into a "society of right claiming" and the impact on the change of war and armed forces. The goal is to determine whether the right to liberty, connected with the obligation to defend the conditions that guarantee rights, has been neglected in the discourse of human rights, read in the matrices of the "society of right claiming".

Keywords: *modern society, human rights, professional armed forces, instant war*

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1. Introduction

Industrial revolution and the civil revolutions of the New Age produced substantial social changes. The Industrial revolution, along with the accompanying changes in labor organization, shook the material foundations of the feudal order. It also enabled the intensification of transportation and urbanization, which undermined the feudal segmentation and paved the way for a better mode of political connection between individuals in larger areas which soon became nation-states. Third, the Industrial revolution brought an incomparable advantage in regards of military technologies to developed European nations, which in turn enabled an undreamed-of level of military exploitation of grand geographic discoveries (Gidens, 2001: 46–53; Starčević, 2022: 91–92). Simultaneously, the civil revolutions produced significant political changes: the downfall of feudal class order, abolition of feudal privileges and royal absolutism, introduction of the separation of powers, empowerment of political representation, pluralism and parliamentarism, spreading of civil rights and liberties. Hence, on the political plane, changes encompassed the entire society, bottom to top, from the individual to collective entities: the place of a subject was taken by a free, politically conscious and active citizen while people solidified and homogenized into a politically potent nation. Eventually, genesis of nations facilitated a new cultural strategy for designing transient human lives as segments of a wider, greater and more durable entity – a nation (Bauman, 2010: 42–50). Although some revolutions introduced terror and relied on means of war and dictatorship (Popov, 1992: 27; Starčević, 2018: 101–107), their results still managed to push the limits of human rights and liberties (Stanovčić, 2003: 173–197). As Starčević (2020b: 155) pointed out, "They (revolutions) proclaimed liberty and justice as their guiding light and freer and more just society as their outcome". While we can surely debate the levels, types, quality, and manifestations of social justness we, as humanity, managed to attain over the years, decades and centuries, it seems indisputable that humans today enjoy more civil liberties than ever before in history.

Civil rights and liberties implied the existence of civil duties, based on which the society as a whole could guarantee individuals their rights and liberties. Moreover, one might argue that all rights and liberties are actually *derived* from preexisting duties and obligations of citizens! It is clearly visible in the famous and glorious *Declaration of the Rights of Man and of the Citizen* produced by The Bourgeois Revolution in France, which states that the goal of all political association is to protect and defend the natural and timeless rights of man (at the time the Declaration was written, these rights included liberty, property, security, and resistance to oppression) but also that in order to guarantee these rights of man and citizen it is essential to have public force, established for the

benefit of all (Melkior-Bone, 1990: 18–20). Hence, fulfilment of duties and obligations of citizens is actually a prerequisite of the possibility to consummate rights and enjoy liberties.

One of the most important duties of a citizen[1] was military service. Introduction of conscription and creation of national standing army as a dominant type of military during the majority of the XIX and XX century was made possible precisely due to the described social changes (Starčević, Kajtez, 2018: 780–781). Already in the XIX century, as military service spread throughout Europe, it was described as "the most difficult duty of a citizen in a state" (Đukić, 2019: 37). However, states persisted in their demands for fulfilment of military service, all the way up to the end of the XX century, when they grew less and less capable of attracting their societies for war engagement (Kastels, 2018b: 625–627). Hobsbawm (2008: 93) noted that "If the XXI century states are now more inclined towards using professional armies or even private military contractors to fight their wars it is not solely for the technical reasons but also due to the fact that they can no longer rely on their citizens to be recruited in millions and to die in combat for their homeland. Men and women are prepared to die (even more likely to kill) for money, for something smaller or larger, but in the primal homes of nations they are no longer prepared to do so for the nation state". Growing global interconnectivity in the McLuhan's "global village"[2], development of global political ideologies, cultural cosmopolitism and many more factors contributed to the phenomenon that Hobsbawm described. Many individuals today declare themselves to be cosmopolites or "citizens of the world"[3], who reject to have their identities defined by nation, religion, etc. They observe the international community "not just as a society of states, but a society of individuals too" (Naj, 2006: 54), founded on a clear liberal premise of "moral primacy of individual over the rights of any type of social collective" (Williams, 2009: 29). Unwillingness of citizens to bear the burden of military service, for a multitude of complex reasons, coupled with the incapability, insufficient political will or lack of state determination to bring them to do so, induced and enabled the transformation of war and the entire military. We cannot but wonder what effect will this fact have on the rights and liberties of man and citizen we are all so fond of.

[1] At the time, it was "explicitly implied" that military service *stricto sensu*, i.e., obligation to serve under arms, related solely to male citizens.

[2] McLuhan (2001) famously envisioned and described the fully globalized and tightly interconnected global society as a "global village" of individuals, and examined the implications of such society on war and peace.

[3] Ancient Greek notions: *Kosmos* – world, *polites* - citizen

2. From a civil society to a "society of right claiming"

While European rulers expected political passivity from their subjects during the XVII and most of the XVIII century, even in war (Kreveld, 2010: 41–66), citizens of nation states were expected to be both politically conscious and active. In ideas which inspired civil revolutions, but also in political and legal practices based on them, the process of governing was envisioned as a two-way, mutual relationship between the ruler and the ruled, in which both sides have appropriate obligations towards and expectations from the other. Citizens owe their allegiance to the legal demands of the government, they bare expenses of the common state and perform their civil duties, but at the same time expect from those who govern to maintain legal order, security of living, their liberties and property, legal security and certain care for wellbeing (Stanovčić, 2006: 8).

Therefore, the very emergence of the citizen was somewhat of a political transformation, transition from vassalage to a new, active concept of political consciousness and social acting. Italian political scientist and sociologist, Giovanni Sartori, noticed that this transformation was simultaneously a transformation of the concept of liberty. Namely, in the Middle Ages, liberties were *privileges*, and privileges were closely connected to *obligations*. Privileges were granted for services and fulfilled obligations and implied commitment to providing similar services in the future. The sovereign obviously granted privileges only in exchange for performed and/or expected services. Likewise, the lord of the land had a duty to protect the subjected community. Sartori claims that precisely this relationship transformed into the formula of rights-duties. This formula included an important principle – that rights inherently imply obligations (Sartori, 2001: 311), or, as we noted earlier, rights are in fact derived from obligations. Therefore, it can be said that obligations even had primacy in the conceptual pairing with rights, as the ultimate purposes of life were found in the transcendent; to enter the realm of the transcendent one had to fulfill his duties, not enjoy his rights and liberties. Performed duties and obligations contributed to existence and enlargement of something grater, more profoundly important and much more long-lasting (ideally eternal) than an individual, while his rights and liberties could only be consummated and enjoyed by him, in his short life span. In the next phase, civil society demanded and received its autonomy from the ruler. It became capable of self-management, liberties ceased to be privileges and became full-fledged rights, equal for all citizens. The rights-duties formula was then translated into a balance between rights and duties. The third step introduced a violation of this balance and the severing of existing ties and correlations between rights and duties. Rights were no longer equal for all due to compensating equality and positive discrimination. This new,

imbalanced society, is a "rights without duties" society, or a "society of right claiming" (Sartori, 2001: 312).

"Society of right claiming", in the sense in which Sartori uses this notion, is characterized by ever-growing demands for two types of rights[4]. First, for civil and political rights, which are, according to this author, rights in the true sense of the word; second, for material rights, i.e., benefits which imply expenses that are, again, expected to be covered by the state. Sartori only acknowledges civil and political rights as absolute and unconditional rights. Material or economic-social rights are, in his view, relative and conditioned rights; in the end, they are conditioned by the state of a nation's treasury. As Sartori sees it, the problem arises when material rights become perceived as absolute, which happens in the society of right claiming (Sartori, 2001: 312-313). If one is entitled to a certain benefit as his or her absolute and natural right, then there is no implied gratitude for it; such a benefit will never eventually become sufficient, as a larger and greater benefit could be expected. Such a situation, in his and many other views (Kreveld, 2012), becomes a very fertile soil or an "incubator" for a "spoiled child" type of human, as Ortega referred to it, a type that is "ingrateful, expects everything for free without ever feeling even solidarity with the conditions which guarantee the benefits it claims" (Sartori, 2001: 313). Using the notions of political philosophy, many claims a "spoiled child" citizen has from his society are simply not valid claims either because they are irrational[5] or because the presuppose fulfilled duties and obligations of the claim-right holder.

Notwithstanding that Sartori's critical edge was mostly directed towards material rights, benefits and social claims, the formation of the "spoiled child" type of human, or the rise of society of right claiming which forms people into "spoiled children" to be more precise, is a substantially greater problem that mere financing of childish caprices and whims by the rest of society. The problem at play is much deeper and profound, even of a different category – it lies in the altered perception of happiness and a happy life of an individual. In modern society, happiness is understood as a continuous absence of discomfort, as it is vehemently depicted by Bauman (2010:40, 62). This means that all those things that

[4] This, to some extent, correlates with the practice present in political philosophy, which differentiates between *liberty rights* and *claim rights.* Liberty rights represent one's freedom to do or possess something, without anyone interfering or preventing him from doing so or possessing what he desires. Contrary to that, claim rights represent the expectation of duties and obligations of others towards the claim-right holder. But we must not lose sight of the fact that only *valid* claims can become claim rights. More on these types of rights and their complex relationship in (Wenar, 2013: 202-229)

[5] Claim rights by definition entail the existence of duties and obligations of others towards the claim-right holder, which are at times irrational or even impossible to demand.

are seen as paths to unhappiness – effort, denying instant gratification for the sake of a higher cause of greater future benefit, masculine firmness in choices which include suffering and feistiness, as well as active empathy which leads to moral economy and consequently to lowering one's own standards in the name of solidarity with one's community or less solvent social groups – are immediately rejected. Quite a Schopenhauerian twist to the Epicurean logic and ontology of human happiness and a peculiar amalgam of pain-avoidance and pleasure-seeking[6].

Life of a Western-civilization modern man, according to Bauman, is a "fluid life" and it unfolds in a fluid modern consumer society. It differentiates from human life in the solid phase of modernity due to an altered dominant cultural strategy. To expand on that - cultural strategies, in the context we are discussing, represent modes in which culture gives meaning to human life, making it possible despite our cognition of our own mortality. Cultural strategy of solid modernity relied on national consciousness and patriotism – moreover, on a strong relationship between an individual (as a segment) and a nation (as a whole). Human life gained meaning from an individual earning his place in the national pantheon, deserved by his work, actions, but also by his participation in war. Collective memory and national glory[7] were a form of eternal life in which an individual could weave his life and existence in. In short, the individual good was subjected to the collective good, which gave the highest order of meaning and glory to self-sacrifice[8] for one's society.

Contrary to that, fluid modernity is designed by a hedonistic cultural strategy which marginalizes concerns of mortality and eternity and which has no place for lasting values and entities (Bauman, 2009: 78). According to the postmodern matrix, the whole is dissolved and its segments become independent (Lyotard, 1995: 24). Abandonment of the whole is accompanied by rejection of all ideals but those individualistic. However, Šušnjić (2019: 82) notes that "individualism offers no answer to the question how to live with or without others". This argument alone is sufficient to explain why military service is perceived as difficult and undesirable – a soldier who rejects the purpose of his service (and it is practically always connected to the whole, i.e., nation state) is a misfit soldier,

[6] As the famous philosopher understood, the very meaning of life should not be the pursuit of higher pleasures and goals but continuous avoidance of pain and suffering. In the context in which we argue in this paper, man of fluid modernity should do all that is possible to avoid discomfort and any form of pain and suffering while simultaneously demanding the society to provide such living conditions that make all pleasures "free".

[7] Even namelessly, anonymously, an idea embodied in monuments such are the ones dedicated to the "Unknown hero" who have his life so that his nation could live and prosper.

[8] In all senses of the word, including the ultimate sacrifice – sacrifice of one's life for a grater, common good.

a low-morale soldier, a useless soldier. Šušnjić (2019: 14-15) concludes that it is "difficut to defend (and succed in this defence) the idea of a whole in the age of such fierce rejection of all ideals". Naturally, some national cultures and identities represented a much more favorable "breeding ground" for individualistic ideas and cultural strategies than others which grately struggle with them till date[9].

Further more, individualistic ideas are firmly connected with a hedonistic cultural strategy, with "reducing the ultumate purpose to personal pleasure and maintaining the moral criteria in the form of formal protocol" (Stevanović, 2017: 107). Such a cultural strategy further hinders every duty, especially duty in the form of military service, because soldiers "are individuals of whom society demands not only to risk their lives, but also their souls and salvation" (Stanar, 2020b: 529) for their nation, a concept that is surely abstract for many young people today; modern individualistic hedonism rejects every duty that carries discomfort making the severing of ties between rights/liberties and duties/obligations, identified by Sartori, completely possible. Even very probable and likely! Civil and political liberties, unburdened by obligations, are perceived as unconditional, which they most certainly are not. Just like the state's treasury can be empty, so can the ability of the state to guarantee rights and liberties be diminished and compromised – for example, in war or during an armed rebellion.

Hence, in fluid modernity, the society of right claiming becomes a "society of perpetual benefit claims" and a "society of continuous rejection of discomfort". At the same time, benefits are claimed by individuals, "humans without social connections" (Bauman, 2010: 87) in a fragmented society in which they actually compete against other individuals. In such conditions, the principle of common good is impaired to the extent that no concept of "individuation" (Kastels, 2018a: 220–221) can strengthen and support it in the long run. Durkheim warned that there can be no society without solidarity. We can only add that there can also be no defence of liberties, especially when those who ought to defend them are preoccupied with avoiding discomfort.

In a nutshell, as Stanovčić (2003: 118) phrased it, "every man has the right to life, body, liberty and property he earned working, and all people must mutually respect these rights". But we must never forget that people fought for their rights in a political struggle,

[9] Western societies, ideologically based on the premises of Protestantism and Protestant ethics "adapted" and "embraced" fluid modernity much better than those based on different civilizational premises and values, like Muslim and Orthodox societies, conservative eastern societies, etc.

rising up against injustice and subjugation, with the risk that comes with resistance and rebellion, defending their order from armed aggressions in the past (Mićunović, 2018).

Situation becomes most obvious when it comes to defending liberties from external armed threats. In case of war, collective identity and the liberty to organize life of a society (ours) in accordance with its (our) own system of social values and norms (order) are defended. *Ergo,* war as a form of solving disputes in international politics (but also internally) jeopardizes the order in which a multitude of individuals (society members) exercises their rights and liberties. Nonetheless, a society of right claiming is undermining its own defensive capabilities – such a society produces a sub-optimal military (Stanar, 2020a). Even if we would to abstain from analyzing the volume and impact of each and every right on military efficiency, the problem still lies in the fact that life in military conditions is full of frustrations even in the absence of war (Starčević, 2020a: 135–141). For this reason, and in consonance with the dominant cultural strategy, modern world is no place for heroes (Bauman, 2009: 60-61). It therefore comes as no surprise that even the most powerful nations have problems replenishing their militaries (Tresch, 2018; Shane, 2022). Moreover, due to the cultural strategy that prescribes instant gratification, boundless pleasures and active avoidance of discomfort and effort, some superpowers now estimate that less than 15% of "military aged" individuals in their societies are actually even physically and psychologically capable of military service! Such a state of affairs greatly undermines a country's defensive capabilities, and it is "sufficient to say that without serious intent to defend itself, no country would have the right to enforce its own laws, which makes defense normatively necessary…" (Babić, 2018: 233).

3. War: between constancy and transformation

After World War II, a huge political, organizational, and legal attempt was made to exclude aggressive war from international relations. It is undoubtable that certain progress was made. It is reflected in the fact that even countries that venture into such wars tend to call them differently. Ideologies connected with aggressive war have left the world history stage. However, war has not disappeared from international relations, it is still an instrument of power in the international arena, and it is still merely a "continuation of political intercourse, with the addition of other means" (von Clausewitz, 1976: 252). Albeit, it has transformed in such a fashion that the famous Clausewitz's definition is now reformulated into defining politics as "continuation of war by other means"[10]! The fact that war remains to be "one of the constants of history" (Durant, Durant, 1968: 82), that

[10] This reformulation has been in heavy use in previous decades, and it is most often attributed to Foucault.

it is still present in human civilization, just like it has been for thousands of years, reveals its inherent nature, constancy and even a somewhat ever-present need of human societies for war as an instrument of fulfilling political interests.

The fact that nuclear weapons forever changed the face of war is indisputable. Superpowers (nuclear superpowers, that is) no longer clash directly and such a war would be so irrational that it even seems impossible – states that possess nuclear weapons did not use it even in armed conflicts in which they were directly involved. Admittedly, they never faced any sort of an existential threat, a threat that would constitute "supreme emergency"[11] and call for the use of nuclear weapons. Technological and technical leaps and bounds we made with weapons and ammunition of terrifying capabilities affected the way we perceive war and introduced a post-heroic age of war.

Additionally, transformation of society also produced a change in war. Namely, most states we see as superpowers had some sort of a humiliating war experience in the end of the XX century, followed by internal objections to war by their own societies. Already after the war in Vietnam, American strategists began to contemplate a war which could be fought without their own society directly partaking. This led to a triple conclusion regarding the acceptability of war – war can be acceptable if and only if: first, if it does not include regular citizens but only professional military, volunteers and contractors; second, if it is sort, ideally instant, in order to avoid spending human and economic resources and weakening of the belief in its justifiableness; third, if the war is clean, seen as surgically precise in hitting legitimate targets, along with the implied information and public opinion manipulation that keeps violence in war within reasonable boundaries and hidden from the public eye (Kastels, 2018b: 625–633). Information-technological revolution supplied the necessary technical resources for new wars, as large powers can today use very little combatant-technicians who are able to kill very precisely, over long distances, risking almost no resources but the ammunition used, and without even "waking up" their societies from their pleasurable everyday lives (Stanar, 2021: 243-244). Further, under its influence the old Taoist wisdom about victory without fighting was reaffirmed – instead of fighting, we can now use political and economic pressures, hybrid threats and "network wars", and all things that fall in the *jus ad vim* category of "force short of war" (Galliott, 2019). But it primarily enabled states to conduct military

[11] Walzer (2004, 33-50) introduced the argument of supreme emergency in which use of all weapons can be justified, even those which violate both selectivity and proportionality. Nuclear weapons are such weapons, but nuclear powers never really faced "supreme emergency", as their "deepest values" and "collective survival" have never been in "imminent danger".

operations using relatively few forces. Seemingly paradoxical, human rights now served as an excuse for military interventions and violation of the principle of state sovereignty (Duzinas, 2009).

4. "Small professional military"

Rejection of western societies to become involved in wars led by their states necessarily raised the question of the type of military needed by such states. Throughout history, all the way up to the XIX century, states either relied on militias, in which citizens bore the burden of defense, or mercenary which were paid by the citizens. It wasn't before the emergence of the national standing army that a bold synthesis of these two models of duties occurred – citizens were obliged to serve in the military for a limited period of time, as well as to fund the professional officer personnel. Moreover, we can observe a spiral change of these types, following the logic of Giambattista Vico – from ancient militias towards ancient mercenaries, followed by feudal militias which transformed into feudal "call-to-arms" armies and then into feudal mercenary armies, after which came civil militias and consequently national standing armies. However, advances in war technology placed professional militaries, which could far exceed the efficiency of national standing armies, in the focus already in the period between two world wars. But it wasn't before the war failures of great powers in Vietnam, Algeria, and Afghanistan that the efforts in that direction intensified and finally fully came to life after the Cold War. Developments of war technology were not the only factors at play. Primarily, it was the society that changed, based on the ideas of human rights (Duzinas, 2009: 52–60) and the aforementioned disbalance between rights and duties (Sartori, 2001: 312). Ideological foundations of human rights and social practices of right claiming societies made this "neo-medievalism" possible, as the world is experiencing the end of national sovereignty (Kambovski, 2018: 37).

To say that military discipline and military unit cohesion are but a mirror of overall social solidarity is to say nothing new or revolutionary, as it has been identified long ago (Pavlović, 1909: 1, 8–9, 57–58). It is a truism that strict discipline is a *differentia specifica* of all armed forces, and an inherent *conditio sine qua non* of military organization. It is of pivotal significance for our discussion that the very essence of military discipline is found in "total subjection of personal interests to combat mission accomplishment" (Starčević, 2022: 229). Following the previously explained changes of cultural strategy and the relationship between rights and duties, as well as meticulous analysis of fluid modernity, we can draw a clear conclusion that the state of social solidarity along with the focus of individuals on their own interest (implying a specific understanding of

happiness) impede and hinder military discipline and cohesion. The problem is even deeper – values of military calling remained the same, but society changed; military service is no longer compatible with the social ideal (Starčević, Blagojević, 2022: 211–214). The number of those who are willing to voluntarily join their armed forces is often insufficient (or will soon become insufficient) to replenish a standing national army. This represents a serious cause of various changes in the military sphere, the most important being transformation into a "small professional military", relying on collective security and outsourcing to private military companies. At first glance, it may seem as though we are witnessing a displacement or regression to a feudal matrix; however, it is a different form of "displacement" – modern militaries are switching from a model in which citizens bear the burden of defence to a model in which they pay specialists who ought to carry the majority of the load (or at least the riskiest elements) of defence.

Still, one must wonder if the model of a small professional military is a "one size fits all" solution, and whether it actually meets the demands for security and protection in all scenarios. The answer is rather simple. It satisfies the need for protection of large countries, possessing adequate potential to recruit and support a hefty professional military and facing little to no danger from attack of an equal enemy, due to its nuclear arsenal. It also satisfies the needs of countries which opted for a system of collective security and entered an alliance with one of the great powers, primarily meaning NATO. However, even in these scenarios state's ability to wage war without using its own society leads to limitation of influence of the said society on politics and war, which signifies a political consequence of the first order that can question the very rights and liberties of citizens. In the case of joining an alliance, the problem of sovereignty arises, especially when it comes to small countries.

A small professional military does not pertain to countries which decide on neutrality, as it does not meet the demands of defence (Starčević, Blagojević, 2022: 224–227). Having in mind its inadequacy for defence and satisfaction of social necessity for security and protection, it is crucial for states aiming to remain neutral to establish a better model of communication with their own societies and align their political goals and strategies with it. The political establishment *and* the military itself, in such states, must therefore communicate and educate the public and their entire societies on the issues of interdependence of rights/liberties and duties/obligations. Task of paramount significance in the future will be raising overall awareness of the fact that individuals in such societies will only be able to continue to consummate their rights and enjoy their liberties if duties and obligations towards the military, the institution that protects peace, laws and "normality of life", are fulfilled.

5. Conclusion

For almost two centuries, national consciousness was a powerful means states used to ensure military service and mobilize societies, as "each state encouraged nationalism as a supplement to its army and navy" (Durant, Durant, 1968: 82). States managed to do so without causing tensions between civil rights and liberties on one side and military service on the other, following the rights-liberties formula. Nonetheless, as of the end of the XX century, the ability of these states to count on military service in their societies has plummeted. This comes as a result of transformation of civil societies of modern age into "societies of right claiming" (in the sense that Sartori uses this notion) of the postmodern age. Balance has been lost in these societies, and eventually, ties have been severed between rights and duties, resulting in the emergence of the "spoiled child" type of human. Without any obligation and with active approach only to issues of narrow private interest, there can be no free citizen. On a proverbial slippery slope from a society of *polites* to a society of *idiotes,* we find ourselves today somewhere in the middle of the slope, where societies are full of manifest *polites,* citizens who only simulate their interest in state maters, common good and their duties, but who in fact more resemble *idiotes,* as they are characterized by the infantile and very indicative lack of interest for reality (Станар, 2022: 28).

Transformation of society inevitably altered both the physiognomy of war and the selection of the dominant type of military, with the basic idea of state strategists being to wage war without society. This introduces a grave peril onto the political stage - influence of citizens on politics and war could further diminish and deepen the crisis of democracy. To opt for professional military and private military companies may seem as a regression to feudal concepts, but it is actually to opt for desertion of the type of military in which citizens bear the burden of defence in favor of a new type of military in which citizens only pay for specialists who ought to carry the majority of load (or at least the riskiest elements) of defence.

Finally, it would be wise to bring to mind that, according to some opinions, division of military obligations and the physiognomy of armed conflicts of the time were crucial for the emergence of the first democracy, the one in ancient Athens. Namely, the wealthiest citizens of Athens supported the navy; the second class, of the very rich, served in the calvary, buying horses and equipment for themselves; the third and largest class, of free citizens of Athens, provided hoplites – heavily armed infantry, while the poor served in light infantry. As the heavy infantry carried the heaviest burden and suffered the gravest casualties in combat, upon returning to the polis, hoplites asked for their war efforts and

merits to be valued in public life in peace and translated into political rights (Karlton, 2001: 92). Their political engagement produced democracy but also the possibility to differentiate between citizens (*polites*) and idiots (*idiotes*). If we desire to overcome the "unexpected crisis of democracy" (Mićunović, 2018: 150–158), we should consider returning to the concept of active citizens. Bauman spoke of the necessity to reconnect politics and power on a global level as a way to overcome modern society's problems; at the level of an individual this corresponds with reconnection of liberties and duties, along with raising the level of political culture, awareness, and responsibility.

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THE MODEL AND PERFECTION OF CHINESE LEGAL AID SYSTEM

At present, China's legal aid is operated in three modes: assignment mode, application mode and duty lawyer mode. In practice, the three modes have their own values but also have defects. The operation mode is directly related to the realization of the value of legal aid system and the embodiment of the legitimacy of criminal procedure. Under the mode of assignment, the implementation dilemma of staged division of criminal defense is harmful to the effect of litigation, so the operation mode of staged assignment should be gradually cancelled, and the same assigned lawyer should be responsible for all the time; under the mode of application, the standard of legal aid qualification recognition is single and rigid, and multiple dynamic standards should be formulated; the design of duty lawyer system is too efficiency oriented, and the case information is not enough. In this case, it is difficult for lawyers to provide effective help. It is necessary to distinguish the types of cases and establish a compulsory file-reading for lawyers on duty.

Keywords: *legal aid; criminal defense; duty lawyer; guilty plea and punishment acknowledgement*

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The Operation mode of China's criminal legal aid system

Since the promulgation of the first Criminal Procedure Law of the People's Republic of China in 1979, the Legal Aid Law of the People's Republic of China was officially promulgated in 2022. China's criminal procedure system has experienced 40 years of rapid development, among which the criminal legal aid system has been continuously improved. At present, China's legal aid system presents a three-way operation mode, including assignment mode, application mode and duty lawyer mode. The assignment mode and the application mode are only different in the way of obtaining legal aid, while the duty lawyer is fundamentally different from the first two in the overall operation procedure.

(1) Assigned legal aid

1. The establishment and development of assigned legal aid

Assigned legal aid is the earliest and the most traditional form of legal aid in China. As early as 1954, at the beginning of the founding of new China, assigned legal aid was established by the Organic Law of the People's Court of China, in which Article 7, paragraph 2 stipulates: "the defendant in addition to exercise his right of defense, can appoint a lawyer to defend him... when the people's court thinks necessary, can also appoint a defender to defend him." This can also be seen as the earliest source of assigned legal aid in new China. After putting things right, the first Criminal Procedure Law of the People's Republic of China was introduced in 1979. Article 27 stipulates: "If a defendant does not entrust a defender, the people's court may appoint a defender for him. If the defendant is deaf, dumb or minor and has not appoint a defender, the people's court shall appoint a defender for him." This was the confirmation of the legal aid system in 1954 and added the type of cases with mandatory assigned assistance, but the word "legal aid" did not appear legally at that time.

Article 34 of the amendment of the Criminal Procedure Law in 1996 stipulates: "If the defendant does not entrust a defender due to economic difficulties or other reasons, the people's court may appoint a lawyer assuming the legal aid obligation to defend him; if the defendant is blind, deaf, dumb or minor without entrusting a defender, the people's court shall appoint a lawyer assuming the legal aid obligation to defend him; if the defendant may be sentenced to death, the people's court shall appoint a lawyer assuming the legal aid obligation to provide his defense." As a result, "legal aid" has been legally confirmed, and the assignment scope has been expanded.

In the second half of the last century, China's legal aid system has experienced great progress, but there are a single model of defects, including only one court assignment. In addition, there are also deficiencies in the scope of applicable cases and the assignment procedure of lawyers. In particular, the mode of providing legal aid assigned by judges is widely criticized. For example, whether the judge has enough energy to analyze the case to assign more appropriate lawyers to different litigants, whether the judge is selfish, intentionally assigning lawyers more willing to cooperate as soon as possible, and whether the judge assignment is inefficient and wasteful of litigation resources. The existence of these problems has seriously hindered the effective operation of the legal aid system, and it has gradually attracted the attention of legislators.

2. The operation procedure of the assigned legal aid

Initially, assignment legal aid took judges as the assignment subject, and the application stage was limited to trial. The Regulations on Legal Aid of The State Council in 2003 and the Criminal Procedure Law in 2012 have substantially improved the designated legal aid, and the operation procedures specifically include the following contents:

First, legal aid agencies are assigned and lawyers undertake it. After the promulgation of the Regulations on Legal Aid of The State Council in 2003, various provinces and cities nationwide have extensively established legal aid institutions, which are the government departments under the judicial administrative organs, specifically responsible for the operation and management of legal aid-related affairs.[1] The criminal procedure law in 2012, in the corresponding case of the people's court, the people's procuratorate and public security organs shall notify the legal aid agencies appointed lawyers to defend the prosecution, so the assigned legal aid method, is public security, the prosecutors, court organs in its responsible for the litigation stage, notify the legal aid agencies to provide legal aid. The specific legal aid cases are aid lawyers, who are selected by them and made into a roster of aid lawyers by local legal aid agencies. Every case occurs, the legal aid agency will choose the right lawyers to undertake the case, considering the nature of the case, the ability of lawyers and the time arrangement.

Second, the scope of the cases to which the assignment of legal aid applies. Under Article 34 of the Code of Criminal Procedure Act of 1996, the scope of cases where the court

[1] Stănilă L. (2019) Children's rights: between UN convention on the children's rights and ECHR towards a new international court? *Yearbook human rights protection/ Protection of the rights of the child "30 years after the adoption of the convention on the rights of the child"*, Number 2, (pp. 27-45). Novi Sad: Provincial Protector of Citizens – Ombudsman; Institute of Criminological and Sociological Research in Belgrade.

should assign legal aid includes only that the defendant is blind, deaf and dumb; the defendant is a minor; and the defendant may be sentenced to death. After the revision of the law in 2012, the scope that should be assigned was expanded, and the following subjects should be added on the original basis: criminal suspects and defendants who may be sentenced to life imprisonment; mental patients who have not completely lost the ability to identify or control their behavior; and mental patients who do not have criminal duties in the compulsory medical procedure.

Finally, the litigation stage of assigned legal aid occurs. According to the Code of Criminal Procedure Law of 1996, legal aid is assigned by the court and is limited to the defendant. Therefore, legal aid could only be provided during the trial stage, and it was difficult for the poor in the pretrial stage to get the help of lawyers. However, in China's judicial practice, the pre-trial stage is often crucial, and the evidence collected by the investigation organs affects the verdict to a large extent. Punishing the crime is always the primary task of the investigation organs, and the investigation behavior for the purpose of treating the crime will also be somewhat biased. To some extent, the intervention of defense lawyers in the pre-trial stage has a more important significance, while ensuring the legitimacy of the pre-trial procedure while safeguarding the litigation rights of criminal suspects. If the implementation stage of legal aid is limited to the trial stage, it is equivalent to depriving the poor of the right to defend their lawyers in the pre-trial stage, which not only affects the exercise of criminal suspects, but also does not conform to the value concept of due process of law. Therefore, the revision of the Criminal Procedure Law in 2012 advanced the time of legal aid to the pre-trial stage. According to Article 34, the number of responsibility subjects for the designated legal aid was increased from the former courts to the public security organs, the procuratorates and the courts. That is to say, in different stages of litigation, whether before trial or trial, the corresponding specialized agencies have the responsibility to inform the legal aid agencies to provide legal aid to the prosecution person.

(2) Application for legal aid

1. The establishment and development of application for legal aid

In 1996, the Criminal Procedure Law stipulated that the court assigned legal aid, and this single model is difficult to meet the needs of judicial practice, so it was widely criticized. In 2003, the Legal Aid Regulations of the State Council increased the application type of legal aid in response to the practical needs, which stipulates that all Chinese citizens who are unable to pay the legal service fees due to economic difficulties shall have the right to apply for legal aid from legal aid institutions. It can be said that the application type of

legal aid plays an important role in the judicial practice, by which the poor can actively exercise the relevant rights of legal aid, and no longer passively wait for and accept the assignment of the court.

In 2012, the Criminal Procedure Law was amended to determine the application for legal aid from the legal level. Paragraph 1 of Article 34 stipulates: "If a criminal suspect or defendant does not entrust a defender due to economic difficulties or other reasons, he or his close relatives may apply to a legal aid institution. For those eligible for legal aid, the legal aid agency shall appoint a lawyer to provide its defense." Thus, the application for legal aid was established at the legal level.

2. Operation procedures of application for legal aid

In judicial practice, the application for legal aid is generally run in accordance with the following procedures: First, the applicant fills in the "legal aid application form" and the "certificate of economic status form", and submits it to the local legal aid agency. If the applicant is detained, the application can be made through the investigators and procurators who interrogated him, and transferred to the legal aid institution by the corresponding public security and procuratorial organs. Secondly, the legal aid agency reviews the qualification of the applicant. The specific audit standard is mainly the poverty level of the accused person. For the applicant who does not meet the requirements for legal aid, the legal aid institution will issue a "written decision on no legal aid" to him, and the applicant has the right to apply to the competent judicial administrative organ of the legal aid institution for reconsideration. Thirdly, for the applicants who meet the conditions of legal aid, the legal aid agency will issue a "written decision to grant legal aid" to them, and then assign legal aid lawyers to provide defense for the relevant personnel. Or notify the law firm and ask it to select lawyers to undertake the corresponding legal aid tasks. Finally, after receiving the assignment, the relevant legal aid personnel will meet with the parties with a legal aid official letter. At this point, the application for legal aid is completed, and the legal defense relationship also officially began.

(3) System of duty lawyers

1. Establishment and development of the duty lawyer system

Duty lawyers originated in the UK, as a result of seeking a balance between the limited financial budget and the gradually expanding demand for legal aid.[2] Duty lawyer system in China was founded in September 2006, when the United Nations development and technology agency and the Ministry of Commerce, Ministry of Justice jointly determine the first "legal aid duty lawyers to participate in pilot projects, in Henan Jiaozuo xiuwu county trial, after nearly a year and a half of operation has achieved good results, but after the relevant system presents the situation, is not promoted across the country.[3]

Until in recent years, with the rise of the reform of the expedited criminal procedure and the lenient punishment for guilty plea, the demand for defense lawyers in the criminal procedure became more and more urgent. The duty lawyer system, with its own advantages, was highly expected by the reformers. Therefore, in 2014, the CPC Central Committee made a decision to comprehensively promote judicial reform, including pushing the "duty lawyer" system to a national pilot.[4] Subsequently, a series of reform documents gradually clarified the system content. In 2014, the Measures on the Pilot Trial Procedure of Criminal Cases in Some Areas; in 2015, the Opinions on Improving the Legal Aid System; in 2016, the Measures on the Pilot System for Criminal Cases in Some Areas (hereinafter referred to as the Measures for Confession) initially clarified the operation mode and functional positioning of the duty lawyer system, and clearly distinguished the legal help provided by the duty lawyer and the criminal defense, indicating that the duty lawyer is not a defender. On August 29,2017, the "Two High Schools and the Three Departments" issued the Opinions on Developing the Work of Legal Aid Duty Lawyers (hereinafter referred to as the Opinions on Duty Lawyers), making detailed provisions on the rights, obligations and responsibilities of duty lawyers, and further distinguishing the duty lawyers and defenders. In 2018, the Criminal Procedure Law was revised, and the duty lawyer system was confirmed at the legal level.

[2]See Zhang Zetao. (2018) Clarification of the Source, Current Status and Their Differences of the Duty Lawyer System. Legal Review, 36(3), pp. 70-78.

[3]Wang Shuhua, Zhang Yanhong. (2009) Exploring the Establishment of China's Legal Aid Duty Lawyer System. Legal Aid, (5), pp.89-92.

[4]See Dong Hongmin, Ma Weijing. (2016) An Empirical Analysis of Building a Legal Aid Duty Lawyer System. Legal Services, (10), pp.39-43.

2. Operation procedures of the duty lawyer system

At present, the operation procedure of China's "duty lawyer" system is that local legal aid agencies assign lawyers to undertake duty tasks to courts, detention centers and other organs to provide immediate legal help to criminal suspects or defendants who need legal help. The biggest difference between duty lawyer and traditional application and assigned legal aid is its immediacy. Under the mode of assignment and application for legal aid, the aid lawyers provide legal defense for the poor as defenders. It can be said that as long as the case is not closed, then the lawyer's legal aid duties will not stop. However, the duty lawyer is not, who only provides legal advice to the accused in specific detention centers, courts and other places. After the consultation, the duty lawyer's legal aid task for the relevant cases was ended.

According to Article 36 and Article 37 of the Criminal Procedure Law, the litigation functions of the duty lawyers include meeting with criminal suspects and defendants, providing legal advice, making suggestions on procedure selection, applying for changes in compulsory measures, and proposing opinions on the handling of the case. However, in practice, the main function of duty lawyers is to provide legal advice and procedural suggestions for the criminal suspects and defendants appearing in their duty places in the form of questions and answers, while the litigation acts such as applying for changing compulsory measures are rarely implemented.In addition, another important function of duty lawyers in the current reform is to witness the signing of a confession letter.

The practical operation dilemma of legal aid system

In the exploration of the law, China's legal aid system has been continuously improved, but in terms of the practical situation, there are still deficiencies in the model design, responsibility concept and the cooperation of specialized agencies.

(1) The rationality of the operation mode design

1. Stage separation of assigned legal aid

Under the mode of assigned legal aid, after the public security, the prosecutor and the court organs inform the aid respectively, the legal aid agencies assign lawyers to the corresponding litigation stage, which presents the operation dilemma of stage separation. In a complete case, three aid lawyers are often responsible for the investigation, examination, prosecution and trial stage respectively. Stage separation largely affects the effect of legal aid.

First, phased assistance leads to the judicial status quo of phased notice. And this eventually leads to the dilemma of not timely, even not notification in practice. Secondly, the criminal procedure is a continuous process, with close links between the various stages. This fragmented criminal defense is difficult to have the best effect if there are multiple defenders for the accused in a responsible manner. The understanding of the defense defenders about the case is limited to the written case files, and it is likely to miss important defense information because they did not participate in the previous stage of the proceedings. Finally, this phased and short-lived legal aid model will alienate the relationship between the defense and the suspect and the defendant. From the point of view of the accused, it is difficult to fully trust multiple defense lawyers. After all, few people want to do so to share their alleged criminal information with the public. And mutual distrust hinders the exchange of important information, and ultimately hinders the act of defense. For aid lawyers, the model of phase responsibility weakens their sense of responsibility to the accused. "The relationship with the accused person is like a worker in the workshop facing the product on the assembly line: they only need to complete the stage of personal responsibility and lack of personal care for the accused person." The lack of sense of responsibility will greatly affect the defenders' dedication and dedication to the case, and damage the effect of legal aid.[5]

2. The standard setting for application for legal aid is rigid

In terms of the application system of legal aid, the identification standard of poverty is not reasonable. According to China's Criminal Procedure Law, a criminal suspect or defendant who is unable to hire a lawyer due to economic difficulties can apply for legal assistance. In practice, the economic status has become an important part of the legal aid qualification review. However, the research results of scholars show that the standard of poverty is generally set too high. In many cases, even if the accused person is difficult to bear the cost of defense economically, their legal aid application will not be approved. For example, according to the legal aid regulations of a certain province of Southeast China, the standard for economic difficulties shall refer to the standard for urban and rural residents published by the people's government at the county level where the applicant is located. In one prefecture-level city, the minimum living security standard for urban and rural residents was 685 yuan per month, as announced in 2019. That is, if a legal aid applicant earns more than 685 yuan per month, he will be excluded from the scope of

[5]See Carrie Leonetti, "Painting The Rose Red: Confessions of a Recovering Public Defender", 12 Ohio St.J.Crim.L.371 (2014-2015).

legal aid. This standard is clearly unreasonable and seriously hinders the right of most pursuers to legal aid.

3. The legal help of the duty lawyer is not very effective

In practice, the duty lawyer provides legal help to the criminal suspects and defendants who met for the first time. After simply listening to the introduction of the case, he should perform the duties of providing legal advice, procedure selection suggestions, applying for changes of compulsory measures, and proposing opinions on the handling of the case. According to the research of scholars, although the law gives duty lawyers the right to review papers, it is basically vacant in practice. For example, duty lawyers in Hanyang District of Wuhan city rarely read papers and do not know the facts and circumstances of the case, so the legal help provided is obviously not targeted. Most of the duty lawyers only play the role of witnessing the legality of the interrogation process, and lack the help of the crime and the sentencing circumstances related to the conviction and sentencing.[6] Some scholars have summarized its functional alienation and calling it: helper of legal publicity and education; witness of confession consultation; and helper of complaint activities.[7] Some scholars call the duty lawyers in practice "platform lawyers" to show the lack of aid effect. "The duty lawyers do not need to be substantially involved in the case, but only prove the legality of the case handling procedures in some more important occasions, whose formal significance is greater than the actual value."[8]

(2) The problem of resource guarantee under the deviation of the concept of government responsibility

Legal aid cases are undertaken by professional lawyers, who are market economy subjects and responsible for their own profits and losses, and earn profits by providing legal services to others. The limited time and energy determines that it can only provide services for a small number of clients, and the high bidder must be able to obtain a better legal defense. However, in terms of our current judicial practice, the economic compensation given by the government to aid lawyers is relatively low. In 2013, the national average case handling subsidy for legal aid in cases was 479 yuan per case. In

[6]See Research group of China University of political science and law, Fan Chongyi. (2018) Standardization of Duty Lawyer System ——Pilot Work of Duty Lawyers in Hanyang District, Wuhan City, Hubei Province. People's Procuratorate, (10), pp.59-51.

[7]See Zhan Jianhong. (2019) How Criminal Case Lawyers' Defense Fully Cover —— Thinking centered on the Role of Duty Lawyer. Law Forum, 34(4), pp.20-30.

[8]See Yao Li. (2017) The Role and Functions of a Duty Lawyer in the Criminal Pleas Procedure. Legal and Business Studies, 34(6), pp.42-49.

Henan, for example, legal aid subsidizes only 300-750 yuan for each litigation phase.[9] In March 2019, the Ministry of Justice, the Ministry of Finance jointly issued the guidance on perfecting the legal aid subsidy standard notice, stipulates the legal aid economic subsidies, subsidy amount has a certain promotion, for example, Zhanjiang, Guangdong province, on May 1, 2019 new subsidy measures, criminal case trial stage cases from the original subsidies per 700 yuan to 2000 yuan.[10] The increase of subsidies is worthy of affirmation but the range is low, compared with the entrusted defense costs still have the obvious gap. In contrast, the financial compensation of duty lawyers is equally modest and regional. In Shanghai, the economic compensation for the duty lawyers in various districts ranges from 200 yuan to 700 yuan for a half-day, with an average of around 300 yuan. In Shandong province, some cities compensate duty lawyers 100 yuan for half a day, while other cities pay 50 yuan for half a day.

Compared with the economic benefits of tens of thousands or even hundreds of thousands of yuan in private agency cases, the economic compensation for legal aid is minimal. Lawyers taking legal aid cases means a large loss of economic income. Therefore, after passively receiving the assignment of legal aid, many attorneys do not consider how to excellently complete the defense task to maximize the litigation interests of the prosecution. The focus is how to deal with the case in the minimum amount of energy input, so that the economic losses caused by legal aid can be reduced to the minimum range. Such a defense attitude, eventually leads to the negative defense behavior of aid lawyers—— will not see, do not investigate, do not read, only the formatted defense opinion is stated in the court.

Economic investment is one of the most fundamental reasons restricting the development of legal aid system, its source lies in the deviation of government responsibility concept, namely the government did not assume the responsibility of legal aid, but more as a manager of legal aid task to the lawyer: its to assign defense or arrange duty legal aid cases to lawyers, and supplemented by disciplinary measures and symbolic economic compensation. In China, the legal aid responsibility subject is misplaced, and the government responsibility is difficult to implement, then the economic investment cannot be in place. In many cases, the government's refusal to pay the lawyer to defend the case.

[9]See Wang Yinglong. (2018) Practical Analysis and Practical Development of The Research on Duty Lawyer System. Law Journal, 39(7), pp.109-119.

[10]http:// news.gdzjdaily.com.cn/zjxw/content/2019-04/15/content_2375699.shtml, accessed on 5.6.2022

This goes against the nature of the government responsibility of legal aid, and the government also seems to be suspected of shifting the responsibility.

(3) Negative performance of the specialized organs

Although the aid lawyer is appointed by the state organ and performs the duty of legal aid on behalf of the government, it still stands up with the prosecution organ in terms of the litigation function. In practice, the intervention of lawyers often affects the play of the prosecution function and delays the litigation process in the trial stage, so the special agencies usually have a cumulative attitude towards legal aid.

The assignment model requires the court, the procuratorate and the public security organ to notify the legal aid agency to appoint lawyers. The application mode requires the public security, procuratorial and court organs to inform the relevant rights, and forward the application. It can be said that the effective operation of the legal aid system is inseparable from the active cooperation of various organs. However, in the judicial practice, the investigation and procuratorial organs often hold a negative attitude towards the legal aid, mainly manifested in the delay in fulfilling the obligation of informing the legal aid, or in the delayed transfer of the legal aid application of the accused person. According to scholars' research, in many cases, aid lawyers receive cases only two to three days before the trial.[11] Under the hasty preparation, the effect of legal aid is greatly reduced, and the litigation rights of the litigant are difficult to guarantee.

The countermeasures and suggestions on perfecting legal aid system

The improvement of the legal aid system should be strengthened from the operation mode, government responsibility concept and relevant legal provisions.

(1) Improvement of the operation mode

1. Change the phased assignment to the case responsibility

Under the case responsibility mode, after the legal aid agency reviews and approves the application, it directly assigns lawyers to specific cases from the establishment of the legal aid relationship until the end of the case. In practice, this mode is mostly used in the cases that obtain assistance upon application. The case responsibility mode is better than the phased assignment in terms of the acquisition of the case information, the grasp of the

[11]See Liu Fangyuan. (2016) Empirical Research on Criminal Legal Aid. Journal of National Prosecutors' College, 24(1), pp.101-122.

overall litigation situation and the formation of the trust relationship. The practice status of phased assignment is completely due to articles 34 and 35 ofthe Criminal Procedure Law, which depends on the separation of criminal defense and legal aid in the litigation stage. In fact, criminal procedure is a coherent and closely connected procedure. Although each litigation stage has different functional positioning, its functions and objectives are consistent in terms of defense behavior, and the phased separation of personnel and behavior will hinder the defense effect. Therefore, in the future reform, the phased assignment mode should be abolished and the case responsibility mode should be completely adopted. That is, after the investigation organ requires the appointment of lawyers in the investigation stage, the lawyer will be responsible for the whole legal aid of the corresponding case, and no more assignments will be made in the subsequent litigation stage.

2. Set up comprehensive approval standards

At present, the legal aid audit in many regions of China adopts mechanized digital standards, that is, completely judged by economic income. The advantage of such a standard design is that it simplifies the audit process. The fixed value audit is objective and simple. However, the simplified process has led to the lack of hommization. In many cases, although the applicant's salary income is higher than the standard of legal aid provision, the individual's special circumstances still make it difficult to afford the high lawyer fees.[12] For example, if the applicant has an elderly family who needs to support him and bears high monthly medical expenses, then the employment of a lawyer will have a serious impact on his family life. As for the above situation, if the parties deny their relevant rights just because they do not meet the formal requirements of legal aid, it can be said that it seriously violates the original intention of the establishment of legal aid and lacks human care.

In contrast, many states and counties in the United States adopt comprehensive dynamic standards, including legal aid at the discretion of multiple indicators. Some scholars surveyed 300 counties in the United States and found that specific assessment indicators in different regions, but the most important ones include the following (see Table 1):[13]

[12] Streltsov, I. (2017) Regulation of privacz in the public law. 45-59. *Yearbook Human Rights Protesction. From Unlawfulness to Legality.* Ed: Pavlović Zoran. Novi Sad: Provincial Protector of Citizens

[13]See Lee Silverstein. (1965) *Defense of The Poor in Criminal Cases in American State Courts A Field Study and Repor 1965*: American Bar Foundation Library of Congress.

Reference factor	Number of counties that included this factor in the determination criteria
Salary income of the person person	245
The possession of the real estate	235
Ownership of automobiles and other valuable property	229
Stocks, bonds, and bank deposits	214
Social security and other social relief funds	154
Financial situation of parents or spouse	132
Financial situation of other relatives	93

Table 1

The approval standards of legal aid in China are too rigid and single, so we should draw on the experience of the United States and design comprehensive dynamic trial standards to meet the diversified needs in practice. This paper holds that the approval of legal aid applications should be half of the average annual income of employees in the above one year as the economic income standard, and other factors should be comprehensively considered on this basis. Other factors here can be learned from the experience of the United States and determined according to the practice.

3. Compulsory marking system for duty lawyers who plead guilty and admit punishment

In the UK, the birthplace of the system, the function of duty lawyers is to make up for the gap of criminal defense and solve the “first kilometer” problem of criminal defense. No defender was present during the first period of time when the suspect first arrived, because neither hiring a lawyer nor making a legal aid assignment was immediate. The duty lawyer, on the other hand, provides relatively simple legal help to the criminal suspect and the defendant before the defender is not in place to make up for this time gap. Its primary value pursuit is the instant efficiency rather than the actual litigation effect. Under such functional positioning, the duty lawyer can only rely on limited information to provide simple legal help, but the marking is not necessary, because first, the subsequent one’s own lawyer to provide defense, and then the marking will consume time and conflict with the value of instant efficiency.

As far as China is concerned, the current criminal defense rate is only less than 30%. In order to achieve the goal of full coverage of lawyer defense, legal aid is provided to the remaining 70% of the cases, which means a huge investment in human, financial and material resources, and it is difficult to achieve in a short time. In practice, the duty lawyer only provides simple legal advice to the prosecution in the way of questions and answers, which exchanges the efficiency of the aid at the cost of reducing the quality of individual case legal aid, thus realizing the goal of expanding the scope of legal aid. Therefore, the reformers borrowed the duty lawyer system to help replace the legal defense with a discount version of the law and promote the goal of full coverage of the lawyer defense.[14] This is also not necessary for the duty lawyer to mark the paper.

However, the duty lawyer system in China is not only to promote the full coverage of lawyer defense reform. In the case of lenient punishment for guilty plea, it bears the responsibility of ensuring the voluntariness and wisdom of guilty plea. The reform of the system of leniency for pleading guilty plea is to pursue litigation efficiency at the cost of reducing the litigation rights of the accused person, and most of the procedural guarantees are omitted after the confession. In the case of the litigation procedure being greatly simplified, it is easy to produce wrong cases, and the prosecution person is easy to make an inappropriate confession based on the heavy pressure of the prosecution and the lack of legal knowledge. Therefore, in the case of confession, it is very important for the duty lawyer to find the real function of litigation, so the duty lawyer should not pursue efficiency as the primary value in the case of confession, and the effect of legal help should be given priority. The duty lawyer is crucial to fully understand the case. Hence, it is the right and obligation of duty lawyer, and the compulsory marking system of duty lawyer should be established to ensure the effect of legal help and ensure the legitimacy and wisdom of guilty plea.

(2) Strengthen the concept of government responsibility and increase government input

Faced with the heavy pressure of judicial reform, China's legal aid system has become more and more perfect in recent years. From the establishment of legal aid institutions to the promotion of the duty lawyer system, and then to the introduction of the "Full Coverage of Defense Measures", step by step for the continuous development. But all these advances involve only institutional innovation, with no development in the most essential concept of responsibility: the government always plays the role of managers,

[14]See Cheng Yan. (2017) On the Value and Improvement of the Duty Lawyer System. Law Journal, 38(4), pp.116-124.

handing over legal aid cases to lawyers by assigning defense or arranging duty, with only symbolic economic compensation, supplemented by disciplinary measures. With the effective supervision of the government, the quality of legal aid can be guaranteed. But this is not the long-term development direction of the legal aid system. In this regard, the government should earnestly fulfill its duty of legal aid and change its role from regulator to responsible person.

First, we will increase government financial input. Around the world, governments can generally invest in between 0.1% and 1% of the government's total fiscal revenue. The British government spends the highest proportion of legal aid, accounting for about 1% of the total central fiscal revenue. In Japan, although the construction of the legal aid system started relatively late, the government's relevant financial input has reached 0.11% of the total revenue today. On the other hand, the government's financial input in legal aid is very little. According to statistics, the government's investment in legal aid-related matters in 2011 only accounted for 0.0122% of the annual total central fiscal revenue.[15] It can be said that this proportion is very low, such a limited financial input, but also to a large extent limited the development of China's legal aid cause. In 2017, national legal aid funds totaled 2.35 billion yuan in legal aid funds, accounting for 0.014% of the total national general public budget revenue of the current year.[16] Compared with 2011, the proportion of legal aid funds in the national fiscal revenue has increased, but there is still a long way from the level of developed countries and regions under the rule of law[17]. Per capita, China's per capita legal aid expenditure in 2017 was only 1.69 yuan, a significant gap with developed countries under the rule of law. Therefore, the government should increase the financial input of legal aid and increase the amount of legal aid according to the market price[18].

Secondly, to explore the establishment of a public defender system in the economically developed areas. The public defender model has the attribute of complete government responsibility: establishing the public defender offices within the government administrative system, and recruiting the public defender in the name of the government public servants to provide legal aid to the poor. Its biggest characteristic is both the public

[15]See Chen Yongsheng. (2014) China's Issues and extraterritorial Experience in Criminal Legal Aid. Comparative Law Research, (1), pp.32-45.

[16]See Zhan Jianhong. (2019) How Criminal Case Lawyers' Defense Fully Cover —— Thinking centered on the Role of Duty Lawyer. Law Forum, 34(4), pp.20-30.

[17]http://www.stats.gov.cn/tjsj/ndsj/2018/indexch.htm, accessed on 14.6.2022

[18] Kolaković-Bojović, M.; Grujić, Z. (2020). Crime victims and the right to human dignity – Challange and attidute in Serbia, Yearbook. No. 3 Human rights protection "The right of human dignity"(pp. 239-270).

office nature.[19] The establishment of the public defender system makes the legal aid no longer rely on the lawyer profession, and can effectively solve the problem of the legal aid lawyers caused by the lack of economic compensation. But the government needs to establish a whole administrative system to support the legal aid work of the public defenders. In the United States, the United Kingdom, Canada and other legally developed countries have established a public defender system, and bear a high proportion of legal aid cases.[20] China can take the lead in the pilot establishment of a public defender system in economically developed areas, promote the diversified development of legal aid models, and fully implement the concept of legal aid government responsibility.[21]

(3) Increase the rigid provisions of legal aid notices and implement procedural sanctions

The negative attitude of various specialized agencies leads to the delay or even lack of legal aid in practice. The reason is the lack of rigid provisions on the notification of law and judicial interpretation on legal aid. Article 34 of the Criminal Procedure Law, Article 44 of the Provisions on the Procedures for Handling the Public Security Organs in Criminal Cases, and Article 41 of the Rules for Criminal Procedure of the People's Procuratorate (for Trial Implementation) stipulate that investigators and procurators shall timely notify the legal aid agencies for criminal suspects who meet the circumstances of their assigned defense. And "timely notice" is difficult to accurately define, which gives the public security, prosecutors, court organs too much discretionary space. Future legislation can learn from the provisions of notifying families after detention, requiring specialized agencies to notify legal aid agencies within 24 hours.

For the absence of legal aid caused by the delay of special agencies, procedural sanctions should be strictly implemented. Criminal procedure law article 35 of the paragraph 2: "the criminal suspect, the defendant is blind, deaf, dumb, or has not yet completely lost the ability to identify or control the behavior of mental patients, and has not entrust a defender, the people's court, the people's procuratorate and the public security organs shall notify the legal aid agencies to appoint lawyers for the defense." Therefore, for specific cases, if in the investigation, examination, prosecution, trial stage, due to the fact

[19] Gregory S. Bell. (1974) "The Organization and Financing of Public Defender System" Foster, The Public Defender and Other Suggested System for the Defense of Indigents. JUDICATURE, (52), pp.247.

[20] See Wu Yu. (2014) A Study on the Public Defender System in the Comparative Law Vision—— and A Discussion on the Construction of the Public Defender System in China. Oriental Law, (1), pp.137-146.

[21] See Cheng Yan. (2017) On the Improvement of China's Legal Aid System —— Establishing a Public Defender System. Journal of China University of Political Science and Law, (2), pp.92-102.

that special organs are negligent in performing the duty of legal aid notification, and resulting in the absence of defenders, it should constitute a procedural violation, the court of second instance should revoke the original judgment in strict accordance with Article 238 of the Criminal Procedure Law.

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Aleksandar Todorović*

EUROPEAN COURT OF HUMAN RIGHTS – BEYOND PILOT JUDGEMENTS IS THE ECTHR INTRODUCING A NEW JUDICIAL POLICY?

It is not uncommon to encounter the position that the European Court of Human Rights has become a victim of its own success in legal literature. This claims aims to highlight that the high degree of trust that Europeans place in this institution has led to a multiplication of the number of applications which the Court cannot adjudicate in a timely manner, and this threatens to make the Court inefficient. One of the instruments that deal with the stated issue is pilot judgments. The Court had introduced pilot judgments in order to establish a mechanism that would resolve systemic and structural issues regarding the respect of human rights that the Court identifies in the legislative framework of a member state. The idea behind pilot judgments is that by making one, the Court creates the necessary conditions for the member states to resolve the identified systemic violations at the national level, by undertaking the appropriate actions, which negates the need for the Court to deal with future violations on which it has essentially already taken a stance. According to the Court's assertions, pilot judgments have mostly provided positive results by reducing the number of pending applications. However, the virtuous idea of the institute of pilot judgments was severely undermined in the Burmych and Others v. Ukraine case wherein the Court, by a single judgment, struck out nearly 12,000 applications against Ukraine, even though those applications were based on the Court's conclusions from an earlier pilot judgment against Ukraine where the Court determined that the defendant state had violated rights.

In this article, I will inspect the arguments that were utilized by the Court when it refused to examine the 12,000 applications in the Burmych case and note why I believe that these arguments are justified from the perspective of the mechanism for the protection of human rights that is established by the Convention. Afterward, by presenting post-Burmych case law, I will attempt to determine whether this was an exception or an indication of new judicial policy.

***Keywords**: European Court of Human Rights, pilot judgment, judicial policy*

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1. Introduction

The notion of pilot judgements in the praxis of the European Court of Human Rights (hereinafter: the Court) came out of necessity (Buyse, 2013: 303). There was a drastic rise in the number of applications submitted after Protocol No. 11 came into force, but also because there was an increase in the number of member states during the 1990s. A significant share of the applications precisely referred to the existence of systematic issues within the member states.

Namely, in practice it was observed that there were entire groups of applications (sometimes several thousands) that essentially relate to the same issue regarding the respect of human rights in certain member states. These circumstances created a situation wherein the Court would make a judgement in one such case, determine a violation of human rights as well as the means in which the violations should be handled and then had the task of issuing hundreds or thousands of identical judgements in other similar cases.

This situation entailed several issues: the first is an irrational spending of the Court's resources, as after identifying the problem and providing an initial solution to the first case from a certain group of cases, the Court, in practice, performed a type of typing task by issuing a large number identical judgments with minute changes in technicalities (in dates and names), instead of directing its judicial capacity to new cases which pose new issues important to interpreting and applying the Convention. Further, this also made the functioning of the Committee of Ministers, which is tasked with ensuring that judgements are enforced by the member states, more difficult, because the Committee of Ministers needs to concurrently monitor the enforcement of a large number of cases in such a situation. Finally, the very nature of the problems in such cases (considering that these are cases which stem from a structural or systematic lack of respect for human rights in a certain member state), as a rule, indicates that it is not sufficient for the defendant state to individually satisfy the request of the applicant that petitioned the Court, but that it is often necessary for the state to carry out specific general solutions (which transcend individual damage compensation) so that the problems identified could be solved and so that they would not be repeated.

With the aim of resolving the issues listed, at one point, during a reform of the control mechanism for the Convention, the Court proposed to institute provisions which would regulate a new procedure pursuant to which the Court could choose specific representative cases relating to a systematic violation of rights by a certain member state and that by resolving those cases provide the member state with guidance on how to

implement the Convention's standards at the national level. In this manner, the Court would resolve entire classes of cases in a single judgement.

Following a detailed discussion on this proposition (for more on the discussion, see: Haider, 2013: 24-32), the preparatory bodies of the Council of Europe took the position that it would not be utilitarian to introduce such innovations by amending the Convention itself. Instead, the Court was provided with political support to put into practice such a way of functioning on its own, without waiting for changes to the Convention.

The pinnacle of such political support was declared in the Resolution of the Committee of Ministers on judgments revealing an underlying systemic problem[1], whereby the Committee of Ministers called on the Court, with the purpose of assisting member states with finding adequate solutions, to:

"[A]s far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications."[2]

Specifically referring to this Resolution, the Court issued its first pilot judgement only a few months later in the *Broniowski v. Poland*[3] case in June of 2004.

Starting with the *Broniowski* case up until today, the Court has made more than 30 pilot judgements. Although research has shown that the effectiveness of pilot judgements varies from state to state and depends on the issue identified (Leach et. al. 2010: 181), according to the Court's own opinion, these procedures were mostly successful.[4] Acting in accordance with pilot judgements, the Court has resolved, or removed from the pending list, tens of thousands of cases.[5]

[1] Resolution of the Committee of Ministers on judgments revealing an underlying systemic problem, *Res(2004)3*, (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session).

[2] *Ibid.* para. I.

[3] *Broniowski v. Poland*, (App. No. 31443/96), Judgment, Grand Chamber, 22/06/2004, para. 190.

[4] *Burmych and others v. Ukraine*, (Apps. No. 46852/13, 47786/13, 54125/13...), Judgment, Grand Chamber, 12/10/2017, para. 163.

[5] Only in the *Burmych and others v. Ukraine* case, the Court had struck out over 12,000 cases from the case list.

2. The general characteristics of pilot judgements

Earlier judicial theory has listed many general characteristics of pilot judgements. Regarding the number of characteristics, judge Wildhaber had gone the furthest, listing eight (Wildhaber, 2009: 71). However, with changes to court praxis and, more importantly, with the introduction of amendments to the Rules of Court from 2011[6], which prescribed by Rule 61 the procedure for enacting pilot judgements, the numerous characteristics that defined pilot judgements essentially condensed into two. Consequently, we can state that a pilot judgement is a judgement that determines that there is a widespread or systemic problem with regards to the respect of human rights in the national framework of the defendant state, for which reason the Court prescribes general measures that the state must enact in order to eliminate the issues identified (similar to Fribergh, 2008, 93). We are dealing with a revolutionary innovation regarding the functioning of the control mechanism for the Convention. Thus, there is no doubt that those authors which state that the creators of the Convention did not foresee that this could happen in the future during the initial negotiations for its founding are correct (Yildiz, 2015: 89).

The general characteristics of pilot judgments are fully conditioned on the two fundamental ideas which the Court used as guides during the introduction of pilot judgements into the control mechanism of the Convention. The first is the idea of a consistent application of the principle of subsidiarity, on which the entire control mechanism is based. The second is the idea of rationalising court procedures and the control mechanism of the Convention in general; this idea is an integral part of long-term judicial policy.

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The Court related pilot judgements to the principle of subsidiarity in the very first case (*Broniowski*), wherein it stated that the task of national authorities to execute all measures necessary in order to correct the identified structural problems is based precisely on the principle of subsidiarity, as remedying the violations at the national level avoids a

[6] European Court of Human Rights, Rules of Court, Rule 61- Pilot Judgment Procedure, Inserted by the Court on 21st February 2011. Available at: https://www.echr.coe.int/Documents/Rule_61_ENG.pdf

situation wherein the Court would "have to repeat its finding in a lengthy series of comparable cases" at the supranational level.[7]

Namely, the Court starts from its very own subsidiary role in the control mechanism for the Convention and the fact that the member states have taken on the duty of guaranteeing and realizing human rights. The subsidiary role is not realized effectively if the Court is compelled to repeatedly decide on issues it had already identified.[8] In such a situation, the Court can contribute nothing new to the interpretation and application of the Convention, but would become an extension of the national judicial system and would practically act as part of the domestic judiciary by spending its time on allotting damages relating the previously identified issues, instead of adjudicating new problems that relate to the interpretation and application of the Convention.

Accordingly, when a pilot judgement determines the existence of a systemic problem at the national level and when the state is ordered to undertake general measures, it is expected from the state to act in such a way so as to encompass all person in the same position during the selection and execution of the measures, including persons that have already submitted applications before the Court. This would also include a potential retroactive application of such measures[9] so that persons that have submitted applications before the Court could realize their rights at the national level, instead of through proceedings before the Court in Strasbourg. Acting in such a manner, in fact, creates a situation wherein cases that have already been brought before the Court are returned to the state for readjudication, in accordance with the measures that the Court ordered the state to execute. This simultaneously unburdens the Court while enabling the member state to redress the issue which came about due to a widespread violation during the execution of the pilot judgment and pursuant to the Court's guidelines.

This is also demonstrated by the very specific context of the effects of the principle of subsidiarity within the framework of pilot judgements. The context is, at same time, both positive and negative (for more on the positive and negative components of subsidiarity, see: Caroza: 1997, 38-79); in other words, it simultaneously has both an upward and downward trajectory. The Court initially utilizes the principle of subsidiarity to perform a downward intervention, intervening in the national legal order of a member state by ordering it to execute certain measures. Concurrently, the purpose of such an order is to

[7] *Broniowski v. Poland*, (App. No. 31443/96), Judgment, Grand Chamber, 22/06/2004, para. 193.

[8] *Burdov v. Russia* (no. 2), (App. No. 33509/04), 15/01/2009, para. 127.

[9] *E. G. Neshkov and others v. Bulgaria*, (Apps. No. 36925/10, 21487/12, 72893/12...), para. 285.

create the conditions necessary to resolve all similar cases at the national level, retaining the concrete ability to judge individual cases at the national level by doing so. The consequences of such actions are that the protection of human rights is more effective at both levels. From the perspective of the international mechanism, efficiency is increased by the Court being relieved of many of the cases so that it can dedicate its resources to resolving other issues significant for the protection of human rights. At the same time, the systemic defect is eliminated in the domain of the national legal order and that order is strengthened by gaining the ability to resolve all similar existing and future issues without further interventions from the Court.

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The principle of subsidiarity applied to the institute of pilot judgements goes arm in arm with the idea of rationalising its procedures, which has been the direction of the Court's policies in the last few decades.

Achieving rationalisation of the procedures of the Court by applying the institute of pilot judgement is envisioned in a specific and innovative manner:

The rulebook currently in force prescribes that the Court may (thus, it is not obligated) initiate the procedure for making a pilot judgement. The rulebook determines only the general conditions based on which the Court makes such a decision. There are two conditions: first, that the circumstances indicate that there is a structural or systemic problem at the national level; second, that the problem is of such nature that it has either led to a large number of applications or may lead to a large number of applications in the future, regarding the same or similar issue. These two conditions are close interconnected. Logically, a large number of similar applications is an indicator of a potential systemic problem at the national level and, conversely, a systemic problem will cause a large number of applications regarding the problem as a rule. In judicial practice up until now, the Court identified systemic problems as those that relate to: a specific class of citizens

in a certain situation,[10] issues with the execution of judgements,[11] the length of the proceedings,[12] the conditions of detention,[13] but also many others.

When the Court decides to adjudicate in the procedure of making a pilot judgement, such a procedure has priority. Additionally, the Court may choose whether the procedure of a pilot judgement will include only one case or whether other similar cases will be consolidated with the case (which happens more often).

The pilot judgement itself, together with the segments which are obligatory for all other judgements, contains two other important elements: identifying the nature of the systemic problem and determining the general measures for eliminating it.

Identifying the nature of the problem necessitates that the Court determine which issues regarding the implementation of the Convention are to be found at the national level and what the source, that is, the cause of the issues is. Depending on the facts of the case, issues can be cause by a legal provision that intrinsically causes a violation,[14] deficiencies in a law that prevents or hinders the effective realisation of a certain right,[15] deficiencies in the actions of judicial[16] or administrative bodies[17].

The Court can order different general measures in order to remove the deficiencies ascertained. Thus, the Court can obligate a state to execute "measures to ensure effective

[10] *Broniowski v. Poland*, (App. No. 31443/96), Judgment, Grand Chamber, 22/06/2004. The issue related to realizing the right to compensation for property that Polish citizens lost after changes to the Polish border once World War II had ended.

[11] *Burdov v. Russia* (no. 2), (App. No. 33509/04), 15/01/2009.

[12] *Rumpf v. Germany*, (App. No. 46344/06), 02/09/2010.

[13] *Rezmiveş and Others v. Romania*, (App. No. 61467/12), 25/04/2017.

[14] As the Court determined regarding the British law from 1983, which, among other stipulations, proscribed persons serving a jail sentence from voting. *Greens and M.T. v. the United Kingdom*, (Apps. No. 60041/08, 60054/08), 23/11/2010, para. 115.

[15] As an example, a lack of the appropriate legal basis pursuant to which foreign citizens could effectively retrieve their investment of "old foreign-currency savings". *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the Former Yugoslav Republic of Macedonia"*, (App. No. 60642/08), Judgment, Grand Chamber, 16/07/2014, para. 146.

[16] Like unjustifiably long durations of civil proceedings. *Gazsó v. Hungary*, (App. No. 48322/12), 16/07/2015, paras. 34-37.

[17] Like a lack of investment into detention and prison facilities, as a result of which the conditions within them are such that they are contradictory to the guarantee against inhumane treatment and punishment. *Neshkov and others v. Bulgaria*, (Apps. No. 36925/10, 21487/12, 72893/12), 27/01/2015, para. 272.

protection of the rights guaranteed"[18] without any further specification regarding the measures or even the types of measures expected from the state. Conversely, the Court may obligate a state to execute a general measure that is very specifically defined, such as the measure from *Suljagić v. Bosnia and Herzegovina*, when the state was obligated to issue government bonds to settle any outstanding instalments to persons that were not paid their "old foreign-currency" deposits, within six months from the final judgement.[19]

Similarly, the intensity of the measures is not always the same. In some cases, the Court demands that the state submit legislation for consideration before parliament within a certain time frame,[20] while in others, the Court simply orders the state to amend existing laws in order to fulfil its obligation.[21] It may even go further and order that *lex specialis* be instituted.[22]

When determining the measures, the Court may also set a time frame within which the relevant state is obligated to execute them.[23] Although the Court is not obligated to set a time frame, it mostly does so and the range has been from six months[24] to two years[25] in heretofore judicial practice.

Finally, the Court may postpone examining all similar applications until the corrective measures ordered by the pilot judgement have been adopted.[26] In case it decides to postpone examining the other applications (which it does, as a rule), further actions of the Court depend on whether the member state has fulfilled the demands from the judgement.

Depending on the manner in which the member state has fulfilled its obligations, the Court has acted in two ways until now. In case the state carried out reforms which enable the essence of the right to be realised at the national level, the Court would strike the applications out of the list by applying Art. 37, para. 1, as it considered the matter

[18] *Manushaqe Puto and others v. Albania*, (Apps. No. 604/07, 34770/09, 43628/07...), 04/11/2014, 6th operative provision.

[19] *Suljagić v. Bosnia and Herzegovina*, (App. No. 27912/02), 03/11/2009, 4th operative provision.

[20] *Greens and M.T. v. the United Kingdom*, (Apps. No. 60041/08, 60054/08), 23/11/2010, 6th operative provision.

[21] *Gazsó v. Hungary*, (App. No. 48322/12), 16/07/2015, 5th operative provision.

[22] *Zorica Jovanović v. Serbia*, (App. No. 21794/08), 26/03/2013, para. 92.

[23] Line 5, Art. 61 of the Rules of Court.

[24] *Grudić v. Serbia*, (App. No. 31925/08), 17/04/2012, 3rd operative provision, (d).

[25] *Gerasimov and others v. Russia*, (Apps. No. 29920/05, 3553/06, 18876/10), 01/07/2014, 13th operative provision.

[26] Line 5, Art. 61 of the Rules of Court.

resolved.[27] However, if the state were to institute new legal remedies at the national level at the direction of the Court, the Court would dismiss the remaining applications, stipulating that the applicants must first utilize the new legal remedy at the national level and only then (if they are not successful in the proceedings) may they again address the Court in Strasbourg with a new application.[28]

In case the state did not fulfil its obligations from the pilot judgement, the Court would chose to continue examining each individual application as a rule.[29]

3. Burmych, the game changer

The Court departed from the rule according to which it would continue to examine each individual application that would otherwise have been encompassed by the solution from the pilot judgement when the general measures from the pilot judgement have not been executed in the *Burmych v. Ukraine* case.[30]

The Burmych case refers to the widespread practice in Ukraine regarding the compulsory enforcement of decisions of the national courts. Namely, earlier in the *Ivanov* case[31], precisely in the process of making the pilot judgement, the Court had identified the existence of a systemic and widespread problem which manifested itself in the fact that many judgements of the national court were never enforced or their enforcement was unreasonably prolonged. Regarding the perceived problem, the Court had ordered Ukraine to execute general measures by setting up an efficient legal remedy or a combination of remedies which would provide the citizens of Ukraine adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions, as well as to grant appropriate redress to all applicants that had applications pending before the Court that were communicated to the defendant state.[32]

[27] *E.G. v. Poland and 175 other Bug river applications*, (App. No. 50425/99), Decision, 23/09/2008, paras. 25-29.

[28] *Nagovitsyn and Nalgiyev v. Russia*, (Apps. No. 27451/09, 60650/09), Decision, 23/09/2010.

[29] *Kurić and others v. Slovenia*, (App. No. 26828/06), Judgment (Just Satisfaction), Grand Chamber, 12/03/2014, paras. 136,138.

[30] *Burmych and others v. Ukraine*, (Apps. No. 46852/13, 47786/13, 54125/13...), Judgment, Grand Chamber, 12/10/2017.

[31] *Yuriy Nikolayevich Ivanov v. Ukraine*, (App. No. 40450/04), 15/10/2009.

[32] *Ibid.* operative provisions 5, 6.

This obligation was supposed to have been executed by Ukraine without any delays and, at the latest, within one year of the judgement becoming final. Simultaneously, the Court had decided to cease examining other cases against Ukraine within the mentioned time frame that related to identical rights violations.[33]

As even after a year of the judgement in the *Ivanov* case becoming final Ukraine had not executed the general measures, Ukraine had applied for an extension for implementing the judgement. The deadline was extended, but Ukraine did not manage to implement the ordered measures even during the extension period. For these reasons the Court decided to continue adjudicating similar applications against Ukraine. However, the number of incoming applications was so numerous that the Court, in 2004, by its own choice, decided to stop examining all similar applications and reassess the practical situation after a one-year pause. After the additional period had expired, the Court continued examining the applications because it assessed that the situation in Ukraine had not improved. Quite the opposite, the situation had worsened and the number of new applications quickly surpassed 10,000.[34] In practice, the Court even referred to these cases as *Ivanov-type*.

The described circumstances were an unorthodox and complex challenge for the Court. The question of what should be done in a situation where the defendant state does not fulfil the general measures from the pilot judgement nor fulfils its obligations from the individual judgements that the Court made after it determined that the pilot judgement did not accomplish the desired results was raised. Issuing a new pilot judgement would only have been a judicial exercise in futility, much like it would have been futile to continue making individual judgements which remain unexecuted.

This unconventional problem required an unconventional solution, and yet, the peculiarity of the Court's solution nearly astonished the professional community.

What did the Court do that was so extraordinary? The Court decided to group all *Ivanov*-type cases into a single proceeding, more than 12,000 of them, and in the *Burmych* judgment strike them all from the list of cases of the Court.

The explanation that the Court provided for this act was exceedingly interesting. In the *Burmych* case, the court decided it was time to re-examine its processes regarding cases

[33] Ibid. operative provision 7.

[34] *Burmych and others v. Ukraine*, (Apps. No. 46852/13, 47786/13, 54125/13...), Judgment, Grand Chamber, 12/10/2017, paras. 16-43.

that refer to the same problem as in a pilot judgement and regarding which the state did not make sufficient effort to execute the ordered measures.

Pointing to the scope of the problem that stemmed from the non-enforcement of the general measures ordered in the *Ivanov* pilot judgement, the Court decided that the hitherto policy that directed that the Court should make judgements in individual *Ivanov*-type applications did not produce any tangible results.[35]Similarly, the Court noted that potentially continuing to individually examine all similar cases would not contribute to a lasting solution to the identified structural problem.[36]

Further, the Court stressed that continuing to make individual judgements in repetitive cases could threaten the control mechanism of the Convention as the Court would need to direct a significant portion of its resources towards examining the same issue and in that manner neglect other important questions regarding the interpretation and application of the Convention which are posed by other cases that are brought before the Court.[37] This was even more pertinent because *Ivanov*-type cases no longer put forward any unsettled questions regarding the Convention. In that context, the Court correctly concluded that it had fulfilled its mission when it identified systemic problems in the *Ivanov* case and ordered the defendant state to execute general measures.[38]

The Court closely relates all of the above with the principle of subsidiarity and notes that the entire control mechanism for the Convention is based on that principle, which necessitates a specific division of competences between the different stakeholders. However, it is interesting that this case was the first time in its judicial practice that the Court includes a new participant into the principle of subsidiarity – the Committee of Ministers. Thus, the Court states that its fundamental purpose is to ensure judicial control of the guarantees of human rights that the member states have taken upon themselves (which stems from Art. 19 of the Convention). Then, it notes that it is the obligation of the member states to secure the rights from the Convention, pursuant to Art. 1, and that it is the member states' obligation to undertake all measures to abide by the judgement of the Court, pursuant to Art. 46 (this would definitely include general measures ordered by pilot judgements). Consequently, it is not the Court's obligation to oversee the process of executing judgements, but the Committee of Ministers'. Neither is it the Court's task to

[35] *Ibid.* para. 152.
[36] *Ibid.* para. 154.
[37] *Ibid.* para. 150.
[38] *Ibid.* para. 197.

start acting like an integral part of Ukraine's legal system by adjudicating, in place of the Ukrainian courts, damage compensation due to the non-enforcement of domestic judicial decisions.[39]

Building on the conclusion that it had fulfilled its task and that there is no unsettled issue regarding the Convention that needed examining, the Court inspected the emerged problem from the perspective of dividing the responsibilities within the control mechanism, pointing out the division of competence as the core issue in this specific case.[40]

In that context, the Court noted that the division of tasks between the Court and Committee of Ministers was clear[41] and that there is a strong general interest to delineate between the roles of the Court, Committee of Ministers and the member state.[42]

Reiterating the arguments that due to judicial policy, rationalising resources and a strong general interest for the Court to dedicate itself to other important issues regarding the application of the Convention instead of making thousands of identical judgements on an issues that is already encompassed by a pilot judgement, the Court decided it was no longer justified to continue examining individual *Ivanov*-type applications. Thus, in accordance with Art. 37 § 1 (c), it decided to strike more than 12,000 of such cases from the list and "direct" them to the Committee of Ministers, so that the Committee of Ministers could undertake the appropriate measures for Ukraine to correctly resolve, in the process of executing the *Ivanov* pilot judgement, the requests from the cases that were struck from the list.[43]

As an additional argument, the Court also stated that the essence of a pilot judgement is precisely to be the umbrella measure that will enable the realization of the rights of both the applicants that are encompassed by the initial pilot judgement and all other persons in an equivalent situation; for this reasons, it found that there is no hindrance for all 12,000

[39] *Ibid.* para.156.
[40] *Ibid.* para.141.
[41] *Ibid.* para.194.
[42] *Ibid.* para.173.
[43] *Ibid.* para.202.

cases to be directed to the Committee of Ministers and for them to be resolved during the process of overseeing the execution of the *Ivanon* pilot judgement.[44]

The importance of the arguments and the very decisions of the Court is manifold and transcends the atypical fact that the Court found an elegant solution to strike more than 12,000 applications in the same breath and give itself breathing room. Regarding the *Burmych* case, two significant aspects should be noted: the practical consequences of the decision and the premise of the Court's reasoning.

The practical consequence of the *Burmych* case is found in the fact that the Court introduces the Committee of Ministers into the subsidiary division of competences and establishes a new rule regarding the manner in which the pilot judgement system functions within the control mechanism. The Court demonstrated that it is willing to decide, in certain situations, that its judicial role has been completed and that there is no further need to repeatedly perform it in identical cases, as it considers it to be the domain of judgement execution and not the domain of judicial control. In other words, the Court, in an innovative manner, positions the Committee of Ministers as a new key player in the division of competences, in the hope that such an act would provide it with more freedom to operate.

This practical consequence is not accidental. It did not come about as a result of a type of understanding of the self-evident and obvious nature of the redivision of competences between the states, the Court and the Committee. Quite the opposite. We are dealing with a carefully guided argument that is based on the premise that there is a strong general interest for the Court to be relieved of making individual decisions in massive cases which raise identical issues to those that had already been settled in a pilot judgement and regarding which the Court had already ordered the execution of general measures. Otherwise, the entire control mechanism could collapse.

As can be observed, the rationale for this change in how the Court functions does not primarily rely on a legal interpretation of human rights as much as it does on the need of the Court to adopt a judicial policy of rationalisation with the purpose of maintaining an efficient functioning of the control mechanism. At the same time, this is the main critique directed towards the Court regarding its approach to the *Burmych* case.[45]

[44] *Ibid.* para.161

[45] See the dissenting opinions in the *Burmych* case.

Making decisions and developing judicial practice primarily based on the judicial policy of the Court may seem counterintuitive. Particularly so when judicial policy goes against such a closely held right as is the right to an individual application. However, the notion that the Court may utilize judicial policy as guidelines when making decisions should come as no big surprise. It should not be forgotten that the European Court of Human Rights is an international judicial body founded by international agreement that acts in the area of international law, which is inevitably connected to politics, as every international legal argument is also in a way a political one (Koskenniemi, 2009: 7-19). And every international court is keenly aware of the political arrangement within which it operates. The bottom line is that all legal values that were initially introduced into the Convention started out as political values. Therefore, it is not unreasonable for the Court to utilize values that are part of judicial policy but not contrary to the ideas found in the Convention as guidelines when deciding on the manner in which it will operate. Those ideas naturally include the efficient protection of human rights. In case a particular problem threatens to impair the efficiency of the entire control mechanism, it is not inconceivable that judicial policy, which is directed towards preserving that efficiency, plays a role in the process of balancing the opposing interests which are being decided on. In this situation, the opposing interests were the general interest in the efficiency of the control mechanism and the right to an individual application. As can be seen, the former prevailed.

Pilot judgements also contribute to the justifiability of using judicial policy as a factor when deciding on human rights. They stem precisely from the necessity to achieve greater efficiency of the control mechanism by rationalising procedures. If pilot judgements are a rationalisation of the procedure which is acceptable, why shouldn't transposing applications from the judicial framework to the domain of executing pilot judgements also be acceptable? Both are based on the same judicial policy.

4. Post-Burmych

Although making decisions pursuant to judicial policy should not be surprising (as was explained in the previous section), what is startling in the *Burmych* case is that judicial policy was, for the first time, clearly and openly the fundamental reason for changing the way the Court makes decisions. Thus, the question is raised – what is the future of judicial policy in the Court's decisions?

While no definitive answer can be given, the fact that the *Burmych* judgement was nearly 5 years ago provides us with the opportunity to observe the influence the judicial policy from the *Burmych* case has had on hitherto judicial practice.

From October 2017, when the judgment in the *Burmych* case was made, up until today, the Court referred to this case a total of 12 times, 7 of which relate to Ukraine. In all 7 of those cases, the Court referred to *Burmych* to demonstrate that these cases do not raise essentially the same issues that are encompassed by the *Ivanov* and *Burmych* judgements and that, consequently, they deserve meritorious adjudication.[46]

From the remaining 5 cases, in 4 of them the Court refers to *Burmych* not for reasons relating to judicial policy but notes certain observations that were made in *Burmych* relating to the principle of subsidiarity.[47]

Only one judgement fundamentally relates to the judicial policy on which *Burmych* is based – the case of *Turan and others v. Turkey*.[48] Here, the Court decided, in a consolidated procedure, on 427 applications that were brought before the Court by judges and prosecutors deprived of freedom immediately following the attempted coup in Turkey in July of 2016. All applicants complained of violations of the right to freedom of movement as a result of an unfounded deprivation of liberty, i.e. violations of Art. 5 of the Convention and unlawful deprivation of liberty (Art. 5, para. 1 of the Convention). Certain applicants also alleged the following violations: that at the time the deprivation of liberty happened there was no reasonable suspicion to base the deprivation on (Art. 5, para. 1c), that they were not promptly brought before a court (Art. 5, para. 3), that not all procedural safeguards were honoured in the process of examining the legality of their depravation of liberty (Art. 5, para. 4).

Deciding on the group of 427 applications in the *Turan and others v. Turkey* case, the Court held that the applicants' right to liberty and security from Art. 5 of the Convention was violated, specifically the guarantee from Art. 5, para. 1, as a result of the unlawfulness of their detention. More accurately, the Court held that their deprivation of liberty was contrary to the rules on the qualified immunity of judges and prosecutors.[49]

[46] E.g. *Stefanov and Stefanova v. Ukraine*, (App. No. 2439/10), para. 51.

[47] E.g. *Grzęda v. Poland*, (App. No. 43572/18), para. 324.

[48] *Turan and others v. Turkey*, (Apps. No. 75805/16; 75794/16; 6556/17).

[49] *Ibid.* paras. 95, 96.

However, the Court refused to examine the complaints that relate to other guarantees from Art. 5 of the Convention and assessed that there is "no need" to examine the individual complaints of other violations which the applicants alleged. The Court explained such a decision by specifically referring to the *Burmych* case. Stating judicial policy as the rationale, the Court noted that it would not be justifiable to examine the individual allegations of other violations by the applicants as examining those violations would significantly delay the final judgement on the applications and strain the Court's resources.[50]

Namely, unlike determining the unlawfulness of the deprivation of liberty, which equally encompasses all applicants because its stems from a violation of qualified immunity (thus, a general characteristic of all applicants), examining other individual allegations, particularly re-examining the existence of reasonable suspicion, would necessitate for the Court to individually determine the relevant factual situation and then subsume it under the applicable class of legal standards from the Convention and only then make final decisions that it would also need to provide a rationale for. Consequently, the Court found that such activities would not be purposeful under these circumstances as it had already determined a violation of the right from Art. 5. Additionally, the Court noted that there is essentially no living Conventional issue regarding the other violations because it already referred to such violations and expressed an opinion in other cases against Turkey that relate to arrests following the coup.[51] In other words, the Court clearly found that nothing would be gained by additional examinations of individual applications, while it could jeopardize the efficiency of delivering justice.

As can be observed, the line of argument in the *Turan and others v. Turkey* case follows the same basic principle of the arguments from the *Burmych* case:

1) the premise of judicial actions is based on judicial policy;
2) the policy is directed towards rationalising the resources of the Court;
3) the Court does not find any unsettled questions regarding the Convention because it has already decided on similar issues;
4) the Court does not find that the situation for the applicants would change (improve) if it were to continue examining additional allegations.

[50] *Ibid.* para. 98.
[51] *Ibid.* para. 98.

Yet, there are a few differences between these two judgements and the differences are a good indicator of the manner in which the Court develops the *Burmych* approach. Unlike in *Burmych*, where the *Ivanov* pilot judgement that dealt with the same issue existed, there are no prior pilot judgements against Turkey dealing with the same issue. The earlier judgements that the Court refers to in this case are not pilot judgements, but individual ones. This demonstrates that the Court, in 2021 (4 years after the *Burmych* judgement), was willing to expand the argument of the judicial policy directed towards rationalising its activities to situations that are not related to pilot judgements. However, it is done under certain conditions: that it contributes to rationalising the Court's procedures, that there is no living issue regarding the Convention (that the Court had already made decisions on a similar issue) and that the situation of the applicants would not be improved by potential adjudication of additional individual complaints.

The other difference, which might not seem significant at first glance, is the fact that the decision in this concrete case was made by a Chamber and not the Grand Chamber of the Court. This demonstrates that the Court believes that the *Burmych* approach to resolving cases is a part of established judicial practice and that it does not represent a new and serious issue which could be the basis for relinquishing jurisdiction to the Grand Chamber pursuant to Art. 30 of the Convention.

5. Conclusion

As it was presented in this article, the idea of pilot judgements rose out of necessity. The Court needed a mechanism which would enable the rationalisation of its procedures and relieve the pressure felt from the large number of applications it needed to adjudicate. Accordingly, pilot judgements as an institute are based on the idea of consistently applying the judicial policy of rationalising the Court's activities. Naturally, this does not mean that the idea of pilot judgements is devoid of any legal value. This article has shown that pilot judgements go hand in hand with the principle of subsidiarity, on which the entire control mechanism of the Convention is founded.

Like judicial policy was the reason for instituting pilot judgements, in the *Burmych* case judicial policy influenced the changes to the manner in which the Court handles examining applications that deal with matters already identified in an earlier pilot judgement. In case pilot judgements are a rationalisation of judicial procedures that is acceptable to the stakeholders, then the approach taken in *Burmych* would not be unacceptable, as it is founded on the same policy of rationalisation and the same legal argument of subsidiary division of competence.

It should not be forgotten that the European Court of Human Rights has a vision for its activities, as does any other court, and that vision is followed by the judicial policy aimed at achieving it. All courts, including this one, are guided by some kind of judicial policy. It would be naïve to assume that the judges who make up the Court, and who are by their nature not only rational but also political beings (*Zoon politikón*), act without an idea on what the Court should be and what it should do. The idea of rationalising court procedures is inherent to any judicial act and should not be cause for mistrust, so long as it does not go against realizing rights and achieving justice.

Although the policy of rationalisation of the control mechanism is certainly not new, the *Burmych* case demonstrates a new approach by the Court to applying the policy. The Court showed that it is prepared to refuse to examine applications, with appropriate reason, under certain conditions: that it has already taken a position regarding the legal issues at hand (that is, that there is no unsettled issue regarding the Convention) and if it simultaneously believes that the situation for the applicants would not change (improve) if it were to continue examining the allegations.

The initial trepidation that applications could be stricken out en masse if the *Burmych* approach were to be consistently applied when there are issues with enforcing pilot judgements showed itself to be unfounded in practice. Even five years after the *Burmych* judgement, the Court has not applied this approach to any other group of cases in other pilot judgements. Moreover, the Court itself noted in the judgement of *Shtolts and others v. Russia*[52] that applying the *Burmych* approach requires exceptional circumstances that relate to a systematic disregard of general obligations from a pilot judgement. It would seem that the Court has set the threshold for exceptional circumstances very high.

Accordingly, the new judicial policy of the *Burmych* case did not have a large impact on other pilot judgements. Possibly unexpectedly, this approach had influence on cases that are not related to pilot judgements. It would appear that the Court is willing to apply the *Burmych* approach under similar circumstances to cases where there is no pilot judgement if it is satisfied with the fact that it has already taken a position in one of the earlier "leading" cases, but, again, under the condition that further examination of the allegations would not contribute to the applicants' position.

The restraint in applying the *Burmych* approach by the Court to other pilot judgements on one hand and its willingness to apply it under certain conditions to individual cases on

[52] *Shtolts and others v. Russia*, (Apps. No, 77056/14; 17236/15; 14023/16), para. 95.

the other shows the potential for the *Burmych* approach, initially envisioned as a way to resolve issues regarding the enforcement of pilot judgements, to spread to the domain of individual judgements, when the Court finds that it has resolved all uncertainty relating to the Convention in one of the leading cases and conditions exists for the interests of the applicant to be satisfied with only a partial examination of the application.

This application of new judicial policy should be closely monitored in the future.

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Dragana Ćorić*

WHY IS THERE NO FORMAL RIGHT TO BE HAPPY?

International and national legal documents have enlisted all sorts of human rights. But there is a little notion about human right to be happy. The UN resolution, adopted by the General Assembly on 28 June 2012., established International Day of Happiness[1]. It also identified the pursuit of happiness as "a fundamental human goal" while promoting a more holistic approach to public policy and economic growth -one that recognizes happiness and wellbeing as important pieces of sustainable and equitable development.

We would like to explore what is happiness at all, according to theorists from different areas of science and from different periods of time, and what should/could/must institutions do in order to help the individual to exercise his/her right to happiness. Or else, is the pursuit for happiness an individual, personal matter of each individual, and that the state has no authority to do anything in that pursuit?

Through legal, philosophical and psychological points of view, the author would like to inspire readers to think about the topic of happiness.

***Keywords**: human right, happiness, individual.*

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[1] Resolution adopted by the General Assembly on 28 June 2012.,[without reference to a Main Committee (A/66/L.48/Rev.1)]66/281. International Day of Happines, available on: https://happinessday.org/wp-content/uploads/2015/11/UN66281.pdf , link retrieved on: avgust 2022.

Introduction

The pursuit for happiness is as lasting as the attempts to define happiness itself. It must be admitted, searching for something that you would like to have, or would like to feel the benefit of something that you do not quite know what it is, can be exhausting and often discouraging. Since ancient (greek) authors, till the modern times, happiness has been associated with economic stability, wealth, health, desire for love, family and offspring, superiority in any sense, or mental stability. In any case, the impossibility of defining happiness unambiguously complicates the pursuit for it, and leads, especially modern researchers, who would like to somehow quantify happiness, to constantly increase the number of parameters that should be taken into account, in order for happiness to get its numerical equivalent (Haybron, 2020).

Defining happiness becomes increasingly difficult, because the ruling individualistic paradigm does not allow generalizations. It is considered that it is more important to guarantee everyone's individuality than to make different compromises in the spirit of collectivism and to achieve a more permanent community of interests and protection.

Not only psychologists and philosophers, but also lawyers are involved into this pursuit for the meaning of happiness and its achieving. Numerous national and international (legal) documents indirectly or directly mention happiness, most often linking it to economic satisfaction, that citizens can achieve independently or with the help of the state. The pandemic conditions that we are living in from 2020. indicate that happiness is much more than the money needed for a dignified and adequate life. Happiness was considered the situation that no one fell ill with covid in the family or in the nearest surrounding, or that he/she did not experience any negative health or material consequences during the pandemic. This contextual meaning of happiness is temporary; all possible factors (that can cause happiness) mentioned in previous paragraph should not be, by no means, excluded from the whole story.

Happiness is much more than mere satisfaction with what one has, with or without pretensions to achieve something more or better. That is why its precise defining is so difficult.

Nevertheless, in the last two decades, the academia, researchers and theorists have begun to shyly speak and advocate for the establishment of the human right to happiness. In addition to so many generations of human rights, which have been recognized or confirmed by international conventions or have been established by those documents, we

can ask a question: do we really need the human right to happiness, or right to achieve happiness, when we still don't even know exactly what happiness is? Is the happiness so hard to achieve that it should be taken on the level of human right in order to preserve it, or to establish the way of achieving it? Either the whole story about the human right to happiness and even the establishment of the *International Day of Happiness* is a pure populist move by the states that they want to appease their citizens from other problems, or a true act of giving hope and faith in a better future for our civilization? Isn't the happiness one of those self-evident truths-whose existence is taken for granted and does not need to be explained separately?

In our paper, we deal with some of the historical considerations of the concept of happiness, as well as with the modern establishment of happiness as a social construct and a constant of social development. In this sense, it is worth mentioning the example of Bhutan, which has a special Ministry of Happiness, which since 2008. has been reviewing every law, every decision of the state with special reference to whether it will bring happiness, well-being and satisfaction to the citizens or not. The unique methodology, which they developed with the help of experts from Oxford University, has spread in other countries and even lead to establishing International Happiness Day, but leaving Buthan on the 95th place according to the World Happiness Report from 2019[2].

This article, therefore, should be seen as an introduction to one's own search for one's own understanding of happiness and its achievement, in a way that does not harm anyone, and in order to fill each individual with the will to search for something better and greater than what they have today. Also, our paper is a kind of reminder to the institutions of the system, i.e. the state, that the happiness of its citizens is also state's own happiness, and that if the loss of an individual diminishes humanity[3], the happiness of each individual, the same humanity, increases and extends its duration.

[2] Interesting fact is that Buthan isn't mentioned at all in World Happiness reports in 2021 and 2022. All reports are available on : https://worldhappiness.report/, link retrieved in August 2022. For example, Republic of Serbia is on the 43rd place, according to the report for 2022.

[3] We paraphrise here part of John Done's poem, which states :
"No man is an island entire of itself; every man
is a piece of the continent, a part of the main;
if a clod be washed away by the sea, Europe
is the less, as well as if a promontory were, as
well as any manner of thy friends or of thine
own were; any man's death diminishes me,
because I am involved in mankind".
Quote available on : https://web.cs.dal.ca/~johnston/poetry/island.html. Link retrieved on August 2022.

Why "pursuit for happiness"?

As to ***Aristotle,*** happiness is the life's greatest goal. It exists when:

> *"…the function of man is to live a certain kind of life, and this activity implies a rational principle, and the function of a good man is the good and noble performance of these, and if any action is well performed it is performed in accord with the appropriate excellence: if this is the case, then happiness turns out to be an activity of the soul in accordance with virtue" (Aristotel,1988: 1098a13).*

Aristotle thinks that happy life means virtuous life, while gaining all the external goods which leads one to the perfect life. So happiness would be perfect, wealthy life, where under the wealth he meant all kinds of goods, physical, material, spiritual, and their possession. (Aristotel, 1101a10). That leads to state of *eudaimonia* - state of general well-being. According to stoics," the happy life is the one which is most pleasant" (although the views on what is pleasure are different among the stoics) (Baltzly,2019).

According to ***Aquinas*** , happiness is something we long to gain throughout our life. It is the perfect good, which is obtained upon seeing God in after life (Aquinas, 1920: 46). That is *perfect happiness* and there is also an *imperfect happiness*, that we are gaining through our mortal life, in order to achieve –perfect happiness and unite with God after our death. Intellectual and moral virtues are the tools to achieving perfect happiness. On that path, one must reject other possible subjects of happiness such as wealth, fame, glory, power, mundane good and go on to the path of perfection, which is inscripted in the soul of human being. External goods don't make a man truly happy- they just make him want for more and to be more unhappy than he was before he had anything of that. So, happiness is not possible in this life, for it is burdened with numerous challenges, before which a weak and pliable man can quickly surrender

Locke in his *Essay Concerning Human Understanding* often contrasts happiness and misery: when he thinks whether a person is capable to reach a state[4] of happiness or misery (Locke,1690 (1999):48,49, 92), or when he states that we are in a kind of pursuit for complete happiness:

[4] Whereby he means the state of the soul.

> *"that we, finding imperfection, dissatisfaction, and want of complete happiness, in all the enjoyments which the creatures can afford us, might be led to seek it in the enjoyment of Him with whom there is fullness of joy, and at whose right hand are pleasures for evermore" (Locke, 113).*

In order to reach happiness, we must remove uneasiness or any pain, or even possibility to feel the pain, because they are "felt to be inconsistent with happiness" (Locke, 238). We all desire happiness, said Locke, although we do not know what is it truly beside that is opposite of pain and misery. It seems that Locke considered happiness as mixed state of tranquillity, joy and pleasures, that are approved by God. As we are in constant desiring for happiness, we are pursuing the happiness as our inner state of soul, which will eventually lead us to peace and Heaven

> *"Thus, how much so ever men are in earnest and constant in pursuit of happiness, yet they may have a clear view of good, great and confessed good, without being concerned for it, or moved by it, if they think they can make up their happiness without it".*

The paradox of this pursuit is that by pursuing the happiness, we are making ourselves unencumbered by the achievement of happiness itself, because the search itself is enough to make us happy. Also, with careful and constant pursuit of true and solid happiness we can achieve "the highest perfection of intellectual nature" (Locke, 279)." The necessity of pursuing true happiness is the foundation of liberty" (Locke, 249) and should be exercised through gaining all those things "which produce the greatest pleasure, and in the absence of those which cause any disturbance, any pain"(Locke, 252).

Blackstone thought that pursuit for happiness is connected with the science of jurisprudence, by which students could know, and then rightly apply, the first principles of the Common Law(Conklin, 2019:11-13). He considered pursuit for happiness for "foundation for ethics, or natural law(Conklin,13). While striving for the reform of English law, Blacstone also dreamed about achieving the perfection of law and at the same time, this intellectual journey was for him journey for happiness. Claim "that man should pursue his own happiness "comes from Blackstone's comprehension on God's work, when he "so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former", and that only with obtaining justice, one can obtain happiness at the same time (Blackstone, 1753(1893)).

This pursuit for happiness, although it is not clear is it taken up in the same sense in which Locke set it up[5], also took over Thomas Jefferson when drafting the United States ***Declaration of Independence***. This construction was present in the Declaration of Independence in the following form:

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness6.*

Virginia Declaration of Rights has expanded the concept of the pursuit for happiness in Art.1. and mentions obtaining happiness and safety together:

> *"That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."*[7]

But if we take a step back, we truly can ask a question: *"The pursuit of happiness,—the pursuit of one's own happiness, —**is it a vain quest** ? and, if not vain, is it a worthy object of life ? "*The fact that the question was asked more than 100 years ago does not diminish its importance" (Brinton, 1893 : 9). Can something that isn't defined that explicitly be the reason of someone's life, his/hers life quest?

"Many quests begin from a sense of discontent or alienation. If you find yourself feeling discontented, pay attention to the reasons why" (Guillebeau, 2014: 38). If philosophy is the studying of death and how to deal with notion of death and it approaching to us every day more and more, then the study of Happiness is the studying how to live (Brinton, 54).

[5] There are discussions that Jefferson meant under the pursuit for happiness – the pursuit or gaining and protecting the property, as it was stated as the third pillar of American democracy, besides life and liberty. The volume of these discussions means that a separate paper can be devoted to this, so we will end our mentioning this topic here.

[6] Declaration of Independence: A Transcription, can be found In National archives- America's Founding Documents, available on : https://www.archives.gov/founding-docs/declaration-transcript, link retrieved on August 2022.

[7] Full text can be found of : https://www.battlefields.org/learn/primary-sources/virginia-declaration-rights , link retrieved on August 2022.

So, happiness could be observed ***as life itself, way of living life***, or more abstract- as a ***state of mind which governs one's life***.

Theorist commonly distinguish two accounts of happiness: *hedonism* (which is pursuit for pleasure as the first aim of the life), and the ***life satisfaction***. Pleasant experience always overcomes unpleasant; one must truly fight for that. On the other side, life satisfaction doesn't depend only on one's recognition of what makes him/her happy, but depends also on other actors of social development - such as the immediate environment of the individual, belonging to different interest, emotional cultural and other groups, the activity and will of state bodies aimed at achieving the well-being of its citizens, etc. The second notion of happiness is the one that we will shortly explore in this paper.

Was the International day of Happiness that much needed?

Since 1945. and the adopting the United Nations Charter, United Nations become the core organization with simple, yet important aim- making peace around the world. After devastating economic years and The Second World War, the world needed the hope and the promise that no one should ever experience such tragedy, loss of human lives and such (war) crimes as it was done during those war years. As it was stated in Art/1 of ***The Charter***[8],

The Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect

[8] The Charter of the United Nations, https://www.un.org/en/about-us/un-charter/full-text.

for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The last paragraph of this article, stating that United Nations should be a "centre for harmonizing the actions of nations", in order to them all achieve peace and stability is interesting to be explored. This paragraph is indirectly connected with our topic in this article, and that is revailing the meaning of happiness and what people/states/organizations/other important political and social actors can do to help individual/ nations to achieve happiness. Happiness is mostly achieved through peace and harmony. States' obligation, specially confirmed by the UN charter is to make peace and maintain it[9] so we see here a link.

In order to establish pursuit of happiness as legitimate goal for people all over the world, and make them thrive for more and better, United Nations adopted ***Resolution Nr. 65/309*** in 19th July 2011[10] , naming it ***"Happiness: towards a holistic approach to development"***. In this resolution directly are mentioned *"promotion of the economic advancement and social progress of all peoples"* earlier mentioned in the UN Charter, conscious that the pursuit of happiness is a fundamental human goal. A year later, Resolution adopted by the General Assembly on 28 June 2012., established International Day of Happiness[11], as of March 20.

The official page for the ***International Day of Happiness***, *HappinessDay.org*, goes one step further in declaring happiness a ***"universal human right"***- although without any normative basis. Further we can find only mentioning the will "for aspiring to the wellbeing of all peoples, not only to our own happiness as individuals"(Lombrozo, 2017).[12] And in those modern living conditions, for achieving the wellbeing one must take more than the declarative thought of happiness, or that he/she should be happy[13].

[9] Some actions done

[10] Full text available on: https://digitallibrary.un.org/record/715187?ln=zh_CN. Link retrieved in August 2022.

[11] Resolution 66/281. International Day of Happiness, United Nations General Assembly, full text available on: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/281, Link retrieved in August 2022.

[12] Text available on: https://www.npr.org/sections/13.7/2017/03/20/520803361/is-happiness-a-universal-human-right. Link retrieved in August 2022.

[13] We find Buen Vivir- holistic concept of good living in Bolivia and Ecuador emphasizes the attainment of well-being through harmony not only between people, but also between communities and nature. More about this : https://theconversation.com/buen-vivir-south-americas-rethinking-of-the-future-we-want-44507, link

"Instead of a right to pursue happiness, we should endorse ***a right to the conditions that*** successfully foster happiness" (Lombrozo, 2017).

As to *Millenium Development Goals*[14] there are eight important goals which, when achieved, could help people around the world achieve life satisfaction. Those goals are:

- eradication of extreme poverty and hunger
- achieving universal primary education
- promoting gender equality and empowering women
- reduction of child mortality
- improvement of maternal health
- combating HIV/AIDS, malaria and other diseases
- ensuring environmental sustainability
- developing a global partnership for development.

Happiness isn't mentioned directly, but goals that are enlisted are the crucial in different spheres of social life and development where people's greatest dissatisfaction prevails. Facilitating equal education, abolishing all discriminatory practices, especially on the basis of gender, ensuring adequate health protection and especially in certain cases where this protection is even more needed (such as the health of women of reproductive age and the fight against the most serious diseases of today) are the problems with which face millions of people around the world .While combating with those challenges, they cannot – pursuit the happiness, yet they are drawn into a struggle for existence.

There is room for the activity of the state and state bodies here. We do not believe that happiness will arise when citizens are completely freed from their mutual obligations or obligations towards the state (although we believe that there are such citizens who would tie their happiness/satisfaction to the concept of complete freedom/freedom from anything to anyone, even towards themselves). We believe that the ***efficient and effective realization of citizens' rights can increase satisfaction with the system they are in***, and at the same time facilitate the fulfillment of obligations. Happiness, as stated earlier in the text, is a concept that has different content for different people. Thus, someone's level of

retrieved on August 2022.Also in article : See discussions, stats, and author profiles for this publication at: Gudynas, Eduardo: Buen Vivir: Today's tomorrow, Thematic Section, Development, 2011,54(4), (441–447).

[14] https://www.un.org/millenniumgoals/ , which enlarged to even 17 goals in agenda till 2030. Full text here : https://www.un.org/sustainabledevelopment/sustainable-development-goals/ Both links, retrieved on august 2022.

happiness may be increased when they see that the state really endures the sanctions provided for by law against all offenders - regardless of who they are. This satisfies one's need for justice and, at the same time, brings happiness because the system works and guarantees protection to everyone.

Direct link between happiness and exercising rule of law as constitutive principle in state was found in article *Does the Rule of Law Make You Happy?* (The World Justice Project, 2013). Simply, two major studies were compared: World Happiness Report and Rule of Law Index. In 2013, four of five countries that were the best ranked countries were the same: Denmark, Norway, the Netherlands, and Sweden. It was noted that some of the parameters of the achievement of happiness that the United Nations set as relevant to the achievement of happiness were identical to the parameters included in the calculation of the success index of the concept of the rule of law, such as citizen's freedom to make life choices and their perception of corruption.

The World Happiness Day is a socio-political construction- a great promise for the violation of which no punishment is foreseen. If we were to constitute the right to happiness as a human right - would it be allowed to remain without the threat of sanction? Then ***what punishment would be adequate for the offense*** - actively preventing someone from being happy or even just unintentionally preventing someone's happiness? Or we should more firmly linked the happiness to principles of rule of law, as it was proven that connection is obvious? According to this statement, the state itself is directly responsible for achievement of happiness of its citizens. This should be taken into account when making new state/local policies, in order to make conditions for creating prosperity and well –being.

The authors of the book *Happiness and the Law* (Bronsteen,J., Buccafusco, Ch.,Masur J.C.,2014) agree with notion of ***close connection between law and happiness***[15]. Law itself has a great impact people's quality of life. The most significant influence is in the areas of criminal punishment and civil lawsuits-if justice is served, the happiness

[15] There's always been a strong connection between law and other social values, or public value. More about it: Stevanović, Aleksandar; Grozdić Borislav, The idea of human rights as a means of the change of public moral, YEARBOOK. No. 1, Human rights protection "From unlawfulness to legality" ,[editor Zoran Pavlović], Novi Sad: Provincial Protector of Citizens - Ombudsman; Belgrade: Institute of Criminological and Sociological Research, 2018, 83.

increases[16] , as well as trust in the institutions of the system and the state's ability to protect and defend its citizens.

Linking rule of law and happiness is the indirect way of dealing with the issue of happiness. But what if we involve state more- more directly, as it was done on the international level when enacting earlier mentioned UN resolutions, and establish , fully, the right to be happy, as one of the, for example constitutional rights?[17]

Establishing ***the right to happiness*** would also mean creating *uniform definition of happiness,* which is not exclusively the domain of public authorities[18]. The state could regulate its share in the whole story about achieving happiness, for example by consistently and strictly punishing those from its ranks who perform their work slowly and inefficiently in communication with citizens (exceeding the deadlines for issuing decisions, delivering the same decisions in a timely manner, which is why citizens in uncertainty or in danger due to the loss of a right, etc).

Furthermore, if the states were to deal with the issue of happiness, as their obligation to citizens, it would entail the issue of establishing an ***appropriate level of happiness***, which must always be supported or possibly increased by the activities of the state: So, it means the we must be able to ***measure the level of happiness***.

The usual way of measuring happiness is through self-reports of every individual. They could be reliable guides to relative happiness, but as subjectively measured values, they are not absolutely reliable, to be taken into account for the whole population. This means that we need another, more objective way of measuring happiness. There is, for example the Experience Sampling Method (ESM) which presents the assessment of subjective wellbeing (Larson, Csikszentmihalyi,2014:21-34); The Steen Happiness Index (Kaczmarek, et alia,2015: 443-453). (Seligman, Steen, Park & Peterson, 2005) the basis of which is a series of statements , where the respondent selects those that best describe

[16] The list of areas where an adequate policy can lead to an increase in the level of happiness among citizens is of course much wider; Huang lists several issues: corporate governance, employment discrimination, estate taxes, family law, legal education and practice, activism, etc. Huang, Peter H., Happiness Studies and Legal Policy, Annual Review of Law & Social Science, Research Paper No. 2010-13 , available on : file:///C:/Users/pc/Downloads/SSRN-id1615501.pdf, link retrieved in August, 2022.

[17] Whereby we think on right to be happy, not right to pursue for happiness and to do that with all legal, and even legitimate resources.

[18] Because of earlier mentioned different private definitions of happiness, which every individual is entitled to.

how he/she are feeling at the present time; Subjective Happiness Scale [19], which consists of four items to assess global subjective happiness, and many more. The model that covers several spheres of life is Selingsman's PERMA model of flourishing, which defines psychological wellbeing in terms of 5 domains: Positive emotions – Engagement – Relationships –Meaning – Accomplishment. As we can see, especially in the last described model, happiness is measured in those areas that belong to the private life of an individual[20].

Concluding remarks

Although not officially established, today more than ever before, we need the human right to happiness. By establishing a formal framework of the right to happiness, we would ultimately transfer the responsibility for creating happiness to real actors in this matter.

The state is an important actor, because it deals with the formalization of the framework of living on its territory. Creating a suitable environment for the well-being of its citizens, raising the efficiency of the work of its state bodies to a higher level than before, the state is responsible towards those who make it what it is. On the other hand, citizens become familiar with the new obligation to achieve happiness and their own well-being for themselves, while not causing misfortune to those around them, at least not intentionally.

Happiness is not and cannot be a characteristic of an individual, because it belongs to everyone, regardless of whether people are aware of its existence, the possibility of achieving happiness or what it can represent. Pandemic circumstances, in which we are living for the third year, have changed the paradigm about happiness, and have drawn our attention to the fact that happiness is a higher generic concept that includes all other existing generations of human rights (and their fulfilment). Because of that, happiness is also a civilizational achievement, and the struggle for its existence must become the highest goal of humanity- if it wants to survive.

[19] More about this scale on the website of creator of the scale: http://sonjalyubomirsky.com/subjective-happiness-scale-shs/, link retrieved in August 2022.

[20] We can also ask, if happiness is value, how can we measure something that we do not exactly know what it is, but we have a sence of immesurability? More about this argumentation in: Babić, Jovan, Prolegomenon. The right to be happy, *Yearbook No. 3, Human rights protection: the right to human dignity* / [editor Zoran Pavlović]. - Novi Sad: Provincial Protector of Citizens - Ombudsman ; Belgrade: Institute of Criminological and Sociological Research, 2020 ,27-30. Also, similar question on measuring values is put in the article: Ćorić, Dragana, How much dignity cost, Yearbook No. 3, Human rights protection : the right to human dignity / [editor Zoran Pavlović]. - Novi Sad: Provincial Protector of Citizens - Ombudsman ; Belgrade: Institute of Criminological and Sociological Research, 2020, 31-44,

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Lorena Velasco Guerrero[*]

DIGNITY: A PENDING CONCEPT IN THE PROTECTION OF THE HUMAN RIGHTS DURING CHILDHOOD

Human rights, as well as the institutions that sustain them, from childhood to old age, are based on the intrinsic dignity of every person. The modern theory of human rights affirms this dignity as its origin, purpose, legitimacy, and key for its interpretation. However, this foundation is blurred in the national and international instruments for the protection of childhood. Dignity is not included in a general and major way, being replaced by related and comparable concepts.

This contribution seeks to address the place that the dignity of the child and the minor occupies in the treaties dedicated to childhood and, to what extent, its absence or substitution has implications for their human rights. To achieve this, firstly, the term dignity in international treaties and political texts is going to be analysed. Secondly, other main concept – "the best interest of the child" – is going to be considered. Finally, the deficiencies and difficulties that the current situation may entail for the protection of human rights during childhood is going to be addressed.

***Keywords**: Dignity, Human Rights, Childhood, Institutions, Best interest of the Child*

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1. Introduction

Human rights, as well as the institutions that sustain them, from childhood to old age, are based on the intrinsic dignity of every person. The modern theory of human rights affirms dignity as its origin, purpose, legitimacy, and key for its interpretation.

The recognition of dignity in international treaties and political texts is recent and has not been achieved without ups and downs. In the first drafts of the Universal Declaration of Human Rights the term could not be found, as the "Dumbarton Oakes proposal, presented by the great powers (China, the Soviet Union, the United Kingdom and the United States), did not contain a Preamble" (Gros Espiell, 2003: 202). It was not until the San Francisco Conference, held between April 25 and June 26, 1945, when a new preamble was included. Due to this new incorporation to the Declaration "the concept of dignity and the value of the human person was introduced" (Gros Espiell, 2003: 202).

However, this foundation of human rights in the intrinsic dignity of the human being is blurred if we look at national and international instruments for the protection of children, since they, in a general and majority way, do not even include the term. This void is filled by related and comparable concepts. Contemporary doctrine has focused its attention, when dealing human rights of children, as well as, the institutions that sustain them, on analogous terms like the *best interests of the child*.

This contribution seeks to address the place that the dignity of the child and the minor occupies in the treaties dedicated to childhood and, to what extent, its absence or substitution by other term has implications for their human rights. To achieve this, firstly, the term dignity in international treaties and political texts is going to be analysed. Secondly, other main concept – the best interest of the child – is going to be considered. Finally, the deficiencies and difficulties that the current situation may entail for the protection of human rights during childhood is going to be addressed.

2. The concept of dignity in the declarations of rights and political text

The central place that dignity has come to occupy after World War II in the contemporary theory of human rights is evident when looking at the different national and international political and legal instruments and the various declarations of rights.

A first approach to some of the main text allowed us to verify this statement.

2.1 The term in the declarations of rights and political texts at a general level

In the international sphere, the *Universal Declaration of Human Rights* of 1948 begins its preamble with an express reference to dignity, importance that is highlight in the first article, where it is indicated: "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."

Other international instruments where a reference to the concept might be found are: *The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1975. In this declaration dignity is referred in its article 2, indicating that: "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights." Likewise, the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1969 indicates in its preamble that: "Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person."

In the American sphere, the *American Declaration of the Rights and Duties of Man* of 1948 begins in its preamble stating that: "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another." At European level, the *European Convention on Human Rights*, in its protocol number 13, states that: "Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings"; and in article 2 of the *Treaty of the European Union* it is established as one of the fundamental principles of the Union, as it is stated that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non – discrimination, tolerance, justice, solidarity and equality between women and men prevail." Finally, in the African sphere, the *Banjul Charter or African Charter on Human and Peoples' Rights* of 1981 indicates in its article 5 that: "Every individual

shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

Considering national legislation and political text the term has also a central place. For example, in Germany in its *Constitution of the Federal Republic of Germany* of 1949 or *Bonn Law*, in article 1 it is established that: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." In Portugal, its 1976 Constitution establishes in its article 1 that "Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society." The *Political Constitution of Chile* of 1980 establishes in article 1: "Persons are born free and equal in dignity and rights."; and the Japanese Constitution of 1947, in its article 24 refers to individual dignity. The Spanish Constitution of 1978 includes the term twenty – one times; thus, for example, in article 10.1 it says: "The dignity of the person, the inviolable rights that are inherent to him, the free development of the personality, respect for the law and the rights of others are the foundation of the political order and of social peace." In the *Constitution of the Republic of Serbia* of 2006, the term appears 3 times, in articles 19, 23 and 28. Thus, for example, in article 23, which opens the second section of the constitutional text dedicated to "Human Rights and Freedoms", it is established that: "Human dignity is inviolable, and everyone shall be obliged to respect and protect it. Everyone shall have the right to free development of his personality if this does not violate the rights of others guaranteed by the Constitution."

2.2. The term in the declarations of rights and political texts in relation to childhood

The protection of childhood and the recognition of their rights has had a great developed in recent decades. However, the inclusion of dignity as the basis of the rights of children and adolescents is scarce. The following examples serve for illustrative purposes, without any intention of referring to the totality:

Firstly, the national legislation and political text are going to be considered. In relation to Latin American and Caribbean countries we find that: the *Political Constitution of Nicaragua* of 1987, establishes in article 71 that: "Children enjoy special protection and all the rights that their condition requires, for which the international convention on the rights of boys and girls is fully in force." The *Political Constitution of Costa Rica* includes the protection of minors in article 51 that: "The family as a total, natural element, and foundation of society, has the right to special protection from the State. Likewise, the

mother, the child, the elderly, and the helpless sick person shall have the right to this protection"; the art. 55º adds that the "special protection of the mother and the minor will be in charge of an autonomous institution." The *Political Constitution of the United Mexican States* establishes in article 4 that, "In all decisions and actions of the State, the principle of the best interests of children will be ensured and complied with, fully guaranteeing their rights. Boys and girls have the right to satisfy their needs for food, health, education, and healthy recreation for their comprehensive development. This principle should guide the design, implementation, monitoring and evaluation of public policies aimed at children."[1]

At a European level, the situation is similar: in Portugal, its 1976 Constitution does not include the term, nor does its article 69, entitled *On childhood*, nor in its article 70, entitled *On youth*, include the topic of dignity. Nor do we find the term referred to in relation to childhood in the *Spanish Constitution* of 1978. Neither is there any reference to the rights of minors and their dignity neither in the *French Constitution*, nor in the *Basic Law of the Federal* Republic of Germany of 1949 or *Bonn Law*, or in the *Constitution of the Republic of Serbia* of 2006. In its three articles aimed at children and the institutions that protect them: Article 64 – Rights of the child –, Article 65 – Rights and duties of parents – and article 66 – Special protection of the family, mother, single parent and child, the term dignity is it not referred.

In Asia, the *Japanese Constitution* of 1947 does not refer to dignity on either of the two occasions in which it includes issues relating to boys and girls – article 26 and article 28 –. The *Constitution of the Republic of India* also does not refer to the term nor in art. 21,

[1] It is interesting to notice that although the official Spanish version of the Political Constitution of the United Mexican States provide by the Chamber of Deputies of Mexico (https://www.diputados.gob.mx/LeyesBiblio/pdf/CPEUM.pdf) does not referred to the word dignity in relationship with children in its article 4: "Los ascendientes, tutores y custodios tienen la obligación de preservar y exigir el cumplimiento de estos derechos y principios. El Estado otorgará facilidades a los particulares para que coadyuven al cumplimiento de los derechos de la niñez" (what translates according to literalness: Ascendants, tutors and custodians have the obligation to preserve and demand compliance with these rights and principles. The State will grant facilities to individuals to contribute to the fulfillment of childhood rights). However, the English versión, provided by the Senate of the Republic of Mexico (https://www.senado.gob.mx/comisiones/puntos_constitucionales/docs/CPM_INGLES.pdf) refers to dignity of the children in this same articule 4: "Ascendants, tutors and guardians shall be obligated to enforce the aforementioned rights. The State shall provide whatever deemed as necessary to uphold both children's dignity and the enforcement of children's rights". The different drafting of "official" international and political declarations and laws when provided in different languages is more common than what one would expect in a field like law, especially human rights, where every word is important and has it essential meaning. For this study, the international declarations and conventions are going to be analysed in its English version, however, the political texts and national laws, when possible are going to be considered in its original language, and, if not, in English.

referring to public education between the ages of six and fourteen, nor in article 24, where work in factories by minors under fourteen is prohibited, nor in art. 45, which establishes the obligation of public powers for the care and education of children under six years of age. Finally, in the *Constitution of the People's Republic of China*, in art. 49 in which the obligations regarding marriage, family, motherhood and childhood are collected, the dignity of the minor is not included.

The general absence of reference to the term dignity is not only at the national level, at the international level, the treaties do not use the term in direct relation to childhood either. Again, we refer, for illustrative purposes, without any intention of referring to the totality, some examples:

The art. 25 of the *Universal Declaration of Human Rights* establishes that: "2. Motherhood and childhood are entitled to special care and assistance. All children, born in or out of wedlock, are entitled to equal social protection."

The art. 24 of the *International Covenant on Civil and Political Rights* establishes that: "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality."

For its part, article 10.3 of the *International Covenant on Economic, Social and Cultural Rights* indicates that: "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."

In the three *Hague Conventions relating to children* – the *Convention* of 25 October 1980 on the *Civil Aspects* of *International* Child Abduction, the Convention of 29 May 1993 on *Protection* of *Children* and Co – operation in Respect of *Intercountry Adoption* and the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* – is the term used on any occasion.

The term is not used in the American declarations of the rights of children or adolescents – i.e., the *Declaration of Leon*, against poverty and social exclusion of Ibero-American children and adolescents – nor in European declarations –i.e., the declarations of the Council of Europe considered in both their English and French versions –.

In this general panorama of absence of the term dignity in relation to childhood and youth, only few cases can be found that express this relationship explicitly.

Firstly, the current *Norwegian Constitution*, both in its original and English version, establishes in its section 104 it indicates that: "Children have the right to respect for their human dignity." Secondly, the *Political Constitution of the Federative Republic of Brazil*, which in its art. 227 establishes that: "It is the duty of the family, society and the State to ensure children and adolescents, with absolute priority, the right to life, health, food, education, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence, in addition to protecting them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression. 1st. The State will promote comprehensive assistance programs for the health of children and adolescents, admitting the participation of non – governmental entities."

In a larger scope, in Europe the term can be found in the *Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on – line information services industry*. This recommendation states, in its Spanish draft, that: "Every child has the right to be protected against the use of her image in a way that is harmful to her dignity." In Latin America and the Caribbean, we find the term dignity in the *Ibero-American Convention on the Rights of Young People* in force since 2008. Article 15.2 of this Convention includes, in its Spanish and English version, the term on one occasion and establishes that: "2. The States Parties shall adopt the necessary measures and formulate proposals of high social impact to achieve the full effectiveness of these rights and to avoid any exploitation of their image or practices against their physical and mental condition, which undermine their personal dignity."

Finally, in the international arena, the term dignity is used in the *Convention on the Rights of the Child*. This Convention was described by Nelson Mandela as this living and Luminous document that seeks to guarantee the rights of every child without exception

to live a life with dignity and self – realization[2]. In it, the term dignity is included on 8 occasions, both in the Spanish, French and English versions. Three occasions in the preamble:

First: "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"

Second: "Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,"

And third: "Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,"

And in five articles:

In article 23, where it is indicated that "States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self – reliance and facilitate the child's active participation in the community".

In article 28, where when speaking of the right to education of the child, it is indicated that in section 2, that "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention".

In article 37, which establishes in section c) that "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. Every child deprived of liberty shall be separated from adults unless it is considered in the child's best

[2] "That luminous living document that enshrines the rights of every child without exception to a life of dignity and selffulfilment" (aken from a statement on Building a Global Partnership for Children,Johannesburg, 6 May 2000).

interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;"

On one occasion in article 39, when stating that "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self – respect and dignity of the child".

Finally, in article 40, in point 1, which indicates that "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

In the additional protocols, the dignity topic is used in the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure.* In it, the term is used twice, even stating that the child is a subject of rights and as a human being he has his own dignity and capacities that has to be developed.

Lastly, the Committee on the Rights of the Child, in the General comments, delved into the concept of dignity, indicating that any discrimination (General Comment No. 1, 2001) is contrary to it, as well as any imposition of a specific vision of reality on minors through the educational system (Day of General Discussion, 1996).

Concluding, the dignity of the minor, although it is referred to in some national and international documents, is not done systematically, as if we found it at a general level. The references are not clear either in their content and breadth: they have not been prepared or developed by the bodies in charge of the interpretation and application of the various instruments; therefore, the scope and understanding of the term cannot be stated as clear and precise.

2.3. Meaning of Dignity

Dignity could be defined as "the equal respect due to every human person" (Hildebrandt, 2006:44 according to Ivanovic, 2017: 153). However, any approach or discussions around

the topic shows a diversity of opinions regarding the content of meaning of dignity and its implications in concrete human acts.

In the legal sphere the meaning of the term is related to the text of the law and the interpretation of those texts. After the analysis of the different declarations of rights and political text, it can be concluded that its meaning cannot be determined by mere attention to text: the understanding of constitutional texts and international law declarations requires something more than mere and unacceptable normative solipsism (Velasco Guerrero, 2020). This is due to two causes: first, because these texts appear "as a right whose terms, techniques and concepts respond to previous theoretical and evaluative constructions" (López Guerra, 1994: 25); that is, they arise and develop in specific historical moments, whose "concepts respond to certain objectives and political values: they are techniques and concepts that result in many cases from long historical experiences" (López Guerra, 1994: 24). Second, and as a necessary consequence, there is no normative or declaratory text of rights that is not a norm interpreted either at the organic sphere – the various international, constitutional, or superior courts that have among their functions the interpretation of these norms –, and at the doctrinal sphere — in the field of higher education, chairs of international or constitutional law—.

The understanding of the concept of dignity entails, therefore, an attention to these areas. In this contribution, we only attend to two courts: the Spanish Constitutional Court and the European Court of Human Rights.

The Spanish Constitutional Court, in its jurisprudence from 1981[3] to the present, establishes that dignity is an attribute of the person; defining it as "a spiritual and moral value inherent to the person, which manifests itself uniquely in the conscious and responsible self – determination of one's own life and which carries with it the claim of others" (STC 53/1985).

In relation to the dignity of minors, the high court pronounces, indicating that:

"In the case of minors and disabled people, the protection (of their dignity and the exercise of the fundamental rights that are based on it) by the public authorities will be greater (cf. STC 55/1994). Especially when the exercise of their rights conflicts with the rights of their parents. In these cases, the right of the minor shall prevail over that of the parents,

[3] This analysis of the jurisprudence of the Constitutional Court was subject to the investigation carried out as part of the doctoral thesis of the author of this contribution. This doctoral investigation has subsequently been published: (Velasco Guerrero, 2020)

the minor being protected by the public authorities. In acts related to personality rights —such as physical integrity— the power of legal representation that parents have as holders of parental authority is excluded, —art. 162.1 of the Civil Code— (cf. STC 154/2002) and are protected by public authorities (cf. STC 154/2002)" (Velasco Guerrero, 2020).

For its part, for the European Court of Human Rights: "the principle of respect for the dignity of the human person is a fundamental principle of an ethical nature that underlies the rights recognized in the Convention and that serves as a principle of material interpretation of themselves" (Maurer, 1999). Central place of dignity, which is consecrated in 2015, when the Court declares in the *Bouvid Case* that "any interference with human dignity attacks the very essence of the Convention" (Maurer, 1999).

Following what was indicated by Professor Natalia Ochoa Ruiz, we observe how the topic is not included in the Convention or in the protocols until its inclusion in the protocol 13 (Ochoa Ruiz, 2019). The Court, however, does refer to the topic in its jurisprudence prior to the approval of said protocol. The *Tyrer Case* will begin this jurisprudential journey, with the indication that "article 3 of the Convention, has among its main purposes «to protect the dignity and integrity of people»." From this moment on, the Court's jurisprudence linked dignity with other rights: "the right to life (art. 2); the prohibition of slavery, servitude and forced or compulsory labour (art. 4); the rights to liberty and security (art. 5), to a fair trial, including the excessive length of judicial proceedings and the presumption of innocence (art. 6) and the principle "there is no punishment without law" (art. 7); the right to private and family life (art. 8), freedom of expression (art. 10) and the prohibition of discrimination (art. 14)" (Ochoa Ruiz, 2019).

3. Analogous concepts: the best interest of the child

The absence of the reference to the concept of dignity that has been revealed in the previous sections, implies a request for principle, which leads to questioning the concepts used to fill this void. The fundamental concept established by specialized literature is the best interest of the child. It is not a new concept. Its origin in the legal field can be drawn at the end of the 18th century. Within the field of family law, the concept was used by an English court. in the *Blissets Case* of 1774. The court establishes that: "if the parties are disagreed, the Court will do what shall appear best for the child" (Torrecuadrada García – Lozano, 2016).

In this section, the place that this concept occupies in the declarations of political rights and texts in relation to the rights of children and the institutions that protect them is going

to be analysed, as well as, the meaning content granted in the legal field to said concept is going to be studied.

3.1. The term in the declarations of rights and political

The best interest of the child is a concept that has been included in recent decades in international declaration of rights regarding childhood. Inclusion that is not reflected in national political texts.

At the international level it could be found in the *Declaration of the Rights of the Child* of 1959. Of the ten principles included in this statement, the concept is collected in two of them. In the second principle, in which it is established that:

> "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration".

As well as, in principle 7, in which, in relation to the right to children's education, it is indicated that:

> "The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents".

In the 1989 *Convention on the Rights of the Child* the concept is used in seven articles throughout the text. First in article 3, section 1. There it is established as a guide point for any decision concerning minors as it states that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

In article 9, in its first section, in regulating cases in which the child can be separated from his parents and the rights that assist him in these circumstances, he establishes that said assumptions may only be established when "such separation is necessary for the best interests of the child". An example is given in the article of such cases in which this higher interest of the child would prevail when it occurs: "Such determination may be necessary

in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence". Likewise, in the third section of the article it is indicated that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

In article 18 of the Convention, in its first section, it refers to the concept in treating parents' obligations regarding the child's upbringing and development. Indicating that: "The best interests of the child will be their basic concern."

In article 20, section 1, reference is made to the "superior interest" of children temporarily or permanently deprived of their family environment. For its part, in article 21, when dealing with the question of the adoption of minors, it establishes that "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall." In article 37, the concept in section C is collected, when indicated that:

> "(…) In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."

Finally, in article 40,2, b) iii It is indicated that "Every child alleged as or accused of having infringed the penal law has at least the following guarantees:" (...) "To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians."

In the *International Covenant on Civil and Political Rights* of 1976, although the question of the rights of minors develops and establishes in other articles, we only find the concept used in article 14 in relation to access to justice and the right to A fair procedure. This article indicates that: "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

In the three Hague agreements related to children the concept is used in the three preambles. First, in the *Convention* of 25 October 1980 on the *Civil Aspects* of *International* Child Abduction – "deeply convinced that the interests of the minor are of primary importance for all the issues related to his custody." – , second, in the Convention of 29 May 1993 on *Protection* of *Children* and Co – operation in Respect of *Intercountry Adoption* – "convinced of the need to adopt measures that guarantee that international adoptions take place in consideration of the child's best interest and respect for their fundamental rights, as well as for Prevent the subtraction, sale or traffic of children " – and third, in the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co – operation in Respect of Parental Responsibility and Measures for the Protection of Children* –"confirming that the best interest of the child deserves a primary consideration" – .

The 1979 *Convention on the Elimination of All Forms of Discrimination against Women* in its article 5, section B, states that family education should include an adequate understanding of motherhood and the development of children taking into consideration their best interest.

In the American sphere, the *Declaration of León* establishes, among other elements, the obligation for the signatory states of including the "rights established in the Convention on the Rights of the Child, with special consideration to the principle of their best interests (…)." In the European sphere, the *Charter of the Fundamental Rights of the European Union* in its article 24 is established, following the *Convention on the Rights of the Child* of 1989, which in all acts related to minors must be taken into account mainly the best interests of the minor .Also, in the European sphere, we find the concept used as the criterion of interpreting the rights of minors, in *the European Convention on the Exercise of Children's Rights* , signed on January 25, 1996, whose preamble collects the term three times[4]; In the *Council* of *Europe Convention* on the *Protection* of *Children against Sexual Exploitation* and *Sexual Abuse*, which establishes it as the principle of procedures [5] and

[4] "(…) Convinced that the rights and best interests of children should be promoted and to that end children should have the opportunity to exercise their rights, in particular in family proceedings affecting them;

Recognising that children should be provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children;

Recognising the importance of the parental role in protecting and promoting the rights and best interests of children and considering that, where necessary, States should also engage in such protection and promotion; (…)"

[5] Art 30: "Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child."

of protection measures [6]. In the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* establishes as criteria the best interest of the minor in its article 5[7].

When considering the political text and constitutions of the different countries, the inclusion of the concept is much lower, being used only in a few cases. It can be found in the *Political Constitution of the United Mexican States*. First, as a criterion for all actions concerning minors:

> "In all the decisions and actions of the State it will ensure and comply with the principle of the best interests of childhood, fully guaranteeing their rights. Boys and girls have the right to satisfy their needs for food, health, education and healthy recreation for their integral development. This principle must guide the design, execution, monitoring and evaluation of public policies aimed at childhood."

Second, in relation to education it is indicated that: "The State will prioritize the best interests of girls, boys, adolescents and young people in access, permanence and participation in educational services." Finally, in reference to access to justice and judicial procedures, it is indicated that: "The guidance, protection and treatment measures that merits each case can be applied, attending to the integral protection and the best interests of the adolescent." In Portugal, its 1976 Constitution, in article 68, section 4, when paternity and maternity are regulated, established that "the law regulates the attribution to mothers and fathers of the rights of dispensation of work for the appropriate period, according to the interests of children and the needs of family interest." In the current Norwegian Constitution, in article 104, when regulating the rights of children, it is established that "the best interest of the child must be a fundamental concern in the actions and decisions related to a child." Finally, in the Constitution of the Republic of Serbia it can be found in the article 65, where it is stated that: "All or individual rights may be revoked from one or both parents only by the ruling of the court if this is in the best interests of the child, in accordance with the law."

[6] Article 31.1: "1 Each Party shall take the necessary legislative or other measures to protect the rights and interests of victims (…)"

[7] "The central authority in the State addressed shall take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities, in order:

a) to discover the whereabouts of the child;

b) to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or of the applicant"

National laws of different jurisdictions – family, criminal, asylum… – also refer to the principle. For example, the *Spanish Law 26/2015, from of July, of modification of the childhood and adolescence protection system*. in its article 11, section 2, When talking about the guiding principles of administrative action, it establishes that: "They will be guiding principles of the action of public authorities in relation to minors: a) the supremacy of their best interests". In the same way, the *Serbian Law on Asylum and Contemporary Protection*, as it "contains several provisions pertinent to the protection of the rights of migrant children as well as to their integration within the country of asylum" (Batrićević and Kubiček, 2019: 361) referred to the principle in different articles. For example, in its article 10 states that "In the course of the implementation of the provisions of this Law, one shall comply with the principle of the best interests of the minor". However due to the scope of this study – the international declarations of rights and political text – this research should be postponed.

3.2. Meaning of concept: the best interest of the child

The attention of the texts allows us to observe that, as happened with the concept of dignity, the concept of best interests of the child is not defined in the declarations of rights or in political texts. Therefore, it can be considered as an indeterminate legal concept or a general interpretation clause.

The *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)**, that was adopted by the Committee on the Rights of the Children at its sixty – second session (14 January – 1 February 2013), try to solve the problems around this fundamental concept. Those difficulties rise due to its very nature as it "is a dynamic concept that encompasses various issues "which are continuously evolving." To this end, the General comment established in its introduction that the principle must be considered from a triple perspective: as a right, as a principle and as a rule of procedure.

In the first case, when being considered as a substantive right it implies that "The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self – executing) and can be invoked before a court." Second, as a fundamental, interpretative legal principle, it implies that "If a legal provision is open to

more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation." Finally, as a rule of procedure it has to be considered that "whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision – making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed."

Considering this triple perspective, its content must be determined on a case – by – case basis in the light of the specific circumstances[8], personal context, situation and needs of each child or group of children or children in general with full respect for the rights[9] contained in the Convention and its Optional Protocols. Although those rights might be divided into different categories – for example: "according to the "three ps", which represent the protection, provision and participation rights of children (Hammarberg, 1990 according to Đanić Čeko and Šego, 2020: 301)". It must be taken into consideration that "children's rights are indivisible and holistic and should not be seen separately or in isolation from each other (Sandberg, 2018 according to Đanić Čeko et all, 2020: 301). In addition, to determine the meaning of the principle on a case – by – case basis other fundamental elements have to be taken into consideration such as: the child's views, the child's identity, preservation of the family environment and maintaining relations, the care, protection and safety of the child and the situation of vulnerability. For example, child labour is forbidden in almost every country, however, "when the engagement of

[8] Regarding what circumstances can be relevant when determining in each case that must be understood by the higher interest of the minor, the convention establishes that some of them may be: "These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc."

[9] Five rights are highlighted along the text. Firstly, the right to non-discrimination the right to life, survival and development and the right to be heard Secondly, the child's right to health and the child's right to education.

children (*child work*) takes place in accordance with the best interests of the child and within the law, it is not considered to be a case of child labour." (Stevanović, 2017:267).

4. Conclusion

The intrinsic dignity of every person is a fundamental concept in the modern theory of human rights. The presence of the topic dignity in international human rights protection instruments, as well as, in national political and legal texts is constant, as well as in the organic and doctrinal spheres. However, its importance is blurred when national and international instruments for the protection of childhood are considered; since, in those, in general, the term is not included.

This absence is not the object of discussion in contemporary doctrine, in which attention has focused on analogous concepts, mainly in the concept "best interest of the minor. This indeterminate legal concept has been included in numerous international treaties, however, the constitutions that refer to it are still scarce.

As a general interpretation clause its indeterminacy implies that its interpretation must be done by the legislative and judicial decisions case by case. The *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)** try to save this indeterminacy by establishing fundamental elements and essential requirements that must be met when seeking to apply the principle in each case.

However, the concept of the "best interests of the child" cannot fill the void of the absence of the concept of dignity, as it is not a foundation of the rights of the child and the institutions that protect it, but a general interpretation clause. This situation, the lack of foundation, as well as the indeterminacy of the terms used, leaves minors in a place of helplessness. Without a clear concept of its dignity, its nature, its areas and development, as well as the scope and limitations of the rights that emanate from it we will not be able to respond to the current challenges faced by children and young people: the globalization of Sustainability, the search for a healthy and sustainable society, the exercise of rights against the State, the exercise of rights against parents, the protection of them, the violation of their rights…

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THE DEVELOPMENT OF RIGHT PROTECTION FOR JUVENILES OF CHINA

During these years, right protection for juveniles presents more and more important in the law system of China. This paper provides the outline developments of protection for juvenile by law in China, by introduced the specific article and mechanism in the criminal law of China and criminal procedure law of China, improved the law of protection for juveniles, consisted the professional, scientific and specific protection system for juveniles by law.

Keywords: *Protection for juveniles of Law; Juveniles; Reporting Obligation*

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1. The National Law System for Protect Juvenile in China

International protection of human rights increased significantly over the last century, due to acknowledgement that individuals must be protected certain attacks against their person. The Universal Declaration on Human Rights had key role in popularizing the use of human dignity in the human rights dialogue (Bošković, [2020:62]).. For the issue of human right, considering the special characteristic of juvenile, provides specific protection by law is always an important issue in each other country, as well as in China. From the prospect of international sociality, The United Nations has been committed to promoting the progress and improvement of juvenile justice systems in various countries through the formulation of international conventions, and has adopted international conventions such as the Standard Minimum Rules for Juvenile Justice, the Convention on the Rights of the Child, the Guidelines for the Prevention of Juvenile Delinquency and the Rules for the Protection of Juveniles Deprived of their Liberty. In addition, the 1948 Universal Declaration of Human Rights, the 1959 Declaration of the Rights of the Child, the 1966 International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights have emphasis the special protection for juvenile and also formed the base for international juvenile justice system. With adoption of CRC and three Optional protocols12 children are seen as individual rights holders, with every human right and fundamental freedoms as any other human being(Čeko, Šego,[2020:294]).

1.1 Accordance with International Conventions

China has actively participated in the negotiating of the United Nations Standard Minimum Rules for Juvenile Justice, Guidelines for the Prevention of Juvenile Delinquency and the Convention on the Rights of the Child. As the signature country for these international conventions, China also fully complies with these conventions and keeps revising national laws and promulgation new laws in order to improve the protection for juvenile's right by law. In August 2011, the principle of maximizing children's interests set up for the first time in the Outline of China's Children's Development (2011-2020), and this principle and the principle of children first were listed as the basic principles of the Outline.

1.2 The Special Law on Protection of Juvenile of People's Republic of China

There are two special legislations for minors in China: one is the Law of the People's Republic of China on the Protection of Juvenile, and the other is the Law of the People's Republic of China on the Prevention of Juvenile Delinquency.

1.2.1 The Law on Protection of Juvenile

The first special legislation on juvenile in China is the Law on Protection of Juvenile, which was formally promulgated in 1991. The law involved 56 articles, established the obligations of the family, society and school subjects in protecting the legitimate rights and interests of minors. Also formally incorporated the principles of education, persuasion and rescue and adherence to the principle of giving priority to education and supplementing punishment for minors who violate criminal law and other laws.

In the year of 2006 and 2012, the law has been revised and the number of articles has increased from 72 to 132, adding two special chapters of government protection and community protection to achieve comprehensive protection for the juvenile, and with these legislative revisions, the law clarifies the responsibility for the protection of juvenile, which should be borne by families, schools, society, government, social community, judicial organs and other relevant subjects. As the most important and comprehensive basic law for the protection of minors, the Law on the Protection of Juvenile stipulates the rights of juvenile and the responsibilities of families, schools, society, justice and others, including the protection of both juvenile and juvenile who against law or commit crimes. In a word, the law plays an active role in promoting the protection of juveniles' rights and interests.

Article 74 of the Law on the Protection of Juvenile stipulates that providers of online products and services shall not provide juvenile with products and services that may induce them to indulge. Network service providers such as online games, alive broadcasting, audio and video, and so on should set up the limit functions of timing, authority and consumption for juvenile. Online education network products and services serving juveniles shall not insert links to online games or push advertisements and other information unrelated to teaching.

Article 113 specifically stipulates that juveniles who have been punished for committed crimes shall not be discriminated against in the qualification of admission to school and employment, while article 116 emphasizes the participation of social organizations and social workers in the education and protection of juvenile.

1.2.2 The Law on the Prevention of Juvenile Delinquency

In 1999, the Law on the Prevention of Juvenile Delinquency came into force, which expand the scope of prevention of juvenile delinquency and serious misconduct. After years later, the Law has been revised and adopted by the Standing Committee of the

Thirteenth National People's Congress of the People's Republic of China at its 24th meeting on December 26, 2020, and is hereby promulgated for implementation as of June 1, 2021.The new Law on the Prevention of Juvenile Delinquency divides juvenile illegal behavior into three types of behavior, namely bad behavior, serious bad behavior and criminal behavior, and sets up different forms of treatment. The corrective measures for juveniles with serious misconduct were changed to special correction with education measures, the correction measures were increased to nine categories, in addition to social services, social probation and other non-personal restrictive measures, special schools with education were also added. Another important change is abolishing the special detention and rehabilitation shelter for juveniles, which is alternative by these above correction measures, also more emphasize the education for juveniles.

By the new law, in the first place, Juveniles with bad behavior refer to those who have carried out the bad behavior stipulated in the Law on the Prevention of Juvenile Delinquency but have not yet violated of law of Public Security Administration of People's Republic of China or commit crime.

Secondly, accordance with the 11th Amendment of the Criminal Law, juvenile who commit crimes prescribed in the criminal law and are not subject to criminal punishment because they are not satisfied with the legal age of criminal responsibility shall be sent to special schools for special corrective education. As the Article 45 of the Law on the Prevention of Juvenile Delinquency stipulates that if a juvenile commits crime prescribed by the Criminal Law and is not subject to criminal punishment because he/she is under the legal age of criminal responsibility, the Administrative Department of Education, together with the Public Security Department, may decide to carry out special corrective education after the evaluation and approval of the special education steering committee. And according to the provisions of the Law on the Prevention of Juvenile Delinquency, Public Security Departments are not only involved in the treatment of some bad acts, but also an important Competent Department in treat of serious bad acts.

Thirdly, with regards to the corrective measure and educational measure, corrective measures are mandatory measures taken for the main purpose of correcting the serious bad behavior of 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(Blagić, Grujić,2021: 216). Specifically, the juveniles who have bad behaviors needed to report regularly on their activities, to abide by specific codes of conduct, prohibited to carry out specific acts, nor to contact with specific persons or to enter specific places, also needed to receive psychological

counseling and behavioral correction, to participate in social service activities and to receive social care. Educational measures are educational measures taken to strengthen juveniles 'awareness of obey with law, which mainly include admonishing, ordering them to make a statement of repentance and ordering their parents or other guardians to discipline them. Restorative measures are measures taken to bridge the relationship between juvenile and victims and communities for the purpose of returning to daily social life. Restorative measures can make juveniles truly aware of the harmfulness of behavior, and restore social relations to a normal state, which is conducive to juveniles ' repentance and rehabilitation, and return to society, mainly including ordering apology and compensation for losses.

2. The Practice of Juvenile jurisdiction in China

2.1. Establishment of Juvenile Court

In 1984, the People's Court of Changning District of Shanghai established the first collegial panel specializing in juvenile criminal cases in China. Subsequently, the Supreme Court proposed to strengthen the reform of juvenile and family trial system, and promote the integration and development of juvenile and family trial on the basis of maintaining their relative independence.

In 2013, for confronting the sexual assault for juveniles and provide specific safeguard for the juveniles, The Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice jointly promulgated the Opinions on Punishing Crimes against Juvenile by Law (Hereinafter referred to as Opinions). In the Opinions on Punishing Crimes against Juveniles by Law, detailed provisions are made on the specific period and treatment of detection for juvenile, regards combatting of sexual assault crimes against young girls, raised the punishment of campus sexual assault and other crimes, strengthening civil compensation and judicial assistance in sexual assault cases involved with juveniles.

2.1.1 The Developments of Juvenile Courts

In the year of 2010, Shanghai funded the establishment of a social helping system for juveniles involved in crimes covering all districts, counties and towns in the city, including 17 helping stations and 215 helping standpoints, thus realizing the socialization of help, education and correction for juveniles involved in crimes (Wei, 2016.June 15th 检察日报，p.5).

In March 2021, the Supreme Law established the Office of Juvenile Court Work, headed by the Vice-President of the Supreme Law, to comprehensively coordinate the guidance of the trial of juvenile cases in the national courts. In the same year, the Juvenile Courts throughout the country concluded 8,765 cases of child molestation, abduction and purchase of abducted women and children, abduction of children, maltreatment of guardians, and organization of juveniles to engage in violations of public security administration in accordance with the law; 138,869 cases involving disputes over the upbringing, guardianship and visits of juveniles were concluded in accordance with the law, and 2,999 personal safety protection orders were issued (Ni, 2022,June 13th 人民日报，p.12).

2.2 Special Principles applied for Juvenile in Criminal Law of China

In the general part of Criminal Law of China stipulates special principles for Juvenile as consider the characteristic of Juvenile and provider special protection for them.

The principle of educate as priority and criminal or administrative punishment as a supplement means applied in the juvenile cases, for juvenile who commit crimes, the Judicial Departments should make full use of all resource to help and educate juveniles, emphasized use of protectionist measures for juvenile offenders, supplemented by appropriate punishment, in order to help them to start a new life and return to society as soon as possible.

The principle of division of cases, which means in the process of juvenile criminal proceedings, the court should separate the proceedings of juvenile delinquency cases, treat them separately from the adult in the whole process.

The principle of non-open trial means that when hearing juvenile criminal cases, the cases of defendants under the age of 18 shall not be heard in public.

The principle of comprehensive investigation means that in the process of hearing juvenile criminal cases, the People's Court should not only investigate the relevant criminal facts of juvenile criminal suspects, but also investigate the physical and mental health and personality of juvenile criminal suspects, and when necessary, it can be examined in hospitals, so as to comprehensively investigate the reasons why juvenile criminal suspects commit crimes. The social investigation system refers to a kind of lawsuit system that the Public Security Departments, the Procuratorial Departments and the Judicial Departments can investigate the growth experience, the cause of crime and

the guardianship education of the juvenile criminal suspect or defendant according to the circumstances when handling juvenile criminal cases.

2.3 Threshold of Age of Criminal Responsibility in Criminal Law

By 11th Amendment to the Criminal Law[1], it is change the threshold of age to undertake criminal responsibility, for the juvenile who have reached the age of 12 years but not reach 14 years, who commit follows crimes that listed in criminal law, including intentional homicide, intentional injury causing death or serious injury causing serious disability by particularly cruel means, results harmful consequences; and in procedure prospect, for above conditions, the start of prosecution needed to be approved by the Supreme People's Procuratorate, after approved by the Supreme People's Procuratorate then shall be investigated for criminal responsibility according to law.

2.4 Mandatory Reporting Obligation

The mandatory reporting system of cases against juvenile means that the subjects of reporting obligations, such as the teacher or doctor, should report or report to the Public Security Departments immediately if they find that juvenile have been or are suspected of being infringed illegally and are in danger of being infringed illegally.

Article 110 of the Criminal Procedure Law of People's Republic of China stipulates that any unit or individual who finds criminal facts or criminal suspects has the right and obligation to report or report to the Public Security Departments, Procuratorial Departments or Courts. The Law on the Protection of juvenile further clarifies that any

[1] On December 26, 2020, the 24th meeting of the Standing Committee of the 13th National People's Congress of the People's Republic of China adopted the 11th Amendment to the Criminal Law of the People's Republic of China, which came into effect on March 1, 2021.

By the 11th Amendment of the Criminal Law, Article 17 of the Criminal Law is amended as: a person who has reached the age of 16 and who commits a crime shall bear criminal responsibility. A person who has reached the age of 14 but not the age of 16 shall bear criminal responsibility if he commits the crimes of intentional homicide, intentional injury causing serious injury or death, rape, robbery, drug trafficking, arson, explosion and spreading dangerous substances. If a person who has reached the age of 12 but not the age of 14 commits the crime of intentional homicide or intentional injury, causing death to another person, or causing serious injury to another person by especially cruel means, resulting in serious disability, and the circumstances are flagrant, he shall bear criminal responsibility after being approved by the Supreme People's Procuratorate for prosecution. Persons under the age of 18 whose criminal responsibility shall be investigated in accordance with the provisions of the preceding three paragraphs shall be given a lighter or mitigated punishment. If a person is not given criminal punishment because he has not reached the age of 16, his parents or other guardians shall be ordered to discipline and educate him; When necessary, special corrective education shall be conducted in accordance with the law.

organization and person have the right to report or charges against acts infringing upon the lawful rights and interests of juvenile.

On May 7, 2020, the Supreme People's Procuratorate, the State Supervisory Committee, the Ministry of Education, the Ministry of Public Security, the Ministry for Civil Affairs, the Minister of Justice, the National Health Commission, the Central Committee of the Communist Youth League of China and the All-China Women's Federation jointly issued the Opinions on Establishing a Mandatory Reporting System for Cases of Infringement on Minors (Trial).

According to the law, the subject has the reporting obligation, including State organs, organizations and public officials authorized by laws and regulations to exercise public power, organizations that have close connection with the juvenile industry and their employees have the obligation to report cases of infringement on juvenile. At the same time, it is clear that all kinds of organizations in the industry of close contact with juvenile refer to enterprises, institutions, grass-roots mass self-governing organizations and social organizations that have special responsibilities for juveniles in accordance with the law, such as education, care, medical treatment, rescue and guardianship, or that have conditions for close contact with juvenile without special responsibilities. While reporting the case to the Public Security Department, it shall report for the record in accordance with the requirements of the Competent Administrative Department.

According to the frequent types and common characteristics of cases against juveniles in practice, nine categories of cases that should be reported, such as sexual assault, abuse, bullying and abduction, are stipulated. In order to stop crimes in time and effectively protect the legitimate rights and interests of juveniles, it is stipulated that suspected cases can be reported, that the reporting personnel are not responsible for verifying and verifying, and that the public security organs shall ascertain the existence of illegal and criminal facts and deal with them in accordance with the law.

Regarding to the juveniles pregnant or abortion, the trial regulation is to divide the age stage. To provide for the reporting of pregnancy and abortion of female minors under the age of 14; For female minors over 14 years of age, pregnancy and abortion caused by sexual abuse should be reported. The second is to give the reporter the right to judge. In the case of pregnancy and abortion of female minors over 14 years of age, the reporting personnel can carry out preliminary verification if they have the conditions, and those who find or suspect sexual abuse must report.

The Opinions also stipulates that the Public Security Departments once accepts the case, shall immediately accept it, ascertain the preliminary information, examine the case of a suspected violation of Public Security Administration Law, file a case for investigation in accordance with the law for a suspected crime, and report the progress of the case to the reporting unit within three days after accepting the case or filing the case, and inform the reporting unit before transferring it for examination and prosecution. If the case is not filed for investigation, supervision shall be carried out according to law. legal supervision to urge all kinds of personnel at all levels to implement compulsory reporting responsibility. One is to strengthen the legal responsibility of failing to fulfill the reporting obligation. Second, the implementation of the supervision system of the supervisory organs, legal supervision and correction of inadequate implementation. In addition, the Opinion also provides fully protection and helping of juvenile victims, including the legal assistance in the criminal process and others. Last but not least, the Opinion emphasized strictly protect the privacy of juvenile, avoiding them suffered the second trauma in the criminal proceedings.

3. The Criminal procedure law of China for safeguard Juveniles rights

3.1 Special Procedure for safeguard Juveniles

The protection of dignity and bodily integrity is a universal right and the right of the child, and the prohibition of corporal punishment of children is an international legal standard. In 2012, the Criminal Procedure Law of China separately stipulated the Particular Procedure for Juvenile Criminal Cases, and clearly stipulated such important systems as suitable adults, conditional non-prosecution and social investigation. Article 282 of the Criminal Procedure Law provides that: If a juvenile is suspected of committing a crime specified in Chapters IV, V or VI of the Specific Provisions of the Criminal Law and is liable to a penalty of up to one year's imprisonment, and if he /she meets the conditions for prosecution but shows signs of repentance, the People's Procuratorate may make a conditional decision not to prosecute. Before making a decision of conditional non-prosecution, the People's Procuratorate shall listen to the opinions of the Public Security Department and the victim.

First of all, Conditional non-prosecution system refers to the decision that the prosecution can make conditional non-prosecution to juvenile criminal suspects who meet certain legal conditions. And may be sentenced to less than one year of fixed-term imprisonment, and has the performance of repentance, the relevant authorities may make a conditional decision not to prosecute. With the system of conditional non-prosecution, since 2012,

there has been a steady decline in the number of juvenile delinquency cases tried by courts nationwide, from 63,782 cases in 2012 to 35,743 cases in 2016, down 59.8% from the peak period (88,891 cases) in 2008, and close to the 33,612 cases in 1998.[2]

According to the judicate reporting of Shanghai in 2016, the number of juveniles involved in non-prosecution, arrest and prosecution decreased from 2,267 and 2,832 at the peak in 2007 to 650 and 845 in 2015, respectively, down 71.3% and 70.2%. The proportion of the total number of prosecutions has dropped from nearly 10% to about 4%. In contrast, from 2007 to 2015, the rate of non-arrest of minors involved increased from 8.4% to 29.4%, and the rate of non-prosecution increased from 3.0% to 34.0%.[3]

By the statistic, we can see that, with the non- prosecution in practice, this special proceeding has significant effect in the criminal cases involved with juvenile, for those juveniles commit the crime without serious consequences or result, non-prosecution mechanism as a bridge that gives the juvenile a second chance, also avoid them serving the sentences, which could help them back to normal life in society and school.

And the article 283 of the Criminal Procedure Law stipulates when the juvenile criminal suspect is subject to conditional non-prosecution, he/she shall abide by certain provisions: (1) to abide by laws and regulations and submit to supervision; (2) report their activities in accordance with the provisions of the inspection organ; (3) to report to the observing organ for approval before leaving the city or county where they live or moving to another place of residence; (4) Correction and education in accordance with the requirements of the investigating organs.

3.2 Particular Interrogation with Guardian in Presence

Starting from the special criminal procedure for juveniles created by the amendment of the Criminal Procedure Law in 2012, the Procurator Department began to explore the establishment of an independent criminal Procurator Department for juveniles, and the Supreme People's Procuratorate also set up a special office for juvenile inspection to provide guidance for the development of juvenile procuratorial work nationwide.

[2] 1998－2016 年度中华人民共和国国全国法院司法统计公报
http://gongbao.court.gov.cn/ArticleList.html?serial_no=sftj, accessed on 8.2.2022

[3] 上海未成年人犯罪数量呈逐年下降趋势 约三成涉案未成年人不捕不诉
https://www.sohu.com/a/75190853_393030, accessed on 8.7.2022

Article 270 of the Criminal Procedure Law of China stipulates that the system of appropriate adult presence for interrogation and trial of juvenile criminal suspects and defendants is also applicable to the interrogation of juvenile victims and witnesses. In the meanwhile, article 14 of the Opinion reiterates the system of appropriate adult presence for questioning victims in cases of sexual assault on juveniles.

3.3 Sealed Juveniles' Criminal Record

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) state that juvenile justice should be seen as contributing to the protection of juveniles and the preservation of a peaceful order in society. Therefore, in addition to protecting minors and maximizing the interests of children, juvenile justice should also maintain social peace and order and protect the human rights of ordinary people. The system of sealing up juvenile criminal records embodies this principle of two-way protection (Sun, 2020:42).. The criminal record sealing system means that when the criminal suspect is under the age of 18 at the time of committing a crime and is sentenced to less than five years imprisonment, except for special matters, generally the relevant criminal record should be sealed. Criminal record sealing system for the protection of minors is of great significance. The new Criminal Procedure Law innovatively adds this provision the respect and protection of human rights into the legal provisions, in which the juvenile criminal record sealing system is a bright spot, the core of which is to pay more attention to the protection of human rights.

In order to strengthen the implementation of confidentiality measures and confidentiality responsibilities. The Ministry of Justice is responsible for guiding local judicial administrative organs to implement the confidential management of relevant file materials and the encrypted preservation of electronic file information in accordance with the law, strictly implement the confidentiality requirements of relevant staff, and establish and improve the responsibility system. The relevant personnel shall be seriously investigated for their responsibilities according to law to ensure that the responsibility for confidentiality is in place.

3.4 Other Basic Rights Safeguard for Juveniles in Criminal Proceedings

3.4.1 The Defense Right

Article 49 of Chinese Constitution provides the legal basis for the safeguard of dense right in proceedings, it stipulates that respectively, that marriage, the family, mothers and children shall be protected by the State. Violation of the freedom of marriage is prohibited, and maltreatment of old people, women and children is prohibited. Legal aid personnel mainly include lawyers, grass-roots legal service workers, staff of legal aid institutions, social organizations and registered legal aid volunteers. The case handlers who provide legal aid to minors mainly come from these five subjects.

The juvenile criminal legal aid is different from the general criminal legal aid, it is the juvenile who gets the criminal legal aid, and the juvenile in criminal cases includes not only the offender, that is, the criminal suspect, the defendant, but also the victim. Therefore, the recipients of juvenile legal aid in criminal proceedings mainly fall into two categories: one is the juvenile criminal suspect or defendant who has not consigned a defender. Other is the juvenile victims who have not consigned the lawyer because of financial difficulties.

According to the Opinion, article 15 gives juvenile victims the right to legal aid, article 16 stipulates that juvenile victims have the right to be informed. When handling a case of sexual assault on a minor, the Public Security, Procuratorial and Judicial Departments shall, without prejudice to the handling of the case, promptly inform the victim and his legal representative of the progress of the case and the results of the handling, and explain the relevant situation. Article 18 stipulates that juvenile victims generally may not accept cross-examination, but if it is really necessary to appear in court, protective measures such as not exposing their appearance and real voice should be taken. If conditions permit, the statement of the minor victim may be broadcast by means of video, and the video shall take protective measures. What is it is really necessary to appear in court is not stipulated in the Opinion, leaving room for judges to exercise their discretion. And the application of the compulsory measure of arrest should be strictly limited, even if the compulsory measure of detention is taken, it should be detained separately from adults.

In fact, Article 12 of the United Nations Convention on Human Rights stipulates that States parties shall ensure that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting him or her, and that the views of the child shall be given due weight in accordance with his or her age and maturity. Juvenile courts have been established primarily to deal with juvenile

delinquency. Articles 19, 27, 30 and 102 of the new Protection of Juveniles Law emphasize respect for the personal dignity of juvenile, listen to their opinions and take their wishes into account, starting from the main subjects of juvenile, such as parents or other guardians, teachers and staff of schools and kindergartens (Liu, Luan, 2021:85)..

3.4.2 Civile Remedy

Article 31 of the Opinion stipulates the scope of compensation for damage to juvenile victims, including reasonable expenses such as medical expenses, nursing expenses, transportation expenses and missed work expenses paid for rehabilitation treatment. The cost of rehabilitation treatment here includes all kinds of expenses for physical and mental treatment.

3.4.3 Special Prohibition Order

Article 28 of the Opinion stipulates that criminals on probation may, according to the circumstances, be prohibited from engaging in work and activities related to juveniles during the probation period, and from entering places where juveniles are used to live, such as schools and kindergartens. This is the application of prohibition order in the case of sexual assault on juveniles, which can effectively reduce the chance of the offender to commit sexual assault again, and realize the special prevention of crime and the protection of juveniles (Xie, 2014:84)

3.4.4 Parents' Responsibility

In a word, the way of juvenile protection and punishment is more than professional, educational and scientific, which need to systematically protected. And in this filed, the participation of parents absolutely has important effects. The Civil Code of China stipulates the specific content of the guardian's duty of guardianship to juveniles, which provides the system support of civil law for consolidating the guardian's responsibility in the prevention of juvenile delinquency and building a strong baseline of defense against juvenile recidivism (Hou, 2022:100)

Conclusion

In recent years, China's juvenile justice work has made many achievements, but also faces new challenges, the juvenile justice system is still constantly improving. In practice, it will rely on the juvenile prosecution and juvenile court, instead of the single mode of criminal punishments, and take early intervention and prevention as the guiding direction of judicial treatment measures, focus on the basic right protection of Juveniles, not only

by judicial departments but also rely on the social resources, so as to better achieve the purpose of education and protection on the premise of timely correction of juvenile bad and law-breaking behavior.

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PROTECTING THE RIGHTS OF THE UNBORN CHILD

Unborn or future children require wider legal protection compared to the one they have today. Basic human rights, starting with the right to life, the right to dignity, the right to health protection and other rights, such as protection from all forms of violence, are tied to the concept of legal subjectivity, which, by carefully reading international and regional documents, today has a different dimension than before. Unborn children are recognized as a category that should be given a chance for equal treatment and protection from harmful influences, based on the law. This is increasingly indicated by medical science that the rights of the fetus should be protected, in accordance with the scientific achievements of perinatology. This certainly does not exclude but rather supports the right and freedom of women to decide on the birth of children/in deciding whether to have children. The civilisational achievements of the new age/era do not exclude the achievements won long ago in national legislation and the special protection of pregnant women. It is about the fact that the law must also protect other rights and (or) relevant legal interests of the unborn child, and not only the hereditary rights established by Roman law.

Keywords: *unborn children, legal protection, inalienable rights of women, rights and interests of the child.*

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Introductory considerations

The legal protection of the unborn child, thanks to modern medical achievements, today acquires a completely different dimension and the need in harmonizing legal documents with the achievements of humanity. Hence, this issue has many dilemmas and different (often conflicting) opinions, which should aim at a single goal: strengthening the positive development of children and their capacity. The complete regulation of the legal protection of the unborn child essentially represents a preventive concept, which can avoid or reduce the risks of various forms of victimization, from the very beginning (Pavlović, 2019, 46). This means that we should take into consideration the traditional understandings of the acquisition of legal capacity of individuals and determine new concepts and constructions of legal capacity that refer to the subject we have designated as an unborn child.

Various risk factors for the healthy psychophysical development of the unborn child have been identified in many international studies. It is about alcohol abuse, drug addiction, smoking, domestic violence, mental and infectious diseases, feelings related to pregnancy, socio-economic status of a pregnant woman who is often left to take care of herself and of the unborn child, and similar. Only by formulating a satisfactory legal framework, which guarantees protection and a favourable developmental start of the child, it is possible to lay a preventive basis for further actions aimed at protecting the unborn child from victimization.

Domestic violence has its psychological, physical, economic and social dimensions, with numerous risks not only for the pregnant mother, but also for the unborn child. It includes low birth weight, miscarriage, premature birth, fetal problems and injuries to the child, which affects, through depression, anxiety and stress experienced by the mother during pregnancy, the child's mental health later in life. Based on these indisputable (notorious) and possible consequences caused by domestic violence, it is indisputable that an unborn child can have harmful consequences in development. That is why the question arises as to how the unborn child can be legally protected, what are his/her rights and - can we claim that the only victim of this risk factor is only the pregnant woman or the woman giving birth.

The questions posed in this way are unresolved, and there is no consensus on a possible solution among the states that belong to the same legal tradition as the Republic of Serbia. Bearing in mind that there is a general disagreement on proposed solutions, a possible way out, could be the establishment of a new institute for the protection of the interests

of the unborn child, which would be socially and legally acceptable in the national legislation.

Although at first glance it seems that specifying the rights of the unborn child threatens only the physical integrity of the mother, we are of the opinion that the legal protection of the mother should be viewed separately from the legal protection of the unborn child. It is the social responsibility to provide protection to the pregnant woman, as it was already recognized before, but also to the unborn child, which is a novelty, especially if such protection would be ensured by the norms of criminal law. In this context, they could also observe the protection of pregnant women who are serving prison sentences (Pavlović, 2020), female convicts as a particularly sensitive category. Except for the right of a woman to freely decide on giving birth, the unborn child should also receive legal protection, if there is a "violation" of his/her rights. Although today there is no uniform position in law on when life begins, but that definition falls within the field of free assessment of each state (the so-called margin of appreciation),[1] the fact is that the fetus also enjoys legal protection (without entering into the nature right of a woman to decides on giving birth).

Looking for a solution to this problem, one should start from international and regional documents, as well as solutions in national legislation, regardless of the fact that these solutions still do not provide a complete answer.

The question that could be proposed is whether the unborn child can enjoy independent legal protection, meaning the right to life, or whether the unborn child (fetus) realizes its rights exclusively throughout the mother! As Kolarić notes, the European Court of Human Rights has dealt with the issue of legal protection of the unborn child on several occasions, but it has very skilfully avoided answering the question to whom the word "every" (right to life) refers, i.e. whether it refers also to the prenatal stage.

Following the academic education programmes at the Faculties of Law, the curriculum of the majority includes a course dealing with the theory of law. Kelsen is certainly an indispensable authority in this area, who ties the beginning and the end of the legal capacity of an individual to the facts of biological birth and death of a human being (Kelsen, 2004). This legal construction was based, with all its consequences, on the hour

[1]The European Court of Human Rights has left discretion to each member state to regulate the issue of abortion as long as the legislation strikes a fair balance between the need to ensure the protection of the fetus and the interests of women. From the judgment of the ECHR: Boso v. Italy, App. No. 50490/99, September 5th, 2002.

of birth, which led to the construction that basic human rights are recognized and protected for the newly born. This concept of protection is still ruling today, with the legal rationale that it is not about some "metaphysical" conditions that an individual must fulfil in order to have legal subjectivity, but rather about an ability recognized by law. In this sense, the right of the unborn and future child to legal protection is not recognized, in the way it is traditionally accepted.

In the jurisprudence of the Republic of Serbia, this was discussed in several cases, especially in the case of the serious crime against human health, where various actions of the doctor towards the mother had led to the death of the fetus. Domestic jurisprudence is inclined to the point of view that until the birth, the fetus enjoys only indirect protection through the mother, through various criminal acts, while the fetus enjoys somewhat more direct legal protection of the right to life only in the case of the criminal act of illegal termination of pregnancy. In some other countries, the issue of more immediate protection of the bodily integrity and health of the unborn child is viewed through the special subjectivity of the fetus (Kolarić, D.2019). Regardless of this fact, judicial practice has so far not specifically dealt with issues of violations of other rights of the unborn child, starting with the right to dignity or the right to protection from the harmful effects of domestic violence. Between the unborn and the future, born person, there is an inseparable connection, because life itself is a continuous process. Legal protection of the unborn child exists and should serve exclusively in the function of protecting the born person and his/her life, so these are topics that should be taken into consideration.

One example and a few questions

According to the indictment of the competent Prosecutor's office in Valjevo, from 2007, the defendant, specialist gynaecologist SG, was accused of acting negligently on the night between January 23rd and 24th, 2007 during the delivery of a child, which resulted in the death of the fetus. After 12 years of trial, a final judgment was passed by the Appellate Court in Belgrade, which confirmed the acquittal of the first instance court. Bearing in mind the fact that the court creates law with its decisions, and that during the trial the matter that was determined primarily related to whether the defendant acted negligently; we could stop in this position, which is here. However, what was determined also concerned the legal status of the child, and whether the unborn child enjoys legal protection. Exercising the right to use all regular legal remedies during the court proceedings, the accused SG and his defence proposed, and it was adopted, forensic medical expertise, which was performed on three occasions by the forensic medical boards of the Medical Faculties of the University of Novi Sad and Belgrade. Their

position, which the court accepted, was that the accused specialist doctor acted conscientiously, and that the fatal outcome was not causally related to his actions.[2]

What the court also took into account during the decision process in this case is the legal status of the unborn child. The Court of Appeal in Belgrade based its decision precisely on that fact related to the legal status of an unborn child, considering that an unborn child, regardless of the fact that it was a self-sustaining fetus, does not have the properties and characteristics required for legal subjectivity. Such a solution to the prejudicial question could be said to be based on the law, reading it *stricto sensu*. At the same time, no analogies with legal fiction from the law of inheritance are possible in the criminal law. In this sense, we cannot even talk about a cause-and-effect relationship between the actions of negligent treatment, that is, a serious crime against people's health and the consequence - the death of an unborn child.[3]

The issue of attitudes towards pregnant women, women in labour and mothers, is a topic of strategic, security and existential importance in Serbian society, and any form of violence towards them concerns the immediate victim, society as a whole, but also the unborn child. This issue as such, has not yet appeared in the practice of the courts, but an (in)adequate social reaction will have consequences for the creation of healthy offspring, in other words, for the developing bio-psychosocial base of children. Experiences of physical, psychological, emotional, economic and financial violence during pregnancy show their effects on children as well, so the issue of protecting the basic rights of the unborn child and its subjectivity is extremely important.

The answers are not simple, and require our full engagement in the future, in order to find the right measure of protection and to determine the legal subjectivity of the unborn child. The unborn and future child are new entities in legal (criminal) theory, and one should be extremely careful in answering these questions. Not a single aspect should be neglected, which requires a broader discussion that goes beyond the scope of this paper. In any case, it is a request to give the unborn or future child an appropriate place in the legislative framework, which will be the basis for the work of all competent institutions. But let us start in order.

[2] https://www.paragraflex.co.rs/dnevne-vesti/280119/280119-vest10.html
Last visited on September 20th, 2022 at 21:00

[3] https://www.novosti.rs/vesti/naslovna/hronika/aktuelno.291.html:772897-Nerodjenu-decu-zakon-ne-vidi
Last visited on September 24th, 2022 at 10:00 p.m.

International legal protection of the unborn child

There is a large number of documents related to the protection of the right to life, and consequently to the legal protection of children. Some of them, by their definition, could also include the rights of the unborn child to protection; however, by reviewing the relevant literature and the jurisprudence of international courts, we did not find confirmation for the stated.

The UN Universal Declaration of Human Rights [4]of December 10th, 1948 states that everyone has the right to life, liberty and personal security. As we have emphasized earlier, the word "everyone" would lead to the conclusion that everyone, including the unborn (and future) child - the fetus has the right to life and to special legal protection independently of the pregnant woman or the child's mother.

The European Convention for the Protection of Human Rights and Fundamental Freedoms [5](ECHR) from 1950, entered into force in 1953, and the contracting parties are all members of the Council of Europe, in its Article 2 regulates the issue of the right to life: "The right to life of every person is protected by law." No one may be intentionally deprived of life, except during the execution of a court verdict by which he/she was convicted of a crime for which this punishment is provided by law. The following text of the convention talks about the right to respect for private and family life, the prohibition of discrimination, but also the right to dignity.

Although it looks like a very modern solution covered by the word "every", the practice of the ECHR has not yet decisively confirmed it. This significantly points to the fact that the protection of the right to life is aimed primarily at those already born. The most widely accepted document at the level of the UN, the Convention on the Rights of the Child[6], means a child as any/every human being who has not reached the age of eighteen, unless, according to the law applicable to the child, majority is not reached earlier.

A multilateral treaty adopted by Resolution 2200A of the United Nations General Assembly on December 16th, 1966, and entered into force on March 23rd, 1976, the

[4] https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/cnr.pdf

[5] http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/02/Konvencija-za-za%C5%A1titu-ljudskih-prava-i-osnovnih-sloboda-sa-izmenama-predvi% C4%91enim-Protocols-11-and-14.pdf

[6] https://www.unicef.org/serbia/media/3186/file/Konvencija%20o%20pravima%20deteta.pdf

International Covenant on Civil and Political Rights [7]similarly defines the subject of protection of the right to life. Namely, Article 6 states that every human being has a natural right to life and that no one may be arbitrarily deprived of life. That right should be protected by law and no one should be arbitrarily deprived of life. If we were to connect this with the definition from the Convention on the Rights of the Child that a child is any human being who has not reached the age of 18, it would be concluded that both conventions protect the right of the fetus because it represents life. Even the signatory states of this Convention interpreted differently when it came to the protection of life before birth. We ratified the convention itself in 1971 (ex Yugoslavia), but we also pointed out the lack of a legislative framework that would elaborate this further.

At the end of this short presentation, we will also mention the General Declaration on Bioethics and Human Rights adopted by the UNESCO General Conference in 2005. In the Preamble of the Declaration, it was pointed out that it is decisive and necessary for the international community to establish general principles that will serve as a basis for providing answers to humanity's ever-growing dilemmas and contradictions that science and technology bring to mankind and the environment. The preamble also refers to international treaties and UN conventions, including the UN Convention on Children's Rights of November 20th, 1989, as well as the UN Convention on the Elimination of All Forms of Discrimination against Women of December 18th, 1979. As the General Declaration on Bioethics and Human Rights refers to science and technological development, and to the need to harmonize international documents with current achievements, it is necessary to do so in the field of fetal rights. General Declaration, in its Art. 3, speaks about human dignity and human rights: "Human dignity, human rights and fundamental freedoms must be respected in their entirety." The interests and well-being of individuals should have priority over the interests of science or society. It follows from the above mentioned that the interest of the child as a human being in the prenatal period should be prioritized and that the right to life as an inviolable right must be enjoyed by every/any child, regardless of whether they were born or are yet to be born or found in the mother's womb.

In the section dedicated to international documents in which we can notice the basis for the initial thoughts that allow the uniqueness of the subjectivity (or legal interests) of the unborn child, we will refer to two national legislations. Namely, the provision that is still valid in the USA, and which was valid in the same or similar form on the territory of our

[7] https://akb.org.rs/wp-content/uploads/2022/03/8-Zakon-o-ratifaciji-Medjunarodnog-pakta-o-gradjanskim-i-politikim-pravima.pdf

country, concerns the execution of the death penalty, which cannot be executed on a pregnant woman. When the USA joined the International Covenant on Civil and Political Rights, it was clearly stated that pregnant women are excluded from the death penalty.

By reviewing all the adopted legal regulations of substantive criminal legislation, which were provided for the death penalty in our country from 1944 until its complete abolition, including the right to execute criminal sanctions in the Republic of Serbia, we did not determine the existence of the possibility that the death penalty could be carried out against a pregnant woman. By further studying the comments on criminal legislation published by authorities in the field of criminal law who wrote and published in the Serbian language from 1944 until today (Tahović J., Srzentić N, Stajić N. and Lazarević Lj., Đorđević M., Čejović B . and others) we did not find a rationale or explanation for this determination. The only conclusion we could draw is that this provision protected (and in the USA this legal rule still applies) the unborn child's right to life. Exactly the same as it is expressly provided for in the UNESCO General Declaration on Bioethics and Human Rights.

Criminal law protection of the unborn child in the Republic of Serbia

And while the civil right position of the unborn child was regulated more than a century and a half ago, primarily through the institute of hereditary law and the fiction that a conceived child is considered born if it concerns the protection of his/her property (inheritance) interests, the criminal legal protection of his/her rights still causes numerous doubts for theoreticians, and only after that for the practice itself, bearing in mind the fact that apart from the listed international documents, no law-based direct protection of the unborn child is foreseen in the national legislation.

Starting from the constitutional provisions and the Constitution of the Republic of Serbia dated 2006 Article 24 stipulates that human life is inviolable. It is not without reason that we emphasized the importance of determining the point when life begins. This issue is very complex because it contains a whole series of not only medical, but also religious and ethical dilemmas (Stjepanović S., Stjepanović B., 2018). If the same mentioned were to be resolved only from a religious aspect, in the religious sense life begins with conception itself, however, modern science separates these two concepts through the right of a woman to have an abortion, i.e. to give birth in countries where it is allowed. In our country, provisions that legally guarantee this right to women date back to the early 70s of the last century.

In the Republic of Serbia, today, abortion is permitted under the conditions prescribed by the Law on Procedures for Termination of Pregnancy in Healthcare Institutions [8], and this law is the regulation to which the blanket disposition of the criminal offense/act of Unauthorized termination of pregnancy from Art. 120 of the Criminal Code, Chapter XIII crimes against life and body. By the way, this incrimination is not new, as well as the crime of Murder of a Child during Childbirth from Art. 116 of the CC both were also sanctioned by the previously valid Criminal Code of the Republic of Serbia. It can be taken already, from the very name of the criminal offense from Art. 116 of the CC, that there is no doubt that in this case the object of protection is the child's life during childbirth or immediately after childbirth, while the mother, who according to the law is the only possible perpetrator, continues to have a disorder caused by childbirth.

But, in the case of the criminal offense/act under Art. 120 of the Criminal Code, a dilemma may arise as to whether the relevant criminal law norm protects the bodily integrity of a pregnant woman, or the life of an unborn child. If the intention was to protect the physical integrity of the pregnant woman in the sense of the possible deterioration of her health in conditions that entail an illegal termination of pregnancy, in that case, considering the object of criminal legal protection, the offense should be regulated in Chapter XXIII of the Criminal Code - criminal offenses against human health, which is not the case.

Based on the mentioned, it follows that the object of protection is also the right to life of the unborn child. Namely, the negligent death of a pregnant woman, a severe impairment of health, or other serious physical injury are qualifying circumstances from paragraph 4 Art. 120 of the CC, while the first three paragraphs in their dispositions do not state any consequence that would refer to the physical integrity of the pregnant woman, but exclusively refer to the conditions of termination of pregnancy, referring to the positive regulations that regulate this matter.

In this connection, it is necessary to return to the provisions of the aforementioned Law on the Procedure for Termination of Pregnancy in Health Institutions. This law, in art. 6, stipulates that termination of pregnancy can be carried out up to the tenth week of pregnancy, and only in exceptional cases even later:

[8] Official Gazette of the RS no. 16/95, 101/2005

- In case that, on the basis of medical indications, it is established that the life of a woman cannot be saved or serious damage to a woman's health cannot be removed in any other way,

- In case that, based on scientific and medical knowledge, it can be expected that the child will be born with severe physical or mental defects and

- In case that, the conception occurred as a result of the commission of a criminal offense (rape, abuse of a helpless person, abuse of a minor, abuse of position, seduction and desecration).

The law stipulates that up to the tenth week of pregnancy, the existence of conditions for termination is determined by a doctor specializing in obstetrics and gynaecology of a health institution, from the tenth to the twentieth week of pregnancy - the doctor's council of the corresponding health institution, and after the twentieth week of pregnancy - the ethics committee of the health institution.

The question that arises is why, after the twentieth week of pregnancy, it is necessary to include forensic ethics in the decision to terminate the pregnancy, forensic ethics as a philosophical discipline investigates the meaning and goals of moral norms. The answer to this should be sought in the fact that modern medical achievements allow premature babies to survive and continue to live even in the 22nd week of pregnancy.

Precisely in the context of that fact, and in connection with the increasingly frequent current events in the legal protection of the unborn child, it is also necessary to consider the position that has been generally accepted in judicial practice until now (judgment of the Court of Appeal in Belgrade Kž.1. 789/15) and refers to the qualifying circumstance for the criminal offense of Serious crimes against human health, from paragraph 2 and paragraph 4 of Art. 259 of the Criminal Code, regarding the criminal offense of Unconscionable provision of medical assistance from Art. 251 of the CC, in a situation where one of the alternatively provided actions was committed against an unborn child. According to this understanding, in order for the child to enjoy criminal legal protection, it is necessary that childbirth has begun, and in all other situations, if death occurs in the mother's womb due to the so-called "doctor's mistakes" would not be about this legal qualification. The position expressed in the specific case is a settled matter, but...

Taking into account everything presented above, this point of view is unacceptable, all the more so because medicine has progressed all the way to fetal surgery - surgery on the

baby in the mother's womb, so there is no reason why the object of protection in the criminal offense of Serious crimes against human health could not be an unborn child also, provided that it is properly established that the death is the result of intentional or negligent use of an obviously unsuitable means or an obviously unsuitable method of treatment or failure to apply appropriate hygiene measures or generally negligent behaviour. To that extent, we cannot fully agree with the legally binding decision from the aforementioned example of a pregnant woman in the case against SG from Valjevo, namely in the part that an unborn child does not have legal subjectivity. Only through the adoption of scientific achievements in this area, we can come to a conclusion whether, and since when, life is protected, and not what life is, because it is, as we emphasized, an uninterrupted whole.

If the judicial practice were to opt for this point of view, it is a special question from which moment criminal legal protection should be provided to the unborn child. It seems that the most acceptable moment would be after the completion of that week of pregnancy until the issue of termination of pregnancy is free (in our country until the end of the 10^{th} week, and in some other legislation up to the 12^{th} week) and depends on the woman's decision, from that moment, excluding the aforementioned reasons justified by the law, abortion is not allowed, so it is logical that from that moment the fetus has the right to the criminal legal protection of life and health.

It seems that the confirmation of the stated position and the incrimination that was introduced into the criminal legislation of the Republic of Serbia with the entry into force of the Criminal Code published in the Official Gazette of the RS no. 85/05 and it is a criminal act of aggravated murder from Art. 114 paragraph 9 where the qualifying circumstance is the murder of a child as well as the murder of a pregnant woman. The very fact that the life of a pregnant woman is protected by the law through a more difficult qualification for which, starting from 2019, a sentence of life imprisonment is also foreseen, indicates that the *purpose* of this provision is that killing a pregnant woman ends not one, but two or more lives in the case of multiple pregnancy and her murder is not an ordinary murder from Art. 113of the CC.

We conclude that the pregnant women, as well as the fetus, that is, the unborn child, are the subjects of protection in the criminal offense of aggravated murder of a pregnant woman.

Here we would point out that our legislation, although the first interventions on the fetus (unborn child) were performed more than half a century ago, did not adequately regulate

either the legal subjectivity or the status of the unborn child. This precedent of civil and criminal law requires a wider discussion than the one with which we have limited this work itself.

Protection of pregnant women from violence in Serbia

By reviewing the relevant literature, we did not find precise indicators of the frequency of violence against pregnant women in the Republic of Serbia, and therefore also against unborn children. A similar situation of the absence of official statistics is observed in neighbouring Croatia, where, according to the Croatian Society of Gynaecology and Obstetrics in 2017, this problem is noted as important, but without clear frameworks of the origin of the threat.

Following the statistical reports on the crime of domestic violence, it is clear that it multiplies during the period of pregnancy. Partner pressure, abuser manipulations and the like during pregnancy could be cited as some of the elements that limit pregnant women and mothers in labour from reporting violence and identifying abusers. To emphasize, not just violence that is perpetrated against a pregnant woman, but also against an unborn child, regardless of the existing vagueness in the definition of violence according to the cited Istanbul Convention, as well as the Law on Prevention of Domestic Violence of the RS.

When analyzing the framework of media reports, it is clear that this form of victimization exists in Serbia. Only a particular obviousness is noted in connection with the cases that ended with a fatal outcome, i.e. the murder of pregnant women. However, such events do not give a precise picture of the frequency of victimization in a given population. Noticing the importance of the problem, in the period from 2019 to 2021, research was conducted on the social response to domestic violence in Serbia. The research (unpublished) which included 86 women (mothers) throughout Serbia, chosen by the method of random sampling, including women aged 30 to 55, asked for an answer about the presence of violence against pregnant women and unborn children. Using the questionnaire that was compiled within the focus group at the criminal law department of the Faculty of Law of the University of Economics in Novi Sad, one of the items related to the respondents' reporting on the experience of violence during pregnancy. A number of respondents, 4.6% of them, positively reported physical or particularly intense psychological violence during pregnancy. About 12% of women subsequently reported various forms of violence, which they did not initially recognize as violence. These include cursing, insults, restricting

movement or contact, as well as threats of abandonment and unfavourable socioeconomic status.

In the same context, the frequency of experiencing of violence, as well as the time of the incident during the gestational period, was also analyzed. Namely, practically the entire sample of respondents reported only one experience of physical violence, while only three respondents gave a positive statement about two or more physically violent incidents. Only when it comes to psychological violence, in the sub-sample of victimized women, more than 85% of respondents reported two or more incidents of serious psychological abuse. These results are not comparable to earlier research, taking into account the pre- and post-covid situation, but they are a reference example of the presence of violence.

The time of violence in relation to the duration of pregnancy was divided by trimesters. In addition, 80% of cases of physical violence occurred in the first trimester, while only 3% of cases occurred in the last trimester. Only when it comes to psychological violence, the advanced stage of pregnancy did not have such striking correlations. In this sense, 28% of women reported that the mentioned incidents were in the last trimester of pregnancy.

Violence against pregnant women is an extreme form of domestic, i.e. partner and gender-based violence, primarily due to its consequences, but not its causes. If we take as correct the paradigm that violence is partly the result of previously suffered violence, then we will see the results only when children not born at that time enter the world in which they will independently perform the functions of life.

As in the earlier research of the same questionnaire (Pavlović, 2019 , 54), the main factors identified as causes of violence are pathological jealousy and expressed suspicion of paternity, alcohol abuse, and economic problems in the family, i.e. problems concerning the male partner's employment. A small number of women cited the diagnosis of an existing or previously sexually transmitted disease in a woman as the reason for the violence, some of which were also transmitted to the newborn. The respondents did not register any comments related to economic and financial violence, because the unborn child also has the right to receive alimentation, conditionally speaking.

The findings of the subject research bring some other important conclusions, which relate to the already stated acquired rights of women and constitutional guarantees on freedom of decision in the reproductive context, which will be an extremely important area for research. Bearing in mind the fact that at the moment we do not have relevant data in the

RS on the exact number of abortions (state and private practice), we cannot know the etiology of abortions, including violence against pregnant women. Because the question to which we do not have an answer is whether pregnancy termination occurs in the absence of emotional and financial support from the partner. Whether it is just the negative attitude of women towards contraception or their lack of knowledge can be the subject of new further research. However, the observations of experts should be emphasized, as well as the reports of women that men often refuse to use contraceptives, considering that it is the woman's duty to prevent pregnancy. It is often about a kind of coercion and psychological pressure, which can be understood as a form of violence.

The question is what should be an adequate social response to this phenomenon? How familiar are we all together with the possible consequences of this behaviour and how to prevent it?

One should also ask whether basic information is enough to protect young people from social pressure. Is there any difference in society's attitudes and support for pregnant women in relation to their age (Solarević, Pavlović, 2018)? But also from all forms of violence to which women are exposed. It is only through the integrative strengthening of gender roles and the correction of social values and trends that a real effect on young people can be achieved. Bearing in mind the fact that pregnancy and childbirth bring a special psychological quality to women, and that that is also recognized at the criminal law level, the need for comprehensive social response, observation and gender empowerment of girls or young women is set as an imperative.

The framework of the relevant laws foresees a whole series of other mechanisms for the protection of mothers and families with children. True is that changes in the law never pass without criticism, and questions are raised about the justification of the correction of legal solutions that would further change the attitude towards pregnant women and unborn children, in order to protect them from violence.

Nevertheless, one gets the impression that in addition to certain, primarily technical details, the state has a well-regulated system of protection against domestic violence, which functions at a satisfactory level. Whether the subjectivity of the unborn child should be recognized within that protection system is a separate question. It is possible that such a relationship would lead to an increase in the birth rate, but for such an attitude, it is still necessary to find a mechanism to empower women. This kind of thinking is essentially a preventive concept, which can be used to avoid or reduce the risks of various forms of victimization, already at the very beginning, and before the birth of a child.

Pregnancy and the period of early upbringing of a child certainly bring within self a whole series of problems. It is a multi-determined framework that includes a whole range of variables that could be analyzed in a separate study. Bare forms of violence, discrimination or the absence of an adequate legal framework are just some of the aspects that require analysis in this kind of a context. Only by formulating a satisfactory standard on the legal protection of the unborn child that guarantees protection and a favourable developmental start of the child, it is possible to lay a preventive basis for further, continuous actions in the area of possible victimization.

Instead of a conclusion

Human rights law from the middle of the twentieth century and at the beginning of the twenty-first century is not only the subject of international conventions on human rights and the work of international bodies, but human rights are part of the legal framework of every state and belong to everyone. It could be concluded that in addition to so many regulations in this area, there is no possibility that the basic right to life will be denied to one human being who, according to the point of view of medical science, is special, different from his parents, and that is the unborn and future child (Stjepanović, S., Stjepanović B., 2018). On the one hand, modern medicine and achievements related to the diagnosis and treatment of the child before birth, pregnant women and childbirth, along with the progress of technology, are developing into a special scientific discipline - perinatology.

On the other side are the rights of parents to freely decide on the birth of children, which in practice translates into the fact that parents, primarily the mother, decide on the termination of the right to life of the fetus under the conditions stipulated by law, which is considered an inalienable right of a woman in the modern world. Family planning is one of the freedoms of parents protected by conventions and constitutions, but conventions also protect the right to life of every human being. Could the answer to the question of when to protect the rights of the fetus be that it is only when it is in the interest of its mother? It is undeniable that the right to life of every human being is interpreted differently when it comes to the fetus. However, at a certain point in pregnancy, the legal protection of the unborn child becomes a separate issue, but also a child's right. From the child's right to life, dignity, protection from the violence, to the child's right to development, alimentation and the like.

In order to realize any human right and freedom, one must have a basic right, which is the right to life. Based on the analysis of international treaties and court decisions

mentioned in this paper, it could be concluded that the protection of the rights of the fetus should be extended to other areas of law and not only to hereditary rights, which were granted by Roman law, which did not have today's achievements of medical sciences in front of it. Issues of social support, administrative law, but also protection by provisions of criminal law require precise standardization.

The issues of regulation of the legal status of the fetus should be in accordance with the recommendations that are also valid for the field of modern medical science. This means that the issue of the right to life is not as relevant as the previous theory has observed it, because life is a constant. The question is, from when one acquires legal subjectivity, regardless of what is the object of protection in connection with the protection of the rights of the unborn child. The way and quality of legal protection of the unborn child will depend on the answer to that question.

If they were to accept the position that the unborn child also has legal subjectivity (complete or partial), then numerous other issues related to the protection of the unborn child will arise. It is a wrong perception that the legal protection of the unborn child is related exclusively to the norms of civil and criminal law. It also concerns norms of social protection, administrative law and others (Đanić Čeko, A, Šego, M., 2020).

The overall improvement of the position of women is linked today to the adoption of the so-called Istanbul Convention on the Prevention of Domestic Violence, as well as the adoption of appropriate regulations by the signatory countries regarding domestic violence. Likewise, by preventing violence against pregnant women and women, we will indirectly reduce violence against unborn children, regardless of their legal status. That is why the question of protecting basic human rights in the way we have raised it here is perhaps a part of the question of our survival in general. The position that we put in the focus of this paper speaks of the fact that the inviolable protection of the rights of a woman, a pregnant woman, does not exclude the special protection of the rights of the unborn child, and in accordance with the established and generally accepted standards in society.

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PROTECTION OF THE RIGHT TO BIRTH IN THE LIGHT OF THE RIGHT TO LIFE IN BOSNIA AND HERZEGOVINA

In the system of universal and regional standards for the protection of human rights and freedoms in particular, the right to the inviolability of human life often takes precedence. This is logical because without ensuring efficient, timely and quality protection of this human right, there is no man as a human being, nor his other rights and freedoms. The right to life guarantees not only the right to a dignified life, i.e. aging and death, but even more the right to birth of man in general. This right, in addition to medical and health regulations in Bosnia and Herzegovina, is regulated and specially guaranteed by criminal legislation. In addition to a precisely regulated procedure for preventing or allowing abortion (in order to protect the human fetus), a newborn child is also protected. Thus, the right to birth was given the basis for enhanced criminal protection of the newborn child through the incrimination of murder of a child at birth (infanticide), and its theoretical and legislative aspects are discussed in this paper.

Keywords: *human rights, life, birth, child, murder.*

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1. Introduction

The right to human life is one of his basic, fundamental, the most important human rights, from the earliest times to the present day, which is protected in all positive criminal (and other) legislations. The situation is similar in Bosnia and Herzegovina. This right is protected from birth to death of a human being. Violation of this human right is the basis for the incrimination of criminal offenses against life (murder in the basic, qualified or privileged form of manifestation).

This 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 universal and regional international legal acts. At the same time, it should be noted that this right enjoys absolute protection (except in extremely rare cases of possibility of applying the death penalty for the most serious crimes). It is protected from the birth of a human until his death, and this life must be dignified in all segments.

2. International standards of the protection of the right to life

By joining the Organization of the United Nations[1], as a successor to the former Socialist Federal Republic of Yugoslavia, Bosnia and Herzegovina became a party to all international conventions and treaties signed and ratified by the former state, including, for its importance for the protection of the right to life in the system of human rights and freedoms, in particular, (Šurlan, 2014: 117-124): a) the Universal Declaration of Human Rights (1948), and b) the International Covenant on Civil and Political Rights (1966) (Etinski, Đajić, Tubić, 2017: 191 -203).

The Universal Declaration of Human Rights, as the first universal international document, although not primarily and exclusively dealing with the standardization of human rights and freedoms, includes essential standards and principles contained in all modern legislations of the United Nations member states, including criminal legislation of Bosnia and Herzegovina (Račić, Milinković, Paunović, 1998: 51-59). Since the recognition of the innate dignity, equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the World, and since disrespect and contempt for human rights have led to barbaric actions which offended the conscience of mankind,

[1] Bosnia and Herzegovina's accession to the United Nations took place on 22 May 1992, when the Security Council approved accession to this international organization by its Resolution No. 755 (1992).

and since the creation of the world in which human beings will enjoy freedom of speech and belief and be free from fear and scarcity – this right was declared as the highest aspiration of every human being, so the international community has concluded that it is important that human rights are protected by the rule of law so that a human being is not forced to rebel against tyranny and oppression as final option (Pavišić, Bubalović, 2013: 78-84).

At the very beginning of the Universal Declaration of Human Rights (Article 1) it is emphasized that all human beings are born free and equal in dignity and rights, and that they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (Gajin, 2012: 51 -58). Therefore, it is logical, in accordance with the solution from Article 2, that every person is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (principle of equality and principle of non-discrimination). 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.

After these summary introductory statements, the Declaration then lists individual human rights and freedoms, in general. In the first place, Article 3 of the Declaration lists the following basic human rights, such as the right to: a) life, b) liberty and c) security of person. Therefore, no one may be held in slavery or servitude (Article 4), which means that slavery and the slave trade shall be prohibited in all their forms. Article 5 of the Declaration further guarantees that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The protection of the right to human life is guaranteed by another universal international document - the International Covenant on Civil and Political Rights (1966). This Covenant today forms an integral part of Annex I of the Constitution of Bosnia and Herzegovina[2], as an additional international human rights agreement that is directly applicable in Bosnia and Herzegovina. The Covenant, in its second part, emphasizes in Article 2 that State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or

[2] Constitution of Bosnia and Herzegovina, "Anex IV to the General Framework Agreement for Peace in Bosnia and Herzegovina " and "Official Gazette of Bosnia and Herzegovina" Number 25/2009.

other opinion, national or social origin, property, birth or other status (principle of non-discrimination), and to take steps in accordance with their constitutional procedure and provisions of this Covenant to enable the adoption of such legal or other measures to exercise the rights recognized under this Covenant and which have not yet entered into force (Paunović, Krivokapić, Krstić, 2010: 22-24).

The third part of the International Covenant on Civil and Political Rights establishes a system of standards for internationally protected human rights and freedoms. As is logical, in the first place (Article 6) the right to life is guaranteed. Namely, without and before human life or after his death, there is no human right, nor human freedom. The right to life (Article 6) is inseparable from the human personality. This right must be protected by law. No one can be arbitrarily deprived of life. Therefore, in countries which have not abolished the death penalty (this capital, the most severe punishment has been abolished in the member states of the Council of Europe), the sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of 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 judgment rendered by a competent court. On the other hand, when deprivation of life constitutes the crime of genocide, it is understood that no provision of this Covenant shall authorize any State Party 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.

In addition, every death row inmate (in countries where this punishment still exists in the penal system of measures of social response to the most serious forms of crime) is entitled to request pardon or commutation of the sentence, provided that amnesty, pardon or commutation of the death penalty may be granted in all cases. Also, the sentence of death shall not be imposed for crimes committed by persons below 18 years of age (juveniles) and shall not be carried out on pregnant women. Finally, none of the above provisions shall be invoked to delay or to prevent the abolition of sentence of death by any State Party to this Covenant (Avramović, 2011: 98-104).

In addition to universal, regional international documents adopted within the Council of Europe guarantee the right to life as well. Within the framework of regional international documents, the European Convention for the Protection of Human Rights and Freedoms[3] (1950) has a special significance for the protection of human freedoms and rights in

[3] Hereinafter: the Convention.

general, in Bosnia and Herzegovina in particular, with additional protocols adopted in the meantime. Based on the standards enshrined in the UN Universal Declaration of Human Rights, the member states of the Council of Europe, as the most numerous and important European, political and security regional organizations, in order to ensure universal and real recognition and respect for human rights, start from the goal of this organization - achieving greater unity between its members and the preservation and development of fundamental human rights and freedoms, and enact the Convention. In this way, the deep faith in the fundamental freedoms and human rights that are the foundation of justice and peace in the World and that are best maintained by real political democracy, i.e. common understanding and respect for human rights on which they depend, as common heritage of political traditions, ideals, freedoms and the rule of law, has again been confirmed.

The Convention is undoubtedly the most effective regional document for the protection of human rights. That power stems from two reasons. These are: a) a political compromise on its content that has successfully withstood the passage of time and many changes that have taken place in recent decades in Europe, and b) the establishment of the European Court of Human Rights with primary function of ensuring compliance with obligations undertaken by individual states – its signatories or, as the Convention calls them "the High Contracting Parties" with its protocols (Nadaždin Defterdarević, 2007: 224).

The rights and freedoms provided for in the Convention are directly applicable in Bosnia and Herzegovina. This document has priority over all other domestic laws, and courts and other bodies in their work are obliged to apply directly the provisions of this Convention, even in situations where the citizens themselves (individuals) do not refer its provisions. The constitutional provision on its direct applicability in the law of Bosnia and Herzegovina means its direct application, not only by the courts in Bosnia and Herzegovina, but also by all bodies and institutions dealing with the protection of human rights and fundamental freedoms guaranteed by this Convention. The Constitution of Bosnia and Herzegovina has taken over the entire catalog of human rights and freedoms guaranteed by the Convention. However, in addition to that, it emphasized the supremacy of this Convention in relation to all other laws. Moreover, the BiH Constitution emphasized its direct and immediate applicability (Sadiković, 2006: 26-28).

The first section of the Convention, entitled "Rights and Freedoms", establishes a system of international standards that ensure the effective protection of the most important human rights and freedoms (Emm Karekles, 2009: 94-97). Among these rights and freedoms, which have the greatest value for the effective securing of the position of the accused persons in criminal proceedings, the following rights stand out. These include, among

others (Carić, 2015: 248-252): a) the right to life (Article 2), b) the prohibition of torture (Article 3), c) the prohibition of slavery and forced labor (Article 4), d) the right to liberty and security (Article 5), etc. Article 53 of the Convention explicitly prescribes that nothing in this Convention shall be construed as limiting or derogating human rights and fundamental freedoms, which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

In the first section, entitled "Rights and Freedoms", in the first place, in the provision of Article 2, the Convention guarantees the "right to life". This is logical because without the exercise of this fundamental right, there is no possibility for a person to use any other right or other freedom guaranteed, both by international documents and by national legislation.

Everyone's right to life (Group of Authors, 2006: 67-72), in terms of Article 2 of the Convention, shall be protected by law, so that 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 contradictory to the Convention, therefore, shall not be considered unlawful and punishable (paragraph 2) when it results from the use of force which is no more than absolutely necessary: a) in defense of any person from unlawful violence (necessary defense or "the right to self-defense") , b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained (official authorization); and c) in action lawfully taken for the purpose of quelling a riot or insurrection (lawful authorization).

3. Criminal justice protection of life in Bosnia and Herzegovina

Of the four criminal laws applicable in Bosnia and Herzegovina today, three legal texts recognize the criminal justice protection of the right to life (entirely from birth to death) entitled "Criminal offenses against life and limb": a) the Criminal Code of the Federation of BiH[4] (CC FBiH) - Chapter Sixteen, b) the Criminal Code of the Brčko District of BiH[5] (CC BD BiH) - Chapter Sixteen, and c) the Criminal Code of the Republika Srpska[6] (CC RS) - Chapter Twelve.

[4] "Official Gazette of the Federation of Bosnia and Herzegovina" Nos. 36/2003, 37/2003, 21/2004, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014 and 75/2017.

[5] "Official Gazette of Brčko District of Bosnia and Herzegovina" Number 19/2020.

[6] "Official Gazette of the Republika Srpska" Nos. 64/2017, 104/2018, 15/2021 and 89/2021.

The life (which includes bodily - physical and psychological - mental integrity and health) of a human has always been a protective object. However, this criminal protection of the right to human life was not complete, nor was it equal for all, but was partial and fragmentary. Nevertheless, it can be said that the object of protection in these criminal offenses (blood crimes) is man as a living human being, i.e. his life (Đorđević, 2014: 9-17). The protection of life begins from the moment of a person's birth (end of labor) and lasts until the moment of his death (Petrović, Jovašević, Ferhatović, 2016: 367-371).

The act of committing criminal offenses of murder can be undertaken only against another person, but not against oneself, since suicide and self-harm are not characterized as criminal offenses. It can consist of a positive, active action (act of doing) or a negative, passive action (omission of doing, an act of not doing). In doing so, it can be undertaken by different means or in different ways, directly or indirectly (Đorđević, Đorđević, 2021: 129-130).

The perpetrator of criminal offenses against life can be any person, except for the criminal offense that is the subject matter of our presentation where the perpetrator is a certain person (*delicta propria*) - the mother of the child. In terms of the perpetrator's guilt, these offenses can be committed with intent or negligence (in which case there is a privileged – negligent causing of death, for which the word "murder" is not even used, but words "deprivation of life").

Criminal offenses against life are called murder because they occur as unlawful deprivation (taking) of life of another person or as causing the death of another person. It manifests itself as: a) basic (ordinary) murder, b) aggravated (qualified murder), and c) light (privileged) murder. Among the privileged forms of murder, by its nature, character and specifics, there is the murder of a child at birth (privileged murder), which is known in all modern criminal legislations.

4. Murder of a child at birth

4.1. Legislation of Bosnia and Herzegovina

Under the title "Murder of a child at birth", this privileged murder is known to the CC RS (Article 127), i.e. CC BD BiH (Article 166). The identical name of this crime is known in the legislations of other countries in the region: a) Serbia[7] (Article 116 of the CCS), b)

[7] "Official Gazette of the Republic of Serbia" Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

Montenegro[8] (Article 146 of the CC MN), and c) Northern Macedonia[9] (Article 127 of the CC NM).

Otherwise, the CC FBiH calls this offense "Infanticide" (Article 169). The term "infanticide" or "murder of a child" is commonly known in domestic and foreign legal theory. This term is also known in the Criminal Code of Slovenia – "Infanticide"[10] (Article 119). It is interesting that this criminal offense is not known today in the Criminal Code of Croatia[11], i.e. the Federal Republic of Germany[12].

This privileged murder exists when a mother takes the life of her child during childbirth or immediately after childbirth under the influence of a condition caused by childbirth. The CC FBiH envisages a slightly different manifestation of this offense, as the killing of a child by the mother during or immediately after childbirth, whereby this offense is characterized only by the time of taking the action of execution, but not the psychological state of the mother at the time when the offense was committed, which has been caused by very childbirth. On the other hand, the CC BDBiH envisages two privileged elements in the deprivation of a child's life by the mother: a) the time the offense was committed - during childbirth or immediately after childbirth, and b) the duration of the mother's disorder caused by childbirth.

It follows from the legal description of this offense that its specific features, which at the same time represent privileged elements, consist of: a) object of attack – a live-born child - or the right to birth of a conceived child, b) perpetrator is a person with special personal characteristics – mother of a born child, and c) time of taking the action of execution – during or immediately after the childbirth.

The object of the attack of this offense is a live-born child (the right to birth of a conceived person as a basic human right), regardless of whether he was capable, whether he has all

[8] "Official Gazette of the Republic of Monte Negro" Nos. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 42/2015, 58/2015, 44/2017, 49/2018 and 3/2020.

[9] "Official Gazette of the Republic of Macedonia" Nos. 37/96, 80/99, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 8272013, 14/2014, 27/2014, 28/2014, 28/2014, 41/2014, 115/2014 i 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 169/2016, 97/2017, 170/2017 and 248/2018.

[10] "Official Gazette of the Republic of Slovenia" Nos. 55/2008, 66/2008, 39/2009, 91/2011, 55/2014, 6/2016, 38/2016, 27/2017, 23/2020, 91/2020, 95/2021 and 186/2021.

[11] "Official Gazette of the Republic of Croatia" br. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019 and 84/2021.

[12] "Strafgesetzbuch – StGB was enacted in 1871 (RGBL.S.127): Strafgesetzbuch – StGB (2012). Deutcher Taschenbuch Verlag, München, 113-116.

physical characteristics, provided that the birth was completed according to medical science and practice. Otherwise, it may be another criminal offense (illegal termination of pregnancy).

The perpetrator of this specific criminal offense can only be the mother of a newborn who is in a special "state" (CC FBiH) or who has a "disorder" (CC RS and CC BDBiH). This disorder (condition) manifests itself in a greater or lesser state of physical or mental discomfort, pain, exhaustion and fear that childbirth entails. Other persons who possibly participate in undertaking the act of committing an offense (killing a child) are not responsible for this, but for another criminal offense of deprivation of life.

Identical solutions are provided by the legislations of Serbia and Montenegro. A specific solution is known in the legislation of: a) Northern Macedonia, where the commission of an offense is required in the following circumstances – "in a state of disorder caused by childbirth", and b) Slovenia, where the deprivation of life of a child was committed "immediately after birth while still under its influence".

Childbirth begins with pregnancy pains, rupture of the amniotic sac and rhythmic contractions of the uterus that push the baby to separate from the mother's body. When the condition (disorder) lasts after childbirth that was caused by it and when it is in a cause-and-effect relationship with labor, it is an issue that the court resolves based on the findings and opinion of a forensic psychiatrist in a particular case. In terms of guilt, the crime can only be committed with intent.

For this crime, according to all legal solutions in Bosnia and Herzegovina, the same punishment is prescribed – sentence of imprisonment for a term of one to five years (which guarantees the principle of equality of citizens before the law as a constitutional principle).

For the criminal offense of murder of a child at birth, the legislation of the countries of the region provides for different punishments: a) sentence of imprisonment for a term of six months to five years (Serbia, Montenegro), b) sentence of imprisonment for a term of three months to three years (Northern Macedonia), and c) sentence of imprisonment for up to three years (Slovenia). Of all the criminal legislations, only in Northern Macedonia punishment is explicitly provided for the attempt to commit this criminal offense (Article 127, paragraph 2). This punishment in other analyzed legislations arises from the general solution that an attempt to commit a criminal offense, for which prescribed sentence is

imprisonment for up to five years (or up to three years), is punishable even when it is not explicitly prescribed.

4.2. Comparative legislation

The murder of a child during childbirth under different names, with different content, description and characteristics, is also known in other modern criminal legislations in Europe.

The Criminal Code of Estonia[13] provides for the murder of a child at birth among criminal offenses against life (Article 116) (Merusk, Pilving, 2013: 392-395). This crime, for which a sentence of imprisonment for up to five years is prescribed (without specifying a special minimum), consists of the following privileged elements (Kerrkandberg, 2011: 276-280): a) the perpetrator can only be a specific person - mother, b) a passive subject is live-born perpetrator's child, c) the action of execution is undertaken with intent as a form of guilt, and d) the action of execution is undertaken at a certain time - during childbirth or immediately after birth (Lišvic, 2010: 356-358). Here, the legislator does not determine, as an element of the crime, that the perpetrator - mother is in a special state caused by childbirth. This means that the legislator assumes that every childbirth carries trauma for the mother, and that her behavior during or immediately after the childbirth should be privileged, even when she deprives her newborn child of life in such a state (Zapevalov, Mancev, 2001: 107-109).

The Criminal Code of Italy[14] provides for privileged murders in the system of criminal offenses against life (Aleo, Pica, 2012: 389-390). Privileged murder under Article 578 of the Criminal Code is infanticide "*Infanticido del consenziente*". The crime is committed by the mother who causes the death of her newborn immediately after his birth or fetus during birth or if the death of the newborn occurred due to his material and moral neglect (Fiorella, 2013: 489-492). This privileged murder is characterized by the following elements (Pagliaro, 2007: 223-225): a) the perpetrator can only be the mother, b) the passive subject or victim is alternatively defined as: a) the newborn - when the childbirth is complete, and b) the human fetus - when childbirth is still ongoing, c) the action of causing death is taken at a certain time (Padovani, 2012: 441-444).

[13] Karistusseadustik (Luhend Kar S) RT I 2001, 61, 364.

[14] Legge 10. Ottombre 1930. No. 1398. Testo coordinate ed aggiornate del Regio Decreto Legge 20.3.2016. No. 20 e 8.Marzo 2017. No. 24.

The law distinguishes between two points in time for taking an action of execution. These are (Pagliaro, 2016: 298-300): after the childbirth is over and while the childbirth is still ongoing, and the death of the newborn occurs due to special reasons (motives) of the mother - due to material and moral neglect of the newborn. It is important that these reasons exist on the mother's side during and after childbirth. At the same time, the law does not require for the existence of this crime any special "mental" state of mother that is caused by or in connection with childbirth (Caraccioli, 2005: 303-305). A sentence of imprisonment for a term from four to 12 years is prescribed.

For criminal political reasons, the law provided for the possibility of milder punishment (Mantovani, 2011: 178-180) of the perpetrator - the mother, if the action of causing death of a newborn or fetus was taken in order to save mother's life. When giving preference to one of the protected goods: a) a newborn or a fetus, or b) the life of the mother, the legislator took the position that even in such a case there is a criminal offense, but a milder punishment can be imposed. Therefore, here the "prevailing interest" is not a basis that excludes illegality of committed crime, but only a basis for mitigation of punishment. In this case, the perpetrator can be imposed a milder sentence in term of one to two thirds of the legally prescribed punishment (Group of authors, 2008: 403-405).

The Criminal Code of Latvia in Chapter XII entitled "Causing Death" recognizes several criminal offenses of murder (Lukashov, Sarkisova, 2001: 143-145). These acts emphasize "Murder of a child at birth" (Article 119). This crime is punishable by the sentence of imprisonment for up to five years (Clarita Pettai, Pettai, 2015: 316-318). The crime was committed by a mother who, during or immediately after childbirth, under the influence of caused psychological or physiological condition, deprives her newborn child of life (Pettai, Ziekinka, 2003: 398: 401).

The Criminal Code of Lithuania[15] in Chapter XVII "Crimes against life" prescribes criminal liability for the destruction of another person's life. The criminal offense of "Murder of a newborn" (Article 131) is also envisaged here (Piesliakas, 2008: 169-171). This crime is performed by a mother who kills her child during childbirth (Russel, Cohn, 2013). A sentence of imprisonment for up to five years is prescribed for this crime.

Article 149 of the Criminal Code of Poland[16] provides for a privileged murder called "Child Murder" (Andrejew, Swida, Wolter, 2012: 312-315). This crime, for which a

[15] Valstybės žinios No. VIII-1968.

[16] Kodeks karny 6. czerwca 1997., Dz. U z 1997., r. Nr 88. poz 553., Nr 240. poz. 1431 z 2012.

sentence of imprisonment for a term of three months to five years is threatened, consists of the following privileged elements (Himmetreich, Krumm, Staub, 2013: 367-369): a) the perpetrator can only be a specific person - the child's mother, b) action of deprivation of life is undertaken at a certain time - during childbirth, therefore, while the childbirth is still ongoing (not yet completed), c) the object of the attack is a live-born child, and d) at the time the action depriving a child of his life was taken, the mother should be in a special condition (psychological and/or physical), which is "under the influence", which is the result of the previous process of childbirth, (Lewandowski, 2001: 512-515).

In the Criminal Code of the Russian Federation[17] in Section Seven entitled "Crimes against the person", in Chapter XVI entitled "Crimes against human life and health" (Преступления против жизни и здоровья) prescribes the crime of "Killing by a mother of her newborn child" (Article 106) and sentence of imprisonment for a term of up to five years. The crime is committed by a mother who during or immediately after childbirth or in a mentally traumatizing situation or in a state of mental disorder that does not reach in sanity deprives her newborn child of life (Рарог, Есаков, Чучаев, Степалин, 2007: 211-214). The crime consists of the following privileged elements (Федосова, Скуратова, 2005: 76): a) the perpetrator of the crime can only be a specific person (criminal offense of a specific person or *delicta propria*) - the mother of a newborn. Only she can be privileged to take the life in this case, while all other persons (including the child's father) are responsible not for this, but for ordinary or aggravated murder, b) the passive subject can only be a specific person – a newborn child of the mother as the perpetrator, and c) the time of taking the action depriving the life of a newborn child (Федосова, Скуратова, 2005: 76-77).

The Code here distinguishes two situations depending on the time of taking the action of committing the crime. These are: 1) during or immediately after childbirth - when for the existence of this form of crime it is sufficient to determine that the action of execution was undertaken at a certain period of time - during or immediately after the childbirth. When there is a moment "immediately" it is a factual issue that the court resolves in each individual case on the basis of all objective and subjective circumstances, and 2) in a state of mentally traumatizing situation or mental disorder that does not exclude sanity (Рарог, 2008: 39-40). For the existence of this condition, it is necessary for the court to determine, on the basis of the findings and opinion of forensic psychiatric expert, that the mother (perpetrator of crime) was in a special mental state at the time of taking the action, which

[17] Российская газета No. 63/1996.

the Code calls "psychotraumatic situation" or "mental disorder" for which it is assumed to be in a cause-and-effect relationship with previously terminated childbirth. At the same time, these mental states of the mother must not be of such intensity and duration as to exclude sanity in the sense of Article 21 of the Criminal Code (Papor, 2008: 123-126).

Among the criminal offenses against life, the Criminal Code of the Slovak Republic[18] provides for an offense entitled "Vražda novonarodeného dieťaťa matkou" (Trestný zákon) or "child murder" (Ivor, 2011: 189-190). This offense is provided for in Article 146 of the Slovak Criminal Code (Samaš, Stiffel, Tomson, 2010: 289-291). The offense is committed by a mother who with intent (intentionally) kills her newborn child during or immediately after childbirth due to a mental disorder caused by the effects of childbirth. The offense consists of the following privileged elements (Madliak, Mencerova, 2006: 161-163): a) the perpetrator is the mother, b) the victim is the newborn child of the perpetrator, c) the mother undertakes the action of execution with intent, d) the mother undertakes the action of execution at a certain time - during or immediately after childbirth, and e) at the time of taking the action the mother is in a state of mental disorder that is caused (result of) by the effects of childbirth (Mencerova, 2013: 189-182). Prescribed sentence for this offense is imprisonment for a term of four to eight years.

The Criminal Code of the Swiss Confederation[19] in the Section one entitled "Crimes against life and health" provides for the criminal offense of murder (Totung) (Himmetriech, Krumm, Staub, 2013: 367-370). Article 116 of the Criminal Code provides for an old criminal offense called "Child Murder" or infanticide - *Kindestotung* (Серебренникова, 2002: 160). A sentence of imprisonment for a term of three years or a fine is prescribed for this offense. The offense (Donatsch, Wohners, 2004: 189-191) is committed by a mother who kills her child during childbirth or in the period after childbirth when she was under its influence (Watter, 2007: 278-279).

The Criminal Code of Ukraine[20] in the Chapter Two entitled "Criminal offenses against the life and health of a person" provides for basic, qualified and privileged forms of murder (Koržanskyi, 1997: 278-280). Privileged murder (Article 117) entitled "Intentional murder of a child at birth". Prescribed sentence for this offense is sentence of imprisonment for a term of up to five years. The offense is committed by a mother who

[18] Criminal code, Official gazette No.300/2005…No.224/2010.

[19] StGB, Schweizerisches Strafgesetzbuch, Aktuell geltende Fassung 2013, 7. Auflage, Zürich, 2013.

[20] Кримінальний кодекс України – Відомості Верховної Ради України, No. 25-26/2001…No.1492-VIII/2016.

intentionally (as a form of guilt) deprives her child of life during childbirth or immediately afterwards (Baulin, Borysov, Tiutiuhin, 2015: 89-91). This criminal offense is characterized by the following privileged elements (Kolavel, Thman, 2010: 417-420): a) the perpetrator is only the mother, b) the victim is a live-born child, and c) the act of deprivation of life is taken at a certain time - during childbirth or immediately after childbirth (Novrotskyi, 2010: 112,114).

5. Conclusion

On the basis of universal and regional international standards that guarantee universal protection of the right to life as one of the basic, fundamental human rights, modern criminal legislations, including the positive legislation of Bosnia and Herzegovina since 2003, recognize criminal offense of murder in their criminal systems. Depending on the circumstances under which the action of execution is undertaken, the manner or means used, the characteristics of the perpetrator or victim, the scope and intensity of the caused consequence, and the form of guilt of the perpetrator, there are: a) basic murder, b) aggravated, and c) light, privileged murders. All of them cause death (killing) or deprivation (taking) of life of another person.

A specific type of criminal offenses of murder are privileged offense for which certain legislations do not even use the word “murder” but killing or causing death, thus indicating a lower degree of severity and social danger, i.e. a milder form of guilt of the perpetrator. For the existence of these offenses, the laws require the existence of one or more privileged circumstances. Within the privileged forms of criminal offenses of murder, child murder (infanticide) or deprivation of life of a child at birth occurs.

With more or less similar legal solutions, this criminal offense is characterized by the following circumstances that give it a milder form of manifestation, for which the law prescribes a milder punishment than for ordinary murder (sentence of imprisonment for a term of up to three or five years – exceptionally, sentence of imprisonment for a term of four to 12 years – Italy, or sentence of imprisonment for a term of four to eight years – Slovakia, or a fine - Switzerland).

Regardless of the differences in the terminological definition of this offense, it is characterized by: a) the capacity of the perpetrator - the mother of a newborn child, b) the born child (provided that the birth is fully or partially completed), c) the time of taking the action of deprivation of life - during childbirth or immediately after childbirth, and d) the existence of a special “condition” or “disorder” on the part of the perpetrator, i.e.

"under the influence of psychological or physiological condition" (Latvia), "mental disorder" (Slovakia) or "condition under the influence of childbirth" (Switzerland) , regardless of whether it is a result, a consequence of birth.

The modern criminal legislation of Bosnia and Herzegovina also lies on these positions, envisaging this incrimination with the stated privileged characteristics.

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CHILDREN AS SUBJECTS OF THE CRIMINAL JUSTICE SYSTEM

The paper primarily deals with the term "child", with a special emphasis on the position of the child in the criminal justice system of the Republic of Serbia, starting from legal frameworks that guarantee the immediate application of the child's rights and the special protection of the child as a victim in criminal proceedings. Also, the paper deals with the position of children with delinquent behavior, with a statistical presentation of the representation of such acts in the previous period in the jurisdiction of the Higher Public Prosecutor's Office in Novi Pazar, with a brief overview of the criminal (ir)responsibility of children and its justification.

Keywords: *child, criminal procedure, criminal liability, the injured party, child delinquency.*

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INTRODUCTION

Children represent a particularly sensitive social category, which, considering the level of psychophysical maturity, requires special protection, position and rights, the regulation and immediate application, which is regulated by law. In the Republic of Serbia, the Constitution, as the highest legal act of the state, specifically guarantees certain rights and protection in relation to children, while over 80 positive legal regulations are relevant in this field, which indicates the enhanced protection of children in relation to other categories of society, which primarily stems from international legal acts, the implementation of which the Republic of Serbia has committed itself to.

The "special" position of the child is particularly expressed in the criminal law sphere, primarily because the basic and most important function of the criminal law is precisely the protective function, and the child as a protective subject represents a person who, due to his psychophysical (i)maturity, is in many situations more endangered than the elderly persons, and also expressed the social need to react more strictly to endangering or injuring the most sensitive age category, which is usually not capable of protecting itself. In this sense, in the following text of the paper, the position of the child as an injured party in criminal proceedings is discussed in detail.

On the other hand, the child as the perpetrator of the crime[1], due to the standardized age limit for bearing guilt in the sense of criminal law, is placed outside the framework of criminal responsibility, which represents the most significant "particularity" of the child's position in the criminal justice system, and, apart from the prescribed measures from the jurisdiction of the guardianship authorities, which affirm the principle of education in relation to punishment, a systemic response on such behavior of the child is completely absent. Although such a humanized approach towards children as perpetrators of criminal acts is, on the one hand, justified and conditionally standardized on the international legal scene, on the other hand, the question of the person injured by that act arises, as well as his position in which there is no responsibility for the damage caused to him by such an act. The fact that such an act is not considered a criminal act if it is committed by a child, and therefore the criminal justice system, in a procedural sense, does not recognize damaged side as a victim.

[1]This wording was used for the purpose of introductory explanation of the position of the child in the criminal justice system and to avoid burdening this part of the paper with conceptual clarifications, while in the following text it is explained that a child cannot commit a criminal offense, even in linguistic terms, but an illegal offense is defined as a criminal offense in the law.

In addition to the above, the specificity of the criminal justice system that concerns children is the prescribed mandatory specialization of professionals who come into contact with children during criminal proceedings, in which way the criminal justice system wants to protect the personality of the child from possible consequences that can be produced by the criminal proceedings themselves when a child is in the role of victim or witness.

THE TERM OF A CHILD

The term "child" was mentioned for the first time in some of the international documents by the League of Nations, namely in the Declaration on the Rights of the Child from 1924.[2] from which the very definition of the child was omitted, but some of the most basic rights of the child were exclusively mentioned, especially apostrophizing that humanity owes the child the best. For the first time, we meet the definition of a child in this sense with the adoption of the Convention on the Rights of the Child[3] adopted at the UN General Assembly on November 20, 1989.[4] where it is defined that a child is any human being who has not reached the age of eighteen, if, according to the law applies to a child, adulthood is not attained earlier. Therefore, in this way, the possibility was left for the national legislations to independently regulate the age limit of the child in more detail. Our legislation, in terms of the age limit, defines the term "child" differently, directly or indirectly, in different legal areas, in the sense of regulating the position and protection of the rights and personality of the child from the sphere of each legal area individually. Thus, the Constitution of the Republic of Serbia[5] does not contain a provision that precisely defines the age limit for defining the concept of a child, but from the provision of Article 37, which prescribes that majority is attained upon reaching the age of eighteen, it can be indirectly concluded that persons who are younger from the age of eighteen are considered children, which further leaves the possibility for laws, as acts of lower legal force, to define in that age frame what is meant by the term "child" in the areas they

[2] Geneva Decleration of the Rights of the Child, adopted 26 September 1924, League of Nations, https://www.un.documents.net/gdrc1924.htm (accessed 03.08. 2022.)

[3]See more in the paper Savić I., "30 years of the convention on the rights on the child - changing environment", *Yearbook human rights protection-protection of the right's of the child "30 years after the adoption of the convention on the rights of the child",* num. 2, Institute of Criminological and Sociological Research, Novi Sad, 2019, p.302.

[4] Law on Ratification of the United Nations Convention on the Rights of the Child, *Official Gazette FRY - International agreements*, No. 15/90, *Official Gazette of the FRY - International Agreements*, No. 4/96, 2/97.

[5] Constitution of the Republic of Serbia, Official Gazette of the RS, No. 98/2006, 115/2021.

regulate. The concept of a child is similarly regulated in the Family Law (hereinafter reffered to as FL) [6] in Article 11, paragraph 1, which stipulates that majority is attained upon reaching the age of eighteen, and again it can be indirectly concluded that all persons under the age of eighteen are considered children, especially bearing in mind that the law, when regulating rights and obligations in relation to the child's psychophysical maturity and abilities, and in relation to parents and third parties, also uses the term "child" in that age range. Criminal matters are more precise in this sense, so Criminal code[7] (hereinafter reffered to as CC) in Article 112, par. 8, 9 and 10 determined the meaning of the terms "child", "minor" and "minor person". According to the aforementioned provisions of the CC, a child is considered a person who has not reached the age of fourteen, a minor is a person who has reached the age of fourteen and not reached the age of eighteen, while a minor person is a person who has not reached the age of eighteen. Therefore, the term "minor" is a generic term for children and minors. These terms are mentioned in the very title of the Law on Juvenile Offenders and the Criminal Protection of juveniles[8] (hereinafter the Law on Juveniles), as well as in its content. Thus, Article 2 of the Law on Minors is dedicated to children - persons up to fourteen years of age, according to whom the possibility of imposing criminal sanctions is excluded, while Article 3 repeats the aforementioned definition of minors from the CC, but further minors are "divided" (classified) into younger minors (persons who have reached the age of fourteen at the time of the commission of the criminal act, but not yet reached the age of sixteen) and older minors (persons who have reached the age of sixteen at the time of the commission of the criminal act, but have not reached the age of eighteen).[9] When calculating years of age, the day, month and year of birth of a person are taken into account, as well as the day, month and year when he committed the act, whereby a certain number of years of age of a person ends with the passing of that day of the last year which, according to its number corresponds to the day of his birth".[10]In this sense, as stated in the decision of the Supreme Court of Serbia 39/93, "if a minor - a child committed a criminal offense on the

[6] Family Law, Official Gazette of the RS, No.18/2005, 72/2011 – other law, 6/2015.

[7] Criminal code, *Official Gazette of RS*, No. 85/2005, 88/2005 - cor., 107/2005 - cor., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

[8] Law on juvenile offenders and criminal protection of minors, Official Gazette of the RS, no. 85/2005.

[9] The aforementioned Article 3 of the Law on Minors also defines the concept of a younger adult, but that category of persons is not the subject of this paper. By the way, FL also uses the terms younger minor and older minor, but in a different meaning compared to the criminal legislation. According to the FL, a younger minor is a child who has not reached the age of 14, while an older minor is a child who has reached the age of 14 (Article 64, paragraphs 1 and 2 of the FL).

[10] Drakić D. On the criminal responsibility of minors, Izdavačka knjizarnica Zoran Stojanović, Sremski Karlovci-Novi Sad, 2010, p. 22.

day of his fourteenth birthday, the proceedings against him should be suspended",[11] which means that such a person on the day of his the fourteenth birthday is considered a child.

The above points to the need to adopt a law (the Law on the Rights of the Child is being prepared) which will define the concept of a child, which will be generally accepted at the level of national legislation.

THE CONSTITUTION AS A CROWN GUARANTEE OF THE CHILD'S RIGHTS

The Constitution of the Republic of Serbia was adopted at a republican referendum held on November 28 and 29, 2006 and promulgated by a decision of the National Assembly adopted on November 8, 2006. As we have already mentioned, the Constitution does not specify a clear age limit that refers to the definition of the concept of a child, but by interpreting the provisions of Art. 37, which prescribes that majority is attained at the age of 18, can indirectly conclude that all persons under the age of 18 are considered children. We believe that precisely the lack of a precise definition of the concept of a child in the Constitution of the Republic of Serbia led to the fact that our legislature did not adopt a universally valid concept of a child, so different laws use different age limits that refer to children. On the other hand, the current Constitution from 2006, with a special Article 64 entitled "Child's Rights", for the first time in the history of constitutional law, singled out and grouped the special rights of children, guaranteeing their immediate application. Namely, Article 64 stipulates that children enjoy human rights appropriate to their age and mental maturity, that every child has the right to a personal name, registration in the birth register, the right to know their origin and the right to preserve their identity, and that children born out of wedlock have the same rights as children born in wedlock. Also, in addition to the rights of the child, this article also stipulates that children are protected from psychological, physical, economic and any other exploitation or abuse.

In addition to the aforementioned article, the Constitution of the Republic of Serbia guarantees special rights to children in various spheres of life in other articles, so Article 66, which refers to the special protection of the family, mother, single parent and child, prescribes that the child in the Republic of Serbia enjoys special protection in accordance with the law, that special protection is provided to children who are not cared for by their parents and to children who are impaired in mental or physical development, and that

[11] Perić O. Commentary on the Law on Juvenile Offenders and Criminal Protection of Juveniles, Official Gazette, Belgrade, 2005, p. 22.

children under the age of 15 cannot be employed, nor, if they are under the age of 18, they cannot work in jobs harmful to their health or morals. Article 68, which regulates health care, prescribes, in terms of children's rights, that children receive health care from public revenues, if they do not receive it in another way, in accordance with the law.

The last paragraph of Article 64 of the Constitution of the Republic of Serbia stipulates that the rights of the children and their protection are regulated by law; however, to date the Law on the Rights of the Child has not been adopted.

CAN A CHILD BE 'GUILTY'?

Pursuant to Article 112. 8 of the CL, a child is a person who has not reached the age of fourteen. A child can exhibit various forms of delinquent behavior, i.e. violations of legal or misdemeanor norms, but it is a generally accepted standard that a child which is fourteen[12] years old is socially, emotionally and intellectually immature, and therefore incapable of taking responsibility for their actions.

The Criminal Code already stipulates in its basic provisions that criminal sanctions cannot be imposed on a person who was under fourteen years of age at the time the crime was committed (Article 4, Paragraph 3 of the Criminal Code). However, the question of the capacity to bear the guilt of a person under the age of fourteen relies on the elementary construction of the criminal act itself.

Namely, for an act to be a criminal act, the following conditions must be met cumulatively (Article 14 of the CC):

1. that there is human action;
2. that it is prescribed by law as a criminal offense;
3. that it is illegal;
4. that there is guilt in relation to the act

[12] In comparative law, it can be noted that the age limit for the capacity to bear guilt ranges from seven to eighteen years, and that in some states it is absolute and in others it is relative in nature. In the Republic of Serbia, as mentioned, the age limit of fourteen years is prescribed and it is of an absolute character, i.e. it is taken as an established age limit and it is not approached to examine and determine the degree of maturity of the child in each specific case.

When determining whether a criminal offense has been committed, one must go through all four elements, in the order in which the legislator positioned them, with the first three elements representing objective elements, while the fourth element, the perpetrator's guilt, represents a subjective element and without it one act cannot be considered a criminal act in its full objective-subjective conception. When determining whether an act is a criminal act, in the event that the perpetrator is a person under the age of fourteen, the first three elements could hypothetically be fulfilled, i.e. that there is an act of a man, that the act is prescribed by law as a blood act and that the act is illegal, that is, there would be an act in an incomplete, objective sense. However, for the existence of a criminal offense, it is necessary to establish the guilt of the perpetrator. Guilt as a subjective element of a criminal offense is lacking in children because they have not reached the necessary level of maturity. In order to understand the child's inability to bear the blame for his actions, we will look at the very elements of guilt in the criminal sense. The elements of guilt are reasonableness, intent (or negligence when provided for by law) and awareness of the prohibition of one's act. If each element is considered individually in its essence, it cannot be stated as a general conclusion that children are insane, nor that they always act without intention, that is, negligence where the negligent form of the crime is also prescribed, nor that they are not aware of the prohibition in any case. In the sense of the above, it is an acceptable opinion that setting an irrefutable assumption that children are the perpetrators of a criminal offense, i.e. an offense that by its features corresponds to a criminal offense, automatically by not having reached a certain age, is not justified, and it is not even possible. In the same way, it cannot be argued that children, due to their age, are not aware of the prohibition of their actions, given that acts such as theft or murder are also known as prohibited acts to the population under 14 years of age, given their pronounced character of unacceptable social behavior. In this sense, it can be concluded that the rules that are valid for determining the guilt of persons over the age of fourteen, which are reduced to the examination of the existence of the necessary elements of guilt, do not apply to perpetrators who are younger than the age of fourteen, considering that in that case it is not even approached in determining the existence of guilt, their inability to bear guilt is assumed considering the legally prescribed age limit, which is accepted in our criminal justice system as the limit of a person's complete psychological immaturity.[13]

[13] In this connection, prof. Vuković points out that "apart from insanity, a person can be incapable of guilt on the basis of insufficient maturity", and that in our law persons who have not reached the age of 14, i.e. towards the children, "according to the irrefutable legal presumption" it is impossible to impose any criminal sanctions. Vuković I. Criminal law - general part, Faculty of Law, University of Belgrade, Belgrade, 2021, p. 232.

Also, although the law stipulates that no sanction can be imposed on persons under the age of fourteen, it clearly follows from this that no criminal proceedings can be conducted against these persons either, because the imposition of a criminal sanction is the final outcome of criminal proceedings and only the conduct of criminal proceedings without the possibility of possibly imposing a sanction would be pointless.

From the above, it follows that in the sense of criminal law "a child cannot be guilty", and although this linguistic formulation indicates that the child, as the perpetrator of an act corresponding to a criminal act, lacks the element of guilt as a mandatory element of a criminal act, fundamentally, we consider it more correct to conclude that a child, due to his immaturity[14] is incapable of bearing guilt.

In misdemeanor proceedings, as well as in criminal proceedings, no misdemeanor proceedings may be conducted against a minor who was under fourteen years of age at the time he committed the offense (Art. 71, paragraph 1 of the Law on Misdemeanors)[15], and if during the proceedings it is established that the minor was under 14 years of age at the time of the misdemeanor, the misdemeanor proceedings will be suspended (Art. 299 of the Law on Misdemeanors). Although the Criminal Code binds the age limit to the impossibility of imposing criminal sanctions, and the Law on Misdemeanors sets the age limit in relation to the possibility of conducting misdemeanor proceedings, it is essentially the same, that is, persons under the age of fourteen are excluded from the scope of responsibility by the criminal and misdemeanor legislation. However, unlike criminal legislation, the Law on Misdemeanors regulates parental responsibility, that is, the responsibility of the adoptive parent or guardian of a child for a misdemeanor (Article 72 of the Law on Misdemeanors). In paragraph 1 of the aforementioned article, it is foreseen that when a child commits a misdemeanor (a person under the age of 14 in the sense of the Law on Misdemeanors) for failing the supervision of the parents, adoptive parents, or guardians, and these persons were able to perform such supervision , the parent, adoptive parent or guardian of the child shall be punished for the offense as if they had committed

[14] That's how Prof. Škulić states: "Such perpetrators simply lack a certain age as a completely objective fact that does not need to be evaluated and explained in any way in a qualitative sense." It is a purely objective and quantitative criterion. A person who was not fourteen years old at the time of committing the act may be individually extremely mature and intelligent, meet all the necessary conditions that formally relate to intellectual and volitional capacity, but he cannot be guilty, because he simply does not have the appropriate age." Škulić M ., op.cit., p. 25.

[15] Law on Misdemeanors, Official Gazette of the RS, no. 65/2013, 13/2016, 98/2016 - CC decision, 91/2019, 91/2019 – oth.law.

it themselves. The possibility of performing parental, adoptive, or guardian duties is determined in each specific case.

In the theory, there are opinions that this way of regulating the misdemeanor liability of parents for misdemeanors committed by their child "is, in fact, objective misdemeanor liability", because the liability is based "on the fact that the parent is not punished for the misdemeanor of failing to supervise properly, but is punished as if committed the offense himself".[16]Also, the Law on Misdemeanors (Article 72, Paragraph 2) provides that the law may stipulate that the parents, adoptive parents, guardian, or foster parent of a minor between the ages of fourteen and eighteen will be held responsible for a misdemeanor committed by a minor if it is committed a misdemeanor resulting from failure to supervise a minor, and they were able to exercise such supervision. Therefore, this responsibility must be specifically provided for in the law[17]. In this case, there is a departure from the principle of guilt (individual subjective responsibility),[18] because in addition to the minor as the active and ″responsible″ subject of the offense, his parents, adoptive parent, guardian, or foster parent are also punished for the offense".[19] Otherwise, in addition to parents, adoptive parents, guardians or foster parents, the law may stipulate that other persons who are required to supervise the minor who committed the offense will also be held responsible for minor offenses (Article 72, paragraph 3 of the Law on Misdemeanors).

CHILDREN IN CONFLICT WITH THE LAW

In recent times, due to a number of factors of the modern age, and above all due to easy and uncontrolled access to multimedia content with elements of violence and aggression and the appearance of the virtual platform of social networks, which is often misused and has a negative impact on minors, there has been an increase in juvenile delinquency and

[16] Ristivojević B., Milić I., "Liability of parents for offenses committed by their offspring", Annals of the Faculty of Law in Belgrade, no. 1/2016, p. 160-161.

[17] Law on road traffic safety (Official Gazette of RS, No. 41/2009, 53/2010, 101/2011, 32/2013 - decision of the US, 55/2014, 96/2015 - other law, 9/2016 - decision of the US , 24/2018, 41/2018, 41/2018 - other laws, 87/2018, 23/2019 and 128/2020 - other laws) stipulates that if a child commits a violation of road traffic safety regulations, he will be fined prescribed for the offense committed by the parent, adoptive parent, or guardian of the child, as if he had committed the offense himself, if the offense was committed due to the failure of due supervision. However, if a protective measure, i.e. penalty points, is to be imposed on a parent, adopter, or guardian for a specific offense, they will not be imposed.

[18] Ristivojević B. Milić I., op.cit., p. 161. Ćorović E., Misdemeanor Law (according to the Law on Misdemeanors from 2013) - authorized lectures, Novi Pazar, 2015, p. 17, retrieved from: http://www.dunp.np.ac.rs/wp-content/uploads/2018/12/18.pdf (accessed on September 14, 2022).

[19] Ђоровић Е., *op.cit*., 17.

that with pronounced elements of brutality and aggressiveness. However, children, i.e. persons under the age of fourteen, remain outside the scope of any responsibility for their actions, while persons between the ages of fourteen and eighteen can be held accountable but in a special procedure that is of a protective nature in relation to the perpetrator and is more aimed at providing assistance to the perpetrator to leave the delinquent model of behavior, but towards punishment or sanctioning of the same for the act he committed.

However, although the position of the child as the perpetrator of an illegal act is humanized in the criminal procedure, which is defined as a criminal act in the law and, in layman's terms, such illegal behavior is "forgiven", the question arises of the position of the injured party and the absence of his satisfaction that the perpetrator of the act bears the sanction for the "damage" he suffered.

In this sense, we believe that there is a need to especially intensify the formal action of the relevant institutions on the prevention of child delinquency (special and general prevention)[20]. Practice has shown that, in our environment, the investigative body is most present in individual or special prevention, that is, when the goal of preventive action is the social and family-legal protection of juvenile offenders, resocialization and prevention of recidivism. Family legal protection is particularly related to the population of children who commit criminal acts, and in this sense, the forms of family law measures that can be applied in relation to child perpetrators of criminal acts and their families (parents) are: supervision over the exercise of parental rights, deprivation of parental rights, foster care and custody of the child[21].

There are several opinions and positions on the most appropriate way to respond to the increase in child delinquency. Thus, in theory, advocates of the idea that it is necessary to lower the lower limit of criminal responsibility are appearing more and more. However, this idea has been criticized for the reason that it is not popular to change the age limit for criminal responsibility, especially bearing in mind that international conventions on protecting the rights of children insist that the lower age limit for criminal responsibility

[20] More about that is in the paper Kambovski V. "Open questions of building a new concept of justice for children", Yearbook human rights protection-protection of the right's of the child "30 years after the adoption of the convention on the rights of the child", num. 2, Institute of Criminological and Sociological Research, Novi Sad, 2019, p.12.

[21] Jugović A., Brkić M., "Social protection and prevention of juvenile delinquency: roles, controversies and good practices", Faculty of Political Sciences - Yearbook, no. 2010, p. 438-439.

be set as high as possible and clearly established[22], so frequent changes to it, especially descending it, in that sense would not be popular.

On the other hand, there are models of countries that have introduced the "criminal responsibility" of parents for the actions of their children, given that it is considered that due to insufficient parental involvement and responsible upbringing of the child, the child, as intellectually immature, committed an illegal act and that the sanction should be borne by the child's parents. This model is justified precisely in the fact that the injured party also deserves some kind of satisfaction of justice, and in the trend of a child protection, the system sanctions parents as responsible persons for the child's actions. Criticisms of this model are reflected in the unacceptability of the position that parents are necessarily and without exception responsible for the actions of their children, given that, in addition to "home upbringing", there are other factors beyond the parents' control that can also affect them, i.e. insufficient commitment of parents can be due to reasons which the parent cannot influence (illness, poverty, etc.) [23].

[22] In particular, the UN Convention on the Rights of the Child imposes an obligation on the signatory states to establish the lowest age limit below which children cannot be considered criminally responsible (Article 40, Paragraph 3, Item a).

[23] As stated in the previous text, in domestic law, the Law on Misdemeanors established misdemeanor liability for parents, adoptive parents or guardians of a child, when the child committed a misdemeanor due to neglecting the duty of supervision of the parents, adoptive parents, or guardians, and these persons were able to supervise, while in criminal law such responsibility does not exist. However, in our criminal law, the criminal responsibility of parents for the activities of their children could be established based on the rules on criminal acts of omission. In this sense, in the judgment of the District Court in Belgrade Kž. 1578/93 of 26.11.1993. on the occasion of the judgment of the Municipal Court in Obrenovac K. 376/92 of May 25, 1993. year, it says: "As a general dangerous tool that causes danger to people's bodies, the air rifle that the defendant gives to a minor twelve-year-old who shows it to his friends at his birthday party, where it causes a fire, then the devil hits one of the minors in the eye, which causes blindness eye, and the basic criminal offense turns into a criminal offense from Article 194 paragraph. 3 in connection with Article 187 paragraph 4 in connection with paragraph 1 of the Criminal Code". This example is explained in the literature as follows: "In this example, it is, in fact, about the commission of a criminal offense through inaction." Namely, the perpetrator, contrary to the provisions of the Law on Weapons and Ammunition (ZOOM), made an air rifle available to his child. According to the provisions of this Law, it is forbidden to give weapons to others in service (Article 14) and the obligation of the owners to store weapons in a way that prevents others from getting into their possession is established.

of the same (Art. 12). In addition, there was a diabola in the air rifle. In this way, a dangerous situation was created. In addition to not complying with the aforementioned legal provisions, the perpetrator failed to supervise the child's behavior. If he had supervised his behavior, he could have turned the barrel of the gun in a direction that would not endanger the lives and bodies of others." See: Ćorović E., Criminal offense of causing danger, State University in Novi Pazar - SVEN, Novi Pazar - Niš, 2009, p. 95. Note: the numbers from the quoted part of the decision and text refer to the previous Criminal Code and the previous Law on Weapons and Ammunition. Also, if a person were to use a child to commit an illegal act that is defined as criminal by law, there would be his liability as an accomplice due to, as it is pointed out, the theory of limited accessory, with the fact that in some cases it could also be about indirect enforcement .See: Vuković I., op.cit., p. 233.

Criminal law, precisely starting from all the specifics related to the developmental psychophysical level of a person who has not reached the age of 14, very carefully approaches the treatment of it, which are first reflected in terminological definitions and then in every other aspect. Namely, the language of criminal law does not under any circumstances classify a child under the term "defendant", which is a general name for the accused, suspect, accused and convicted, and a child cannot even in the conceptual sense commit a "criminal act". In the sense of the above, the Law on Minors in relation to an act committed by a child uses the term "illegal act, defined in the law as a criminal act", that is, an act committed by a child does not formally represent a criminal act.

Based on the aforementioned fact that the law prescribes that no sanction can be imposed on persons under the age of fourteen, and that no criminal proceedings can be conducted against those persons, the question arises as to what happens to the proceedings, i.e. reports in which children are in conflict with the law. Article 182 of 1. point. 2. The Code of Criminal Procedure stipulates that the public prosecutor will dismiss the criminal complaint by decision if it follows from the complaint itself that there are circumstances that permanently exclude criminal prosecution. The fact that it is a child, that is, that the perpetrator has not reached the age of 14, is considered to be one of those circumstances that permanently exclude criminal prosecution.

Looking at the total statistics of reports filed against minors, it cannot be said that out of that number, an insignificant number of reports were filed against persons under the age of 14. Namely, for the purposes of this paper, it was determined that in the territory of the High Public Prosecutor's Office in Novi Pazar in the previous period (2017-2021), of the total number of criminal charges filed against juvenile offenders, almost 10 percent of criminal charges were filed against persons who were under the age of 14 at the time of the crime. More about the total number of reports where children are reported, classified by criminal offenses and age, is in the table below.

Year/ca	2017	2018	2019	2020	2021
crimes against life and body	1	2	1	0	2
crimes against property	6	2	7	8	3
criminal acts against public order	14	9	6	0	3
other	0	0	1	0	0

Total number of reports against children	**21**	**13**	**15**	**8**	**8**
Total charges against minors	180	134	209	123	134

Table 1: Tabular representation of the ratio of guilty pleas filed against children with the total number of criminal reports against minors, classified by age and crimes within the jurisdiction of the HPO in Novi Pazar.

Analyzing the above statistics, it is evident that it can be concluded that in the previous five years there has been a noticeable decrease in the number of reports filed against persons who have not reached the age of 14, however, this statistic should not be accepted as a decrease in the crime rate for one reason. Namely, due to the fact that proceedings cannot be conducted against these persons, the practice of acting public prosecutors has recently become established to submit notifications about acts committed by children to guardianship authorities in order to take measures within their competence, so that a large number of these notifications, that is, the reports are not taken to the prosecutor's office.

In this sense, it should be noted that social protection institutions, specifically centers for social work, play a key, if not exclusive role in the system of formal social reaction to child delinquency.

CHILDREN IN THE POSITION OF DAMAGED IN THE SENSE OF CRIMINAL LAW

The concept of injured party in our positive law in the sense of criminal law is regulated by the provisions of Article 2, paragraph 1, item 11 of the Code of Criminal Procedure[24] (hereinafter referred to as the CPC), which defines that the injured party is a person whose personal or property rights have been violated or endangered by a criminal act . Personal rights primarily mean the right to life, mental and physical integrity, personal dignity, freedom and security, legal certainty, equal legal protection, freedom of movement, expression, as well as rights related to the right to work, marriage and others personal rights. Property rights include, among other things, real and property rights, but also property copyrights and rights to compensation for damages. As previously stated, in order for someone to be considered injured in the criminal law sense, it is necessary that any of the mentioned rights have been violated or threatened by a criminal act.

[24] Criminal Procedure Code, Official Gazette of the RS, no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - US decision, 62/2021 - CC decision).

The participation of the injured party in the procedure is regulated by provisions that prescribe what rights the injured party has during the procedure, so Art. 50 of the Code of Criminal Procedure, it is stated in detail what rights the injured party has, and among other things, it is stated that the injured party has the right to submit a proposal and evidence for the realization of a property claim and to propose temporary measures for its security, to point out the facts and to propose evidence which are important for the subject of proof, to review the files and look at the cases, be informed about the rejection of the criminal charge or the waiver of criminal prosecution, be instructed about the possibilities of taking over the criminal prosecution and representing the prosecution, attend the hearings, file an appeal for certain reasons, as well as other rights given to him in the procedure.

All of the above generally refers to the rights of the injured party, without questioning whether the injured party is an adult or a minor, i.e. a child, with the fact that Article 56 of the CPC regulates that, if the injured party is a minor, it is his legal representative authorized to make all statements and undertake all actions to which the injured party is authorized by law. Also, the legal representative, just like the injured party, is given the right to take over all these actions through an attorney, with the fact that the attorney must always be a lawyer.

Respecting certain specificities of this category of injured parties, there are special procedural rules on the protection of minors, i.e. children as injured parties in criminal proceedings, which can be grouped into several basic normative segments:

- The rule of mandatory specialization of all official actors of such criminal proceedings;
- The principle of minimizing secondary victimization;
- Application of special rules for hearing minor victims;
- Prohibition of confrontation in order to prevent secondary victimization;
- Obligatory legal representation of the minor victim;
- Special recognition rules;
- The fundamental urgency of such criminal proceedings[25]

[25] M. Škulić "Protection of children/minors as victims and witnesses in criminal proceedings", In: Group of authors, Protection of child victims and witnesses of criminal acts, IMG, 2014, p. 47.

As stated in the previous lines, a person whose personal or property right has been violated or threatened by a criminal act is considered to be the injured party in the criminal law sense. However, all those consequences, which should first of all be considered the consequences of the primary victimization of the injured party, should be distinguished from the consequences that arise from the secondary victimization of the child as a victim in the proceedings. There are different definitions of secondary victimization, but what they all have in common is that secondary victimization is considered to be an aggravation of primary victimization through a negative, i.e. wrong or inappropriate reaction of the competent authorities. In order to prevent or minimize secondary victimization, based on comparative rights and numerous international conventions, our legislator introduced special provisions on the protection of minors as victims in criminal proceedings in the third part of the Law on Minors. Due to the fact that secondary victimization should be seen as a complex and serious problem, the legislator prescribed that the panel presided over by the judge, the acting public prosecutor, as well as the officials of the internal affairs bodies must have special knowledge in the field of children's rights and the criminal protection of minors.

Also, due to the fact that, by definition, certain criminal acts represent characteristic criminal acts that cause a high degree of secondary victimization, the legislator in Article 150 of the Law on Juvenile Offenders and Criminal Protection of Minors enumerated criminal acts in which the victim in the proceedings has special protection rights. This primarily refers to the special protection of minors, and therefore also children, where they appear as victims of crimes against life and body (serious murder and grievous bodily harm), crimes against freedom and rights (kidnapping), criminal acts against sexual freedom (rape, abuse of a vulnerable person, abuse of a child, abuse of position, illicit sexual acts, pimping and facilitating sexual intercourse, mediation in prostitution, showing, obtaining and possessing pornographic material and exploiting a minor for pornography), crimes against marriage and family (extramarital union with a minor, abduction of a minor, change of family status, neglect and abuse of a minor, domestic violence, incest) crimes against property (theft, robbery, extortion), crimes against health people (enabling the enjoyment of narcotic drugs) and crimes against humanity and other goods for protected by international law (war crimes against the civilian population, trafficking in human beings, trafficking in children for the purpose of adoption, establishing a slave relationship and transporting persons in a slave relationship).

Respecting the general rule of prevention, i.e. minimizing secondary victimization, the public prosecutor, the judge and the judges in the council must take into account the age of the injured party, his personal characteristics, education and the circumstances in which

he lives, all for the reason of avoiding possible harmful consequences of the procedure for his personality and development . In this sense, it is prescribed that the examination of minors is carried out with the help of a psychologist, pedagogue or other expert. This is a norm of an instructive nature, so that the possible questioning of a minor in the absence of these persons does not lead to a loss of evidentiary credibility. Special attention is focused on the position of a minor who is being questioned as a witness and who has been harmed by one of the criminal acts referred to in Article 150 of the Law on Minors, where it is prescribed that the questioning can be conducted a maximum of two times, and only exceptionally more times only for the purpose of the procedure. In view of the development of technology, it is a general recommendation that, given the particularities of the criminal offense and the characteristics of a minor, that person is examined using technical instruments for sound and image transmission, without the presence of other parties and other participants in the proceedings. If the acting judge so determines, then the questioning will be conducted so that the minor will stay in a separate room, the parties and other persons who have the right to do so, will ask him questions exclusively through a judge, psychologist, pedagogue, social worker or other expert. This method of questioning can also be carried out if a minor is questioned in the capacity of a victim-witness in his apartment or another room. In any case, his testimony will always be read at the main trial, that is, the recording of the interrogation will be played. Minors, that is, children who are victims of crimes against sexual freedom, have a special need for this type of protection. Namely, this is where the vulnerability of these people comes to the fore because, in principle, it is about people who do not want to face the injured party, so as not to relive that emotional suffering, in the form of a feeling of helplessness, exposure, and ultimately shame.

As for the rules for examining witnesses at the main trial, Article 402 of the CPC, paragraph 5, lists three types of witness examination, namely: basic, cross-examination and additional witness examination. While in the basic and additional examination, by the nature of things, no major problems are expected in the examination of minors, that is, children, the possibility of cross-examination opens up the field of numerous inconveniences for this category of witnesses. Cross-examination of witnesses is the examination of witnesses undertaken by the party after the basic examination and, according to the logic of the matter, is aimed at refuting parts of the statements obtained during the basic examination In contrast to the basic and additional examination, in cross-examination it is allowed to ask leading questions, and this is because the legislator in Article 98, paragraph 3 of the CPC, which regulates the general rules of witness examination, prescribed that the witness may not be asked questions that lead him to the

answer, except when it comes to cross-examination. Therefore, without entering at this moment into whether it is justified or not, given the possibility, to introduce cross-examination of witnesses into our criminal proceedings, we still find that the legislator had to somehow limit the possibility of cross-examination of minors, especially children who are injured. First of all, it is a well-known fact that children are particularly susceptible to suggestion, so this way of questioning, apart from the fact that it can be very unpleasant, can also lead to the question of the credibility of the statement itself. True, by introducing the status of a particularly sensitive witness[26] the legislator in some way tried to provide special protection for the personality, physical and mental state of the witness, and set certain rules in the examination of these witnesses, however, we are of the opinion that by leaving the possibility that this category of witness can be asked suggestive questions, an omission is made because it can lead to their subsequent traumatization. This is because a child, who is by nature sensitive to suggestive influences, appears in the role of a witness - the injured party, and who, by the nature of the proceedings, would be proposed by the public prosecutor who would conduct the basic examination, and where after that the defense attorney and the defendant would be given the opportunity to traumatize the child additionaly with suggestive questions. Precisely considering that when standardizing the possibility of cross-examination, the legislator failed to limit this type of examination to a certain category of witnesses, we are of the opinion that in some future period, through changes in the law or new legal solutions, it would be necessary to completely prohibit the possibility of asking suggestive questions, if not to all minors, then most certainly to the children.[27]

As one of the special types of protection of minors, and above all children, the legislator prescribed that if a minor is examined as a witness who is particularly sensitive due to the nature of the criminal act, its consequences or other circumstances, that is, if he is in a particularly difficult mental state, then it is forbidden to confront him and the defendant. Given that the confrontation as an evidentiary action most often involves the presentation

[26] The authority of the procedure may ex officio, at the request of the parties but also at the request of the witness himself, pass a decision on a particularly sensitive witness for a person who, considering the age, life experience, way of life, gender, state of health, nature, method or consequences of the commission of the criminal act, as well as other circumstances that indicate that this is a particularly sensitive person. In that case, questions can be asked to a particularly sensitive witness exclusively through the procedure body, treating him with special attention, if necessary with the help of a psychologist, social worker or another expert, and this witness can also be questioned using technical techniques. means, and all this in order to avoid the harmful consequences of the criminal procedure for the personality, physical and mental state of the witness. (Article 103 and 104 of the CPC)

[27]More about that is in the paper M. Škulić, "The principle of publicity and the protection of privacy in criminal proceedings", Conference papers International Scientific Conference "Freedom, security: The right to privacy", Novi Sad, 2017, p.250,

of statements already given, as well as that it is often of a conflicting nature, it can be said that as such it does not have any special significance in the procedure. In addition, the negative consequences of the confrontation in the sense of creating a "new conflict" between the defendant and the child as the victim, can definitely influence the strengthening of secondary, and in this case even the creation of tertiary victimization, and therefore the prohibition of confronting the defendant and this category of minors is very justified.

Also, the special rules of criminal proceedings from Article 150 of the Law on juvenile perpetrators of criminal offenses and the criminal protection of minors are reflected in the fact that a minor as the injured party must have an attorney starting from the first examination. In the event that a minor as the injured party does not have a representative, then the representative will be appointed from among lawyers who have acquired special knowledge in the field of children's rights and criminal legal protection of minors. Although the legislator's intention to protect minors in this way is fully justified, two debatable issues arise with such a technically unclear provision. The first debatable issue is whether the attorney chosen by the minor, i.e. his legal representative, must possess special knowledge in the field of children's rights and the criminal protection of minors, or whether only the attorney appointed by the president of the court must possess this. If we interpret this norm strictly linguistically, then this is definitely not set as a condition for the chosen defender, which can be justified by the freedom of will of the minor himself, that is, his legal representatives when choosing a representative. Otherwise, if it were to be interpreted in such a way that the attorney must also have special knowledge in the field of children's rights and the criminal law protection of minors, it could eventually lead to a situation where the procedural body prevents the minor, i.e. his legal representative, from making a free choice, which would could be interpreted as counterproductive in gaining trust among minors. Another debatable issue is that a minor must have an attorney from the first hearing of the defendant. Namely, it is unclear what the legislator meant by the term "from", that is, whether the legislator meant that a minor as the injured party must have an attorney before the hearing of the defendant begins, or he will have to have an attorney only after the hearing of the defendant is completed, and secondly, considering that the injured party as well as his attorney, according to the general provisions of the criminal procedure, do not have the right to attend the first hearing of the defendant. Nevertheless, this provision "from the hearing" should be interpreted in the sense that a minor must have a representative even before the first hearing, as this would enable an even more favorable position for this category of injured

parties, regardless of the fact that the representative does not have the right to attend the hearing.

In the end, the legislator also saw the need to provide special protection to injured minors during identification, by obliging the court, as well as all the authorities that carry out this evidentiary action, to act especially carefully, i.e. in a way that completely prevent the defendant from seeing this minor.

THE SPECIAL ROLE OF THE PROSECUTOR'S OFFICE IN THE AIM OF CHILD PROTECTION

By ratifying the Convention on the Rights of the Child, the Republic of Serbia undertook to take care of its realization, i.e. to protect children's rights and to improve the position of children. In this sense, the obligation to provide the minor with such protection and care as is necessary for the realization of his well-being, taking into account the rights and obligations of his parents, legal guardians or other individuals who are legally responsible for this purpose, includes all legislative and administrative measures. However, in order to achieve this, states must ensure that all institutions, establishments and services responsible for the care or protection of minors adapt to the standards established by the competent authorities.

Considering the fact that the public prosecutor's office is an independent state body that prosecutes perpetrators of crimes and other punishable acts and undertakes measures to protect constitutionality and legality, it certainly has a particularly important place and role in achieving the protection of children. In order to achieve effective protection of children, it is necessary that there is close and constant cooperation between the public prosecutor's office and other entities participating in the child protection procedure, and the prerequisite for such cooperation is the legally defined roles of each participant. In addition to the laws that regulate and define the roles of all authorities, it is necessary to mention that our country has adopted a Special Protocol on the actions of judicial authorities in the protection of minors from abuse and neglect. Among other things, this protocol stipulates that in proceedings all authorities, including the public prosecutor, have the interest of the injured minor in mind first and foremost. This refers first of all to the perspectives of his further development, socialization, recovery, and especially through actions and procedures that reduce secondary victimization to a minimum, which is an important difference compared to usual criminal procedures. Specifically, immediately after learning that a criminal offense has been committed in which a minor, i.e. a child, has been harmed, the public prosecutor will order the police to urgently

undertake certain evidentiary actions, first of all, order to discover and secure traces of the criminal offense and objects that they can be evidence in the proceedings. At the same time as collecting evidence about the criminal act, the public prosecutor is obliged to consult with experts in the guardianship authority, to collect from them information about the child and the family. He should simultaneously request such data from health, educational and other institutions within their jurisdiction, all with the aim of obtaining additional data about the child and his family for a joint, proper assessment of the risk of victimization and taking appropriate measures.

As it has already been emphasized in the previous lines, the public prosecutor must have special knowledge in the field of children's rights and the criminal protection of minors. In this sense, the constant participation of public prosecutors in specialized training is necessary, where, first of all, special attention is paid to the approach that public prosecutors have with minors, that is, children as injured parties. First of all, public prosecutors are trained that minors must be freed from the fear of the court, so the public prosecutor or another expert will familiarize the child with the area, show him the building, computers, possibly give him juice or chocolate, some suitable toy, in order to in that environment the child felt safe. The public prosecutor should explain to the child what will happen in court in a way that he can understand, explain what is expected of him and make sure that the child understands it. The examination must be adapted not only to the child's age and his personal characteristics, but also the vocabulary must be adapted to his age in order for him to understand properly, as well as the tone of the voice, so that all the time, in a soft voice, he simultaneously calms and encourages him to explain the event or events that happened. At the same time, the public prosecutor should pay attention to the behavior of the minor (facial expression, body movements, anxiety, whether he shows fear towards parents or another family member, etc.) and adjust the course of the hearing to the observed reactions of the minor person.[28] Therefore, all this indicates that public prosecutors have a special obligation to take care of the efficient and effective protection of children and the exercise of their rights in criminal proceedings.

[28] More about this and other recommendations for conducting interviews with minors can be found in the Special Protocol on the Actions of Judicial Authorities in the Protection of Minors from Abuse and Neglect, since those recommendations refer to the judge, and which should certainly be transferred to the prosecutor's office when the investigation is transferred to the prosecutor's office. to public prosecutors.

INSTEAD OF CONCLUSION

Given that the adoption of a law that will be the lex specialis, has been in the work for years, and which will deal with the rights of the child in more detail, it is not possible at this moment to pass any conclusive considerations on the status of the child in our criminal justice system. Bearing in mind all of the above, it should first of all be emphasized that the legislation of the Republic of Serbia defines the term "child" in different ways, directly or indirectly, in terms of the age limit. While in principle in all other legal areas the age limit is defined in indirect ways, we can conclude that in this sense criminal matters are much more precise. Namely, in the previous sections it was pointed out in several places what is to be considered under the term "child" in the criminal law sense, and at the same time, the ways of regulating the position and protecting the rights and personality of the child were shown. In principle, children can appear in the criminal justice system as multiple subjects. However, as we have already argued in the previous lines, regardless of the fact that they may be in conflict with the law, children cannot be held criminally responsible. In this sense, children as subjects of the criminal justice system most often appear as witnesses, and not so rarely as witnesses of injured parties. Precisely, respecting certain specificities of this category of injured parties, we emphasized that the legislator also recognized the special need to protect the rights and position of children. This is first of all reflected in the standardization of the obligation of specialization of all competent authorities in the acquisition of special knowledge in the field of children's rights, in order to preserve those rights. This is also reflected in the legislator's intention to prevent, or at least minimize, the occurrence of secondary victimization of a child, through the application of special rules for the investigation of minor victims, the prohibition of confrontation and special rules for recognition, and through the obligation of legal representation of the minor victim by an attorney.

Since the regulations that regulate the concept and status of the child in our criminal justice system, and we are primarily referring to the Code of Criminal Procedure and the Law on Minors, were enacted over a long period of time, it is no wonder that there are certain conflicting norms and that they certainly represent the basis for certain ambiguities in this certainly sensitive area. While waiting for the legislator to pass the laws that are being announced in the coming period, at this moment there is no possibility to make a final conclusion that the status of the child in the criminal law sense is regulated in the best possible way. Therefore, there was a need to point out the facts that there is an intention of the state to improve the position and protection of children's rights, but also

to point out certain illogicalities, primarily some technical omissions, all with the aim of an even more qualitative way for regulating this area.

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A STUDY OF OMISSION CRIMES INVOLVING CHILDREN AS VICTIMS IN JAPAN

This article discusses the issue of omission crimes in Japan, focusing on cases in which children are the victims. Omission crimes are often committed by the dominant person in the power relationship, such as guardians, supervisors and parents. As a result of power imbalance, children are often the victims. When considering the protection of children under criminal law, consideration of omission crimes cannot be avoided. A number of theoretical problems exist with omission crimes. The purpose of this paper is to examine these theoretical issues and to contribute to comparative law on the issue of omission crimes involving children as victims.

Keywords: *Omission crime, Children as victims, Japanese law, Attempt crime, Causality, Complicity.*

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1. Introduction

1.1. This article discusses the issue of omission crimes in Japan, focusing on cases in which children are the victims.

1.2. Omission crimes are often committed by the dominant person in the power relationship, such as guardians, supervisors and parents. As a result of power imbalance, children are often the victims. When considering the protection of children under criminal law, consideration of omission crimes cannot be avoided. A number of theoretical problems exist with omission crimes.

First, in omission crimes, the stillness of the body is the offence. In the case of commission crimes, it is, to a large extent, clear whether his or her action is, or is not, a criminal offence if the physical movement of the offender's body is observed. In the case of omission crimes, however, there is no physical movement that has to be observed, which raises difficult questions as to whether his or her attitude can be assessed as a crime.

Second, as omission is, physically, non-existent, the question arises as to how to construct a theory of causality. Some have suggested that because omission is nothing, there is no causal relationship. The statement that "nothing comes from nothing" is persuasive. Consider, however, the case of a child who is victimized by the neglect of his or her parents. In a case where those in a position to protect, e.g. the parents, put the child's life in danger and ultimately caused his death by failing to protect him, can we say that there is no causal relationship between the parents' omission and the child's death? We need to consider the theory in this case[1].

Third, there is the difficult question of what type of offence it is when a person causes the death of a victim, such as a child, without providing the protection necessary for survival. Normally, it would seem that if the perpetrator had the intent to kill, the offence would be homicide by omission. However, the Japanese Penal Code contains a crime category called 'Abandonment Causing Death or Injury', which is punished much less severely than homicide. On the other hand, in Japanese judicial practice, even in cases where there is an intention to kill, the offence may be considered to fall within this crime category.

[1] Kurtovic, R – Alic, M. (2020): The right on human dignity through the prism of trial within a reasonable time. Yearbook of the Provincial Protector of Citizens - Ombudsman: Human Rights Protection – The Right to Human Dignity, pp. 467-490.

Fourth, in Japan, there are cases where one of the parents (typically the father) physically abuse the child and the other parent (typically the mother) stands idle. In this case, the question arises as to whether complicity in assault by omission is established in respect of the other parent who stood idle (i.e. did not prevent it). This issue provides a difficult problem, as it is a compounded question of omission crime and complicity.

In this article, I introduce the Japanese debate on the above-mentioned issues, which I hope will be of reference to many people.

2. Theoretical issues of omission

2.1. Some criminal law theorists said that omissions are not actions, because they constitute nothing. It has also been said (in one German criminal law theory) that omissions without a purpose are not acts because human action is the performance of a purposeful activity.

These ideas, while understandable in theory, are not realistic. If a parent fails to feed his or her child and causes the child to starve to death, the child is considered to have starved to death as a result of the parent's actions, and such a parental attitude is, in any event, an attitude that should be criminalized.

Therefore, omissions, as well as commissions, must be punished in certain cases. Such a value judgement would be unmovable.

However, the above theory is significant in that it argues that the existential structure of omission is different from that of commission, and makes it clear that a precise theory is required to justify punishing omission. This paper addresses that issue first.

2.2. Acts can be either commissions or omissions. If we look at the facts as they are, commission is the movement of the body and omission is the stillness of the body. Defined in this way, acts of commission and omissions are both acts, and are therefore considered punishable.

It should be noted, however, that omission is not pure bodily stillness. Omission is, more precisely, the absence of an expected commission. In relation to that expected commission, a person may be doing some activity at the same time, even if the body is stationary. Consider, for example, the case of a parent chatting in a café without feeding his or her child. Even though chatting in the café involves physical movement of the body,

in relation to the expected commission (feeding the child), the person's act would be assessed as an omission.

Thus, inaction is always understood as 'omission of an expected commission'.

2.3. The next question is: what is the causal relationship of omission? In some criminal law theory (in Germany) it was once said that no consequences can result from doing nothing. Indeed, nothingness cannot be the cause of an outcome. However, as noted above, omission is not mere nothingness. An omission is the failure to fulfil an expected commission. Current Japanese criminal law theory therefore sees the causal relationship of omission in the form of 'if the expected commission had taken place, this result could have been avoided'.

Causal relationships in ordinary cases are determined using the conditio-sine-qua-non formula. This is "if the act P had not taken place, the result Q would not have occurred". It is then not possible to apply this formula to omissions that do not exist in the first place (there is no P, so the assumption that if there had been no P is itself impossible). Therefore, we are forced to add a condition for the causal relationship of omission in the form of 'if the expected commission had taken place'. This is known as the hypothetical causal relationship formula.

2.4. Thus, the causal relationship of omission is whether 'there was a possibility to avoid the result by performing the commission'. If so, the next question is the level of the possibility. What level of probability is needed to assess that there is a possibility? On this, we shall refer to the Japanese case-law.

The case involved a 13-year-old girl who was the victim. The victim girl became delirious and died as a result of the injection of methamphetamine by the accused. If she had been given immediate emergency medical care at this point, she would have been able to save her life "in eight or nine out of ten cases". The Supreme Court held in this case that a causal relationship could be established between the omissions of the accused and the outcome of the girl's death.

The Supreme Court used the expression "in eight or nine out of ten cases", which does not literally mean 80% to 90%. This is understood in the sense of probability bordering on certainty, i.e. certainty beyond reasonable doubt.

2.5. In parallel with the crime of commission, if the causal relationship of omission is lacking, an attempted crime is also concluded for the omission crime, since the perpetrator has commenced the execution of the crime[2]. However, if there is no objective possibility of avoiding the result, then the expected commission cannot be conceived in the first place, and therefore the omission itself is absent (there is no possibility of committing the act). In fact, there is an example of a District Court case-law in which omission per se was rejected and the offence of attempted homicide was rejected.

The question at issue here is whether the commission is possible. If the expected commission is impossible, the omission cannot be conceived. This is because the law does not force a person to do the impossible. For example, if a person who cannot swim fails to rescue a drowning person, he cannot be assessed as having killed the person by omission.

However, there can be a debate on how to determine this possibility. Let us make a slight variation to the case of the case-law of the Supreme Court referred to earlier. Suppose that even if the girl had been taken to an emergency hospital, from an ex post facto and objective point of view it would have been impossible to save her life. However, suppose that at the time the girl was in a state of confusion, it looked to the general public as if she might be saved if she had been taken to an emergency hospital. In this case, ex post facto and objectively, there was no possibility of saving her life, however, the accused could have taken her to the emergency hospital. If that is the case, then, although it was indeed impossible to save her life, the attempted offence could be established. This is because at the point when the girl was delirious, the general public would not have known whether or not there was a chance of saving her life, and therefore it would be necessary to oblige the parent to take part in a life-saving act. Without this consideration, the victim cannot be adequately protected.

3. Abandonment Causing Death or Injury: Neglect by parents

3.1. A classic example of omission crime against children is what is known as ‘neglect’. “Neglect” is a term used in Japan to describe the neglect of a child by the parents who have to take care of the child’s needs, neglecting the child, putting the child in danger, causing the most life-threatening conditions and ultimately causing the child’s death. In

[2] Stanar, D. (2020), The Right to Die with Dignity: Soldiers in Post-Modern Warfare, Yearbook Human Rights Protection - The Right to Human Dignity, publishers: Provincial Protector of Citizens – Ombudsman and Institute of Criminological and Sociological Research in Belgrade, 519-532

this case, the Japanese Penal Code provides for the crimes of unprotected offences and unprotected manslaughter. The following are the provisions:

Article 218 (Abandonment by a Person Responsible for Protection)

When a person who is responsible for protection of a senile, immature, physically disabled or sick person, abandons, or fails to give necessary protection to such person, the person shall be punished by imprisonment with work for not less than 3 months but not more than 5 years.

Article 219 (Abandonment Causing Death or Injury)

A person who commits a crime prescribed under the preceding two Articles and thereby causes the death or injury of another, shall be dealt with by the punishment prescribed for either the crimes of injury or the preceding Articles, whichever is greater.

As can be seen from the text of the articles, this crime applies not only to cases where children are victims, but also to cases where the elderly, the sick and other vulnerable persons are victims. However, this paper will focus on cases where children are the victims.

In Japan, incidents of parents leaving their children unattended and causing their deaths are often reported. A typical example is a case in which a parent took his or her child to a so-called pachinko parlor and left the child in a private car while he or she played, where the hot summer temperatures made the inside of the car extremely hot and the child died of heat stroke. In such cases, a crime of Abandonment (failing to give the protection) Causing Death is concluded.

3.2. Recently, the Japanese Supreme Court issued a new decision on the interpretation of ‘failing to give protection’:

“The act of committing abandonment by a person responsible for protection by failing to give the protection referred to in Article 218 of the Penal Code is based on the premise of a situation where a senile, immature, physically disabled or sick person requires a specific protection act for his/her survival (a protection requiring situation) and means not conducting the specific act that is expected to be conducted under the Penal Code as the act of protection necessary for the survival of such person.”

According to this case law, simply not taking care of the necessities of daily life does not constitute 'failing to give protection'. The Supreme Court is considered to have interpreted the phrase 'failing to give protection' in Article 218 of the Japanese Penal Code as protection which, if not provided, would result in a danger to life.

So, a crime of abandonment (failing to give the protection) is a crime where a parent's failure to protect their child (e.g. by not feeding them, keeping them clean, not taking care of their illness or health, etc.) results in a risk to the child's life.

3.3. If this is interpreted in this way, the next issue is the distinction between Abandonment Causing Death and Homicide by omission.

In Japanese criminal law, there are two types of omission crimes punishable as omission crimes: genuine omission crimes and non-genuine omission crimes. This concept derives from German criminal law theory.

A crime of abandonment (failing to give the protection) under Article 218 of the Japanese Penal Code is provided for in the form of punishment for the omission (i.e. 'failing') of the perpetrator. This is referred to as a 'genuine omission crime'. And if the failure to protect caused the death of a person, then this is punishable as a crime of Abandonment Causing Death or Injury under Article 219 of the Japanese Penal Code. 'Genuine omission crimes' pose virtually no theoretical problems, since it is simply a matter of applying the case to the article.

On the other hand, the homicide is provided for in a form that punishes the perpetrator's commission of the act (i.e. 'kill'). The provision of the homicide is as follows:

Article 199 (Homicide)

A person who kills another shall be punished by the death penalty or imprisonment with work for life or for a definite term of not less than 5 years.

Such a case where a crime originally prescribed in the form of a commission is committed by omission is called an 'omission crime by omission'. The term 'omission crime by omission' applies the case to the text of the article in a way that is somewhat remote from the wording of the article. This leads to various interpretative problems. This will be discussed in the next chapter.

The question is how to distinguish between A Crime of Abandonment (failing to give protection) Causing Death and Homicide. To begin with, the former has a much lighter statutory penalty. Is it appropriate to punish a parent as A Crime of Abandonment (failing to give protection) Causing Death if he or she fails to protect the child with the intent to kill?

However, the distinction in Japanese case law and in academic theory is based not on whether there is an intent to kill, but on whether the omission poses tremendous risks to a person's life which can result in death. It is not reasonable to treat an act as Homicide simply because it has the intent to kill, nor is it reasonable to impose a punishment on par with that of Homicide where an act poses a low risk to life. From this perspective, only cases where a guardian (parents) kills a person by omission with a high risk to life, based on the natural assumption that there is an intention to kill, are punishable as a Homicide omission crime by omission, and other cases are punishable as A Crime of Abandonment (failing to give protection) Causing Death.

4. Homicide by omission

4.1. Let us now look at the cases in which the homicide by omission can be committed. With regard to the homicide by omission, there is no typical case-law for cases where a child is the victim[3]. Therefore, we shall look at the debate in Japanese law, focusing on theories.

Since the homicide by omission is the realization by omission of a crime that is prescribed in the form of an act of commission, the first question is whether it violates the principle of legality. In response to this question, Japanese academic theory answers that, since the norms of criminal law include prohibitive norms as well as imperative norms to a certain extent, the same article may be used to punish a violation of an order to 'do an act' by doing nothing.

4.2. The question is: to which persons is such an imperative norm directed? Consider, for example, the following case study.

[Case study]

[3] Kambovski V., (2018) *Natural rights, legitimacy of laws and supranational basis of unlawfulness*, Yearbook Human Rights Protection: From unlawfulness to legality, Number 1, Novi Sad, 2018, pp. 31-49.

A child was drowning in a park pond. Mr. A, who had nothing to do with the child and was passing by, left without helping the child, hoping the child would die (with intent to homicide). The child subsequently drowned. In this case, is Mr. A guilty of homicide by omission?

Conclusion first. Under Japanese law, Mr. A is not guilty of any crime (even if his act is morally condemnable, it cannot be punished as a criminal offence under the Criminal Code). This is because Japanese criminal law does not impose a duty on Mr. A to rescue the child.

According to Japanese criminal law theory, for an 'omission crime by omission' to be concluded, the perpetrator must have a duty to perform a commission. The obligation to perform a commission arises from several grounds. (1) The first is a statutory duty, (2) the second is a contractual duty/duty from benevolent intervention in another's affairs and (3) the third is a duty arising from the perpetrator's own prior acts. In the case study, none of these grounds exist.

Suppose, for example, in the case study, the person passing by was a parent. In this case, the parent has a statutory duty to rescue the child (see Article 820 of the Japanese Civil Code). In addition, if the perpetrator accidentally pushes a child into a pond, the perpetrator has a duty to rescue based on his or her own act.

4.3 The Supreme Court has only issued one case-law on omission crimes for homicide. This case was like the following: The leader of a religious organization had attracted followers who claimed to have the power to cure illness through his religious acts. On one occasion, his followers asked him to treat a seriously ill patient, so he had the patient brought to the hotel where he was staying, disregarding the instructions of the doctor in charge. However, when he failed to treat the patient properly, he left the patient to die, with the intent to kill him.

The Supreme Court stated the duty to rescue the accused as follows:

"the defendant caused a concrete threat to the patient's life due to reasons within his control, despite the fact that in the hotel into which the patient was taken, the defendant was fully entrusted by the patient's relatives, who were believers of the defendant, to perform treatment for the patient suffering from a serious illness. Considering that at that time, the defendant was aware of the patient's serious condition and had no reason to

believe that he was able to save the patient's life, the defendant was responsible for having the patient immediately receive necessary medical treatment for keeping him alive."

The Supreme Court refers to the fact that the risk was caused by reasons attributable to the accused (requirement (3) above). It then states that the accused is in a position of full entrustment of the allowance, i.e. the accused has control over the entire treatment of the patient.

This element of 'control' is something that has been argued for in Japanese academic theory in recent years. In this case, since the perpetrator has control over the entire event, it can be said that the perpetrator's omission can be assessed as equivalent to an commission, even if it did not cause the result. From this perspective, it is reasonable to require 'control' of the event for the conclusion of an 'non-genuine omission crime'.

5. Omission crime and complicity

5.1. Incidents may occur where one of the parents (typically the father) is predominantly violent towards the child and the other parent (typically the mother) lets it happen. In this case, the question arises as to whether the other parent, who has left the assault or injury of one parent unattended (i.e. not prevented it), is guilty of complicity in the crime of assault or injury by omission.

Before we jump into the discussion of this issue, let me explain a little about the Japanese complicity provisions. The Japanese Penal Code distinguishes between co-principals and accessory:

Article 60 (Co-Principals)

Two or more persons who commit a crime in joint action are all principals.

Article 62 (Accessoryship)

(1) A person who aids a principal is an accessory.

Article 63 (Reduced Punishment for Accessories)

The punishment of an accessory shall be reduced from the punishment for the principal.

If two parents, through their will, decide to assault a child together, they are co-principals under Article 60 of the Criminal Code. And in practice, this is often the case. The problem

is when there are no such circumstances and only one of them commits the assault and the other stands idle.

In this regard, there is a case-law that provides an important decision. A, the mother of her own stepchild, the victim child V (3 years old), knew that her husband B was assaulting V and did not stop the violence. As a result, V died as a result of B's assault. In this case, B is the perpetrator of the crime of injury causing death. On the other hand, as regards A considered an accessory by omission to the crime of injury causing death.

The key question here is how to distinguish between a co-principal by omission and an accessory by omission. In Japanese criminal law theory, the general view on the distinction between co-principal by omission and accessory by omission is that, as starting point, the participation by omission is an accessory.

In Japan, when more than one person is involved in a crime, most participants are assessed as co-principals (approximately 97%). In contrast, only about 3% are assessed as accessory. In this light, it seems reasonable to assume that the above cases are also assessed as co-principals. However, in the case we now have in question, it is B who controls the crime; A does not control this crime, nor does she play a significant role in it. In such a case A, who was a bystander to the crime, can only be guilty of an accessory.

5.2. In addition, in recent times, the Supreme Court has issued the following case-law. The accused persistently encouraged the mother of a diabetic child (7 years old) not to administer insulin to the child. As a result, the child died. In this case, the Supreme Court found the accused guilty of homicide for taking advantage of the mother's omissions.

In this case, directly the child died because the mother did not administer insulin to the child. However, the mother was mentally dominated by the accused and was in a psychological state of blind faith in what she was saying. The accused therefore took advantage of the mother's omissions to perform the crime.

The problem in this case was that the mother had a blind religious belief in the accused. In the case-law reviewed earlier, a case in which the victim died because of blind faith in the leader of a religious organization was also discussed. There have been many cases where a parent or guardian's blind faith in a cult has led to the death of a child or sick person due to the fact that the victims did not receive medical treatment that they needed.

6. Last Remarks

This article examines theoretical issues related to omission crimes in Japan, focusing on cases where children are the victims. The victimization of children by parents' failure to protect their children is a major problem in contemporary society and appears to be prevalent in many countries around the world. The legal issues examined in this paper are probably also being debated in many other countries.

From a comparative legal perspective, I would be happy if the Japanese discussion can be of some help.

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CHILDREN'S PROTECTION IN CYBERSPACE. NEW TYPES OF THREATS AGAINST SEXUAL FREEDOM AND SEXUAL INTEGRITY

Children are delicate human beings and their physical, intellectual, emotional and moral development should be carefully monitored by their families and by the State institutions. They are easy victims for which cyberspace looks like the Pinocchio's Land of Toys[1] *where temptations and the illusion of freedom and escape from the family rules blind their senses and their developing judgment.*

A whole set of dangers is lurking at every step in the virtual realm, sexual predators being the common threats.

In the present article, the author seeks to reveal the new types of cyberthreats against sexual freedom and sexual integrity of the minors and to examine if the Romanian Criminal Law is successfully facing the new types of sexual dangerous conduct in the online environment.

Keywords: *cyberspace, underaged victims, minors, sexual predators, cyberflashing.*

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[1] In Chapter 30 of the Carlo Collodi's bedtime story *Pinocchio*, the Marionette, instead of listening to the Fairy and becoming a boy, runs away to the Land of Toys with his friend, Lamp-Wick: *"We shall see. In case you do disobey, you will be the one to suffer, not anyone else. Why? Because boys who do not listen to their elders always come to grief."*

1. Introduction

A study published in 2019 and conducted in Sweden in 2014 (Jonsson et all., 2019) revealed that adolescents had gotten to know someone during the preceding 12 months for the purpose of engaging in some kind of sexual activity online. 9.7% of those belonging to the the index group, had felt that they had been persuaded, pressed or coerced on at least one occasion. Sexual interaction under pressure was seen as constituting sexual abuse. Given the fact that the study was conducted 7 years ago, it is interesting to find out how the things evolved in the area of online sexual abuse on minors. In 2021 the Internet Watch Foundation released online its annual report stating it took action to remove a record-breaking 252,000 URLs which it confirmed contained images or videos of children being raped and/or suffering sexual abuse[2]. Of these, 182,281 URLs contained images or videos of "self-generated" material. According to the Report, this was a 374% increase on pre-pandemic levels when, in 2019, analysts took action to remove 38,424 URLs containing self-generated material. The year of 2021 was the year of sexual abuse imagery of girls being shared more widely than any previous year. Almost 7 in 10 instances of child sexual abuse involved 11-13 year olds. Also "self-generated" child sexual abuse, where someone captures a recording via a phone or computer camera of children who are often alone in their bedrooms, was pointed as the predominant type of child sexual abuse imagery found online – over 7 in 10 reports including this type of content. Sadly, the Report showed instances of children aged 3-6 year old being contacted and abused online. All these is disturbing information. Not only the online sexual abuse of children phenomenon is expanding, but the age of the victims is dramatically decreasing. At a first glance, a quick conclusion might be drawn: the means and instruments in combatting online sexual abuse of children are insufficient or deficient. Is that so? These instruments are of a diverse nature, both legal and judicial. Could we do more or just the law and practical instruments cannot keep up with the development of digital instruments and online acts resulting in sexual harms with minor victims?

In our opinion, one should address this issue following certain steps. Firstly, one should identify the legal instruments (national and international) providing regulation in this area; the, one should identify all (including the latest types of acts that could be committed in this area of protected sexual values). If this analysis would reveal a lack of

[2] Internet Watch Foundation, The Annual report 2021, available at https://annualreport2021.iwf.org.uk, accessed on 30.08.2022.

correspondence between the items – acts in opposition with rules and legal reactions – then we have been identified the issues and could hazard in proposing solutions.

Children spend a significant part of their time online nowadays, which has a great impact on their lives and development. Unfortunately, younger children have become increasingly reliant on the internet during the pandemic and that spending more time online can make them more vulnerable to criminal communities looking to find and manipulate children for record one's own sexual abuse on camera. The images are then distributed to other criminals on the open internet.

While common abuse of minors is, let us put it this way, more facile to be identified and sanctioned, online sexual abuse of minors is very difficult to combat, the perpetrators cannot be identified with ease, nor punished and, in addition, the effects of committing these kind of acts online are spreading without control, having in mind the fact that images and other types of recordings are "migrating" from one site to another, being distributed by different persons.

2. International instruments providing boundaries in relation with the protection of children and their sexual development in cyberspace

The existing legal framework in regard with the protection of minors against sexual abuses committed online or through digital instruments consists of measures in the areas of criminal law, protection of privacy and personal data, and the internal market, regulating online and telecommunications services and content moderation including two types of instruments:

a) instruments in the area of data protection, online privacy and e-services (e.g. GDPR[3] and e-Privacy Directive[4] and its proposed revision[5]),and of the single market for digital

[3] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('General Data Protection Regulation'), *OJ L* 119, 4.5.2016.

[4] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ('Directive on privacy and electronic communications'), *OJ L* 201, 31.7.2002.

[5] Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) COM/2017/010 final - 2017/03 (COD).

services (e.g. e-Commerce Directive[6] and the proposed Digital Services Act[7]); *and*

b) specific legislation regarding sexual acts committed againt minors, such as the Child Sexual Abuse Directive[8], the Europol Regulation[9], the Interim Regulation derogating from the application of certain rights and obligations under the ePrivacy Directive[10], and the Victims' Rights Directive[11].

All these instruments are presented and analysed in relation with the problem of child sexual abuse and constitute the basis for a proposal for a regulation of the European Parliament and of the Council laying down rules top prevent and combat child sexual abuse in the online environment.[12] While stating that the the fight against child sexual abuse (CSA) is a priority for the EU, the initiative of the Commission aims to complement the existing EU framework by defining the responsibilities of certain online service providers to protect children against sexual abuse. In the absence of harmonised rules at EU level, providers of social media platforms, gaming services, and other hosting and online communications services find themselves faced with divergent rules across the internal market.

[6] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce in the Internal Market ('Directive on electronic commerce'), *OJ L* 178, 17.7.2000.

[7] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC of 15 December 2020, COM/2020/825 final.

[8] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *OJ L* 335, 17.12.2011.

[9] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.

[10] Regulation (EU) 2021/1232 of the European Parliament and of the Council of 14 July 2021 on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse, OJ L 274, 30.7.2021, p. 41–51.

[11] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJ L* 315, 14.11.2012.

[12] European Commission, Commission staff working document, accompanying the document "Proposal for a regulation of the European Parliament and of the Council laying down rules top revent and combat child sexual abuse", Brussels, 11.5.2022, SWD(2022) 209 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0209, accessed on 30.08.2022.

In other words, the fight against sexual abuse of children in the online environment remains a dull desiderate in the absence of a concerted action envolving states, public institutions and private parties to reduce the perils provided by the Internet as regards sexual life, freedom and development of the minors, aspect known and addressed by the EU Comission.

In addition to the European instruments presented above, it is worth to mention the well-known *Convention on the Rights of the Child* adopted in 1989 and the *Optional Protocol of the Convention on The Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, adopted in 2000. These two instruments enumerate children's rights and throw light on the obligation of states to protect children from sexual exploitation and sexual abuse. Other important instrument is the so-called *"The Lanzarote Convention"*, that is the Council of Europe's *Convention on the Protection of Children against Sexual Exploitation and Abuse* (entered into force on the 1st of July 2010. This last one instrument aims to prevent child sexual exploitation and abuse, to protect victims, prosecute offenders and promote national and international cooperation in the identification, investigation, prosecution, and prevention of these crimes[13].

Lat, but not least, we cannot but mention the Council of Europe Convention on cybercrime adopted in 2001 aka "The Budapest Convention"[14], which is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with computer-related fraud, child pornography, hate crimes and other harmful acts committed online.

3. Types of online sexual conducts or online deeds which peril the sexual life, sexual freedom and sexual development of the children

Several classifications of the online sex abuses committed against minors were proposed by the scholars.

According to one of these opinions (Vilks, 2019: 3-4) online sexual abuse is a type of sexual violence while sex offenses among young people are often related to violations committed on the Internet. According to the same author, most widespread forms of

[13] The English version of the the text of the lanzarote Convention available at https://rm.coe.int/protection-of-children-against-sexual-exploitation-and-sexual-abuse/1680794e97, accessed on 30.08.2022.

[14] English version available on https://www.coe.int/en/web/cybercrime/the-budapest-convention https://www.coe.int/en/web/cybercrime/the-budapest-convention, accessed on 30.08.2022.

sexual violence against children are: cyber pornography, cyberbullying and cyberstalking (Vilks, 2019: 4).

In another view (Malmir et co., 2013: 247-250), the online forms of sexual abuse on children are: sexual tourism on Internet, child trafficking through Internet and online child pornography.

According to Graham and Smith, there are two types of cyber sexual abuse (Graham & Smith, 2020: 50-51, 73-74):

A. Cyberpornography consisting in: child pornography, internet facilitating sex trafficking, obscene pornography, sexting, sex work.

B. Cyber violence that could appear as sexual abuse of minors, consisting in, among other forms: cyberstalking, online shaming.

Child pornography is defined as the visual depiction of sexually explicit conduct involving a minor while cyber pornography is the publication or trading of a sexually expressive materials in the digital environment (Wall, 2001). *Internet facilitating sex trafficking* refers to the recruitment, harboring, transportation, provision, obtaining, patronizing or soliciting of a person for the purpose of commercial sex act.[15] *Cyberstalking* is a repeated pursuit of an individual using electronic or internet capable devices (Reyns et all, 2011:1150). *Online shaming* refers to a group subjecting an individual (in our case, minor), to harassment, bullying and condemnation because of some real or perceived transgression (Graham & Smith, 2020: 75). In case these acts involve sexual knowledge or images about the minor victim, it is easy to observe the fact that we are in the presence of an online sexual abuse.

It is also worth tom mention the classification of online sexual abuse of minors provided by the Lanzarote Convention and the Budapest Convention. Online sexual exploitation and sexual abuse of children includes, according to these two international instruments

[15] GAO-21-385, US Government Accountability Office, *Sex Trafficking. Online Platforms and Federal Prosecutions*. Report to Congressional Committees, June 2021, p. 1, available at https://www.gao.gov/assets/gao-21-385.pdf, accessed on 30.08.2022 .

the behaviour described by articles 18 to 23 of the Lanzarote Convention and by article 9 of the Budapest Convention in an online environment or otherwise involving computer systems:

1. Sexual abuse (article 18, Lanzarotte Convention) includes:
    a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities; or
    b. engaging in sexual activities with a child where:
        - - use is made of coercion, force or threats; or
        - - abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or
        - - abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.“
2. Child prostitution (article 19, Lanzarotte Convention), includes:
    a. recruiting a child into prostitution or causing a child to participate in prostitution;
    b. coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes; or
    c. having recourse to child prostitution.”
3. Child pornography (article 20, Lanzarotte Convention), reffers to:
    a. a) producing child pornography;
    b. b) offering or making available child pornography;
    c. c) distributing or transmitting child pornography;
    d. d) procuring child pornography for oneself or for another person;
    e. e) possessing child pornography;
    f. f) knowingly obtaining access, through information and communication technologies, to child pornography”.

    “Child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.
4. Corruption of children (article 22, Lanzarotte Convention), consists in the intentional causing, for sexual purposes, of a child who has not reached the age [below which it

is prohibited to engage in sexual activities with a child] to witness sexual abuse or sexual activities, even without having to participate.

5. Solicitation of children for sexual purposes (article 23, Lanzarotte Convention) consists in the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set (below which it is prohibited to engage in sexual activities with a child) for the purpose of committing any of the offences established in accordance with article 18, paragraph 1.a (engaging in sexual activity with a child), or article 20, paragraph 1.a (producing child pornography), against him or her, where this proposal has been followed by material acts leading to such a meeting. In this case the Lanzarote Convention prohibits the conduct of "grooming".

Article 9 of the Budapest Convention on Cybercrime provides the offences related to child pornography: a) producing child pornography for the purpose of its distribution through a computer system; b) offering or making available child pornography through a computer system; c) distributing or transmitting child pornography through a computer system; d) procuring child pornography through a computer system for oneself or for another person; e) possessing child pornography in a computer system or on a computer-data storage medium.

The term "child pornography" shall include pornographic material that visually depicts:

a) a minor engaged in sexually explicit conduct; b) a person appearing to be a minor engaged in sexually explicit conduct; c) realistic images representing a minor engaged in sexually explicit conduct.

In our opinion the acts of sexual abuse of minors should be grouped into several categories:

A. sexual abuse criminally sanctioned by the legislation of national states

   a. sexual abuse that may be committed solely online (i.e. online child pornography, online recruiting minors for sexual purposes)

   b. forms of traditional sexual abuse which are committed through online instruments (i.e. rape or sexual assault committed on the purpose of creating pornographic materials)

   c. assimilated crimes (i.e. blackmail committed on the purpose of obtaining

B. sexual favors from the minor victim, live streaming of physical sexual abuse)

Of course, there are multiple specific acts that could be framed in one or more of the categories identified by the doctrine such as: grooming, blackmail, sextorsion, luring, love bombing, sexting, streaming, etc. *Grooming* consists in a set of tactics in order to develop a relationship with the minor victim to later persuade her/him to accept specific sexual conducts. Groomins is performed through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with the sexual predator. *Luring* is when a person uses online communication to contact someone they think is under 18, in order to make it easier for them to commit a sexual offence against that person. Sextortion is a type of blackmail consisting in someone using a sexual photo/video of the victim to or coerce him/her into accepting specific sexual conduct. *Love bombing* is a method used by the exploiter consisting in an abundance of compliments and affection to gain the victim's love and trust. *Sexting* consists in self-production of sexual images, that is creating, sharing and forwarding of sexually suggestive nude or nearly nude images through mobile phones and/or the internet. It is an often consensual activity between peers still may consist also in unwanted actions, non-consensual, such as sharing or receiving unwanted sexually explicit photos or messages.

A specific form of sexting is *cyberflashing*. *Cyberflashing* consists in the digital distribution of genital images or videos to minors, without their consent. This new type of sexual abuse was analysed in very recent work (McGlinn & Johnson, 2021) raising concerns on the lack of legal provisions sanctioning it. *Cyberflashing* is a term which identifies the interconnection between technological nature of the practices and other forms of sexual exposure, also known as flashing (McGlinn &Johnson, 2021: 4). If other actions and tactics of online sexual abuse could be classified as sexual crimes, in case of cyberflashing it is very difficult: it does not meet the legal requirements to be classified neither as a sexual offence, even if constitutes a sexual intrusion, nor an public indecent exposure, since it is not been performed in public, the images being sent only to one or more specific recipients. It could not be classified as harassment because harassment consists in repeated acts which creat a disturbing or alarming state for the victim. These are reasons why the criminal law was criticized for failing to provide efficient protection to victims, urging for "a coherent legal response that adequately expresses societall condemnation and meets demans for justice, redress and change" (McGlinn &Johnson, 2021: 87). There are few legal criminalizing initiatives pf cyberflashing in countries like Denmark, Japan, while the harassment legislation in states like Finland, Canada and Australia is efficiently applicable to cyberflashing (McGlinn &Johnson, 2021: 101-102).

Live streaming of sexual abuse on minors consists in broadcasting acts of sexual abuse of minors live via webcam to people placed in different parts of the world. This type of live streaming is very difficult to investigate for the official bodies. As pointed out by the docctrine, due to the live stream element, there is often little evidence that the offence occurred apart from session logs, chat logs and data usage trails, unless one of the parties records the live streamed abuse (Açar 2017). Also Europol Report IOCTA 2020 states on the actual peril of this specific online conduct. (Europol, 2020/a). Live streaming of sexual abuse on minors is also difficult to prosecute, as the criminal provisions in some states do not keep up with its unique features (Dushi, 2020), in monitoring darknet sites, reported an increase in sharing of child sexual abuse material captured through webcam early in the COVID-19 pandemic. This included a category listed on forums as 'live streams'. Europol attributed this increase to offenders moving from contact offending to online offending due to travel restrictions (Europol 2020/b).

Live streaming of child sexual abuse occurs on online chat rooms, social media platforms, and communication apps (with video chat features) (Europol, 2018). Also viewers of live streaming child sexual abuse can be passive (i.e., pay to watch) or active by communicating with the child, the sexual abuser, and/or facilitator of the child sexual abuse and requesting specific physical acts (e.g., choking) and/or sexual acts to be performed on and/or performed by the child. Active participation on the part of the viewer is known as child sexual abuse to order, and can occur before or during the live streaming of child sexual abuse.

4. Romanian criminal provisions incriminating types of online sexual conducts or online deeds which peril the sexual life, sexual freedom and sexual development of the children. The imperative need to adapt the criminal legal frame to the new "cyber-realities"

The Romanian legislator has put some effort in responding to the new threats coming from the online environment, successively adopting new provisions or amending the old ones as we are to mention in the following.

The provisions of Criminal Code of Romania (RCC) in force[16]were designed to respond, according to the Romanian legislator perception of social perils, at the time of the

[16] Law no. 286/2009 entered into force on 1st of February 2014, published in the Official Monitor no. 510/24th of July 2009.

adoption, to all types of conducts, including those committed in or involving the usage of online environment.

Thus, art. 218 RCC providing the crime of rape sets among the circumstances aggravating the rape the quality of the victim to be a minor (under 18 years old) and the commission of rape on the purpose to produce pornographic materials. In these cases, the penalty is imprisonment no less than 7 years and no more than 12 years. The penalty is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights when the rape, simple or assimilated[17] was committed against a minor in the circumstances provided for in para. (3) lit. a), b) and d)-f) (if the victim was in the care, protection, education, guard or treatment of the perpetrator, if the act was committed by a family member or by a person who lives with the victim, if the act was committed for the purpose of producing pornographic materials, if he act resulted in bodily injury or endangered the life of the victim in any other way and the act was committed by two or more people together) or by a person who has previously committed a crime against sexual freedom and integrity against a minor, a crime of child pornography or pimping against a minor. Similar provisions are provided in the case of sexual assault – art. 219 RCC -, penalties being imprisonment from 3 to 10 years, respectively 5 to 12 years.

Also, in case of Sexual intercourse with a minor- art. 220 RCC – the crime in its basic or aggravated forms is even more serious if it was committed for the purpose of producing pornographic materials. In the case of this crime the minor victim should be a person aged between 14 and 16 years old in the basic form and under 14 for the aggravated form.

The reason why we are presenting these provisions is because these crimes could be committed and streamed online or recorded and later the pornographic materials resulted from the commission of rape, sexual assault or sexual intercourse with a minor could be uploaded and distributed online. Also, in specific cases, it is incriminated the commission of this deed if performed by a major with a minor aged between 16 and 18 years old (if the minor was a family member of the major, if the minor was in the care, protection, education, guard or treatment of the perpetrator or he has abused his recognized position of trust or authority over the minor or his obviously vulnerable situation, due to a mental or physical handicap, a situation of dependence, a state of physical or mental incapacity

[17] Assimilated rape is defined as any act of vaginal or anal penetration, other than sexual intercourse, oral and anal sexual act.

or another cause, if the act endangered the minor's life and if the act was committed for the purpose of producing pornographic materials).

The las amendments of these criminalizing norms were made in 2020 by the Law no. 217/2020 for amending and completing RCC.[18] Also, by the same amendment law, Art. 221 para. 2 lit. d, paragraph 2^1 lit. d RCC was modified by providing the act of sexual corruption of minors *for the purpose of producing pornographic materials* and the art. 222 RCC - the recruitment of minors for sexual purposes - by modifying its criminalising conditions. Thus, the act of recruitment of minors for sexual purposes consists in the act of an adult proposing to a minor who has not reached the age of 16 to meet, in order to commit an act from those provided in art. 220 or art. 374 (child pornography), *including when the proposal was made by means of remote transmission*. This form of the crime is punishable by imprisonment from 6 months to 3 years or a fine. Also, the act of an adult proposing to a minor who has not reached the age of 14 to meet, in order to commit an act from those provided in art. 221, including when the proposal was made by means of remote transmission, is punishable by imprisonment from 6 months to 3 years or a fine. The modification of this article is meant to respond to the increasing number of acts by which minors are recruited in sexual purposes in the online environment, in social online platforms or chatrooms, the legislator trying to fight back against the background of the increase in the phenomenon of sexual abuse of minors (regardless of whether the act is classified as rape, sexual assault, sexual intercourse with a minor or sexual corruption of minors) as a result of the meeting with adults whom they initially contacted (or who were contacted) in cyberspace. The crime involves the preparation of the minor for the maintenance of sexual acts of any nature in order to obtain sexual satisfaction. This can be performed by befriending the minor, often by pretending to the minor that the perpetrator was also a minor, engaging the minor in intimate discussions and gradually exposing him to sexually explicit material to reduce his inhibitions about sex. The minor can also be involved in the production of pornographic materials with minors by sending or capturing compromising personal photos using a digital camera, web camera or phone (in which case the crime of child pornography can also be apprehended - art. 375 RCC – if the minor, in the transmitted or captured materials, has explicit sexual behavior), materials that help the adult to later control the minor, including through the use of threats or blackmail.

[18] Published in the Official Monitor no. 1012/30th of October 2020.

The last sexual act criminalized by RCC with potential minor victims is child pornography, provided by art. 374 RCC. According to this legal criminal rule, child pornography consists in producing, possessing, procuring, storing, exhibiting, promoting, distributing, as well as making available, in any way, of pornographic materials with minors are punishable by imprisonment from one year to 5 years. The same penalty is provided for urging or recruiting a minor for the purpose of his/her participation in a pornographic show, obtaining benefits from such a show in which minors participate or exploiting a minor in any other way for the performance of pornographic shows. It is obvious that these shows could occur online. Watching pornographic shows in which minors participate is punishable by imprisonment from 3 months to 3 years or a fine. If the acts described *were committed through a computer system or other means of storing computer data*, the penalty is imprisonment from 2 to 7 years. By computer system the Romanian legislator meant *any device or set of devices interconnected or in a functional relationship, one or more of which ensures automatic data processing, with the help of a computer program,* as stated in art. 181 RCC (for example, laptop, mobile phone, tablet, etc.). Storage media can be internal or external hard drives of a computer system, other magnetic storage media or punched tapes (floppy drives, CD-ROMs, CR-Rs, DVDs, zipp-drives or any other backup devices).

Unauthorized access to pornographic materials with minors, through computer systems or other means of electronic communication, is punishable by imprisonment from 3 months to 3 years or a fine. If the acts described were committed in the following circumstances: a) by a family member or by a person who lives with the victim; b) by a person in whose care, protection, education, guard or treatment the minor was or by a person who abused his recognized position of trust or authority over the minor; c) the act endangered the minor's life; d) by a person who has previously committed a crime against sexual freedom and integrity against a minor, a crime of child pornography or pimping against a minor ; the special limits of punishment are increased by one third.

The legal norm also provides a legal definition of the term *pornographic material with minors,* meaning any material that presents a minor or an adult as a minor, having explicit sexual behavior or that, although it does not present a real person, simulates, in a credible way, a minor having such behavior, as well as any representation of a child's genitals for sexual purposes and of the term *pornographic performance,* meaning the direct exposure addressed to the public, including through information and communication technology, of a child involved in explicit sexual behavior or of a child's genital organs, with a sexual purpose. The Romanian law also punishes the attempt to all these acts.

By criminalizing child pornography, the legislator, on the one hand, decided to penalize activities likely to pervert the moral sense of citizens, and, on the other hand, to protect, the minor victims. Provisions of art. 374 C. pen. Are harmonized with the Framework Decision 2004/68/JAI of the Council of the European Union, but also with Directive no. 2011/93/EU of the European Parliament and of the Council, according to which child pornography must be countered, through a global approach, which includes the essential elements of criminal law, common to all member states, especially in terms of effective, proportionate and dissuasive sanctions and which should be accompanied by judicial cooperation as extensive as possible.

In 2003, Law no.196/2003[19] regarding the prevention and combating of pornography was adopted (6 years earlier than the adoption of RCC). According to this legal instrument, the term *pornography* means obscene acts, as well as materials that reproduce or broadcast such acts. *Obscene acts* means explicit sexual gestures or behaviors, committed individually or in a group, images, sounds or words that by their meaning cause offense to modesty, as well as any other forms of indecent manifestation regarding sexual life, if performed in public. *Obscene materials* means objects, engravings, photographs, holograms, drawings, writings, prints, emblems, publications, films, video and audio recordings, advertising spots, computer programs and applications, musical pieces, as well as any other forms of expression that explicitly present or suggest sexual activity.[20]

The provisions of the special law do not apply neither to works of art or science, nor to materials created for artistic, scientific, research, education or information purposes from easy to comprehend reasons[21].

The persons who create pornographic sites are obliged to restrict access by imposing passwords. Access should be allowed only after paying a fee per minute of use, established by the site creator and declared to the fiscal Romanian authorities. The persons who create or administer websites must clearly highlight the number of accesses to the respective website, in order to be subject to the fiscal obligations provided by law. It is forbidden to create and manage websites with a pedophile, zoophile or necrophile character[22]. Pornographic films, regardless of the medium on which they are made, will be rented or sold only in spaces with a special destination and will not be rented or sold

[19] Published in the Official Monitor no. 198/20th of March 2014.

[20] Art. 2, Law no. 196/2003.

[21] Art. 3, Law no. 196/2003.

[22] Art. 7, Law no. 196/2003.

to minors. The provisions of the special law complete and help judges to interpret and apply provisions of art. 374 RCC. Here are some examples of convictions for child online pornography in Romania:

1.The actions of the defendant, who recorded the minor injured party with his mobile phone while the minor was having sex, images that he later downloaded to his laptop and then repeatedly threatened the minor with the distribution of this video, thus causing her to give him various sums of money, meet the constituent elements of the crime of child pornography through computer systems and blackmail in repeated form[23].

2.The fact of the defendant who, through repeated actions, carried out on the basis of the same criminal resolution, possessed, including with a view to spreading, transmitted, offered and made available, a number of 58 films representing positions or pornographic sexual acts, which present or involve minors who have not reached the age of 18, meet the constitutive elements of the crime of child pornography, in continued form, provided for by art. 374 para. (1) and (2) RCC in repeated form. In this case, the acts of child pornography were committed exclusively through computer systems, the defendant downloading from the Internet and watching the pornographic films on his laptop, later picked up by the investigative bodies, the Court has retained both forms of the crime of child pornography, provided by paraghaph 1 and 2 of art. 374 RCC.[24]

3. The act of the defendant who promoted on his Facebook page a link to a video called "Nikolay and Vadim", the preview image of the link showing two minors (males), obviously under the age of 18 from an anthropometric point of view, with obvious sexual connotations, in explicit sexual poses, link leading to a web page, which contained the video file in question and various other pornographic video materials with male minors, meets the constitutive elements of the crime of child pornography through computer systems, provided for and punished by art. 374 para. (1) and (2) C. pen., both on the objective side and on the subjective side, from the evidence as a whole resulting that it was committed with guilt in the form of intention[25].

[23] High Court of Cassation and Justice, penal section, penal decision no. 1230/8th of April 2014 , available on www.scj.ro.

[24] High Court of Cassation and Justice, penal section, penal decision no. 1731/21st of May 2014 , available on www.scj.ro.

[25] Brașov Appeal Court, penal decision no. 123/20th of February 2015 , available on https://www.avocatura.com/speta/198270/coruperea-sexuala-a-minorilor-art221-ncp-curtea-de-apel-brasov.html, accessed on 5.09.2022.

4. The activity of the minor who photographed herself having an explicit sexual behavior cannot be assimilated to the crime of child pornography in the form of production of pornographic materials since she only exercised her right to dispose of her own body in the privacy of her home. Under these conditions, the defendant cannot be held criminally liable for having instigated the minor to take photographs[26].

All Romanian scholars consulted for the present study insist on the same idea: even if the Romanian legislator has put significant efforts in combatting forms of online sexual abuse against children, it is not enough, the amendments of the national regulation as a consequence of the European initiatives come with a delay, while other novel acts like cyberflashing are not covered at all by the Romanian criminal legislation (Uşvat, 2003:38; Dobrinoiu et all, 2016; Iugan, 2020; Spiridon, 2015). There is still a lot of work in this direction.

5. Conclusions

As the EU Commission has proposed in its *Proposal for a regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse*[27], the measures to be taken by the European Commission to combat online sexual abuse consist in adopting a new set of rules to save children and protect them against new abuses, preventing the reappearance online of materials containing sexual abuse of children and bringing criminals to justice. These new rules should include:

1. mandatory risk assessment and risk mitigation measures: providers of hosting services or interpersonal communications will have to assess the risk of abusive use of their services for the dissemination of materials containing sexual abuse of children or for luring minors for sexual purposes, action known as "grooming". Suppliers will also have to propose risk mitigation measures.

2. specific detection obligations, based on a detection order: Member States will have to designate national authorities responsible for examining the risk assessment. If those authorities determine that a significant risk persists, they may ask a court or an independent national authority to issue a detection order for known or new material containing child sexual abuse or for known or new cases of "grooming". ". The detection orders are limited in time and target a certain type of content within a certain service.

[26] Bucharest Appeal Court, penal decision no. 1289/8th of October 2019, unpublished).

[27] See note 12.

3. solid guarantees regarding detection: Companies that have received a detection order will be able to identify the content only using child sexual abuse indicators verified and provided by the EU Center. Detection technologies must be used only for the purpose of detecting child sexual abuse. Providers will have to implement technologies that are the least intrusive on private life, in accordance with the current state of technology in the sector, and that limit as much as possible the error rate of false positive results.

4. clear reporting obligations: providers who have detected sexual abuse of children online will have to report them to the EU Center.

5. effective removal: National authorities can issue removal orders if materials containing child sexual abuse are not quickly withdrawn. ISPs will also have to disable access to images and videos that cannot be retrieved, for example because they are hosted outside the EU in non-cooperative jurisdictions.

6. reducing exposure to "grooming": The rules require application stores to ensure that minors are prevented from downloading applications that may expose them to a high risk of seduction for sexual purposes.

7. solid supervision mechanisms and appeals: Detection orders will be issued by courts or by independent national authorities. To minimize the risk of false detection and reporting, the EU Center will verify provider reports of potential online child sexual abuse before passing them on to law enforcement authorities and Europol. Both suppliers and users will have the right to challenge in court any measure that affects them.

According to the normative act proposed by the EU Commission indicated in the first part of the present article, the Center of the EU will support:

- online service providers, especially in terms of complying with their new obligations, namely performing risk assessments, detecting, reporting, removing and blocking access to materials containing online sexual abuse of children, by providing indicators for detection of sexual abuse of children and by receiving reports from providers;
- national law enforcement authorities and Europol, by examining supplier reports to ensure that they are not erroneously transmitted and by quickly directing them to law enforcement authorities. This will contribute to saving the children who are abused and bringing the perpetrators of the crimes to justice;
- member states, by fulfilling the role of a knowledge center for good practices regarding prevention and assistance given to victims, promoting an evidence-based approach;

- the victims, by helping them obtain the withdrawal of the materials containing the abuses they were subjected to.

It is crystal clear that the most effective instruments should be of the same nature with instruments used by online sexual predators in committing sexual crimes against minors. A traditional approach by the national, European or international institutions is no longer suitable in combatting this phenomenon. Digitalization has contaminated everything, including the way the crimes are committed, thus, the reaction in fighting them should be also digitalized, among other official acts and actions.

Minors represent a primary group of victims of cyberviolence, in particular with respect to online sexual violence. Easy to recruit, persuade or force, minors need increased protection against all the actual types of online sexual abuse. Human conduct is evolving, minors are exposed from a very young age to sexual content, while the supervision of children is very poor, due to the fact that their parents need to work and provide food. These are only some of the factors that potentiate the growth of the online sexual abuse of minors phenomenon. International organisms, state institutions and private parties need to be vigilant and to cooperate in order to control and fight back because Internet is not going anywhere and is offering infinite possibilities for sex predators.

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Ranka Vujović*

A CHILD AS A PARTICIPANT IN A CLINICAL TRIAL OF MEDICINES

The child's right to protection from medical experiments, due to the lack of consensus at the international level, has not yet found its place in the catalog of children's rights, which is why scientific research related to the participation of children in these experiments is still current and provocative. The aim of this paper is to review the level and mechanisms of protection provided in domestic legislation to children who participate in the clinical trial of a drug for human use, considering a number of essential rights guaranteed by the Convention on the Rights of the Child, the exercising and protection of which are directly linked to these examinations, such as the right to life, survival and development, rights related to health, the right to protection from exploitation, from inhuman and degrading treatment, the right to dignity and bodily integrity, and, in particular, the right to participation and protection of the best interests of the child. The research showed that the national medical law in the part related to children participating in clinical trials is largely harmonized with the international regulations valid in the European legal area, but that the protection mechanisms provided by both international and domestic regulations, especially with regard to the right on participation in decision-making and protection of the best interests of the child, are neither sufficient nor comprehensive, and that there is room to eliminate certain inaccuracies and shortcomings and improve the protection of minor participants.

Keywords: *children's rights, medical law, clinical trial of medicines, right to health, special legal capacity, informed consent, protection against exploitation.*

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1. INTRODUCTION

The participation of children in clinical drug trials is related to numerous ethical issues, as it may conflict with fundamental human values. A clinical trial of a drug is a trial performed on humans to determine or confirm the clinical, pharmacological and pharmacodynamic effects of the drug, to determine any adverse reaction to the drug being tested, to examine its resorption, distribution, metabolism and excretion of the drug and to determine its safety, that is, efficiency (Law on Medicines and Medical Devices, Art. 59. Par. 1; Rulebook on Clinical Trials of Medicines, Art. 2). Clinical trials are a terrain where different interests, public and private, collide. On the one hand, it is the legitimate interest of society to enable better protection of people's lives and health in the future, and on the other hand, it is the interest of the subjects themselves to protect their life and health from the risks to which they are exposed during such trials. To that should be added the various interests of other actors involved in the trial (drug manufacturers, sponsors, researchers, parents, etc.), as well as the need to protect the subject from the risk of exploitation. Investigators must take into account the balance between the benefits and risks of the study and whether the benefit to the subject and society is greater than the risk to the subject. It is a basic condition that needs to be met. The Ethics Committee, based on the request for approval to conduct a specific clinical trial, takes a position, makes decisions and gives an opinion on ethical issues of importance for ensuring good scientific practice, respecting the rights of subjects and preserving the basic principles and duties of investigators established by positive regulations and the professional ethics code. This is necessary because medical ethics is part of bioethics, application of moral norms and values to medical practice, that the current professional ethics are too narrow and need to a greater extent consider the patient's dignity and right to self-determination (Heberling, 2021: 593). A positive opinion of the Ethics Committee is a condition for granting permission to conduct clinical trials. In Serbia, such a license is issued by the Agency for Medicines and Medical Devices.

A necessary condition for participation in a clinical trial of drugs is the consent of the subjects themselves. No one shall be subjected to medical scientific experiments without their free consent (International Covenant on Civil and Political Rights, Art. 7). The Family Law (FL) and the Law on the Rights of Patients (LRP) recognize that a child who has reached the age of 15 and who is capable of reasoning, has the ability to give consent for the undertaking of a medical procedure, that is, a proposed medical intervention. However, a child does not have this particular legal capacity when it comes to making a decision on participation in the clinical trial of a drug. For this type of trial, according to the law governing the field of medicines, informed consent can only be given by a person

of full legal capacity (LMMD, Art. 61-63). Due to the absence of a legally relevant will that would make them capable of giving valid consent to participate in the clinical trial of the drug, children can participate in this procedure only with the consent of the parents or guardians. The legislator's different approach to regulating this issue is justified by the different purpose of undertaking a medical procedure on a child from the purpose of participating in a clinical trial of a drug, although both cases concern the exercise of personal rights.

In order to understand the legal position and the level of protection of the rights of the child as a participant in drug trials, this research carried out a comparative analysis of the content of domestic regulations governing clinical trials of drugs and the most important international legal sources in that area, through a thematic analysis that focuses on the interpretation of meaning. The basic legal principles and key conditions for the participation of a child as a subject in the testing of new drugs, the mechanisms for the protection of the rights guaranteed to every child in all procedures by the Convention on the Rights of the Child (CRC), as well as the positions presented in the legal literature, are presented. The focus of this paper is not the assessments and decisions of competent bodies, which refer to scientific, i.e. clinical aspects of the trial, or the conditions concerning the ethical justification of conducting a clinical trial of drugs on children.

The results of the conducted analyses point to certain inaccuracies and shortcomings, which are not only a feature of domestic regulations, then, to the uneven level of legal protection provided to the child as a subject by Regulation (EU) No 536/2014, on clinical trials on medicinal products for human use, as the key secondary source of law of the European Union, the Convention on Human Rights and Biomedicine (CHRBM) and other European and international legal acts – especially when it comes to the child's right to participate in making all decisions important for them, as envisaged by the CRC, and mechanisms for protecting his or her best interests. The paper also points to the high degree of harmonization of national law with international standards in the field of clinical trials of drugs and to complete harmonization in the field of acceptance of the Guidelines of Good Clinical Practice in clinical trials of drugs, which provide uniform standards for the European Union, Japan and the United States of America.

2. CHILDREN'S RIGHT TO HEALTH AND PROTECTION FROM MEDICAL EXPERIMENTS

The right of the child to health derives from a broader principle and the child's right to life, survival and development, contained in Article 6 of the CRC, which goes beyond not only other children's rights, but also other convention principles and is a prerequisite for the exercise of all other children's rights (Vučković-Šahović & Petrušić, 2015: 95). The principle of the right to life, survival and development is elaborated through a series of special provisions of the Convention which, among other things, ensure protection of the child from physical and mental violence, abuse and neglect (Article 19), the highest attainable standard of health care (Article 24), prohibition of children trafficking (Article 35), prohibition of all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36), protection from inhumane and degrading actions (Article 37) and other rights. The complex content of this principle includes rights related to the child's psychophysical integrity and health and clearly indicates the need for daily care and counseling related to the child's health and development issues. The guarantees also include unborn children (which is in accordance with the *nasciturus pro iam nato habetur quotiens de commodis eius agitur* fiction) and implies the right to healthcare and appropriate care for the health of mothers during pregnancy and childbirth (CRC, Art. 24. Par. 2 (d)). In accordance with the stated principle and the legal fiction that a conceived child is considered born if it is in his or her best interest, there is also a ban on clinical testing of drugs on healthy pregnant (and breastfeeding) women in the national legislation of member states (in Serbia, this issue is regulated by the LMMD, Art. 63).

International human rights and child rights law does not proclaim the right to health *per se.* The concept of "right to health" is derived from health-related rights, such as the right to enjoy the highest attainable standard of health care, medical rehabilitation, protection and treatment of physical and mental health, the right to access health care, insurance in case of illness and other rights which are proclaimed as such in the most important international legal documents of universal character (CRC, Art. 24 & 25; UDHR, Art. 25; CHRBM, Art. 10. Par. 3, Art. 11. Par. 1 - 2, Art. 12. Par. 2. a), b), c) and d)). Today, there is ample empirical evidence for the presence of therapeutic nihilism (Ljubičić, 2021: 528). The Committee on the Rights of the Child explained that the concept of "right to health" should be viewed more broadly than the content of the CRC provisions relating to the body of rights to life, survival and development and to the highest attainable standard of health care (CRC/GC/2003/4, Par. 4). In this context, the right to health includes access to medicines, as well as the child's access to information that is necessary for maintaining and improving his or her health and his or her healthy development. The promotion and

implementation of the provisions and principles of the CRC, especially Articles 2-6, 12-17, 24, 28, 29 and 31, are crucial in guaranteeing the rights of adolescents to health and development (CRC/GC/2003/4, Par. 15).

The child's right to protection from being subjected to medical experiments is not expressly prescribed as such by any international legal document, including the CRC. The possibility of children's participation in clinical trials is therefore closely related to the basic principles of the protection of children's rights, starting with the right to life, survival and development and including the right to protection of dignity and bodily integrity, protection from exploitation, from inhuman and degrading treatment, to express opinions and to protect the best interests of the child. None of these rights of the child can be considered in isolation from the principle of equality of rights. Children, as human beings, also have the right to equal legal protection without discrimination, and that stage in the development of legal thought and legal practice was not immediately and easily reached, at least not when it comes to understanding childhood as a concept and the position and rights of the child (Vujović, 2020: 79). For all these reasons, the participation of children in medical experiments belongs to "new" and provocative topics in the law of human rights and children's rights (Vučković-Šahović & Petrušić, 2015: 180).

3. REQUIREMENTS FOR THE PARTICIPATION OF CHILDREN IN CLINICAL TRIALS ON MEDICINES

The basic guiding principle for the participation of children in clinical trials is – the primacy of the human being, expressed through the rule that the interests and well-being of the child as the subject of the trial should take precedence over the interests of science and society (DoH, Par. 8; CHRBM, Art. 2). It happened, however, that children suffering from severe and incurable diseases or permanent damage to their health were subjected to medical experiments in which all means were resorted to, including those not directly related to the child's health condition and diagnosed illness. The literature mentions, as an example, an experiment carried out at the Willowbrook State Hospital in New York, in which a group of children with impaired mental health were tendentiously infected with the hepatitis virus, in order to check the effectiveness of the vaccine (Adshead & Sarkar, 2004: 15-17). It also happened that children were the subjcects of experiments for no immediate health reasons, as a result of the need of the family or some other institution to acquire material profit (Vučković-Šahović & Petrušić, 2015: 180). In order to protect children from abuse and prevent their exploitation, modern legislation allows clinical trials of drugs on children under conditions that must be prescribed by law, and which, as a rule, are stricter than the conditions applied to adult subjects.

In the Republic of Serbia, the conditions for the participation of children in clinical drug trials are prescribed in the LMMD are harmonized with the basic principles prescribed by the Helsinki Declaration of the World Health Organization (DoH),[1] as well as with the conditions prescribed by Regulation (EU) No 536/2014 of the European Parliament and the Council on clinical trials of medicinal products for human use. For clinical trials in which children participate, the general conditions for undertaking scientific research in the field of biology and medicine, prescribed in the CHRBM, a document adopted in 1997 under the auspices of the Council of Europe, which Serbia ratified and which, in accordance with its Constitution, is applied directly. The method and mechanisms of conducting clinical trials are mainly contained in the guidelines of relevant international bodies, of which the Guidelines for good clinical practice in clinical trials of the International Council for harmonisation of technical requirements for pharmaceuticals for human use, which contain international ethical and scientific quality standards for planning, implementation , recording and reporting of trials involving the participation of children (ICH E11(R1) step 5 Guideline), mandatory in Serbia as well.[2]

In order to carry out a clinical trial of a drug on children, it is necessary to cumulatively fulfill the general conditions prescribed for the participation of any physical person as a subject (Živojinović & Planojević, 2015: 84), as well as special conditions that apply only to children.[3] Those special conditions correlate with the need to ensure additional

[1] The Helsinki Declaration of the World Health Organization – Ethical Principles for Medical Trial Involving Human Subjects, World Medical Organization (WMA), was first accepted in 1964 in Helsinki, and was amended and supplemented in 1975, 1983, 1989 and 1996, and as a brand new WMA Declaration of Helsinki on Ethical Principles for Medical Research on Humans was adopted in Edinburgh in 2000 and replaced all its earlier versions. This was followed by official clarifications (interpretations) of some of its members. The Clarification Note on Article 29 was adopted in Washington in 2002, and the Clarification Note on Article 30 was adopted in Tokyo in 2004. The revised text of the 2000 Declaration, which includes clarifications from 2002 and 2004, was adopted in Seoul in 2008 under the name: *World Medical Association Declaration of Helsinki. Ethical Principles for Medical Research Involving Human Subjects*, 2000, 2002 and 2004 (hereinafter the: DoH). The last update of the text was made in Brazil in 2013. The text is available at: https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/ (accessed: 17 July 2022).

[2] Clinical trial of drugs is performed in accordance with the Guidelines for Good Clinical Practice in Clinical Trials (the LMMD, Art. 59. Par. 6).

[3] The general conditions are set out in Chapter III. Medicines, Section IV. Clinical drug testing, LMMD, and comply with the conditions of Regulation (EU) No 536/2014, Art. 28. Par. 1, which provides for the following: (a) the anticipated benefits to the subjects or to public health justify the foreseeable risks and inconveniences and compliance with this condition is constantly monitored; (b) the subjects, or where a subject is not able to give informed consent, his or her legally designated representative, have been informed in accordance with Article 29(2) to (6); (c) the subjects, or where a subject is not able to give informed consent, his or her legally designated representative, have given informed consent in accordance with Article 29(1), (7) and (8); (d) the rights of the subjects to physical and mental integrity, to privacy and to the protection of the data concerning them; (e) the clinical trial has been designed to involve as little pain, discomfort, fear and any other foreseeable risk as possible for the subjects and both the risk threshold and the degree of distress are specifically defined in

protection of children from further damage to their health and potential abuses to which this vulnerable category of respondents may be objectively exposed. As a rule, children who have an illness or conditions for which the drug is being clinically tested can participate as trial subjects, if necessary and under special precautions (LMMD, Art. 63. Par. 2). Clinical trial of drugs on healthy children is generally prohibited (LMMD, Art. 63. Par. 1 (1)), but there are certain exceptions that will be discussed later.

The special conditions for the participation of children suffering from the disease for which the drug is being clinically tested is intended, according to LMMD (Art. 64. Par. 2), are as follows: 1) the parent or guardian has given written consent (the written consent must represent an assumed desire of the minor and may be withdrawn at any time, without harm to the minor); 2) the child has received information in a manner understandable to him or her from a person who has experience in working with minors, which relates to the course of the clinical trial, the risk and benefit to the health of the subject; 3) written consent given without soliciting to participate in a clinical trial of a drug by offering or giving any material or other benefit; 4) The Ethics Committee has assessed that a clinical trial of a drug on a minor subject provides a direct benefit for a certain group of patients, as well as that such a trial is essential for the evaluation of data obtained by a clinical trial on persons who are capable of giving written consent independently; 5) The Ethics Committee, based on the opinion of a specialist in the field of pediatrics, with special reference to clinical, ethical and psychosocial problems in the conduct of the clinical trial of the drug, made a positive decision on the conduct of the clinical trial of the drug.

the protocol and constantly monitored; (f) the medical care provided to the subjects is the responsibility of an appropriately qualified medical doctor or, where appropriate, a qualified dental practitioner; (g) the subject or, where the subject is not able to give informed consent, his or her legally designated representative has been provided with the contact details of an entity where further information can be received in case of need; (h) no undue influence, including that of a financial nature, is exerted on subjects to participate in the clinical trial. Essentially, it is about the basic principles of medical research, which were founded in 1865 by the French physiologist and doctor, Claude Bernard. More details: La Follette H., Shanks, N., "Animal Experimentation: The Legacy of Claude Bernard", International Studies in the: La Follette H., Shanks, N., "Animal Experimentation: The Legacy of Claude Bernard", *International Studies in the Philosophy of Science*, 1994; 8(3): 195-210. The principles established by Bernard are the basis of modern medical law. They are incorporated in Article 16 of the CHRBM, according to which trial on a person can be undertaken if the following conditions are cumulatively met: 1) there is no alternative of comparable efficiency to research on humans, 2) the risks to which that person is exposed are not disproportionate to the potential benefits from the research, 3) the research project was approved by the competent authority after an independent assessment of its scientific value, including the importance of the trial goal and multidisciplinary assessment of its ethical acceptability, 4) the persons subjected to the research were informed about their rights and the guarantees prescribed by law for their protection, 5) the necessary consent has been obtained, express and specific, and is appropriately documented. Such consent can be freely withdrawn at any time.

The Ethics Committee of Serbia is a professional body, whose members are appointed and dismissed by the Government, on the proposal of the Minister of Health. The task of that body is to take care of the provision and implementation of health care in accordance with the principles of professional ethics, the principles of respect for human rights and values and the rights of the child, at the level of the Republic of Serbia (the Law on Healthcare, Art. 141. Par. 1). It is within the scope of authority of the Ethics Committee to give opinions on controversial ethical issues that are important for the implementation of scientific, medical and research in the field of public health in health institutions in the Republic of Serbia, as well as to give an opinion on the clinical trial of a drug in a procedure that is carried out simultaneously with the procedure of making a decision on the application for approval of the clinical trial of the drug before the Agency for Medicines and Medical Devices of Serbia (LHC, Art. 142).

The group of special conditions concerning consent/agreement for the child's participation in a clinical trial of a drug (which is intended for the treatment of a disease/condition diagnosed in a child) includes: 1) informed consent of the child's parent, i.e. the guardian 2) informing the child and 3) absence of material or other impermissible benefits for giving consent. The second group of conditions, as we have seen, refers to the decisions of the Ethics Committee, which evaluates the ethical justification of conducting clinical trials on children. Such decisions are related to the ethical and clinical aspects of the trial itself, and will not be discussed separately here.

Healthy children can, exceptionally, be included in the conduct of a trial, if two additional conditions are fulfilled: that the trial is in the interest of "healthy persons who have not reached the age of 18" and that there is written consent of the parents or guardians for the participation of a healthy child in the trial (LMMD, Art. 63. Par. 3). Since the stated "additional" conditions practically repeat the prescribed principle of protecting the interests of the subject and the prescribed condition regarding the consent of parents/guardians for the child's participation in the trial,[4] it cannot be concluded that these are additional or special measures for the protection of healthy children.

Namely, within the framework of the general conditions, the basic principle of conducting clinical trials on humans is prescribed: "The rights, safety and interest of the subjects must be prioritized in relation to the interest of science and society as a whole" (LMMD, Art.

[4] The LMMD uses different terms: "agreement" of the parent/guardian (for the participation of a sick child in the trial, Art. 64) and "consent" of the parent/guardian (for the participation of a healthy child in the trial, Art. 63) - to denote practically the same requirement, which is realized in the same procedure (informed consent, Art. 2. Par. 1 (23)), b without indicating the essential reason for this terminological distinction.

60. Par. 1). The principle of prioritizing the rights, safety and interests of the subjects, in the context of clinical trials conducted on children, is in accordance with the principle of protection of the best interests of the child from the CRC, Art. 3. Since that principle applies to all minor participants in clinical trials, the meaning of translating the general principle into an additional condition, which should justify an exception – the participation of healthy children in clinical drug trials, is unclear.[5] The problem in the application of general legal standards is that the legislator did not directly derive the appropriate rules from the prescribed standard "interest of the participant", either in the law itself, or in the secondary legislation (RCTM), which would refer to the factors on which the decision on whether is a specific trial of the drug in the interest of the minor participant, but that question is left to practice. Another problem in the application of the required "additional" condition is that it is difficult to distinguish whether in this case it is about protecting the interests of the subject him/herself, i.e. the direct health benefits that he or she will have from testing a specific drug, or about the interests of children in a broader sense, as the interests of the entire children population affected by a certain health risk. Regulation (EU) No. 536/2014 allows a clinical trial of a drug that is scientifically based on the expectation that the minor subject and the population of children he or she represents will have a direct health benefit, with the fact that it is necessary to balance risks and benefits in such a way that there are minimal risks and minimal burden for the minor in question compared to the standard treatment of his or her health condition (Art 32. Par. 1 (g)). The requirement that the benefit of the drug being clinically tested is greater than its possible risk to the life and health of the subject is a general condition from Art. 61. Par. 1 (1) LMMD.

The following general rule is aimed at eliminating the risk of causing additional harm to the life and health of the clinical trial subject – the clinical trial of the drug must be planned and conducted in such a way as to minimize pain, discomfort, fear and any other foreseeable risk to the health of the subject, whereby the risk threshold and degree of pain are separately defined and constantly monitored (LMMD, Art. 60. Par. 2). Mechanisms for ensuring special protection of minor subjects aimed at reducing fear, pain and discomfort and eliminating the risk of causing additional harm to the life and health of minors are elaborated in more detail in the ICH E11(R1) step 5 Guideline, which, as already stated, an integral part of the RCTM (space in which the research is conducted is adapted to age, familiar environment, experienced and trained staff for conducting the

[5] Art. 63. Par. 3 of the LMMD reads: "Exceptionally from the provision of paragraph 1, point 1) of this Article, clinical trials can be performed on healthy persons who have not reached the age of 18, if it is in their interest, with the written consent of parents or guardians".

trial on children, ready to recognize and adequately react to possible adverse events, etc.). The Rulebook stipulates that the investigator in a clinical trial must be a doctor of medicine (or a doctor of dentistry, depending on the trial) who is directly involved and responsible for the treatment and care of patients/trial participants and responsible for conducting the clinical trial. If the clinical trial of a drug is conducted by a team of investigators, the investigator responsible for conducting the clinical trial of the drug is the principal investigator (RCTM, Art. 2 (11) & Art. 29).

The principle of voluntariness applies to all clinical trials – the participation of subjects in a clinical trial is voluntary. Soliciting consent to participate in a clinical drug trial by offering or giving any material or other benefit is not permitted (LMMD, Art. 64. Par. 2 (3)). This issue is very important from the aspect of respecting personal rights and deserves special attention. It is important how this principle is realized when it comes to children as participants in a clinical trial, since minor subjects are not recognized as having the right to independently make a decision about participation in the trial. This is both a legal and an ethical issue, and this paper addresses its legal aspects. Serbian medical law stipulates that the statement of the legal representative (parent/guardian) on the consent for the child's participation as a subject in the clinical trial of the drug must be given voluntarily, after providing complete information "about the nature, significance, consequences of the trial and the risk to health" (LMMD, Art. 61. Par 1 (5) & Art. 64. Par 2 (1); RCTM, Art. 2 Par. 1 (8)). It is also a condition that the child be informed about the trial in a way that he or she can understand, and that by a person who has experience in working with minors (LMMD, Art. 64. Par 2 (2)). Any person who is legally incapable of giving consent to a medical trial should be informed of his/her rights and the insurances prescribed by law for his/her protection, "unless the person is unable to receive the information" (Additional Protocol to CHRBM, Art. 15. Par. 1 (iii)).

The information given to the child should refer to "the course of the clinical trial, the risk and benefit to the health of the subject". This is further elaborated in the RCTM, which stipulates that the principal investigator and the clinical trial team (i.e., a member of the team designated by the principal investigator) are obliged to give an oral and written explanation to the subject, in a way that he or she can understand, about the data on the drug being clinically tested, the objective and the plan for carrying out the clinical trial, the risks and benefits for the subject, the method of selecting subjects, the approximate number of subjects and other possible forms of treatment, as well as the advantages and disadvantages of such treatment (RCTM, 32. Par. 4 & Art. 33. par. 2).

Another issue in this context deserves attention, and that is the issue of terminological and substantive (essential) distinction between the terms used, which are important for recognizing the child's right to participate in making important decisions for him or her: children "capable of forming an opinion and evaluating information" (LMMD, Art. 65) and children who are "mentally mature" (Section 2.6.3. ICH E11(R1) step 5 Guideline). None of the mentioned regulations contain a more detailed explanation of the mentioned terms, which significantly complicates the application of the prescribed norms and leaves it to the interpretation of the investigators themselves. For determining the content of the mentioned terms, it is also important what is prescribed in the system law in this regard. U The law governing children's rights stipulates that every child, regardless of age, who is "capable of forming his or her own opinion" has the right to freely express that opinion, and that a child who has reached the age of 10 can freely and directly express his or her opinion in every judicial and administrative proceeding in which his or her rights are being decided (FL, Art. 65. Par. 1. & 4). The Law on Medicines and Medical Devices, as we have seen, does not prescribe the duty of the investigator to obtain and appropriately document the opinion of a child capable of forming an opinion regarding his/her participation in the trial. Further, the Family Law does not recognize children who are "mentally mature", but uses the term "capable of reasoning" for children who it recognizes as having special legal capacities. The ability to reason, depending on the circumstances (the ability to independently submit a request to change one's personal name, the ability to give consent to undertaking a medical procedure, the ability to recognize paternity/maternity, etc.), the aforementioned law binds to children aged 10, 15 and 16.

Even the condition – that the child does not object to the trial (provided in Art. 17. Par. 1 (5) CHRBM), is not explicitly prescribed as such in the LMMD. Given that the CHRBM has become part of the domestic legal order through its ratification and is directly applicable in Serbia, this is not even necessary. And yet, Article 65 of the LMMD mentions "withdrawal of consent": "During the conduct of a clinical trial of a drug, a child who *is capable of forming an opinion and evaluating the information* received about participation in a clinical trial of a drug may *withdraw consent* at any time, that is, *withdraw* from the clinical trial of the drug, about which he or she will inform the principal investigator or a member of the clinical trial team". It is not entirely clear why the focus of the legislator is on the withdrawal and not on the consent of the child. In addition, it is not specified in what form and in what manner the "notification" of a child capable of forming an opinion – to withdraw consent, i.e. to withdraw from the trial – is

to be submitted. Orally, in writing, by conclusive actions, personally addressed to the investigator or through parents/guardians?

When it comes to the age of children that allows giving consent to participate in the trial, i.e. signing the consent form, the RCTM regulates that issue in an appendix, in the aforementioned Section 2.6.3. *Agreement and consent*, taken from the ICH: E 11 (step 5) Guideline, as follows: "All participants should be familiarized with the trial as much as possible, using language and concepts that are understandable to them. Where feasible, participants should give their *consent* to participate in the trial (*the age at which consent is given should be determined by the Ethics Committee in accordance with the law*). Participants who are *mentally mature* should sign and date a separate consent form or *consent declaration form*. In both cases, participants must be informed of their right to refuse to participate, that is, to withdraw from the trial at any time. Attention should be paid to signs of excessive suffering in patients who are unable to clearly express their suffering. Although the subject's decision to withdraw from the trial should be respected, in therapeutic trials of serious and life-threatening diseases such circumstances are possible which, in the opinion of the investigator and the parents or guardians, may endanger the well-being of the child if he or she withdraws from the trial. In such circumstances, *the further consent of the parents or guardians is sufficient for the child to continue participating in the trial*. Emancipated, that is, older minors (*the age is determined by law*) can give consent themselves".

It follows from the above that the fact that the informing of the child was carried out in the manner prescribed in Art. 64. Par 2 (2) of the LMMD, is sufficient to assume that the child consented i.e. agreed to participate in the clinical trial, unless they expressly objected at any time during the trial. Further, it follows that the child can withdraw that assumed consent, that is, withdraw from the trial at any time, but this does not mean that his or her will be respected, i.e. that his or her participation in the trial will be terminated. In addition, a special authorization of the Ethics Committee to determine the age of the subjects is envisaged, which enables the subjects to exercise their right to consent *in accordance with the law*. Since the Ethics Committee gives its assessments and opinions in the process of approving a specific trial, it may be concluded that for each trial it can determine a different age of minors on which the minor's right to consent depends. But, since the age, to which the right of consent is attached, should be determined by law, and the LMMD grants that right only to adults, this authority of the Ethics Committee is only a "dead letter". The same can be concluded when it comes to the part of the mentioned norm that reads: "Emancipated, that is, older minors (the age is determined by law) can give consent themselves", because this is also an unenforceable norm – the age for giving

consent on their own is determined by the LMMD at the threshold which corresponds to the age of adulthood – 18 years of age.

4. REPRESENTATION, OPINION, WISHES AND BEST INTERESTS OF THE CHILD

Practically, the decision on the child's participation in the clinical trial of the drug is made by the parent, i.e. guardian, by giving written consent. This special condition prescribed in Art. 64. Par. 2 (1) of the LMMD, which reads: "the parent or guardian has given written consent (the written consent must represent the assumed wish of the minor and can be withdrawn at any time, without harm to the minor)", apparently corresponds to the general condition from Article 61, paragraph 1, Clause 5) of the LMMD, which reads: "the subject, i.e. *his or her legal representative*, having been fully informed about the nature and importance of the clinical trial and possible risks, in a manner understandable to him or her, gave his or her written consent to participate in the clinical trial", thus it seems that it is a question of repeating a general condition. A more detailed analysis of this condition shows that this is not the case and that serious objections can be made to this "special" condition.

The general rule is that legally incompetent persons are represented by a legal representative (parent or guardian), and this rule applies to children, just as it applies to adult incompetent research subjects. On the other hand, minors who have acquired full legal capacity before reaching the age of majority (which in Serbia is acquired at the age of 18, FL, Art. 11. Par. 1) — have the right to independent representation in all proceedings.

As mentioned above, the LMMD does not recognize the capacity of minors (all persons under the age of 18) to represent themselves in the clinical trial of a drug. Since this rule applies to all minors, the agreement/consent of the legal representative from Art. 64. Par. 2 (1) LMMD acquires the character of a "special" condition, because it represents a limitation of the rights of those minors who acquired full legal capacity before reaching the age of 18. It is unclear why the legislator decided to link the ability to give consent/agreement to participate in a clinical drug trial to the legal institutions of "minority" and "adulthood", and not to "full legal capacity" which occurs before the age of adulthood in cases of emancipation. In Serbian law, full legal capacity can be acquired before reaching the age of majority, through emancipation, in two cases: 1) when a minor who has reached the age of 16 enters into marriage, based on court permission, 2) when the court declares a minor who has reached the age of 16 to be fully legally capable, and

he became a parent (FL, Art. 11). By prescribing this "special" condition, a precedent was introduced into the domestic legal system – that a fully capable minor can independently represent him/herself (and his/her child, if he/she has one) in all procedures and before all authorities and bodies – except in a clinical trial of a drug. This limitation of acquired status rights of minors opens up a number of practical issues. Among other things, the issue of the održivosti viability of the legal basis for consent to participate in a clinical trial of a drug on behalf of a fully legally capable minor is given by a parent whose parental rights over that person have ended.[6] Such life situations are real. Also, if a child whose parent is a minor who has acquired full legal capacity through emancipation (assuming that person is the only known or only living parent) and who is the representative of his/her child according to the law (FL, Art. 72, u vezi sa Art. 11) – could the aforementioned LMMD provision serve as a valid legal basis for placing his/her child under guardianship and appointing a guardian in the process of clinical drug testing? Or would it be a limitation of parental rights that the FL does not recognize?! If the legislator started from the assumption that "capacity for reasoning" (which is the assumption of the "ability to give informed consent") represents a "factual state that is relatively and subjectively determined" (Ponjavić, 2013: 97), and that it does not have to be proved only when it comes to adults, and, between the right to personal autonomy and legal certainty, it chose the latter – it did not choose the correct starting point. A minor who acquired full legal capacity through emancipation – passed the test of the "ability to reason" in the court proceedings that preceded emancipation.[7]

In the legal order that operates on the principle of unity, what the domestic legal order is (Constitution of the Republic of Serbia, Art. 4. Par. 1. & Art. 194. Par. 1) issues concerning the personal and family status of citizens and which as such governed by the system law (FL), should not be subject to partial regulation by "sectoral" laws. It would be sufficient if the legislator, regarding the agreement/consent of the legal representative for the child's participation in a clinical trial of the drug, adhered to the general condition from Article 61, paragraph 1, point 5) of the LMMD, because it is fully in accordance with the FL. And, of course, if it had operationalized the child's right to appropriate participation in that procedure.

[6] According to the FL, Art. 84. Par. 1 (2), the parental right ends when the child acquires full legal capacity.

[7] In the procedure of granting a license for the conclusion of marriage of a minor, the court evaluates the psychophysical maturity of minors to exercise their rights and duties in marriage (FL, Art. 23. Par. 2). The rules of this procedure accordingly apply to the procedure for obtaining a court license for the acquisition of full legal capacity of a minor who has reached the age of 16 and has become a parent (FL, ART. 360).

The Declaration of Helsinki stipulates that when a potential research subject *is deemed by law to be incapable* of giving consent, the physician must request that a legally authorized representative give consent for his/her participation in the study (see DoH, Par. 28). An even more precise provision is contained in the CHRBM, Art. 6. Par. 2: "if, *according to the law*, a minor is not capable of consenting to the intervention, the intervention can only be carried out with the approval of his/her representative or *competent authority or a person or authority provided for by law*". In that case, according to the CHRBM, the opinion of the minor should be taken into account. Regulation (EU) No. 536/2014 does not provide as a special condition the consent of the child to participate in a clinical trial, nor does it require obtaining an opinion from the child, although it states that the national legislation *may provide for the obligation of the investigator* to obtain consent from a minor capable of "forming an opinion and evaluating the information communicated" for participation in a clinical trial. Although Regulation (EU) No. 536/2014 does not determine the minimum age for acquiring the capacity for informed consent, it requires the member states to determine the age of the subject which is the presumption of this capacity (Art. 29). The Serbian legislator also acted in accordance with the aforementioned. It seems that the stated requirements from Regulation (EU) No. 536/2014, as well as from the ICH Guideline, which are incorporated into the Serbian legislation in the field of clinical drug trials, below the level of protection of the child's right to participation provided by the CHRBM and below the level guaranteed by the CRC.[8]

In Serbian law, a distinction is made between the capacity of a minor to consent to the undertaking of a medical intervention/medical procedure and the capacity of a minor to consent to participate in a clinical trial of a drug. In legal theory, this distinction is justified by the different purpose of applying a medical procedure from the purpose of participating in a clinical trial of a drug and by the need to strengthen the protection of minors against abuse in the context of conducting clinical trials (Živojinović, 2017: 632). Is the mentioned distinction a guarantee of more complete protection of the child's rights? It has already been said before that FL and LRP recognize that a child – a minor patient who has reached the age of 15 and who is capable of reasoning, has the ability to independently give consent for a medical procedure (FL, Art. 62. Par. 2), i.e. the proposed medical intervention (LRP, Art. 56. Par. 1). The capacity for reasoning of a child who has

[8] In general, some legal writers point out that even on other issues, Regulation (EU) No 536/2014 did not bring anything new and more advanced compared to the earlier acts and that, in certain segments, it is below the level provided in valid international and other European acts in this area (see Živojinović, 2017: 627).

reached the age of 15, according to the LRP, means "the child's ability to understand the nature of his/her health condition, the purpose of the proposed medical procedure, the risks and consequences of taking and not taking the procedure, as well as the ability to weigh the information obtained in the process of making a decision" (LRP, Art 2. Par. 1(4)). In addition, and in order to fully protect the rights of the child, the LRP prescribes that a child who has reached the age of 15 has the right to use health services without the presence of parents, legal representatives and other adults, that health workers are obliged to encourage the child to include in the use of health care an adult of his/her choice, as well as that, with the child's consent, the health worker can communicate information about the child's health and the proposed medical measure to a person of the child's choice (Art. 57. The Family Law lowers the age limit of the child, when it comes to the duty to obtain his/her opinion, to 10 years of age, and individually, even lower, tying it to the "ability to form an opinion" which is determined in each specific case. Thus, in Art 65, the FL stipulates the following: "A child who is capable of forming his/her own opinion has the right to freely express that opinion." The child has the right to timely receive all the information he/she needs to form his/her opinion. *Due consideration must be given to the child's opinion in all matters concerning him/her and in all proceedings in which his/her rights are decided*, in accordance with the child's age and maturity. A child who has reached the age of 10 can freely and directly express his/her opinion in every judicial and administrative procedure in which his/her rights are decided." The Family Law also stipulates that the child's opinion is determined in cooperation with persons trained to work with children (a school psychologist, i.e. a guardianship authority, a family counseling center or another institution specialized in mediating in family relations), as well as that a person of choice of the child him/herself is present at the interview. However, that law does not provide answers to many questions (e.g. on whose proposal and with whose help the child will choose a person who will provide him/her with help and support in the procedure in which he/she needs to form and express his/her opinion, whose duty it is to inform the child on his/her right to choose a person he/she trusts, who will support him/her in the process of forming and expressing his/her opinion), since it is a general rule that applies to all situations in which a child has the right to express his/her opinion. Therefore, it is reasonably expected that more complete rules on the method of obtaining the opinion of a child who is a candidate for a subject in the clinical trial of a drug will be contained in the law that governs that area – LMMD and the regulations adopted for its implementation. The aforementioned regulations, however, only insist that the child has *received* information in a manner understandable to him/her from a person who has experience in working with minors, and which relates to the course of the clinical trial, the risk and benefit to the health of the subject. The condition that the

child *has received the information*, in the prescribed manner and by the prescribed qualified person, implies that the competent investigator is obliged to document in an appropriate manner that this special condition for the child's participation in the trial has been met. However, there are no firm rules in the mentioned regulations according to which the investigator would be obliged, after informing the child, to obtain, consider and appropriately document the opinion of the child (capable of forming an opinion) regarding his/her participation in the trial.

Truth be told, a certain possibility is given in the ICH: E 11 (step 5) Guideline, when it comes to "participants who are mentally mature", who "should sign and date a separate consent form or declaration of consent form". However, it is not specified what "mental maturity" is considered to be. Is the ability to form an opinion the same as "mental maturity" or is it the ability to reason? The term "mental maturity" was taken into the local RCTM through simple interpolation of ICH E11(R1) step 5 Guideline, without the necessary clarifications and specifications. Therefore, it depends on the assessment of the investigator him/herself whether a child capable of forming an opinion will even get the opportunity to communicate that opinion. This is, unfortunately, an issue that has not been given the attention it needs in the regulations governing clinical drug trials, given its importance. The child's right to express his/her opinion is not only a rule from the FL. It is a convention right and one of the basic principles of the CRC: "Member states shall ensure to the child who is capable of forming his/her own opinion the right to freely express that opinion *on all matters concerning the child*, with the child's opinion being given due consideration in accordance with his/her age life and maturity of the child" (Art. 12. Par. 1). The opinion of a minor is taken into account as an increasingly significant factor in accordance with his/her age and degree of maturity (CHRBM, Art. 6. Par. 2).

In general, the ability to form an opinion and the ability to reason, in the context of information, which is a prerequisite for giving the informed opinion of the child and for giving the informed agreement/consent of the parents/guardians, represents both an ethical and legal issue. Provision of information in clinical drug trial procedures, and in general, in medical experiments, the extent and manner of communicating information are directly related to the ethical framework of the research. In addition to the child, the parent/guardian must also be fully informed "in a manner understandable to him/her" in order to be able to give "informed" agreement/consent. All of them, since as a rule they do not have medical knowledge, they should understand the given information and notices, to understand the risks that the clinical trial of drugs carries, and all that in a situation where these risks are unknown even to the medical profession. It is very

important who provides the necessary information to the child and parent/guardian. If it is a doctor who normally treats a child, in theory it is considered that it is to be expected that there is a certain relationship of trust, but also dependence between them, which can affect the quality of the given opinion/agreement/consent of both the child and the parent, because the one who gives consent or expresses an opinion is most certainly under certain pressure. "The common law concept of undue influence includes coercion." Coercion, in this/her context, does not require confinement or force, a very small pressure on the will of vulnerable or dependent persons is sufficient, which would be too heavy for them and which would force them to agree to participate even though it is not their true desire" (Klajn-Tatić, 2012: 71).

The literature especially indicates that there are many and varied difficulties that make it almost impossible to set firm rules regarding the issue of informed consent. Some theoreticians emphasize that the reason, among other things, lies in the fact that clinical trials are by their very nature such that "there is an essential need for a certain degree of ignorance in the trial", considering the seriousness of the condition being treated or examined, the psychology of individual patients, etc., and that "the standard of the information provided must certainly be that of a 'reasonable research subject', but certainly not the standard of a 'reasonable doctor'" (Klajn-Tatić, 2010: 226).

A problematic area is also the requirement of the legislator that the written consent of the parents must represent the "presumed wish of the minor" (LMMD, Art. 64. Par. 2 (1)). This leads to the conclusion that the written consent of the parents, which is not an expression of the "presumed wishes of the child", cannot be legally relevant for the inclusion of the child in a medical trial. The question is how to prove the "presumed wish of the child" and who evaluates it. Undoubtedly, the child's wish (as well as of any ill person) is to get well as soon as possible. In this context, any parental consent to a medical sesearch of a drug, which the parent believes may contribute to the child's recovery, could be considered a presumed wish of the child. That is a problematic conclusion. Although he/she does not have a legally relevant will, a child cannot be included in a clinical trial of a drug as a subject without being given the opportunity to express his/her opinion on the matter beforehand.

The necessity of ensuring the child's participation in making the decision to be a subject in a clinical drug trial stems from the right of every person to autonomy and personal dignity. It is, therefore, about the rights of individuals and these rights should be respected from the very beginning, for the duration of the research, until its completion. "If a child as a research subject becomes capable of giving independent informed consent during the

trial, his/her informed consent should be sought and his/her decision respected, whatever it may be" (Klajn-Tatić, 2012: 274).

When it comes to the child's right to refuse further participation in the research, in the mentioned Section 2.6.3 *Agreement and consent*, ICH E11(R1) step 5 Guideline (RCTM), expressly emphasizes that: "Although the subject's decision to withdraw from the trial should be respected, in therapeutic trials of serious and life-threatening diseases such circumstances are possible which, in the opinion investigators and parents, or guardians, may endanger the w*ell-being of the child* if he/she withdraws from the trial. In such circumstances, *the further consent of parents or guardians is sufficient for the child to continue participating in the trial*." It follows from the cited provisions that the child can refuse to participate in the trial at any time, but also that, despite the child's opposition, his/her participation in the trial can be continued if, in the opinion of the investigator and the parents, it is in the child's interest. In theory, there is a view that an older child's objection to participation in a trial should always be respected, even when parents have given consent, "unless the child requires medical treatment that is not available outside the research context or the research procedure shows promise of therapeutic benefit, as well as when there is no acceptable alternative medical treatment." In such cases, even when an older child is involved, but especially if the child is very young or immature, "the parent or guardian can override the child's objection, that is, opposition." If the child is older and closer to the age at which he/she is capable of independent informed consent, the investigator should seek special approval or permission from the scientific committee or review by the Ethics Committee in order to start or continue the research treatment" (Klajn-Tatić, 2012: 274). In general, during medical experiments on children, investigators should not be guided solely by the fact that there is a formal written consent of the parents to conduct the trial, and say: "The parents have agreed, and that means I can continue" (see Mason & Smith, 2011: 643). Undoubtedly, the explicit wish of the child to refuse participation in the clinical trial of the drug must be taken into account at any time, if the child is able to form his/her own opinion and to evaluate the information regarding the trial, its risks and benefits. Also, a distinction should be made between the expressed wish of the child and the interest of the child. The best interest of the child is the guiding principle of the CRC. According to Article 3 of the CRC, ensuring the protection of the best interests of the child is the duty of all who conduct any proceedings involving children. At the same time, the child's interests do not necessarily have to be in line with the child's expressed desire (Vujović, 2019: 205-210). U The family legislation prescribes limitations on the child's participatory rights that are related to the *assessment of the child's best interests*, and are related to the persons conducting the procedure and

the persons representing the child and their release from the duty to enable the child to express his/her opinion if they assess that it would obviously be in contrary to his/her best interest (FL, Art. 266 (3), 267 (3) & Art. 268. Par. 2). At the core of those restrictions is the view that the right to free expression of opinion and the principle of the best interests of the child can be mutually contradictory, in which case the best interests of the child should prevail. However, in contemporary law, the best interest of the child is not viewed separately, nor is it considered that adults are the only ones who determine the content of the principle of the best interest of the child, but the starting point is the position that these two principles are interconnected, whereby it is precisely the respect of the child's opinion very often in his/her best interest (Petrušić, 206: 113).

But the child's interests may conflict with the parents' interests. Likewise, they may conflict with the guardian's interests. Neither LMMD nor RCTM recognize these situations. According to the FL, when the interests of the child and parents are in conflict, the child is represented by an independent legal representative (conflict guardian), who, depending on the specific situation, is designated by the court or guardianship authority. The same rule applies when the interests of the minor ward and guardian are in conflict (FL, Art. 132. Par. 2 (3), Art. 265 & 266). Parents' views can also be in conflict – regarding the child's participation in the clinical trial of the drug. The rule, which derives from the principle of parental equality in the exercise of parental rights, mandates that both child's parents decide on issues that significantly affect the child's life, jointly and by agreement, regardless of whether they live together and regardless of whether they exercise parental rights jointly or independently. It is important that they were not deprived of their parental rights (FL, Art. 75-78). Questions that fall within the circle of those that are considered essential according to the FL, and are listed as *exempli causa*, are also questions related to the undertaking of major medical interventions (FL, Art. 78. Par. 4). If we take into account everything that has been said before about medical procedures and clinical trials, it is clear that the participation of a child in a clinical trial is *par excellence* an issue that significantly affects a child's life. How will the competent investigator who believes that it is in the best interest of the child to take or continue to participate in the clinical trial of the drug act, if the parents do not agree on this? Who would be obliged to inform whom (Ethical Committee? Guardianship Authority?) that it would be beneficial for the child to be involved in a trial on which the parents do not share a common opinion? The Family Law contains a principle provision according to which "all children's, health and educational institutions or social welfare institutions, judicial and other state bodies, associations and citizens" have the right and duty to inform the guardianship authority about the reasons for the protection of the child's rights (FL,

Art. 263. Par. 3). Since this right (and duty) of health institutions has not found its place in the regulations governing clinical trials of drugs and the conduct of investigators, in case the parents do not agree on the child's participation in a clinical trial of a drug that could be of great interest to the child him/herself, it is to be expected that this will not be reported to an authority that could initiate appropriate procedures to protect the rights and best interests of the child.

When it comes to children who are under guardianship, consent for the child's participation in the clinical trial of the drug, as already mentioned, is given by the guardian. The general powers of the guardian of a child without parental care are also regulated by the provisions of the FL. According to Article 137 of that Law, the guardian acting on behalf of the ward does not have the right to independently decide on issues related to medical interventions on the ward – for such a decision the guardian must have the *prior consent of the guardianship authority.* The Convention on Human Rights and Biomedicine also refers to the need to obtain authorization from authorities provided for by law: "If, according to the law, a minor is not capable of consenting to a procedure, the procedure can only be performed with the approval of his/her representative or authority, or person or authority provided by law" (Art. 6. Par. 2). Bearing in mind the nature and purpose of clinical trials of drugs and the need to protect minors from possible misuse in this regard, there is no doubt that there is a legal basis and the need to apply the restriction from Article 137 of the FL to the agreement/consent of the guardian for the participation of a minor in a clinical trial of a drug. Such restriction, however, in the regulations governing clinical trials of drugs in which the participant is a child under guardianship, is not indicated, thus missing the opportunity to operationalize through the LMMD and regulations adopted for its implementation the principle of special protection of children without parental are, but who participate in clinical trials of drugs (Constitution of the Republic of Serbia, Art. 66. Par. 3).

5. CONCLUSION

Medical research carries numerous risks, both those of additional damage to health and life, and risks of exploitation. In principle, the Declaration of Helsinki prioritizes the well-being of the research subject over the interests of research institutions and society as a whole. The principle expressed in the DoH is also confirmed in the CHRBM (Art. 2) u in the Additional Protocol to that Convention (Art. 3), in point (1) of the Preamble of Regulation (EU) No 536/2014, as well as in the provisions of Article 60 of the Serbian LMMD.

The interest of the child as a subject in the clinical trial of a drug is to improve his/her personal life and health and to protect the child him/herself from the dangers and risks to which he/she is exposed during the trial. The requirement that the trial be "in the best interests of the child" is consistent with the CRC's basic principle that the best interests of the child must be of paramount importance in all activities concerning children, regardless of whether they are undertaken by public or private institutions. Respect for the best interests of the child implies that medical research should be based on a scientifically based expectation that participation in a clinical trial of a child suffering from a disease or condition for which the drug is being tested could bring direct health benefits to the child and that it will exceed the risks associated with the trial. And yet, in clinical trials of drugs, it is about the interests of the child in a broader sense, as the interests of the entire child population affected by a certain health risk. This implies that a clinical trial in which a child participates will benefit the population of children it represents. It follows from the legal definition that clinical trials of drugs are primarily focused on evaluating the effectiveness and safety of the drug, and not on the treatment of the children included in the trial, which is especially pronounced in trials conducted on healthy children. Hence, the risks of exploitation of the minor subjects are very high.

In order to protect children from abuse and prevent their exploitation, contemporary legislation allows clinical trials of drugs on children under conditions that must be prescribed by law, and which, as a rule, are stricter than the conditions applied to adult subjects. Serbian medical law, based on modern European and international law, in addition to the requirement to eliminate the danger of causing harm or additional harm to the life and health of the child who is the subject of the trial and provide guarantees regarding protection against abuse (that the child is not the object of an experiment without immediate health reasons or to be used by the family or another person or institution as a "means" for acquiring material profit), envisages, as a necessary condition for the participation of children in clinical trials of drugs, the informed written agreement/consent of the parents/guardians of minors. The solutions contained in this regard in the LMMD, apart from not being aligned with the FL, are predominantly paternalistic in nature, limiting in terms of the possibility of independent representation of minors capable of reasoning and insufficient when it comes to guarantees for exercising the right to express the opinion of children capable of forming their own opinion in connection with their participation in the trial.

The inclusion of the ICH E11(R1) step 5 Guideline in the RCTM certainly creates a presumption for unifying the standards that apply in the European Union, and we have also seen broader, as well as more precise determination of the rules in the behavior of

investigators, because the issues of child protection are addressed in a unified way as participants in clinical drug trials, the specifics of the inclusion of different age groups in the trial, evaluation by the Ethics Committee, etc. However, even the Guideline does not provide precise instructions on how to implement a solution in practice, which leaves room for investigators to have different interpretations and different behaviors.

The modern concept of the relationship between children and parents rests on the requirement that the rights and duties of parents are exercised in order to protect the welfare of the child. In accordance with that principle, Serbian family legislation insists that the rights of parents are derived from the duties of parents and that they exist only to the extent necessary to protect the personality, rights and interests of the child (FL, Art. 67). Parents may have different views on this matter. Will the child be included in or excluded from trial if one of the parents objects? For example, the parent who does not live with the child and does not exercise parental rights objects, because he/she was not given the custody of the child by the court's decision?! Will that parent be aware of the possibility of the child participating in a clinical drug trial? Who is obliged to warn the parent exercising parental rights? Could the involvement of another parent in making a decision about the child's participation in a clinical trial of a drug slow down or delay the making of such a decision? How is the best interest of the child protected in that case?

The fact that the parental consent for the child's participation in a clinical trial of the drug was given by respecting the child's wish (presumed or established?), is not in itself a sufficient condition and justification for conducting trial on the child. Since the child's welfare is the primary concern, it hardly needs to be said that parental consent to something that is clearly contrary to the child's best interests is unacceptable. The guarantees of protection of that interest are not so firmly established in the LMMD, and the same can be said when it comes to children under guardianship. The guardian's agreement/consent for the participation of a minor ward in a clinical trial, without the obligation for the guardianship authority to agree with that consent (as provided for in the FL), weakens the protection of the child, above all from the risk of exploitation, because it skips an important mechanism of verifying the circumstances in which such agreement/consent is given and thus the best interest of the child is called into question.

The necessity of ensuring the child's participation in making the decision to be a subject in a clinical drug trial stems from the right of every person to autonomy and personal dignity. Although, in principle, the child must be informed in a way that he/she can understand about the essential aspects of the trial itself, there are no rules on how to obtain and document the opinion of a child capable of forming that opinion. The right of a child

capable of reasoning to independently give informed consent to his/her own participation in the trial is not considered in the context of the investigator's duty to facilitate the realization of that right, even when it comes to minors who acquired special legal capacity through emancipation before reaching adulthood.

Finally, it may be useful to recall the position of the Appellate Court of Maryland expressed (on appeals from the ruling of the Circuit Court for Baltimore City) in the well-known cases *Ericka Grimes v. Kennedy – Krieger Institute; Myron Higgins, a minor, etc., et al v. Kennedy – Krieger Institute, No. 128 & 129 (2001), p. 81*: "Whatever the interests of a parent, and whatever the interests of the general public in fostering research that might, according to a researcher's hypothesis, be for the good of all children, this Court's concern for the particular child and particular case, over-arches all other interests.". The cited decision, as stated in the Decision itself, is not so much a call to reconsider the ethics of trials involving children, as it is a warning to ensure that the existing protections of children's rights are adequately implemented and monitored.

In order for the care of all the participants in a particular trial to be focused on a particular child participating in the trial – on the protection of his/her rights and on his/her best interests – the laws governing that matter would need to have stricter rules and provide stronger guarantees. The objections that can be raised in this regard to the achieved level of protection of the rights of minor subjects in Serbian medical law are also valid for its models in European and international law.

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CHALLENGES OF DEINSTITUTIONALIZATION IN BOSNIA AND HERZEGOVINA –TOWARDS IMPROVING THE LIVES OF CHILDREN WITHOUT ADEQUATE PARENTAL CARE

The number of vulnerable people around the world is increasing, their needs are growing, and support systems are often unable to provide adequate and timely responses. In a large number of priorities within this group, children without adequate parental care need special attention and support on the path to growing up and independence. Bosnia and Herzegovina is facing a slow pace of change due to a lack of human and material resources in the field of social protection. Certain activities have been started related to the processes of transition from institutional care to community support services, but this path will require continuous commitment of national and local authorities, as well as the support of the international community. Despite the many difficulties the country faces in this field, a valuable resource for future action is the existence of civic solidarity and social sensitivity.

***Keywords**: Bosnia and Herzegovina, deinstitucionalization, children without parental care, challenges.*

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Introduction

Bearing in mind the importance and severity of changes in the sensitive area of social protection, it is expected that they require resources and time, especially when it comes to developing countries. Regulating the area of protection of children without adequate parental care implies the creation of certain systemic and practical preconditions and is certainly at the top of the priorities of decision makers activities. Deinstitutionalization processes have been initiated in numerous countries, also in Bosnia and Herzegovina, but measurable results, conditioned by various factors, can only be expected in the future.

According to the latest Report on the progress of Bosnia and Herzegovina (European Commission, 2021:85), the transformation of social protection institutions, especially institutions for children without parental care, is ongoing, the transition to protection at the community level is progressing slowly, deinstitutionalization requires a comprehensive reform in terms of financing of new services, for capacity building and for supporting centers for social work throughout the country. It is indicated that services within the community that enable independent living are not adequately supported, and that the implementation of strategies and laws related to social inclusion and protection at the entity level faces challenges, lack of funds, standards and coordination. The negative impact of institutionalization on the development of children and their participation in society, exposure to mistreatment and abuse, the need to take measures to prevent the separation of families and the development of foster care, as well as the provision of support for children aged 18 who leave child care institutions, were pointed out. From the above, it can be concluded that Bosnia and Herzegovina is facing a long and challenging processes of social changes for which the support of the entire social community will be necessary.

Jurisdictions in the field of social, family and child protection in Bosnia and Herzegovina are at the entity (Republic of Srpska and Federation of BiH/cantons) and Brčko District levels, which implies that the mentioned areas in certain parts of the country do not have identical stages of social development in which they are located, nor identical resources, but certainly have a common goal. In the Republic of Srpska, the system is centralized, which represents an opportunity for faster social development, while in the Federation of Bosnia and Herzegovina, the system is decentralized (level of the Federation of Bosnia and Herzegovina and ten cantons). In addition to these specificities, the country faces economic challenges and the need to allocate much more funds for social protection budgets. Also, the problem of lack of human resources, which is present in other areas as well, is visible through the increasing number of individuals and families who move out

of the country. Certain research (Union for Sustainable Return and Integration of BiH, 2021) showed that about 170,000 people left Bosnia and Herzegovina in 2021, and almost half a million citizens left the country since 2013.

1. Protection of children and youth - right and need

The family, as the basic cell of society, is increasingly facing challenges and requires strong family relationships, a safe environment and the existence of mutual trust between its members. The current pace of life and different life circumstances cause a weakening of family capacities and focus on meeting existential needs. Children and youth often grow up in unfavorable circumstances that further direct their lives, decisions and actions. Children's rights are often threatened even within their own families. Preventive activities aimed at strengthening the family nucleus are insufficient. A number of children, in their best interests, often have to be separated from their families and placed in some form of alternative care.

Various reports have indicated the need to promote foster care and alternative solutions for children without parental care, as well as providing support for young people who leave institutions (United Nations Development Program in Bosnia and Herzegovina, 2020:126). The provision of social services to children and youth often depends on the capacity of the local community. Some authors define “child-friendly social services” as social services that respect, protect and fulfill the rights of every child, including the right to provision, participation and protection and the principle of the best interest of the child, and emphasize the fact that modern parenting takes place in the context of numerous social changes that pose numerous challenges to parents, and in fulfilling the parental role, society's support is necessary (Đanić, Čeko, Šego, 2020: 297-300). Children, as human beings, have the right to equal legal protection without discrimination, and this stage in the development of legal thought and legal practice did not come immediately and easily, especially when it comes to understanding childhood as a concept and the position and rights of children in the family (Vujović, 2020:79).

Non-governmental organizations have an important role in working directly with children, including the duty to really listen to children's opinions, understand them and respond to their needs and requests (Cerović, 2019: 295). Non-governmental and governmental sectors should act as partners in the protection of children and families, however, it often happens that their mutual relationship is permeated by a lack of cooperation and joint actions. The importance of timely support for children and youth in various forms of risk is often mentioned in professional circles and as a topic of numerous

gatherings in Bosnia and Herzegovina, however, given that insufficient resources are directed at remediation of the consequences of social problems, very few activities are carried out in areas of prevention.

Children without parental care need continuous support in various aspects of life - growing up, protection of physical and mental health, upbringing, education and guidance. Ombudsmen of Bosnia and Herzegovina believe that it is necessary to work preventively on the awareness of youth about systemic support in education, especially when it comes to children and youth without parental care. When it comes to education, the support of the system is very much needed even after finishing high school (Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina, 2022:126).

The Convention on the Rights of the Child emphasizes respect for the best interests of the child in all matters, especially when it comes to the need to separate him from the family. [1] In accordance with the UN Guidelines for the Alternative Care of Children, the family is the basis of society and the natural environment for the growth, well-being and protection of children, and it is necessary to focus efforts on enabling the child to remain or return to the care of his parents or other relatives. Separation of a child from the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible time. Financial and material poverty, or conditions directly and uniquely attributable to such poverty, should never be the sole justification for separating a child from parental care, but should be seen as a signal for the need to provide adequate support to the family.[2]

2. Challenges of (de)institutionalization

Deinstitutionalization and transforming children's services is a collection of activities: it is not just the removal of children from institutions. Rather it is systemic, policy driven change which results in considerably less reliance on residential care and an increase in service aimed at keeping children with their families and communities (Harlow, 2022:173, according to Browne 2007 and Licursi 2013). The concept of deinstitutionalization is related to modern institutional care, not only for children, but also for old and infirm persons and other beneficiaries, and in its most distant perspective it has the abolition of institutional accommodation as it was until now, and in a closer and

[1] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

[2] UN General Assembly, *Guidelines for the Alternative Care of Children : resolution / adopted by the General Assembly*, 24 February 2010

realistic perspective it refers to the introduction of family elements in residential accommodation, a more favorable ratio of the number of children and professionals, the specialization of institutions, especially in terms of treatment, etc. Due to frequent staff changes and due to the organization of the work where several educators take care of them in shifts, the impossibility of ensuring continuity of care is problematic. The institutional environment does not know the so-called individualized care for the child, which jeopardizes the development of secure and stable attachment among children-beneficiaries of institutional care (Sladović Franz, Kregar Orešković, Vejmelka, 2007: 557). The issue of adjustment is crucial for assessing the success of the social protection intervention, which separates the child from a threatening family and places him in a children's home or foster family. Children who grow up in children's homes often face with a number of difficulties (psychological, socio- economic, underdeveloped social networks, learned wrong patterns of behavior and communication in their primary family) which is precisely one of the reasons why the placement of separated children in a foster family should be a more frequent form of child care than placement in a children's home (Sladović Franz, Mujkanović, 2003: 170).

Support for young people leaving care should be based on their social and developmental needs which includes improving the stability of care, allowing young people to transition from care based on their developmental, social and emotional needs rather than their chronological age, and investing in appropriate housing support to prevent the large numbers of young people leaving care becoming homeless (Campo, Commerford, 2016: 18). An institution for children is understood to be any residential setting where ‘institutional culture’ prevails. Institutional culture in terms of children can be defined through isolation of children from the wider community and obligation to live together, insufficient control by children and their parents over their lives and decisions that affect them and precedence of the institutions requirements over child’s individual needs. This means that children placed in institutions cannot form the kind of attachments crucial to healthy physical and emotional development (Opening Doors for Europe’s Children, 2017:5). Children and their circumstances are not homogeneous. Each child faces distinctly different risks and specific vulnerabilities. Hence each child must be dealt on a case-by-case basis (Bajapi, 2017:211). An individualized approach is the basis for working with children, and precisely because of this, the problem of lack of human resources, that is, professionals who have knowledge, skills and enough time to dedicate themselves to each child, is one of the priorities that should be solved. In the entire process of deinstitutionalization, the focus should be on the best interest of the child. The child's stay in the institution must be purposeful. It is necessary to create a plan with clearly set

treatment goals, content and work activities, as well as a time limit, while respecting the child as a beneficiary and co-constructor of the treatment plan (Sovar, 2015:322):

Numerous authors, discussing the institutionalization and deinstitutionalization of children, agreed on policy and practice recommendations for global, national and local actors (Goldman, Bakermans-Kranenburg, 2020: 606) which can be summarized in the following: global actors should work jointly to support the progressive elimination of institutions and promote family-based care, national child protection systems should be grounded in a continuum of care that prioritises the role of families, local programmes should address the drivers of institutionalisation and the specific needs of each child and family, donors and volunteers should redirect their funding and efforts to community-based and family-based programmes, community-based and family-based programmes are fiscally efficient and promote long-term human capital development, more efforts to improve data, information, and evidence to inform policies and programmes are urgently needed.

United Nations General Assembly on December 18, 2019 adopted the Resolution to promote and protect the rights of children which notes that that children without parental care are more likely than their peers to experience human rights violations, such as exclusion, violence, abuse, neglect and exploitation, and in this regard expresses deep concern on the potential harm of institutionalization and institutional care to children's growth and development and emphasize the need to ensure that all decisions, initiatives and approaches related to children without parental care are made on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, through a judicial, administrative or other adequate and recognized procedure and that data collection, information management and reporting systems related to children without parental care should be improved.

3. Improving the lives of children without parental care in Bosnia and Herzegovina

A Situational analysis of children at risk of losing family care and children without parental care in Bosnia and Herzegovina (Unicef, 2017:12-31) indicated that better directed and more efficient work on prevention and support for families can result in a smaller number of children who need alternative care, that siblings usually stay together in the same forms of care, but almost a quarter of children without parental care have siblings who are still cared for by their parents or relatives and that children of high school age (fourteen to eighteen years old) are the most numerous age category of children

without parental care (two fifths of children without parental care belong to this age group- 42.1%). Also, as most common reasons for including children in the system of alternative care are problems in responding, neglect and abandonment of the child and the death of a parent, the frequency, continuity and variety of advisory and professional work with families at risk differ significantly among local communities and mainly depend on the capacity of centers for social work and after separation, children often receive support in maintaining contact with their parents, if possible, but the probability of their return home is low. In the analysis it is emphasized that the capacities of multidisciplinary teams of centers for social work to provide effective support to families and child protection differ significantly from canton to canton and from municipality to city.

In the Republic of Srpska, according to the latest official information, there are 315 children without parental care, and currently 110 of them are placed in the Home for children and youth without parental care "Rada Vranješević" in Banja Luka. There are a total of 137 foster families for children, in which 196 children are placed, and in foster kinship families there are 98 of them placed.[3] Basic conclusion of the Evaluation report on the implementation of the Strategy for the improvement of social protection of children without parental care in the Republic of Srpska 2015-2020 is that the primary goal of all activities aimed at protecting children and families was to strengthen biological families and prevent the separation of children from their families, that all children without parental care achieve a certain level of protection and care, but that the existing level and totality of measures applied to protection and disposal do not fully ensure the achievement of the goals defined by the Strategy. The Transformation Plan of the Home for children and youth without parental care "Rada Vranješević" in Banja Luka which was adopted in 2018, envisages the realization of new services: kindergarten, resource center with counseling center "Our corner", shelter, day center with "Respite" service, housing with the support of a family associate. Also, a Memorandum of Understanding was signed in the process of independence of young people without parental care in the Republic of Srpska and inclusion in the labor market with the aim of providing support for young people without parental care in professional orientation, independence and inclusion in the labor market (Ministry of Health and Social Protection of the Republic of Srpska, 2021:30).

[3] Data obtained from relevant institutions and published on the web site *https:// aloonline. ba/vijesti/us vajanje-djeca-republika-srpska/*

The Strategy of deinstitutionalization and transformation of social protection institutions in the Federation of Bosnia and Herzegovina (2014-2020) had as a long-term goal the reduction of entry into institutions and the increase of exits from institutions into new forms of care, especially stimulating family reintegration (with the guarantee of one or more family support services in local community). The Strategy identified numerous problems in the area, most of which are still present today: lack of databases, lack of reliable data on the reasons for separating children from their parents, as well as on the measures that need to be taken in terms of child protection and support for families, insufficient cooperation of institutions and organizations which deal with child protection at different levels, which results in duplication of work, non-transparent work and waste of otherwise insufficient resources, insufficient capacity of centers for social work, insufficiently developed services for the prevention of separation of children from their parents, insufficient development of support services for young people who leave the system of public concerns and not using good practices that already exist (Federal Ministry of Labor and Social Policy, 2014: 34).

In May 2022, the Draft Law on Social Protection Institutions in the FBiH was established in the Federation of Bosnia and Herzegovina. In the Explanatory Notes to the aforementioned Law, it was pointed out that it represents a high-quality legal framework for transforming the existing form of care for socially sensitive categories in social protection institutions founded by the Federation, especially in the segment of harmonizing their activity and way of working with international standards in the field of respect for human rights (Federal Ministry of Labor and Social Policy, 2022). In the Federation of Bosnia and Herzegovina, as part of the social protection reform in 2017, the Law on Foster Care[4] was adopted and its application began in March 2018. The main goal of this Law is the systematic arrangement of accommodation and support for children without parental care, adults without family care, and the elderly, infirm and disabled by providing care and protection in a family environment. The adoption of this Law created prerequisites for ensuring equal quality and equal access to foster care services throughout the Federation of Bosnia and Herzegovina, with regard to equal identification procedures as well as a unified method of selecting and educating foster parents. (Ministry of Human Rights and Refugees of Bosnia and Herzegovina, 2021:13). Thanks to the implementation

[4] *Law on foster care in the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, number 19/17*

of the Law on foster care in the Federation of BiH, there are currently 258 registered children placed in foster families and 299 registered foster families.[5]

In addition to the adoption of legal regulations in both entities, recruitment and training of foster families and raising awareness of the public and professionals about the importance of the family for a child's growth are significant steps that support deinstitutionalization. An important feature of deinstitutionalization is the prevention of children being separated from their biological families. Although it is at the beginning, the process of deinstitutionalization, apart from the part of prevention, is increasingly present in all segments of social protection for children and families, so it is believed that it will significantly contribute to the development of the necessary services in order to enable children without parental care to exercise their right to quality protection in family environment (Sofović, 2019: 24-25). In the Special Report of the Ombudsman for Human Rights of Bosnia and Herzegovina on the situation and problems faced by centers/services for social work in BiH, it was pointed out the absence of foster families, the insufficient interest of foster parents in the children of the Roma population and the lack of families who would participate in training in order to acquire the status of foster parents (Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina, 2019:30-34).

The concluding observations on the Combined Fifth and Sixth Report of Bosnia and Herzegovina adopted by the Committee on the Rights of the Child at the eighty-second session recommend to Bosnia and Herzegovina the following:

- speed up the process of deinstitutionalization in all parts of the state, through supporting and facilitating the care of children in a family environment and harmonizing the foster care system at all levels of government;
- continue to implement capacity-building programs for social workers and foster care providers, including those working in social work centers, and allocate adequate human, technical and financial resources to childcare facilities to ensure equal access to quality services and care, regardless of location;
- ensure periodic review of the placement of children in institutions and foster families and provide available channels for reporting, monitoring and resolving inappropriate treatment of children;

[5] Data obtained from relevant institutions and published on the site *https://www. oslobodjenje. ba/ vijesti / bih/u-hraniteljskim-porodicama-u-fbih-smjesteno-258-djece-znate-li-koliko-iznose-hraniteljske-naknade-761436.*

- support the social integration of young people before they leave the social care system and to provide them with assistance after leaving the system;
- strengthen awareness-raising programs, including campaigns, among the general public about children's rights in early childhood and the impact of institutional care on children's development and well-being.

3.1 Future courses of action

The field of foster care has been intensively developing in recent years in Bosnia and Herzegovina and it represents the most adequate form of protection for children without parental care. Activities to strengthen this extremely important and sensitive area are implemented in BiH with the efforts of the relevant governments, non- governmental sector and with the support of various international donors. In this process, the role of professionals, their networking and sharing of experiences is very important. Media campaigns were launched to make the public as familiar as possible with the meaning and forms of foster care (Open your heart, become a foster parent/Every child needs a family), and a major focus was placed on the local level, where promotional activities are led by competent social work centers.

Foster care is implemented through the competent Center for Social Work. While the child is in foster care, the Center for Social Work team works with the biological family to strengthen them and create conditions for the child to return to his primary family. Various documents and manuals have been prepared with the aim of strengthening the capacity of professionals in social work centers across the country, in order to more successfully educate potential and current foster families. Despite the great overload with different and sensitive tasks in the domain of competence of centers for social work in Bosnia and Herzegovina, a great motivation in promoting foster care is visible, they are connected within the regions and regularly share experiences, doubts and ideas in order to make the development of foster care as successful as possible in local communities.

Residential accommodation should be temporary and limited and in order to prevent the negative effects of the institutional care of the child on his proper development, the best interest of the child is comprehensively assessed and determined during the placement of the child, as well as its termination, taking into account numerous elements. When it comes to the element concerning the availability of institutions, it is necessary to pay attention to the existence of the institution in accordance with the child's needs (specialization in a certain type of support, reception capacity, etc.), the professional qualifications of the employees in the institution (professional staff, special development

stimulation programs etc.), proximity of the institution to the child's biological family/former place of residence, possible influence of the child on the environment/possible influence of the environment on the child, provision of the necessary conditions for staying in the institution (living conditions, hygiene, rules of conduct, etc.), the possibility of ensuring continuity in child's upbringing, ethnic, religious, cultural and linguistic origin by placement in an institution, appropriate position of the institution in relation to the center of satisfaction of the child's interests - infrastructure, proximity to school, health, sports institutions (Bubić et al., 2019:59-63). Some authors (Troutman, Ryan, Cardi, 2000:31) have pointed out the importance and needs of preserving the mental health of children in foster care, their need for continuity of relationships, care and affection, as well as the choice of an adequate foster family. This certainly also applies to children placed in institutions.

The reform of the child protection system of Montenegro represents an example of good practice of countries in the region. Through joint action (authorities, international organizations, civil society, media, academic community) between 2010 and 2019, the number of children placed in institutions in Montenegro decreased by 50 percent, while in 2017 the country achieved an important milestone by not having any children under the age of three in institutions (The Child Protection Hub, 2020).

Conclusion

The processes of deinstitutionalization in Bosnia and Herzegovina have been started in a certain way, but a lot of human and material resources and commitment are needed in order for the process to take place in accordance with the needs of the system. The transformation plans of homes for housing children and youth without parental care aim to reduce the number of children in homes, and increase the number of services that will benefit the community and strengthen the child protection system. Along with that, it is necessary to regulate the area of providing support to young people in becoming independent after leaving institutional/alternative care. Along with the development of foster care, it is necessary to work on strengthening biological families in order to avoid the separation of children from families. In situations where this is not possible, foster care is the most adequate form of child protection.

A prerequisite for the successful development of foster care is its promotion and it is necessary to continuously work on it at the national/cantonal and level of local communities. Positive examples across the country testify to the importance of teamwork

and cooperation with biological and foster families. It is important to inform citizens about how they can become foster parents and to support foster parents in their noble role.

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Jelena Kostić*

THE ROLE OF THE SCHOOL IN THE PREVENTION OF PEER VIOLENCE

The school has a very important role in the education of students. At the same time, all children should have equal chances to realize their right to education without discrimination. In addition, they have the right to be protected not only from discrimination, but also from any form of violence, abuse and neglect. Today, a special problem is peer violence, which has different forms and can manifest itself in different environments, both in the physical and in the digital environment. Therefore, it seems that today's education system requires a different approach.

In the paper, we will first of all point out the rights of the child, which are guaranteed by both international documents and national regulations, as well as the role of the school in their realization. Bearing in mind that we deal with the subject of peer violence in our work, our research is limited to pointing out the importance and role of the school in the prevention of peer violence, bearing in mind that one of the rights of the child is protection from any form of violence. In the first part of the paper, we will first point out the international documents that guarantee these rights, and then the content of national regulations. In the second part of the paper, we will point to the results of the author's research from the previous period, and then to the research we conducted in June 2021, on a sample of about 500 students from the territory of different cities in the Republic of Serbia, which concerns digital peer violence. In this way, we would like to point out the need for a more active involvement of the school in the process of preventing peer violence even in those situations when it does not take place physically in the school, but its participants are students of the school.

Keywords: *role of school, prevention, peer violence*

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1. Introduction

The role of the school in the prevention of peer violence is a very important topic that is dealt with not only by scientific literature, but also by a large number of experts from different fields. Her role in the aforementioned area enables the realization of the child's right to be protected from any form of violence.

By assuming obligations from the ratified Convention on the Rights of the Child (Law on the Ratification of the United Nations Convention on the Rights of the Child, *Official Gazette of the SFRY*-supplement: International Treaties No. 15/90 and *Official Gazette of the FRY*-Supplement: International Treaties, No. 4/96 and 2/97) the state has assumed the obligation that every individual, as well as institutions, protect the rights of the child and to improve his position both in the family, as well as in institutions and the entire social community. (Žunić-Cicvarić & Cicvarić, 2010: 2).

According to Article 29 of the Convention, and the recommendation of the United Nations Committee on the Rights of the Child, states should improve the quality of education through curriculum reform, include training on human rights and children's rights in curricula, organize programs and activities to promote tolerance, peace and cultural understanding diversity in order to prevent intolerance, violence and discrimination, both in school and in society (Žunić-Cicvarić & Cicvarić: 17).

Even before the aforementioned Convention, international documents guaranteed the rights of the child. According to the Geneva Declaration on the Rights of the Child from 1924, every child must have the means necessary for his normal material and spiritual development.[1] Unlike the aforementioned document, the United Nations Declaration on the Rights of the Child provides that the child enjoys special protection and that the law must provide him with oporunities and means for healthy and proper physical, psychological, moral, spiritual and social development in conditions of freedom and dignity. In implementation of those rights, the best interests of the child must be taken into account.[2]

[1] Available at: http://www.un-documents.net/gdrc1924.htm, Accessed 11.9.2022.

[2] Item 2 of the United Nations Declaration on the Rights of the Child from 1959. Stated according to Children's Rights in International Documents (2011), Belgrade: Commissioner for the Protection of Equality, Protector of Citizens, 90. Available at: https://www.unicef.org/serbia/sites/unicef.org.serbia/files/2018-08/Prava_deteta_u_medjunarodnim_dokumentima.pdf, Accessed 11.9.2022.

According to the Convention on the Rights of the Child, which was also ratified by the Republic of Serbia, the contracting parties undertook to implement adequate legal, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury, abuse, negligent treatment, maltreatment or exploitation, including sexual abuse or negligent treatment, mistreatment or exploitation (Article 19 of the Convention). This implies not only the adoption of laws and by-laws, but also the adoption of various plans and programs and their implementation in practice. Therefore, at the institutional level, in order to suppress peer violence, the school should undertake a large number of preventive activities.

UNHCR believes that providing education and organizing activities for children can contribute to the prevention of violence. One of the recommendations of the mentioned organization is to encourage both parents and children for continuous education and participation in various organized activities in order to influence the prevention of aggression and violence. Accordingly, the school is the environment in which such activities can be carried out, act as an incentive for the prevention of violence and improve the role of parents in preventing any form of peer violence. One of the basic goals of education would be to reduce the impact of negative behavior models on students in order to reduce peer violence (School-based violence prevention, A practical handbook, 2019: 2).[3]

The basis for undertaking various activities aimed at preventing peer violence is contained in the legal and by-laws adopted at the level of the Republic of Serbia. However, their implementation depends on the readiness of various social factors to react in a timely manner and to get involved in the prevention program in an adequate way.

2. The legal basis for the prevention of peer violence at the level of the Republic of Serbia and the definition of violence

The basic principle of education and upbringing implies that all children have the same right to education and upbringing and that they have equal chances for it without discrimination. In addition, the basic principles include respect for human rights and the rights of every child and student with respect for human dignity, fostering cooperation and tolerance, as well as commitment to basic moral values and full respect for the rights

[3] Available at: https://www.unicef.org/media/58081/file/UNICEF-WHO-UNESCO-handbook-school-based-violence.pdf, Accessed 11.9.2022.

of children and adults. In order to implement the stated principles, it is necessary to achieve the goals of education and upbringing by providing welfare and support for the overall development of children and students, as well as providing a stimulating and safe environment for the overall development of children and students, developing non-violent behavior and establishing zero tolerance towards violence (Article 7 of the Law on the Basics of the Education System, *Official Gazette of the RS*, no. 88/2017, 27/2018 - another law, 10/2019, 27/2018 - another law, 6/2020 and 129/2021).

Every child in an educational institution has the right to be protected from discrimination, violence, abuse and neglect (Article 79, paragraph 1, item 4) of the Law on the Basics of the Education System). Accordingly, it is necessary for the school to undertake a series of activities and adopt a plan and program of action aimed at preventing peer violence.

Violence is a big problem for children's development. If it is not acted upon in a timely manner, it can leave lasting consequences on the individual. Peer violence has different forms, and they are defined in more detail by the Rulebook on the protocol of behavior in the institution in response to violence, abuse and neglect (*Official Gazette of the Republic of Serbia*, no. 46/2019 and 104/2020). In accordance with the mentioned act, it means any form of verbal or non-verbal behavior once done or repeated that has the effect of actually or potentially endangering the health, development and dignity of the child, student or employee. [4]In addition to the above, there are other definitions of violence. According to the Education and Skills Committee of Great Britain, bullying means behavior that is aimed at endangering not only physical, but also psychological health and includes, hurting, provocations, making fun of, making negative comments, hitting, pushing, taking things, sending inappropriate messages via e-mail, sending inappropriate photos via the Internet, gossiping, removing children from the peer group and spreading false and offensive information (Bullying, House of Commons, Education and Skills Committee, The Stationery Office, London, 2008: 8, stated according to Đorić, 2009: 148). It seems that peer violence used to be most often associated with physical violence. However, today the concept of peer violence is much broader.

This is also recognized in the Rulebook on the protocol of behavior in the institution in response to violence, abuse and neglect. The aforementioned act recognizes both physical and psychological (emotional), social and digital violence. Physical means behavior that

[4] See: Vujović, R. (2020) The Child's right to dignity and bodily integrity – European standards and Case Law, in: Yearbook Human Rights Protection: The right to human dignity, (Zoran Pavlović, ed.), no 3. Novi Sad: Provinicial Protector of Citizens – Ombudsman and Institute for Criminological and Sociological Research, 75-92.

can lead to actual or potential physical injury to a child, student or employee, as well as physical punishment of children and students by employees and other adults. Mental means violence that leads to immediate or permanent endangerment of the mental or emotional health and dignity of a child, student or employee. Although it seems that it was previously neglected, today social violence is also recognized as a form of violence. According to the Protocol, it means any exclusion of the child and participant from the peer group and various forms of social activities, separation from others, non-acceptance based on diversity, denial of information, isolation from the community and denial of meeting social needs.

It should be borne in mind that some new forms of violence can affect children to a greater extent, and it is very difficult to detect them by the school, unlike, for example, physical violence. This is the case with digital violence, which, according to the same Rulebook, means the misuse of information technologies that can result in the injury of another person and endangering their dignity. The mentioned type of violence is manifested by sending messages by e-mail, sending messages via SMS, MMS, via a website, chatting, participating in forums, social networks and the like. This type of violence is the most dangerous, because potential abusers are separated due to the distance, i.e. lack of direct contact, as well as the victim's unwillingness to oppose the act of violence at the moment. That's why it happens very often on social networks or applications for exchanging phone calls and messages (eg Viber). The fact that in recent years more and more young children have their own profiles on social networks is particularly worrying. Thus, according to the policies of the Facebook company, a person who opens a profile on that social network must be at least 13 years old at the time of its opening. However, this is not taken into account by the said company *ex officio*, but parents can report that a person under the age of 13 has opened a profile on the said network, as well as delete the profile of their minor child (stated according to Kostić, 2017: 421).

Given the fact that children cannot be deprived of communication in the digital environment, which in the era of the pandemic caused by the COVID-19 virus has proven to be extremely useful, the Committee on the Rights of the United Nations has issued General Comment No. 25 (2021) on the rights of the child in in connection with the digital economy. Item 4 of the aforementioned Comment states that children's rights must be respected, protected and realized in the digital environment as well. The realization of these rights must be based on the following principles: non-discrimination, the best interests of the child, the right to life, survival and development, respect for the views of the child (Part III of the General Comment). If children undertake acts of violence in the digital environment, the contracting states should follow preventive, protective and

corrective legal approaches towards children who are involved in peer violence either as perpetrators. In addition, they need to take adequate institutional measures in order to prevent violence in such an environment (paragraph 82).[5] This implies the undertaking of adequate measures by the school, which performs a very important role in the process of education and upbringing.

3. Obligations of the school in the prevention of peer violence

The school's obligation is to ensure respect for human rights and the rights of every child and student with respect for human dignity and to provide education and upbringing in a democratically organized and socially responsible institution that fosters openness, cooperation, tolerance, awareness of cultural and civilizational connections in the world, commitment basic moral values, values of justice, truth, solidarity, freedom, honesty and responsibility in which respect for the rights of children and students is fully ensured (Article 7, paragraph 1, item 3) of the Law on the Basics of the Education System).

In order for the school to fulfill its legal obligations, it is of particular importance to achieve quality communication with students during the teaching process and to observe problems from the students' perspective. The authors especially emphasize the importance of openness in the communication between teachers and parents, which is later reflected in the communication between students. Thus, teachers provide a desirable model with their way of communication, which can have a positive effect on the relationship and communication among peers, and on the development of students themselves (Popović, 2014: 78 and 77). This contributes to the achievement of one of the general goals of education and upbringing, which consists in providing a stimulating and safe environment for the overall development of children, students and adults, the development of non-violent behavior and the establishment of zero tolerance towards violence (Article 8, paragraph 1, item 2) of the Law on the Basics of the Education System). Achieving that goal enables the realization of students' right to protection from discrimination, violence and abuse (Article 79, paragraph 1, item 4 of the Law on the Basics of the Education System). The realization of the right to this protection also represents an obligation for other students to respect the personality of other students (Article 80, Paragraph 1, item 5) of the Law.). The law stipulates that any form of

[5] General comment No. 25 (2021) on children's rights in relation to the digital environment, Committee on the Rights of the Child. Text in english is available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/053/43/PDF/G2105343.pdf?OpenElement, Accessed 11.9.2022.

violence, both physical and psychological, social, sexual, digital and any other violence and abuse of students is prohibited in school (Article 111, paragraph 1 of the Law).

According to the protocol of actions in the institution in response to violence, abuse and neglect, the department head, educator, teacher and professional associate have the duty to ensure the protection of the child and student from arbitrary or illegal interference in his privacy, family, home or correspondence, as well as protection from illegal attacks on his honor and reputation. This is exactly why it is important to have a violence prevention program at the school level, as well as internal procedures for dealing with such situations.

Although school employees do not have to directly undertake an act of violence, they can create a situation that can be a source of student dissatisfaction, so it can manifest itself in the form of peer violence (Popović: 81). It is, for example, it can reflect through favoring certain students or excessive and frequent criticism. In addition, the authors state that teachers can even have a direct influence on the occurrence of peer violence at school. So they, for example, they can be violent, perceive violence, react in the wrong way or remain indifferent to its occurrence (Olweus 1993, stated according to Popović: 81).

The effective response of teachers should include constant monitoring of students and taking quick and direct action, without ignoring suspicious cases. In addition to the direct influence, the authors highlight the importance of the indirect relationship of teachers through their relationship with students and teaching (Popović: 81). That is why the continuous training of teachers in order to acquire skills for the prevention of peer violence in schools is of great importance. Sometimes teachers are not even aware that they have contributed to its appearance with their own behavior.

The manner in which the school acts in case of suspicion of peer violence is not prescribed in detail by the Law, but rather by the Rulebook on the protocol of actions in the institution in response to violence and abuse. According to that act, the school should implement preventive activities that raise the level of awareness and sensitivity of children, students, parents and employees to recognize all forms of violence, foster an atmosphere of cooperation and tolerance, respect and constructive communication, and build an environment where violence is not tolerated. abuse and neglect, improve the knowledge, skills and attitudes needed to create a safe and supportive environment and to respond constructively to violence. However, if the violent behavior is repeated and if the educational work was not effective, if the consequences are more severe, if it is violence and abuse by a group towards an individual or if the same person commits repeated violence and abuse at the first level, the school has an obligation to at the internal level

of the implementation of the pivot measure. Bearing in mind that some forms of violence such as verbally and socially transferred into the digital space, the question can be raised as to how to react if this type of violence occurs outside of school, but between peers who attend the same school, bearing in mind that it is not defined by a legal provision. The conclusion is that different interpretations are possible. However, bearing in mind that the obligations of students are stipulated by the Law, as well as the definition of digital violence, which can also happen outside of school, it is our opinion that even in such situations the school must react if it is a question of communication between children from the same class or school. (Kostić, 2021: 1700). Violence in the digital space can be even more dangerous than what happens in direct contact. Namely, it is characterized by three characteristics. The first is reflected in the permanence of messages sent to peers in the digital environment. There is also the ease and freedom of sending insults, which is conditioned by the lack of direct communication, while the third characteristic is the invasive approach of negative texts that are delivered via computer or phone (Hinduja & Patchin, 2007: 93; Stanković, 2019: 14).

The school should take the prevention of violence, abuse and neglect seriously and plan the activities that contribute to the realization of that goal with a development plan and an annual work plan. It should contribute to the creation and improvement of a safe environment. In addition, the existence of a program for protection against violence is also important. It is created based on the analysis of the state of security of all aspects of the school environment, the presence of various forms and intensities of violence, abuse and neglect, the specificity of the institution and the results of self-evaluation and evaluation of the quality of the institution's work.

This points to the need for careful monitoring and analysis of the state of peer violence at the school level throughout the year, and not only during the period of preparation and development of the violence protection program. The protection program defines preventive and intervention activities, responsible persons and the time dynamics of their implementation. It must define preventive measures and activities that will be carried out in everyday life and work within the framework of educational, teaching and extracurricular activities, measures for professional development of employees in order to improve competencies for preventive work, timely detection, recognition, response to violence, abuse and neglect, ways of informing about obligations and responsibilities in the field of protection from violence, abuse and neglect, development of content and methods for increased educational work with the aim of developing self-responsible and socially responsible behavior, development of procedures for early recognition of the risk of violence, abuse and neglect, improvement of ways of responding to violence, abuse

and neglect, division and strengthening of roles and responsibilities when acting in cases where there is a suspicion of the existence of violence and abuse, planning and planning the form and content of work with children and students, that is, those who suffer, commit or witness violence, abuse and neglect, planning the way, form and content of cooperation with the family, local self-government unit, competent organizational police unit, center for social work, health service, judicial authorities and determination of monitoring, evaluation and reporting methods. A special part of the program should refer to designing ways of monitoring, evaluating and reporting to the institution's authorities on the implementation and effects of the protection program, especially in relation to the frequency of incident situations and the number of reports, the representation of different forms and levels of violence, abuse and neglect, the number of injuries, the frequency and number of educational and disciplinary procedures against students and disciplinary procedures against employees, the number and effects of operational protection plans, training in the prevention of violence, abuse and neglect and the need for further training, the number and effects of actions that promote cooperation, understanding and help of peers, as and the degree and quality of parents' involvement in the life and work of the institution (Rule on the Protocol of procedure in institutions in response to violence, abuse and neglect). This should be approached seriously, bearing in mind the seriousness of the consequences of peer violence. The results of the research by Schneider and other researchers on the impact of the Internet and traditional forms of violence on psychological stress in 20,406 high school students in the USA show that students who were exposed to both types of violence had worse academic results than other respondents. Among those students, depressive symptoms, the presence of suicidal thoughts, a tendency to self-harm and suicide attempts were also recorded. In addition, the results show that the negative consequences of peer violence in the digital environment are even greater than traditional forms of abuse (Schneider, 2021; Vaillancourt *et al.*, 2017: 370).

However, the fact that many schools do not take a serious approach to solving the problem of peer violence is worrying. On the websites of most schools, programs for the prevention of peer violence, protection programs, and reports on the state of peer violence and the measures taken to combat it are not clearly highlighted. Although a number of activities are undertaken at a higher level with the aim of preventing and empowering teachers and students in opposing peer violence, it seems that there are no clear and reliable indicators in schools on the basis of which it would be determined which measures were actually taken in terms of prevention and ways of responding to reported cases of peer violence. If peer violence is reported, this type of reporting is mostly

contained in the annual reports on the school's work. However, it seems that it would be useful if the reporting on it was highlighted, and the information was available to all interested parties.

One of the key findings according to the results of the regional research on the state of violence against children in schools in Southeast Europe is that schools react less to cases of psychological violence, as well as that local communities have social norms that do not encourage children to report violence and that the community itself tends to tolerate psychological violence. A lack of preventive and educational programs was also observed, while those that already exist in schools are considered insufficiently efficient and effective (Milojević & Lazor Obradović, 2021: 2). Children lack confidence in community institutions, as well as their ability to provide them with adequate protection. In addition, a lack of trust in internal school mechanisms regarding prevention and protection from peer violence was also observed. Despite the children's conviction that in case of peer violence they could talk to teachers and school pedagogues, the research also showed that the dominant attitude is that more should be done to change the way of responding to violence (Milojević & Lazor Obradović: 19).

4. Causes of peer violence and students' attitude towards peer violence

Violence is a phenomenon that should by no means be ignored. According to research, the consequences of peer violence can have a negative impact in later life, both on partner and parental relationships (Ilić, 2021: 37).

The causes of peer violence are different. One of them is the desire to prove oneself and belong to a group of peers. If that group justifies and encourages violence, it will have an impact on the behavior of every individual who is part of the group. Individuals who want to belong to it try to adapt to the behavior, value system and attitudes of the members, thus accepting some socially unacceptable behaviors (Ilić: 34).

Some minors resort to peer violence because they think it's fun or they do it to get revenge for some behavior that an abusive person has taken towards them (Ferrara *et al*., 2018: 2). The authors even believe that sometimes peer violence is not directed by any previous provocation, and one of the ways of manifestation can be exclusion from the peer group (Bulat Rajhvan & Ajduković, 2012: 168). Bearing in mind the internal nature of aggressive behavior towards a person, as well as the intention to cause harm, some authors distinguish between peer violence and peer abuse. Referring to Olweus (1999) in his paper the authors Bulat Rajhvan & Ajduković state that certain behavior can be

considered peer bullying if it is aggressive behavior or intentional harm to another person, which is repeated and lasts for some time and characterized by an imbalance of power in those interpersonal relationships (Bulat Rajhvan & Ajduković: 168).

The results of research conducted in Croatia in 2005 indicate that pre-adolescent children commit more violence towards others, and that the frequency of violent behavior increases if children feel rejected or unsafe in the school environment. (Buljan Flander *et al.*, 2007: 171). This can represent a vicious circle, because according to some research, minors commit violence because of acceptance, i.e. in order not to feel rejected. In addition, minors who feel rejected exhibit the highest degree of direct or indirect aggression (Selmivelli, 2000, stated according to Vasić *et al.*, 2018: 78).

According to a 2014 study on peer violence in Niš and Vidin, students cited as a reason the attention of students who perpetrate some form of violence on themselves (40%), then different educational styles of violent students (18%), and the inability to resolve conflicts, as well as the inability to resolve the conflict, except by resorting to violence (17%) (Report on the prevalence, types and causes of peer violence in Niš and Vidin, 2014: 8).

The respondents stated that the reasons also depend on the type of peer violence. Thus, electronic violence is manifested most often due to the anonymity it provides, because such a method of communication encourages doing what otherwise would not be possible, while the cause of verbal violence is most often cited as disagreement in opinion, attitudes and religious beliefs. In addition, jealousy and the division of society into popular and unpopular, as well as different styles of clothing, opinions and behavior, are cited as reasons. Students of primary schools in Vidin are, for example, cited as the main reason for mutual differences between students, which leads to the manifestation of power and intolerance between students. Violent students draw attention to themselves, and those who suffer violence withdraw into themselves, which leads to the deepening of differences and the impossibility of resolving violence (*Ibid*: 9). In the same research, the students, for example, as the most pronounced form of violent behavior they emphasized verbal, followed by physical, social, sexual and electronic violence (*Ibid*:13).

As verbal and social peer violence can be transferred to the digital environment, we were interested in the perception of verbal and social peer violence in the digital environment during the COVID-19 virus pandemic, given that the presence of children on the Internet due to isolation increased during that period, and there was also an increased risk of digital violence. The research was conducted through a questionnaire, and 500 respondents from

elementary schools from the territory of Belgrade, Novi Bečej, Kragujevac and Smederevo participated in it. Bearing in mind the fact that minors are increasingly using digital technologies and opening profiles on social networks, as well as the fact that the frequency of peer violence is very common in the pre-adolescent period, the sample consisted of students aged 10-14. The largest number of respondents, even 44.2% of them, believe that more violence is represented on social networks and applications for exchanging telephone calls and messages than in person, 36.8% declared that it is equally represented both on social networks and in schools, while 19% respondents believe that peer violence is more common in school during direct communication (Kostić & Ranaldi, 2022: 92). This indicates the need for a comprehensive approach to solving the problem of peer violence. Plans and programs of the school for solving peer violence, measures related to the prevention of gang violence in the digital environment must also be included.

According to the results of the research, a total of 68.1% declared that they know who they should turn to if they suffer verbal violence, 18.1% that they do not know who they should turn to, but believe that the insult cannot harm anyone, not even him. In contrast to them, 10.3% of respondents declared that they do not know who they should turn to if they suffer verbal violence, and 3.5% know who they should turn to, but would never turn to them because they believe that no one can help them in those situations. This indicates that education should also include teaching students how to react to violence and prevent their own victimization and is exactly why education and building trust between teachers and students is important (Kostić, 2021: 1705).

When it comes to the trainings that have already been conducted on the topic of preventing peer violence in the digital environment, 11.9% of respondents declared that they were completely useless, a large number of respondents, 39.4%, declared that they were very useful, and 39.4% that the trainings were useful, but that they should be adapted to the age of the minors attending them. This leads to the conclusion that trainings in this area are very useful and that the school should organize this type of training more often with the prior development of strategies at the institutional level (Kostić & Ranaldi: 91 and 92).

5. Conclusion

Although, at the national level, the Law on the Basics of the Education and Training System, and the Rulebook on the Protocol of Behavior in the Institution and the Response to Violence, Abuse and Neglect provide the basis and method of response of school

institutions to peer violence, it seems that it is still necessary to make additional efforts in order to the system of protecting children from peer violence was improved. Bearing in mind the increasingly frequent use of digital technologies in the mutual communication of minors, it seems that verbal and social violence is taking on a new form and that it is necessary to take adequate measures to suppress this new form of violence. This was recognized by the United Nations Organization, so in accordance with this, the Committee on the Rights of the Child issued a General Comment on the rights of the child in relation to the digital environment in 2021. Although digital violence can be perpetrated at any time and outside of school, it should take adequate measures to prevent it. This primarily refers to measures of an educational and educational nature, but also to measures that adequately respond to the reporting of such cases.

According to the research results, although children have no problem reporting cases of peer violence to teachers and psychologists, there is still no confidence in the effectiveness of the school system's response. This forces the conclusion that it is necessary to improve the response system through various mechanisms. First of all, although peer violence is reported most often in the annual report on the school's work, we believe that trust would be improved to a greater extent if the report on this phenomenon were published on the school's website. When it comes to creating a program for the prevention of peer violence, it should not be understood as a formal obligation, but risk assessment and security analysis should be approached seriously at the school level, taking into account cases and situations from the previous period.

When it comes to education, it seems that it should take place continuously, not only for the teaching staff and psychologists, but also for the students themselves. Based on the research conducted in June 2021, it can be concluded that a large number of students evaluate the educational programs of the school in the field of prevention of peer violence as very useful. In addition, a large number of students believe that such education should be adapted to the age of the students.

The largest number of respondents from the survey conducted in June 2021 believe that violence is equally prevalent both in school and in the digital environment. In times of crisis, such as the COVID-19 virus pandemic, an increasing number of students use information technologies and applications to exchange calls and messages, thus increasing the possibility of becoming victims of peer violence in the digital environment. Therefore, it is necessary to work on empowering students in order to prevent their own victimization, as well as familiarizing them with the most adequate way of reacting to this type of violence, so that it does not happen that conflicts from the virtual environment are

transferred to physical environments such as school, which can result and physical violence among children.

In order to prevent this type of violence, in addition to parents, the school should also play an important role. Bearing in mind that digital violence is also committed outside of school, as well as after classes, the school should also take adequate measures to prevent and prevent this type of violence if students from its school participate in it. Because of this reason it is first of all necessary to develop adequate action programs and establish a relationship of trust between children and teaching staff. Also of great importance is the establishment of cooperation mechanisms between the school and parents, through inclusion in various educational programs and workshops of the school on the topic of prevention of peer violence.

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CLIMATE CHANGE AND CHILDREN RIGHTS TO LIVE IN HEALTHY ENVIRONMENT

Climate change and is on humanity's greatest threat. Our health and quality of life depend on clean air, safe water, sustainably produced food, a stable climate, healthy biodiversity and ecosystems. About 20 years ago the worlds political elite actually began to take in consider the dangers of climate change more seriously, although many scientists had previously warned of the possible consequence of this way of life. Right to a healthy environment is a human right and climate change has a negative impact on the enjoyment of human rights and big impact on children right to live and grow in healthy environment. There is relationship between climate change and the full effective enjoyment of the rights of the child.

In that regard, the paper provides an analysis of the relevant provisions concerning at healthy environment the level of the UN, the Council of Europe, the European Union and the Republic of Croatia but also provides analyse of work of ombudsman for children. The Office of the Ombudsman for Children of the Republic of Croatia deals with this important topic in the framework of complaints of violations of children's rights to grow up in a healthy and safe environment.

***Keywords**: human dignity, children's right, climate change, healthy, clean and safe environment*

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1. Introduction

Climate Change- on humanity's greatest threat

Our health and quality of life depend on clean air, safe water, sustainably produced food, a stable climate, and healthy biodiversity and ecosystems. Climate scientists from all over the world contribute to our understanding of the atmosphere's overheating and are warning people of the incalculable and frightening results, such as rising sea levels or more extreme climate events. The international community has concerned itself with limiting rising sea-levels since the 1990s. The Kyoto Agreements[1] and Paris climate protection plan[2] are the most prominent UN accords that initiated climate change measures aimed at curbing Global Warming. The 2021 United Nations Climate Change Conference in Glasgow has presented Glasgow Climate Pact[3], which once again emphasized the importance of maintaining global temperature stability.

How could it come to this?

The increased use of fossil fuels – that is coal, oil and natural gas – since the beginning of the 19th Century and industrialization, deforestation in tropical regions, and the growth of cattle farming to feed an ever-growing population; have raging effect on global climate and temperatures. The concentration of CO2 in the atmosphere today is 40% higher than it was at the beginning of industrialization.

Consequences of global warming

The average global temperature is 0.85 degrees Celsius higher than it was in the 19th century. The previous three decades were warmer than any previous ones since it was first recorded in 1850. Climate scientists see an increase of two degrees Celsius in the average temperature as a red-line that, if crossed, could have catastrophic results for the environment. The international community has agreed upon the same finding that temperature rise must be kept below two degrees Celsius threshold. A recent report of the

[1] UNFCCC (1997) Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted at COP3 in Kyoto, Japan

[2] Paris agreement UN Climate Change Conference (COP21) in Paris

[3] Glasgow Climate Pact https://ukcop26.org/the-glasgow-climate-pact/

Intergovernmental Panel on Climate Change outlined that the failure of humanity to curb global heating has already guaranteed irreversible damage.[4]

All states in the world are called upon for the same goal, to ensure that all sectors of their economy, energy production, land, air transport businesses and households are geared towards this thanks to the implementation of legally binding measures in the coming years. We don't have much more time to lose.

2. Sustainable Development – save our environments

It is estimated that 24% of all global deaths are linked to the environment, which is roughly 13.7 million deaths a year. (World Health Organization, 2021). Among these risks, the WHO lists factors such as air pollution and exposure to hazardous substances.

The right to a safe, clean, healthy and sustainable environment has been officially recognized as one of the fundamental human rights. This is a very important step forward, which took place on October 8, 2021, when the United Nations Human Rights Council approved Resolution 48/13[5], calling on UN Member states to cooperate to implement this right. On the same day, the Human Rights Council adopted Resolution 48/14[6], establishing also the position of a Special Rapporteur on the promotion and protection of human rights in the context of climate change. The right to a healthy environment is already recognized with different phraseologies in the state law of more than 150 states, which recognize the importance of environmental conditions for the existence and well-being of humanity.

In 2001 the Constitution RH[7] amendments to the obligation of the state to ensure the right of citizens to a healthy environment were replaced by the obligation of the state to ensure conditions for a healthy environment. Although the Constitution does not refer specifically to the protection of this right as a child's right, the Constitution obliges the special protection of children and gives them the right to a decent life (Art. 63i and Art. 65 (1)) (Lucić, Marošević 2020). "Everyone has the right to a healthy life. The State shall

[4] Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2022: Impact, Adaptation, Vulnerability, 'Summary for Policymakers' (IPCC, 2022) < https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/

[5] https://www.ohchr.org/en/statements-and-speeches/2022/04/right-healthy-environment

[6] https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session48/res-dec-stat

[7] Ustav Republike Hrvatske, Official Gazette RC, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14

ensure conditions for a healthy environment. Everyone is obliged, within the scope of their powers and activities, to pay special attention to the protection of human health, nature and the human environment" (Art 70). Also, various other documents and plans that ensure environmental protection and sustainable development exist, but is that sufficient to ensure environmental protection to its fullest? 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 (Kambovski 2021). 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 (Kambovski 2021).

Children have a right to get information on the issues that is comprehensible to them and be in a position to express their own views and share information freely. The state should ensure that all children have the opportunity to participate in policies and decision-making related to the environment and climate change according to Article 12 of the CRC. Also, should ensure child friendly information about climate change and access to justice mechanisms.

According to the report of the Croatian Ombudsman "The detected shortcomings in the environmental protection system, whose function is not only to protect nature and the environment but also human rights, indicate that the primary goal envisaged by the Environmental Protection Act[8] – the protection of life and health – has not been achieved. The sustainable development principle has not been implemented to a sufficient extent due to the fact that environmental protection is treated as secondary to instead of equally important as social and economic development. The implementation of the precautionary principle requires a higher level of environmental and health protection; however, this is avoided and minimal and/or inadequate protection is provided. Thus, the institutions need to invest much more effort in order for the efficient protection of the right to a healthy life and the implementation of the constitutional values of nature and environmental

[8] Environmental Protection Act, Official Gazette RC, No. NN 80/13, 153/13, 78/15, 12/18, 118/18

protection to be achieved. Pollution of the environment and of nature, climate change and the pandemic represent the greatest challenges for the humanity, decision makers and the human rights protection system itself. Following the lead of the European lawmaker, the Croatian Parliament should proclaim the state of the climate and environmental crisis and thus send a message to the youth, as well as to everyone else, that the state of nature and the environment in the Republic of Croatia can and must be improved. The current generation of young people demands and expects a healthier, greener and more equal world. It is our duty and commitment to make that happen".[9]

Croatian children and young people took part in the Fridays for Future global movement, which aimed to warn of climate change and encourage governments to act. They expressed their recommendations and demands. Their recommendations were addresses to the Croatian Parliament, The Government of the Republic of Croatia, the Ministry of the Economy and Sustainable development, the Ministry of Health, the State Inspectorate, the Ministry of Construction, Psychical Planning and State property, and the Ministry of Science and Education. One of the recommendations is to:

- proclaim the state of environmental and climate crisis and to thereby strengthen its commitment to the implementation of the constitutional values of environmental and nature protection, the right to a healthy life and sustainable development;
- include youth NGOs and representatives into the processes of planning and development of all public policies pertaining to environmental protection and sustainable development;
- develop the children's and young people's awareness of environmental issues by introducing the content on the right to a healthy life and climate change into the curricula
- adequately support environmental human rights defenders (NGOs, civic initiatives and others), including the implementation of their rights stemming from the Aarhus Convention.

Under the European Green Deal, it is suggested that EU should become climate neutral by year 2050. The European Commission adopted a set of proposals to make the EU's climate, energy, transport and taxation policies fit for reducing net greenhouse gas

[9] Ombudswoman of the Republic of Croatia, Special Report: The Right to A Healthy Life and Climate Change in the Republic of Croatia (2013-2020)

emissions by at least 55% by 2030, compared to 1990 levels. This requires higher shares of renewable energy and greater energy efficiency. At the same time, it will ensure there are opportunities for everyone, supporting vulnerable citizens by tackling inequality and energy poverty, and strengthening the competitiveness of European companies. To ensure climate neutrality mentioned above it is necessary to:

- transition to greener mobility will offer clean, accessible and affordable transport even in the most remote areas
- the green transition presents a major opportunity for European industry by creating markets for clean technologies and products.
- the electrification of the economy and the greater use of renewable energy are expected to generate higher employment in these sectors.
- renovating our homes and buildings will save energy, protect against extremes of heat or cold and tackle energy poverty.

3. Children right to a healthy environment

The Convention on the Rights of the Child[10] states that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. It establishes children's rights as inalienable and universal human rights and it is the most widely ratified human rights instrument in the world. In its General comment No. 15 (2013)[11] on the right of the child to the enjoyment of the highest attainable standard of health, the Committee on the Rights of the Child described climate change as one of the biggest threats to children's health. Children are disproportionately impacted by climate change due to their unique metabolism, as well as their physiology and developmental needs. In a report on the relationship between children's rights and environmental protection, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment concluded that no group was more vulnerable to environmental harm than children (A/HRC/37/58, para. 15). The Special Rapporteur stressed that "climate change and the loss of biodiversity threaten to cause long-term effects that will blight children's lives for years to come" (ibid., para. 69). In particular,

[10] Konvencija o pravima djeteta (Narodne novine – Međunarodni ugovori br. 12/93, 20/97, 4/98, 13/98, 5/02, 7/02, 2/03, 2/17, 4/17)

[11] General comment No. 15 (2013) on the right of the child, https://www.icj.org/wp-content/uploads/2014/10/General-Comment-CRC-15-Right-to-health-art-24-2013-eng.pdf

climate change may seriously affect children's enjoyment of the highest attainable standard of physical and mental health, access to education, adequate food, adequate housing, safe drinking water and sanitation – with children in developing countries often sustaining its worst effects. (A. Daly,2020)

In its study on the relationship between climate change and the full and effective enjoyment of the rights of the child, OHCHR concluded that all children were exceptionally vulnerable to the negative impacts of climate change, with the youngest children being most at risk (see A/HRC/35/13). In the study, OHCHR outlined the key requirements of a child rights-based approach, including ambitious mitigation measures to minimize the future negative impacts of climate change on children, as well as adaptation measures that focused on protecting the most vulnerable children. OHCHR highlighted the need for mitigation and adaptation actions that were the product of participatory, evidence-based decision-making processes that took into account the ideas and best interests of children as expressed by children themselves. Children and young persons also play an important role in the climate justice movement, including the Fridays for Future and during 2019, 2020, 2021, protests were held by students for the climate: School Strike 4 Climate, based on Fridays for future, with the participation of children from five Croatian cities.[12]

Young people point out that they are protesting for their future. They point to global warming, floods, earthquakes, food shortages, poverty and diseases that occur because of climate change.[13]

3.1. Ombudsman for Children – Children's representative

The Convention protects children's rights to life, development, health, social welfare, education, protection from all forms of violence and exploitation, rest, play and leisure time as well as many other rights. All children are born with the freedoms and rights that belong to all human beings. The Republic of Croatia adopted the Convention on the Rights of the Child in 1991, thus making a commitment to respect and protect children's rights. In order to do that in the best possible way, Croatia in 2003 established the institution of the Ombudsman for Children. The Ombudsman for Children represents all

[12] Greta Thunberg skip classes on Fridays to strike, and these days were called Fridays for Future. Her action inspired hundreds of thousands of students around the world to participate in their own Fridays for Future.

[13] Mršević, Zorica, Unmarried Couples In Serbia Between The Constitution And The Laws, in: *Human Rights Protection "From Unlawfulness To Legality", Yearbook*, Provincial Protector of Citizens – Ombudsman Institute of Criminological and Sociological Research in Belgrade, Novi Sad, 2018, p. 201-217.

children in Croatia and protects their rights. He or she monitors whether our country fulfils its obligations under the Convention, whether all laws are harmonized with the Convention and how regulations on the rights and interests of children are implemented. The Ombudsman monitors individual and general violations of children's rights and proposes measures and programs for the integrated protection of children's rights and interests and for the prevention of harmful effects on children.

In our annual reports[14], the Ombudsman for Children highlights problems in the field of environmental protection and children's right to a healthy environment.

A healthy environment is an essential prerequisite for the safe and healthy development of every child. As a vulnerable group, children are particularly vulnerable to harmful environmental influences. The Office of the Ombudsman for Children of the Republic of Croatia deals with this important topic in the framework of complaints of violations of children's rights to grow up in a healthy and safe environment. The complaints we have dealt with related to children's exposure to poor air quality, exceeding noise levels in places where children live, the impact of harmful electromagnetic radiation, setting up base stations near children's homes, disposal of hazardous waste and environmental pollution due to inadequate disposal waste.

We actively monitor what the competent authorities do at the state, regional and local level in relation to the adoption of regulations and their implementation related to environmental protection. We have especially dealt with the problem of environmental and air pollution in the area of the town of Slavonski Brod, which due to the operation of a refinery in the neighbouring country (Bosnia and Herzegovina) had elevated values of air pollution, which adversely affected the health and well-being of children.

Also, we monitor the issue of installing base stations of teleoperators who, according to the current law, only need a permit from the local self-government body, and antennas and antenna poles are installed without a construction and location permit. Cities and municipalities in their spatial planning documents determine the conditions for the installation of devices and determine which areas are of "increased sensitivity".

We make recommendations on how citizens should be involved in deciding on determining the location and issuing permits for the installation of the devices. We are

[14] On https://dijete.hr/hr/izvjesca/izvjesca-o-radu-pravobranitelja-za-djecu/

monitoring the installed base stations (antennas and antenna systems) by asking the State Inspectorate and the competent Croatian Network Regulatory Agency (HAKOM), which check the permitted radiation levels generated by these devices.

We are more active in this field during 2022, as it is the ENOC's[15] 2022 priority theme. Also, the UN Committee on the Rights of the Child is preparing its forthcoming General Comment no. 26. (General comment on children's rights and the environment with a special focus on climate change)[16].

3.2. Strengthening the voice of children in society

The Ombudsman for Children listens to children and respects their views. The Network of Young Advisors – NYA, consisting of children aged 12 to 18 from the whole of Croatia, advises the Ombudsman, points to children's problems and proposes potential solutions.[17] The Ombudsman proposes measures to improve the position of children and increase their influence in society, meets children and advises them on the method for the realization and protection of their rights, cooperates with children, encourages them to express their views on all matters important to them and urges adults to respect children's views.

In addition to cooperating with children during official visits to institutions where children reside and when children visit the Office of the Ombudsman for Children, the Office of the Ombudsman for Children has the Network of Young Advisers to the Ombudsperson for Children – NYA (in Croatian: Mreža mladih savjetnika - MMS), a permanent advisory body that has been active since 2010. The 5th generation of the Network of Young Advisers to the Ombudsman for Children, which consists of 25 children from all over Croatia, aged 12 to 16, whose term lasts for three years, has just started and participates in the activities of 2022 ENYA.

A novelty in 2022 is a special activity with a group of children over 16 years of age. The Office of the Ombudsman for Children has recently established, in addition to the Network of Young Advisors, another consultative body made up of young people, in

[15] ENOC- European Network of Ombudspersons for Children, https://enoc.eu/?page_id=2316

[16] General comment on children's rights and the environment with a special focus on climate change, https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and

[17] Jovanović, S. (2020) The right to die with dignity in Serbia. In: Pavlović, Z. (Ed). *Yearbook Human Rights Protection the Right to Human Dignity*, No. 3. Novi Sad: Provincial Protector of Citizens - Ombudsman and Institute of Criminological and Sociological Research in Belgrade, 533-550.

order to promote effective and meaningful children's participation in society. This is a newly established Forum 16+, which consists of children over 16 who have shown motivation and willingness to cooperate with the Ombudsman and contribute with their ideas to improve children's rights and the position of children in society. Forum 16+ has 16 members from various parts of Croatia. We are also member of European Network of young advisors. The purpose of the ENYA project is to actively involve children and young people in ENOC's annual work and to give them the opportunity to be heard at a level that exceeds their country boundaries, at European level.

ENYA aims to ensure a meaningful and effective participation of young people by giving them a say on specific topics. They have the opportunity to express their concerns and views regarding their rights, to make their proposals heard, and to participate in the elaboration of common recommendations. Children's right to be heard and to participate, as enshrined in Article 12 of the UNCRC, is one of the most undermined rights of the child and the one on which ENOC and ENOC members committed to focus extensively.

The theme of ENYA 2022 is *"Let's Talk Young, Let's Talk About Climate Justice"* and after the end of theme recommendations for the climate justice will be pronounced to Authority. The aim of this theme is underline children right to healthy environment which is granted under CRC, these include the general principles of the CRC, that is, the right of children to be heard and to have their views given due weight (Article 12); the right of children to have their best interests as a primary consideration (Article 3); the right to life, survival and development (Article 6); and non-discrimination (Article 2). It also includes the principle of the evolving capacities of the child (Article 5); and the right to health, including a healthy environment (Article 24).

4. Instead of Conclusion

The importance of this topic was also recognized by the Committee on Children's Rights. The Committee on the Rights of the Child will dedicate its next General Comment No. 26 to children's rights and the environment with a special focus on climate change. The General Comment will provide authoritative guidance on how children's rights are impacted by the environmental crisis and what States must do to ensure that children live in a clean, green, healthy, and sustainable world. From December 2021 – 2023, the United Nations Committee on the Rights of the Child will host a series of offline and online consultations and workshops with the global community, including specific consultations with children and young people, to inform the General Comment launching in 2023.

Children are invited to actively participate in the adoption process with their comments [18]

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EMPLOYMENT: THE SOCIO – ECONOMIC LINK BETWEEN THE YOUTH AND THE OLD AGE

The aim of the paper is to discuss some issues related to the employment as a link between youth and old age. It was pointed out that labor per se is a crucial socio-economic activity for the individual and the whole society. In this sense, it was underlined that not only the current existence is ensured through work, but also that it represents a form of investment in the old days through the social insurance system. It was stated that workers' rights, as a set of important socio-economic rights, actually belong to the category of basic human rights since the rights of the so-called first generation human rights cannot be enjoyed without the existence and adequate protection of workers' rights. The historical background of the development of political-economic deliberation on work in general, as well as reflections of dominant production models in practice, were presented in the paper. After that, the importance of employment was discussed with a special focus on several basic issues. In this regard we discussed the potential impact of (un)employment on deviant behavior, working in the informal economy with inhumane working conditions, as well as the correlation between technology and education with employment.

Keywords: *Employment, Labor, Socio-economic rights*

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Introductory considerations

The issue of (un)employment is of immeasurable importance for society and particularly for its political, economic and social aspects. Employment actually goes beyond the sphere of individual and collective interests of workers and employers, since important interests of the entire society are correlated with it (Jovanović, 2015: 37). The employment relationship basically represents a link between early youth (ages suitable for work ability) and old age, since social security for old age is ensured through work in the form of a pension, and also other forms of social insurance.[1] In the literature, it is rightly pointed out that the right to life is the most important human right, but that it can only be realized if there is a proclaimed right that protects against hunger, which in most cases is the right to (dignified) work (Jovanović, 2006: 9). Such a conception certainly raises the question - *Are labour rights human rights* ? There is an extensive and ongoing academic debate on this issue (Mantouvalou, 2012) and the doctrine is sharply divided on this issue. However, the demarcation point is reflected in the position of social-economic rights in relation to civil-political rights. (Kovačević, 2021: 294). When it comes to the international normative position, fundamental rights and economic freedoms are considered equal, with no primacy of one over the other (Bruun, Bücker, 2012: 288).

It is necessary to notice that the labor market *per se* and particularly the youth labor market, is an heterogeneous category, influenced by a wide range of socio-economic conditions, while it on the other hand, has an immeasurable influence on almost all spheres of a society. There were many studies on employment topic and one among them that was recently conducted at the level of the whole world with the aim of determining those aspects of social life that worry people the most, showed that respondents aged 16 to 64, out of 17 offered categories, were most concerned about unemployment in 39% cases.[2] Such result has established the issue of (un)employment as a problem that worries society the most nowadays and represents the biggest obstacle to its development and prosperity. It is of a great importance to point out that the study results showed that unemployment worries people to a much greater extent than *exempli causa* terrorism or climate change, which occupy much more space in the media than the issue of unemployment. This fact indicates that people on a global level have developed

[1] There is many studies that associated unemployment with risk of future morbidity and premature mortality. See: Janicki-Deverts, D., Cohen, S., Matthews, K. A., & Cullen, M. R. (2008). History of unemployment predicts future elevations in C-reactive protein among male participants in the Coronary Artery Risk Development in Young Adults (CARDIA) Study. *Annals of Behavioral Medicine*, *36*(2), 176-185.

[2]https://www.ipsos.com/sites/default/files/201612/What_Worries_the_World_Oct_2016.pdf;access 06.05.2022.

awareness of the importance of the relevant issue which is an encouragement and a good starting point for solving the problem of unemployment in general, including youth unemployment as well.

As it was stated in our literature, one of the most important goals of labor law regulations enacted within the framework of a democratic and socially oriented state is precisely to enable the employment for as many people as possible under acceptable and equal conditions. However, it seems that labor law regulations in the majority of countries fail to achieve their goal, and today, based on numerous studies and official and unofficial statistics, we can conclude that unemployment, especially youth unemployment, is going to become "the world's number one problem", if it has not already became (Šunderić, 1975: 7).

1. Historical background

From a historical point of view, the issue of (un)employment did not until the so-called The "industrial revolution" that took place primarily in Europe during the 17th and 18th centuries arousee special attention of society, since until then the concept of work and employment relationship did not exist in the form in which it exists today, as one of the most widespread legal relationships in general.

In Ancient times, the dominant work was conducted by slaves who were completely deprived and their rights that need to be protected by state intervention did not even exist. During the Middle Ages, the feudal socio-political and economic order appeared on the scene (Tarle, 1948: 14), which proclaimed the work of dependent peasants - serfs who were not considered workers. In this regard, until the period of the Bourgeois Revolution in 1789, serf labor was dominant in Europe, but the elements of capitalism and its inherent processes slowly began to mature (Tarle, 1948: 15).

The first state interventions in the field of work, due to the relative underdevelopment of the labor relations themselves, provided partial protection, both in terms of the objective field of application, and in terms of the personal aspect, which is of specific interest for the matter in question. In line with this, the first subjects to whom the protective function of labor law legislation applied were children. Thus, in Great Britain, in 1802, the Child Labor Protection Act was passed, while in Prussia, a law was passed that prohibited the work of children under the age of 9 (Lubarda, 2013: 246). The International Labor Organization (hereinafter: ILO) also reacted to the abuse and exploitation of child labor by adopting a series of conventions and recommendations aimed primarily to prevent

such negative phenomenon that was gaining momentum. Consequently, ILO Convention No. 5 from 1919[3] prohibited the work of children under 14 years in industry while ILO Convention No. 6 from 1919[4] prohibited night work for persons under the age of 18. There are a number of other conventions and recommendations adopted with the same purpose.

At the beginning of the 19th century unemployment was not a crucial socio-political issue, since the new concept of the economy (industrialism) was still in its infancy, and it was relatively easy to get a job mainly because the demand for industrial workers was still at high level (Brajić, 1972: 69). When it comes to the field of application of protective labor legislation, effort to improve working conditions, which was initially limited to the regulation of working hours and adequate compensation for work, was the main question in labor-social environment.

After the great economic crisis, known as the "Great Depression", that happened in the 1930s, the issue of unemployment really gained importance, and was especially considered from the political and economic point of view. This is precisely the period when the problem of youth unemployment was mentioned and highlighted for the first time within the ILO regulations, in Recommendation No. 45 from 1935, from the 90th session of the General Conference held in 2002. Similar circumstances have appeared after the last major economic crisis that occurred at the end of the first decade of the 21st century. As pointed out in the domestic literature, many politicians in Western countries, who largely opted for a capitalist system of economy and politics in general, publicly emphasized that it is better and more acceptable for them to have a very high inflation rate, rather than unemployment (Šunderić, 1975: 1). In an attempt to reconcile the tensions between the economic sustainability of the working process and the social security components of it, in the mid-2000s, the flexicurity concept was developed (Bekker, Mailand, 2018: 142) which is now ongoing tendency in employment. However, although the aim of active employment measures is to ensure full employment, it should be note that creator of the Full Employment Theory, *Arthur Pigot*, claimed that full employment implies and tolerates unemployment to a certain extent, calling it normal unemployment, i.e. friction (Šunderić, 1975: 5).

[3] Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (Entry into force: 13 Jun 1921).

[4] Convention concerning the Night Work of Young Persons Employed in Industry (Entry into force: 13 Jun 1921).

2. The importance of employment

With the maturation of the circumstances for the implementation of the term "employee - citizen" in legal and political discourse, the field of *workers' rights* has developed and expanded from basic rights at work like compensation for work, safe and healthy working conditions, all the way to the right to protection of personal data and the right to freedom of expression within work organization. In the literature, it could be even find the point of view according to which during the last decade of the last century, a set of key labor rights took the significance of "human rights at work" (Bellace, 2014: 177). For this reason it was pointed out in the literature that during the course of the 1990s, the characterization of the key worker rights began to move from 'labor standards' to 'human rights at work' (Stevanović, Kostić, 2020: 601). This practically means that the legitimacy of state power, on the internal and external, diplomatic level, depends on the level at which the regulation and provision of those rights is found. It follows that it is about the individual rights of the employee and that adequate legislative activity with effective application are the pivot of human protection in the sense of Kant's claim that work is a human existential need (Ocić, 2016: 121).

Employment could be understood as integration into work engagement, rather than purely establishing an employment relationship. In general, employment, as it has already been stated in the literature, indicates the "state of engagement of people in the working process" and represents, in relation to employment, a static category. From a dynamic aspect, employment is considered to be kind of integration into various forms of socially useful work (Brajić, 1972: 28).

In accordance with the indicated social importance of the relevant topic, solving the issue of unemployment, i.e. increasing employment, is one of the most important steps towards achieving labor law goals such as social justice, labor and social peace and regulation of competition (Lubarda, 2013: 107). In line with this, solving the problem of unemployment, especially of young people, should be understood as a distinctly socially justifiable task, but also a goal of a programmatic political nature.

An important aspect of reducing the unemployment rate is reflected through the socialization process and proper inclusion in social flows, which today cannot be completely achievable without the employment. Many sociologists, psychologists and anthropologists refer to this process as individualization which depends on a group of structural and cultural factors. Individualization in its full meaning does not only mean the path to social maturation and independence, but also the achievement of psychological

maturity and individuality, which is not possible without the realization of structural factors. One of the basic ones from that group is certainly the possibility to earn income that is sufficient to satisfy, first of all, existential needs, and then certain individual needs that affect the overall development of a person. In light of this, it is important to take into account that most people on a global level earn their income mainly based on their work, not from the capital (capital investment and renting).

From a political point of view, reducing the unemployment rate within active employment policy, is in line with the program goal of most sovereign states reflected in enabling the realization of the right to work. When it comes to young people, it is one of the most effective ways to prevent an extremely harmful social phenomenon, the leaving of the country by young people, usually highly qualified, known as "brain drain".

2.1. Unemployment and deviant behavior

Social importance of employment issue is also reflected in the reduction of potential deviants and acts of violence, as well as criminality in general. This attitude is part of a broader criminological (etiological) orientation that explains the origin of criminality with economic factors and the hypothesis is that crimes are committed as a result of economic deprivation of individuals and collectivity, which is most often considered a consequence of the bad state of the economy and high rates of unemployment in one society (Stevanović, 2019: 114). Although there are a number of authors who relativize the correlation between unemployment and crime, the concept of "criminal employment law" has been developed in the doctrine (Levin, 2018). In addition to the impact of unemployment on deviant behavior (criminality), some authors also point to the inverse relationship. Namely, a criminal record sharply decreases a job applicant's likelihood of gaining employment, and employers' refusal to hire formerly incarcerated applicants has led to a growing population of unemployed and underemployed people with criminal records. Every year, more than 600,000 people are released from prison, but, a year after release, over seventy-five percent of them remain jobless (Levin, 2018: 102).

Newer theories that deal with the issue of violence emphasize an extremely large influence of unemployment and workplace stability on the appearance of the phenomenon of violence (Opalić, Ljubičić, 2008). The stated hypothesis can be defended by applying a statistical method, and a good example of this is Japan. Namely, Japan is a country with an extremely low unemployment rate and a very original and efficient youth employment system after completing education (Brinton, 1998: 443). For instance, according to the data for 2008, the murder rate is extremely low and amounts to only 1.02% compared to

countries with cumulatively high rates of both murder and unemployment. Research conducted by the Organization for Economic Cooperation and Development (hereinafter: OECD) could serve as an indicator of the correlation between the low unemployment rate and the individual security. An extensive survey involving OECD member states showed that countries with low unemployment rates usually have a low murder rate, but also that the residents of those countries feel much more safer.

2.2. Inhumane working conditions and the informal economy

In practice, the working conditions are too often contrary to what the concept of dignified work affirms, and the social insurance package that is acquired through employment is often unattainable for that reason. The high unemployment rate is often the cause of the fact that employers exert a great influence on workers by imposing illegal working conditions. The growth of precarious work since the 1970s has emerged as a core contemporary concern within politics, in the media, and among researchers as well.

There is a lot of evidence of the inhumane treatment of workers such as the one given by *Li Qiang*, founder and executive director of the workers' rights organization China Labor Watch, who reported that "workers from *Foxconn* factories in Chengdu and Shenzhen were [being] sent to the *Quanta* factory in Changshu to work 12-hour days making Apple watches in order to meet the company's April 24 release deadline. As there was a shortage of dormitory space for the workers at the factory, they found themselves forced to sleep in buses. These workers also found themselves producing watches in freezing temperatures while wearing thin work uniforms, and where close to 100 workers became ill and had to be hospitalized" (Barak, 2020:4).

It should be noted that there is a huge number of people, especially young people, who work within the so-called "informal economy." The very concept and notion of work in the informal economy (eng. *informality*) are extremely vague and defined from several different aspects and starting points. ILO for instance starts from an enterprise-based concept and suggests that a company operating in the informal sector is considered to be one that: 1) in accordance with national legislation and circumstances has a smaller number of employees than is foreseen or usual for related activity; 2) is not registered in accordance with the law and 3) does not register its employees.[5] There are also authors

[5] ILO's Key Indicators of the Labour Market(KILM)

who differentiate informal and formal economy according to whether workers are registered for social insurance and based on which contracts they perform work.

The expert group that deals with the issue of statistics in the informal sector (*Delhi* group) proposed at its fifth session that the definition of work in the informal sector should be expanded by redefining the term informal employment, by moving from the e*nterprise-based* concept towards the *job-based* concept.[6] In essence, this proposal should be accepted since the inhumane working conditions can also exist within the formal sector. Nevertheless, the dominant view is that informal work within the formal or informal economy implies poor working conditions, especially in the context of working hours and compensation for work, as well as social security.[7] Certain researches have shown that young people who work on the basis of contracts on temporary jobs are not registered, that they have lower incomes than young people who work on the basis of the same contract, and at the same time are registered.

2.3. Employment and technology

Today, technology is a distinctive feature of modern society and a *condictio sine qua non* of modern life. Furthermore, the overall usage of digital technology has dramatically transformed the landscape on which laws are created, because this aspect of modern everyday life cannot be outside normative regulation (Stojšić Dabetić, 2020: 158).

Since the so-called industrial revolution that took place in the period of the 17th and 18th centuries in the Europe and especially since the so-called "informatics" revolution at the end of the 80s of the 20th century, technology begins to have an enormous impact on all pores and areas of society and social life.

Regarding the issue of the integration into the labor market, it seems that the most significant change is the one that happened thanks to the development of technology or, as it is often said, technological changes. However, the radical changes have taken place in the social environment, and consequently in the labor market. The development and application of new technology, undoubtedly made work and production more efficient, but also led to a large number of collective layoffs, especially of young people in accordance with the often used principle *last in first out*, and individual jobs "turned off" leaving them to new machines and products of new technology. The other one dimension

[6] Final Report of the 17th International Conference of Labour Statisticians

[7] http://ilo.org/global/topics/employment-promotion/informal-economy/lang--en/index.htm, access 17.7.2022.

is reflected in the fact that today a huge number of new jobs based on information and communication technology are rapidly being created. Information technology is particularly shown to be a comparative advantage of young people when employed in jobs that require IT skills. This thesis is supported by the fact that a survey that profiled the most sought occupations came to the result that out of the 7 listed occupations, even 3 are impossible to perform without knowledge of new technology in work, such as web designer, programmers and IT managers.[8]

2.4. Employment and education

When it comes to the correlation between education and employment, the roots of the importance of education for the process of inclusion in the labor market was parallel with the emergence of the concept of work specialization, when each specific work task and workplace require a special set of knowledge and skills that are acquired both in the institutions of the educational system in a formal way and informally, during work, i.e. through the acquisition of the so-called work experience.

Considering the historical development of the perception of the importance of education and the goals it has to fulfill, a certain discrepancy between the ruling doctrinal positions over time is also noticeable. During Ancient times and then Enlightenment in the 18th century, until the 70s of the 20th century, education was viewed outside of the economic and market prism (Vargas, 2014:98). Since that period, economic theories about human capital have been developed, which conceptualize education not only as an investment in the economic development of the state, but also in the improvement of the quality of life of the individual (Desjardins, 2009:18-40). In this way, theoretically framed issues related to employment and labor relations in general became correlated with education.

As stated in our literature, any discussion of employment in modern conditions must start from education (Brajić, 1972: 118). There are also theses that the right to education, after the right to life and personal freedom and security, perceive as the basic human right of the socio-economic category (Šunderić, 2009: 150).

One of the important aim of education is the development of the individual's expertise/ specialization that will correspond to his chosen occupation and the needs of the workplace in which he is seeking employment. Expertise should be one of the most important special conditions for establishing an employment relationship and a *condictio*

[8] http://www.blic.rs/it/7-najtrazenijih-poslova-koji-donose-odlicnu-zaradu/ynse885, access 13.08.2022.

sine qua non for performing work. The claim that today education is the direct productive force (Pečujlić, 1969: 10) seems to be confirmed and in this sense, it is even stated that countries with higher quality education systems developed in a faster and more efficient way compared to those that created new technologies, and which had shortcomings in the education system. For that reason, many legal documents on national and international level proposed for high-quality early childhood education (Klemenović, Lazić, 2019: 223).

When it comes to the relationship between education and the acquisition of professional qualifications in relation to employment, there are two models in the world, the *Japanese* and the *American*. The first mentioned is characterized by the fact that formal professional qualifications play a decisive role during employment and determine the status of the employee.

On the contrary, the *American* model inaugurates the principle that formal qualifications are not a key factor for employment in the economy. That model is based on economic *ratio*. There is a basic assumption that formal education loses its importance and the function of acquiring certain knowledge and skills were becoming kind of test that sends a signal to potential employers about intellectual abilities, readiness for work, willingness to learn and the possibility of rapid advancement and the like. Today many young people get jobs without any formal qualifications for the field for which they got the job. There are many examples of young people who have dropped out of their studies, mostly because of the high cost of studying and did not get a degree, but still got a well-paid job. A former student of *Loyola* University (Loyola University Chicago) testifies to this, and said that after leaving her studies, she got a well-paid job in journalism, and no one asked her for formal qualifications. A similar example is the student who dropped out of *LaGrange* College and today, without any formal qualifications, is a successful bullion trader.[9] However it is necessary at this point to emphasize the concept of "lifelong learning" when it comes to the content of knowledge, since it implies constant innovation of knowledge in order to adapt to technological-structural changes in the work process. In this sense, programs of professional training, improvement, requalification and the like are important. This matter was legally shaped by the ILO through the Paid Educational

[9] Carlozo L. „Why college students stop short of a degree", *http://www.reuters.com/article/us-attn-andrea-education-dropouts/why-college-students-stop-short-of-a-degree-idUSBRE82Q0Y120120327, access, 12.7.2022.*

Leave Convention No. 140[10] and the Human Resources Development Convention No. 142.[11]

Conclusion

Regardless of opting for the conception of workers' rights as human rights, there is no doubt that important individual and social goals are manifested and achievable through the work. It could be said that labor is a central social activity that pervades most of people's lives. Practically, from education phase as a kind of preparation for work, up to the use of pension insurance derived from labor. The crisis of labor and social rights is inextricably linked to the economic crisis, and to the actuarial model of production, where profit maximization is of greater importance then the workers' rights are.

There are many different points of view in the literature, but it seems that there is accepted view that the right to work is a presupposition of the right to life. Logically speaking, if work is dignified, life itself should be like that. Furthermore, it is important to point out the fact that work, thanks to its social component, in some way represents an important investment for the old age, and that is the main reason why we claim in the title of the paper that labor makes the link between the youth and old age.

For the aforementioned significant socio-economic reasons, the issue of work is not regulated only by civil and administrative norms, but also by criminal norms. In this way, work is recognized as a basic social value that is protected by the criminal justice mechanism. However, we are witnessing a major crisis regarding the collapse of the achieved level of labor and social rights, which further leads to the collapse of individual and collective interests of the entire society. Such state of affairs reminds us of the need for constant concern for the protection and improvement of labor and social rights, and for reasons of "interest solidarity" both the old and the young should gather around this issue.

[10] C140 - Paid Educational Leave Convention, 1974 (No. 140).

[11] C142 - Human Resources Development Convention, 1975 (No. 142).

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Silvia Signorato*

STRENGTHENING INVESTIGATIVE COOPERATION BETWEEN STATES AS A TOOL TO MORE EFFECTIVELY COMBAT CYBERCRIME AGAINST CHILDREN AND THE ELDERLY.

The number of cybercrimes committed against Children and the elderly is constantly increasing. However, the fight against these crimes is characterized by significant problems. This is not only because many victims do not report these crimes, but also because there are various aporias affecting the investigations. Investigations for the fight against cybercrime often require the collection of evidence in another State. However, this requires investigators experienced in digital evidence and requires cooperation instruments between States which, often enough, imply periods of wait time incompatible with investigative needs. Furthermore, if the principle of double criminality is not satisfied, States do not cooperate. All this highlights the need to rethink the very concept of investigation. It is necessary to be aware that, just as the head is part of the human body, so national investigations are part of a larger investigative body. Hence, the need to reach criminal law and criminal procedures that are the same in all States is urgent. Even if this objective may appear utopian, it is not impossible to achieve and it is necessary to work towards its realization in order to reach a more effective fight against crimes.

Keywords: *Investigations against cybercrime; Children and the elderly as victims of crime; Reporting crime; Investigative cooperation between States.*

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1. Introduction: Children and the elderly as victims of crime.

From the point of view of the spread of crime, the Internet has allowed new ways of committing crimes as well as the possibility of perpetrating new kinds of crime. Statistics show that the number of cybercrimes is constantly increasing, year after year. Consequently, the fight against cybercrime needs to be stepped up.

Anyone can be the victim of a cybercrime and this is because it is a particularly insidious type of crime. In particular, children and elderly people are undoubtedly very easy targets of this type of crime because they are among the most vulnerable potential victims. As regards children specifically, extremely serious crimes are perpetrated, such as offences related to child sexual abuse material. Indeed, "as a result of the rapid development of information and communication technology, there has been a significant increase in the number of cases of child pornography" (Pavlović, Paunović 2019: 181). In general, crimes against children are committed using new technologies as much as possible. Consider, for example, that the use of the Internet and new technologies are used as tools to commit the offences of the sale and sexual exploitation of children, online grooming activities on social media, and online gambling platforms (Europol, Internet Organised Crime Threat Assessment (IOCTA), 2021: 10). "Children, all around the world, suffer sexual abuse and exploitation since individuals who seek them out realized that digital technology provides the ability for making profit from their's exploitation" (Pavlović, Paunović, 2020: 318).

As regards elderly people, it should be noted that a significant number of them are not able to use computer systems. However, some services are now available online only. In various States this is the case; for example, for certain banking services, health services[1], and tax data. Moreover, it is possible to communicate with institutions and administrations only by email. Having the possibility of using certain online services is certainly an advantage. However, if online mode is the only way to access services, this becomes a factor of discrimination between those who are able to use computer systems and those who are unable to use them, as in the case of many elderly people. This appears to be of particular concern due to its important consequences.

An elderly person who is unable to use the internet is forced to appoint another person to create his/her IT credentials to access the services. Therefore, such a third person will use these credentials. Or else, the elderly person will have to delegate other people to carry

[1] Examples are booking medical examinations, viewing reports, simply requesting information, etc.

out the IT services on his/her behalf. These behaviours increase the risk of fraud, identity theft and various other cybercrimes committed by people whom the elderly trust (Kratcoski, 2018: 101-123).

Even the elderly who know how to use computer systems are significantly exposed to the risk of being victims of crime. Statistical data show how significant the number of elderly victims of online fraud is. For example, they are victims of Romance Scams[2] conducted by people they meet on social network. Among the pains that such a crime can cause to the victims there is a serious psychological harm (Sorell, Whitty, 2019: 342-361). Phishing is another example of cybercrime in which the elderly person is often the victim.

The risk of ageism is real[3], not only because elderly people are an easy target of crime, but also because, in many States, the action to combat crimes against the elderly is weaker than that against other crimes.

2. Reporting crime.

The number of crimes committed online against the elderly and children is very high. However, it is impossible to provide a reasonable estimate of these crimes because many times they are not reported.

There are many reasons why crimes are not reported. Sometimes, victims are unaware that they suffered a crime, as can happen in the case of unauthorized access to a computer system. It should also be noted that in various States there are victims who do not trust the law enforcements authorities, public prosecutors, judges and institutions because they believe the level of corruption is high and they think they will not get justice. Unfortunately, there are also victims who do not report because they are unable to bear the economic costs of the process. Moreover, since in many States trials may last many years, the elderly often does not report because they have a short life expectancy. In addition, older people often fear reputational damage, i.e., they feel strong shame and guilt for having been the victims of scams or other crimes. What is more, due to age (very young or very old), people may not have the psychological and physical strength to face a criminal trial.

[2] "Romance scams occur when a criminal adopts a fake online identity to gain a victim's affection and trust". See, Federal Bureau of Investigation (FBI), official website: https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/romance-scams.

[3] In general, discrimination against older people appears to exist (Sargeant, 2011: 1-15).

The fact that many victims do not report crimes leads to a high number of crimes that the institutions are not aware of, with the consequence that the victims remain unknown. However, it may happen that, regardless of whether or not a complaint exists, in the context of investigations involving other subjects, the investigators discover that there are also victims who have not filed a complaint. This often happens in the context of investigations aimed at contrasting the sexual exploitation of children, since there are cases in which law enforcement agents find images depicting children victims of crimes but whose name and surname, nationality and current age are unknown. Moreover, the photos may have been taken many years ago. In order to identify the victims, various States have provided a/the Victim Identification Taskforce, to identify and offer help to the victims.

It should not be forgotten that victims of crime are often also injured in their hearts and souls. No court will ever heal such a wound. Indeed, the fact of having to face a criminal trial often means additional pain for the victims. At the European level, Directive[4] 2012/29 / EU of the European Parliament and of the Council of 25 October 2012 sets minimum standards on the rights, support and protection of victims of crime. This directive specifies that: «Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health. In all contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice».

[4] "Directives have different characteristics. Pursuant to Art. 288 TFEU, they are binding upon Member States only as to the results to be achieved, leaving them free to choose the form and methods to achieve such results. Therefore, directives, like regulations, cannot be applied selectively or partially, but, unlike regulations, they are not directly applicable and become effective in the national legal order only indirectly, that is, by means of the specific measures through which the State must implement them" (R.E. Kostoris, 2018: 25).

For this reason, States should put in place measures aimed at helping people who intend to file a complaint as victims of a crime.

3. The fight against cybercrime regarding children and the elderly.

Effective protection of the victims presupposes that the investigations allow the perpetrator to be identified quickly. However, this is not always the case, due to technical and legal obstacles.

Cybercrime investigations are technical investigations, which require specific digital forensics skills of investigators. However, many investigators lack the necessary technical skills. In this regard, there is a twofold risk. First of all, there is the risk that investigations will be carried out by investigators who are not experts in digital forensics who, involuntarily, commit technical errors that, in certain cases, can affect the admissibility of evidence in a criminal trial. On the contrary, there is a risk that investigators who actually have the technical skills are delegated to carry out an excessive and disproportionate number of investigations, with the consequence that they are forced to select which crimes to prosecute and which to overlook, causing discrimination between the victims.

From a legal point of view, there are some issues.

Firstly, cybercrimes are often characterized by problems inherent to the *locus commissi delicti* or foreign elements. For example, the perpetrator may be foreign, or foreign servers may have been used. However, in cases where it is necessary to collect evidence abroad, there are often obstacles due to the fact that cooperation of other States is usually necessary. It is necessary to point out that a foreign State cooperates only if the investigations concern a fact that the foreign State itself considers a crime (the so-called principle of double criminality). Otherwise, it refuses cooperation. This is what happens in the case of requests for cooperation addressed to the United States in the context of investigations concerning online defamation. In fact, unlike many other states, the United States considers freedom of speech and freedom of the press to prevail over the protection of reputation that the crime of defamation aims to protect. For this reason, Meta Platforms, Inc. (the Facebook company) refuses to cooperate in investigations concerning defamation.

Secondly, "one of the main obstacles is the difficulty in the collection of IP addresses[5], which are very important evidences" (Signorato, 2019: 481). Each State has its own legislation, and there is no uniform law about the retention period of IP addresses.

Thirdly, the States collaborate on the basis of the agreements in place with the State requesting the cooperation. Usually, the collection of evidence required by a European state from another European state is faster and easier than the collection of evidence required by a European / non-European state from a non-European state. This is because almost all European states apply a common discipline, namely Directive 2014/41 / EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO). The latter is a judicial decision issued in or validated by the judicial authority in one EU country to have investigative measures to gather or use evidence in another EU country.

Outside the European states, cooperation takes place on the basis of multilateral or bilateral agreements, which often provide for letters rogatory[6]. However, often the letter rogatory takes a very long time, which contrasts with the need for investigative speed. Indeed, it may happen that the letters rogatory are so slow that often they operate when the evidence has already been canceled.

In summary, although many steps forward have been made globally, the fight against cybercrime still does not seem to be fully satisfactory. The number of experienced digital forensics investigators available at global level is less than what would be needed ideally. Furthermore, the collection of evidence in other States often slows down investigations, sometimes undermining their effectiveness.

4. Conclusions: If the world is interconnected, investigations are also interconnected.

The British mathematician Alan Turing, who was one of the main founders of information technology, wrote that "The displacement of a single electron by a billionth of a centimetre at one moment might make the difference between a man being killed by an avalanche a year later, or escaping" (Turing, 1950: 433–460). Moreover, the American mathematician and meteorologist Edward Lorenz, in a very famous lecture he gave on

[5] IP states for Internet Protocol.

[6] The letter rogatory is based on the "principle of mutual assistance. It consists in a request for evidence collection from one State to another, which is subject to a whole series of controls" (Daniele 2018: 360).

December 1972 at a session of the annual meeting of the AAAS (American Association for the advancement of Science), wondered "A butterfly flapping its wings in Brazil can produce a tornado in Texas?"

From a mathematical and physical point of view, the world is interconnected. The COVID-19 pandemic was and is characterized by a global interconnectedness. Similarly, interconnectedness also exists in investigative matters. Cybercrime is increasingly characterized by elements of extraneousness between victims and criminals and, in addition, by the fact that the corresponding evidence if often found abroad. For example, Romance Scams are often committed by Africans to the detriment of Europeans, using American social networks such as Facebook and having the money credited by the scammed persons on bank accounts located in non-European countries.

In such a scenario, cyber investigations are no longer just national. Rather, they require the acquisition of evidence abroad. However, this entails the need to rethink the same concept of investigation in a global key, in which the whole world is conceived as a single investigative body. In such a view, each state retains its individuality, but as part of a whole. Just like in the human body, the head or arms are parts of the human body. Without a global vision of the repression of crime, the fight against crime, in particular the fight against cybercrime, remains weak. From a practical point of view, it is necessary and urgent to reach a global criminal code and criminal procedure valid in all States. It could be argued that such a solution is utopian and unattainable.

However, various historical cases have shown that actions or measures that appeared to be impossible to implement or to propose at a certain time turned out to be possible later.

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INTERNATIONAL HUMAN RIGHTS LAW AND OLDER PERSONS

In today's world where young people strive more towards their careers than concentrating on their families, the generation of older persons is expanding. But with this expansion come many challenges especially in regards to protecting human rights of older people. There are many gaps and fragmentation's in International human rights law in regards to older people. Therefore, the aim of this paper is to present these gaps and propose solutions in order older people rights to be presented and respected as any other human being rights.

Keywords: *International human rights law, older persons.*

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I. Introduction

In today's society there is decrees in natality and an increase in the older population. More than 760 million people are over 60 years and it is estimated that by 2050, this number will be 2 billion. From this number 65 per cent live in developing countries.[2] This demographic changes are of grave importance for the new developments in our societies as well as the main factor in trying to protect older persons' human rights and incorporate them more in international legislation. This demographic changes will cause a lot of turbulence in today's society and create economic and social challenges. Therefore, elderly people rights will become more important but at the same time more vulnerable and also make the abuse of those rights more common. Therefore, the question is why we have so much disrespect towards older people and their rights? Well, there is a perception in society that old people are a social problem, mostly due to the gap of age differentiation, and mostly due to the fact that once you reach a certain age you represent a burden to society and the economic and health system, since you don't work but you have a pension, you need more health insurance and so on. So, the elderly are viewed as a social problem, therefore any definition for that group will determine it as a social problem, which is linked to another problem the policy making.[3] Moreover, with the stigma persistent towards this group and how it is perceived in society, is influenced the policy making and legislation which in regards to this group is very general. In international law and treaties these group of people were not specifically covered in any of the legislative texts probably because they were not present in such a percentage, but today we see that these gaps need to be fixed in order to prevent the stigma from rising.

II. Defining old age

The elderly people are distinguished from the rest of the population due to their age. They as a category are harder to define than for example children, due to the fact that many of the people who fall under this category may feel different about their age, meaning some may feel young others may not. Also, the elderly are viewed as a social category which creates difficulties of perception. Defining old on certain characteristics, can be very difficult and in some instances discriminating. But if a specification is added in the

[2] "International human rights law and older people: Gaps, fragments and loopholes". Help Age International. Retrieved from: international-human-rights-law-and-older-people-gaps-fragments-and-loopholes.pdf (helpage.org)

[3] Marthe Fredvang and Simon Biggs. "The right of older person. Protection and gaps under human rights law". Social Policy working paper No. 16 The center for public policy August 2012. Retrieved from: The rights of older persons: protection and gaps under human rights law

definition by clarifying that old means the end of the life-cycle, than it is more clear. But in regards to legislation we need to clarify what it means "the end of a life cycle" for some it may mean 60 for others it may mean 8o years of age, therefore the term is still very vague. Furthermore, in order to have a precise protection in regards to human rights, a specific definition for these category is needed. [4]

III. Discrimination against old age (elderly)

The United Nations has identified aging as a global issues, as already explained above due to the fact that the numbers of the elderly are increasing and this will certainly impact all sectors of life and society. This trend will cause economic and political pressures on the health care systems because older people are more prone to certain health conditions than young people, they rely on their pensions and social protection opposite of the young population which is still productive. Due to all these factors discrimination against the old is inevitable at this moment. The UN General Assembly report from 2012 presented that the discrimination and stigmatization of elderly, is widespread, in the form of stereotypes, isolation, exclusion, violence and abuse, disability, health or socioeconomic position and so on. OHCHR argued that older persons should be protected because ageism is part of discrimination definitions in international human rights law, but only it is used in general terms.[5] For example, the Universal Declaration on Human Rights states "that all human beings are born free and equal in dignity and rights", therefore being equal does not change with getting older, we are equal and free no matter our age. Other rights are the right to equal protection, the right to own property, the right to education, the right to work, the right to participate in government and many more. So all of these rights cover the elderly but not as a specific category. Some rights may be more relevant to older people than others. Protecting these rights will help older people to lead dignified lives, as equals in society. With the fast growing population of the elderly there is escalation of discrimination since there are no precise regulations and with this escalates the importance to address the causes for this sort of discrimination as well as how to prevent it. Ageism is the stereotyping or prejudice against a persons age, and age discrimination is changes in treatment due to someones age. Ageism and age discrimination violate older

[4] Frederic Megret. "The human rights of older persons: A growing challenge". Human Rights Law Review 11:1 The Author [2011]. Published by Oxford University Press. All rights reserved. For Permissions, please email: journals.permissions@oup.com doi:10.1093/hrlr/ngq050 Advance Access publication 29 January 2011 Retrieved from: ngq050 37..66 (corteidh.or.cr)

[5]Alan Guterrman. "*Human Rights of Older Persons"*. February 2022. Retrieved from: https://www.researchgate.net/publication/351854337_Human_Rights_of_Older_Persons [accessed Sep 22 2022].

people rights, but they are still tolerated. The rights of older people are violated in different ways like denial of services and jobs, verbal abuse, psychological and financial, as well as denied social security. They may not receive appropriate health and social care because of their age. We saw this during Covid 19 where old people were denied treatment or ventilators due to their age. Also, older people are refused the right to be employed due to their age. [6] Therefore, all of these gaps need to be solved because the stigma and discrimination will only escalate since there is no concise law that can regulate the problem that come from these gaps.

IV. Legal framework

There are many documents and treaties that refer to rights relevant to the elder, but there is no specific international instrument that specifically is constructed for the protection of the elderly, which does not mean that international instruments do not cover the elderly, but it simply underlines the fact that such instruments are not straightforwardly conducted specifically for this group, but they recognize the rights of all persons. These instruments range from international treaties to regional and national laws, but there is no treaty constructed specifically to their needs. So, as a result, the rights of the elderly are often ignored or even denied, which leads to breaking the elderly human rights. In order to ensure and protect their rights and needs we need to have a legally binding instrument by which governments will be held responsible. [7] So, International human rights law up until now has not considered the special and unique needs of the elderly due to the fact that this category came to be more present in the last couple of years. So, none of the clauses of the Universal Declaration of Human Rights, or the International Covenant of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, mention this category as a specific category, they do apply in general terms. For example, Article 25(1) of the UDHR states that everyone has the right to security and a standard of living, meaning also the elderly. Furthermore, in the two Conventions, the ICESCR and the ICCPR, there are the work-related rights (Articles 6–7), the rights to social security (Article 9), to an adequate standard of living (Article 11), to education (Article 13) and the right to physical and mental health (Article 12), which are also applicable to the elderly. So, once again these articles are general which apply to all as well as the elderly but are not specific for these category of people. In 1995, the Committee on Economic,

[6] "Strengthening older peoples rights: Towards a UN Convention". Retrieved from: Strengthening_Rights_2_-update_Older_people.pdf (hscni.net)

[7] Jaclynn M. Miller. "International Human Rights and the Elderly". Marquette Elder's Advisor: Vol. 11: Iss. 2, Article 6. Available at: http://scholarship.law.marquette.edu/elders/vol11/iss2/6

Social and Cultural Rights (CESCR) released a General Comment No. 6 on the economic, social and cultural rights specifying the older persons as a category and of how the convention should apply to this category. But this was only a Comment not a binding instrument. Furthermore, there are several Conventions that mention age, which we can use it to argue that it can be a direct mention of the elderly category and those are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in Article 11, and the Convention on the Protection of the Rights of Migrant Workers and the Members of their Families (ICMW) in Article 7. However, these group still remains vulnerable with no legal instrument specific to it.[8]

Human rights are classified based on the type of rights they protect. The civil and political rights (CPR), are considered as rights and they require immediate protection and supervision. On the other hand the Economic, social, and cultural rights (ESCR) are general and are considered as goals or aims. The rights of the elderly are recognized in some Conventions throughout the world law as specific provisions only applied to this category. For example: Article 17 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Article 23 of the Revised European Social Charter; Article 18 of the African Charter on Human and Peoples' Rights; Article 25 of the Charter of Fundamental Rights of the European Union, and Articles 46 and 47 of the Andean Charter for the Promotion and Protection of Human Rights. Therefore, it can be concluded that so far these rights are recognized as "Rights of progressive implementation" which means that states are not required to apply and obey those rights in their jurisdictions, because they are presented as goals, not rights. [9]

V. Concluding remarks

The elderly are human beings like any other category of people and they should be treated as such. With the growing population of the elder people, the International legislation system comes to a point that it will not be able to protect the fastest growing population in the world since in International law they as a group are not covered specifically, their category does not fall in the category of rights but as goals which authorities are not obliged to respect and protect. Therefore this gap is a big burden to society, since this

[8] SARA TONOLO . "International Human Rights Law and the Protection of the Elderly in Europe". MEDICINE, LAW & SOCIETY Vol. 11, No. 2, pp. 107-120, October 2018. Retrieved from: https://journals.um.si/index.php/medicine/article/view/118/85

[9] Rodríguez-Pinzón, Diego and Claudia Martin. "The International Human Rights Status of Elderly Persons." American University International Law Review 18, no. 4 (2003): 915-1008. Retrieved from:The International Human Rights Status of Elderly Persons (american.edu)

category can not be protected as it should and with this notion they will be disrespected and abused by the system and the people. Therefore, immediate intervention is needed in order the gaps in International human rights law to be filled and the elderly protected as they should be.

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(ON) LIFE IN AN INSTITUTIONAL CARE: THE NURSING HOME FOR ELDERLY - RESIDENTS' PERSPECTIVE

Paper analyzes the narratives of the nursing home residents with respect to their life in the institution. In order to investigate how the elderly, see their life in nursing home, we have dealt with topics that include their lived-through past, experienced present and anticipated future. In our in-depth interviews with eight residents of a private nursing home in the suburbs of the capital-they talk about the reasons for moving to nursing home, practices of adapting to a new milieu, and expectations both before and after arriving to the nursing facility. An additional topic- how to design life in the institution came along. The findings indicate that moving into such an institution is rarely an option that our interlocutors have chosen independently. Despite the fact that everyday life is routinized, the nursing home life is praised. In fact, the introspection and self-negotiation about the positive aspects of life at nursing home are key elements of the strategy for designing a uniform present and exactly the same future.

***Keywords**: the elderly, institution, perspective, adaptation, meaning*

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Introduction

According to Bobić (2013: 131), aging is a "world-historical process" and since the 21st century it has been a dominant feature of demographic development both in Western societies and in the Republic of Serbia (Knežić, 2011: 26; Dragišić-Labaš, 2016: 47). The latter is evidenced by the fact that a quarter of the population of our country is over 65 years old, and projections are such that by 2050, even a third of the population will fall into the category of the elderly.

Although the aging of the population is an undoubted consequence of overall social progress, especially in the field of medicine and economics (Knežić, Vidanović, 2011), it presents a number of challenges to the community. Aging societies face the task of changing existing population policies and formulating new models of social and health care (Kozarčanin, 2010; Bobić, 2013: 132). Caring for the elderly is no longer a matter for their families, nor can they rely solely on family resources. Whether it is a matter of necessity or personal choice, living in single households shifts the burden of care to the state, while the extent of the potential problem is strikingly stated by the fact that over 30% of elderly Europeans live alone (https://hir.harvard.edu/elder-care-infrastructure).

On the other hand, systemic flexibility in the domain of attitudes towards aging and the elderly in modern (both developed and less developed) societies is absent. The reasons are numerous, mostly of an economic nature.[1] This is illustrated by the example of the European Union countries. Although social care for the elderly is one of the pillars of social rights, that member states place great importance on, their policies in this area are not particularly successful because they lack the infrastructure which would meet the growing demands of an increasingly aging population (Ljubičić, 2020; https://hir.harvard.edu/elder-care-infrastructure/).

There are not enough nursing homes for the elderly or trained caregivers.[2] The social programs intended for the elderly are not sufficiently developed in terms of quality either.

When it comes to our country, in addition to the ones listed, another challenge was noted - the late start of reforms in the field of elderly care (Matković, 2012). In principle, the national strategic documents pay necessary attention to the elderly, but practical policies

[1] Bobić (2013) indicates high costs as the reason for no further increase in the number of nursing homes for the elderly in Europe. Instead, the focus is on the developing care services in the community.

[2] For instance, in Germany alone, the number of caregivers should be increased by 120,000 so that the necessary care services could be provided for people in the third age (Kozarčanin, 2008).

towards them are not changed and/nor implemented (Kozarčanin, 2010). A holistic approach in the domain of long-term care for the elderly is missing (Kozarčanin, 2008). In addition, services that would fall under the domain of deinstitutionalized care (e.g., elderly day care centers, day rehabilitation centers, family accommodation) are almost not developed at all (Knežić, Vidanović, 2011; Matković, 2012).

Despite the fact that until recently, the elderly has been the poorest in our country[3] (Satarić, Miloradović, 2008), facing social exclusion, reduced access to health care and worse health conditions, material benefits and non-material services[4] (e.g., home care) can be provided only to the most vulnerable. To illustrate this, Matković (2012) refers to the findings of two studies on the elderly. It was found that out of 826 respondents aged 70 and over, a third could not independently maintain a household or pay bills, a quarter needed help preparing meals or feeding, one in seven elderly people could not maintain hygiene independently, and one in ten needed help to move. The authors of another study, which was conducted on a sample of 6,875 households, came to similar findings. It was shown that even 7% of people over the age of 65 cannot function independently, and those who have difficulty moving or who are immobile are in a particularly difficult situation.

A number of elderly people in need are taken care of in social welfare institutions, but there is every chance that the needs exceed the available capacities. Thus, despite the significant increase in the number of nursing homes (in the period between 2015 and 2020 by as much as 172%), this type of care is available to only 1.2% of citizens over 65 years of age (https://www.un.org/esa/socdev/ageing/). It is also interesting to note that the occupancy rate of these institutions in 2020 compared to 2018 dropped significantly (from 90% to 77%) (Report on the work of institutions for the accommodation of adults and the elderly for 2020, 2020). The reason for this should primarily be found in the corona virus pandemic and its restrictions (reception, mobility...) that also affected nursing homes, and partly in the significant resistance of our elders to this type of accommodation. Namely,

[3] Data for 2008 show that the poverty rate of the elderly was significantly higher compared to the rest of the population (9.6% compared to 6.6%), while the risk of poverty was by 40% higher. To illustrate how difficult their position is, we cite a finding from research by Satarić and Miloradović (2008): 65% of those who receive social welfare consume fruit less than once a week.

[4] Based on a survey from 2008, which included 1,021 respondents aged 65 and over, with low or no income, only about 6% of respondents receive financial assistance. The elderly beneficiaries of this type of social care are in such a small percentage due to lack of information and the huge documentation necessary to submit when filing for an assistance request.

it is a common idea that nursing homes are actually sites of death.[5] Furthermore, relocating to a nursing home is generally not the choice of the elderly, but the decision made by their relatives. This is especially true in the case of private nursing homes where the striking 97% of the residents are the elderly with functional dependency[6] (Babović et al., 2018).

If we bear in mind the following findings: 1. placement in a nursing home is the way to solve the problem of a number of elderlies, mostly functionally dependent persons; 2. there is a strong resistance to institutionalization among the elderly and 3. we can expect an increase in the number of residents in nursing homes, our stand is that we should ask ourselves how the elderly design their lives, adapt, and what problems they face when being institutionalized.

More on this will be said in the next chapter.

1. Benefits and challenges encountered by elderly living in nursing homes

According to the definition, nursing homes for elderly should be safe places that provide their residents - persons with a need for support and help from others- a life worthy of a human being[7] (Egeljić-Mihailović et al., 2021). The quality of life in these institutions is most often assessed as moderate, although various researches indicate mutually inconsistent findings. For example, research conducted on a sample of respondents from 19 nursing homes in Zagreb has shown that over 60% of the elderly are satisfied or very satisfied with their lives, while Pavlović's study from 2019 (according to Egeljić-Mihailović et al, 2021) has revealed that users are generally extremely dissatisfied with this service. The research done by Tasić and Jankelić (2008) that compared non-

[5] This prejudice is partly based on empirical data: over 81% of them leave the home when they die, and for a third this outcome already occurs during the first year of their stay in the nursing home (*Report on the work of institutions for the accommodation of adults and the elderly for 2020*, 2020) . It should be said that such a finding is not surprising if we know that the primary reason for going to the nursing home is the health condition (Babović et al., 2018), as well as that more than half of the residents belong to the category of the elderly (over 80 years old).

[6] Only 12% of the elderly can function independently (Report on the work of institutions for the accommodation of adults and the elderly for 2020, 2020).

[7] However, a number of authors believe that nursing homes for the elderly are not safe, but rather places that significantly limit the rights, freedoms and autonomy of residents (Kozarčanin, 2008; Stikić et al., 2017). This is especially the case if moving into a nursing home is imposed on an old person by relatives, if the rights to relevant information and/or freedom of choice are denied. It is considered that the rights of demented persons are often violated by placing them in inadequate wards or by neglecting their remaining potentials.

institutional and institutional care for elderly[8] has shown that there are significant differences in several dimensions when it comes to the quality of life. Those who live in a family environment rate the quality of their life higher than those who are placed in nursing homes.

The quality of life in the institution is affected by a number of different factors. For example, Van Malden et al. (2016) has found on a sample of residents of Belgian nursing homes that a nurturing approach to active aging has a significant influence on their level of satisfaction with life, while other authors have found that residents' satisfaction is influenced by the nature of daily routines, social support networks and interactions among residents, after all by their health condition as well as degree of functionality. The poor quality of life of the elderly in the institution goes hand in hand with a routinized everyday life without much content, the absence of social networks, more serious health condition and a lower level of functionality (Egeljić-Mihailović et al., 2021). Some authors (Kozarčanin, 2008) highlight that the quality of life in institutions is affected by inadequate quality of services: lack of privacy, multi-bed rooms and/or too many restrictive rules for users.

It should be specifically underlined that diseases accompanied by functional dependency were the decisive reason for placement of the elderly in the institution.[9] Previous research shows that this affects both the level of satisfaction of nursing home residents and the prevalence of their loneliness and depression. Jansson (2020) cites an almost paradoxical fact that the loneliness of the elderly increases after admission to an institution and that it is higher among residents of nursing homes than among those who live (even alone) at home. The prevalence of loneliness[10] ranges between 29% and 72%, and its significant predictors are illness, lack of closeness and contact with significant others. Furthermore, Ajduković, Ručević and Majdenić (2013) report that approximately 40% of institutionalized residents show symptoms of depression, and Schaie and Willis in 2001 (according to Ajduković, Ručević, Majdenić, 2013) find that the probability is extremely high (59%) that elderly people would report symptoms of depression during the first year

[8] The sample consisted of 84 old clients of the Institute of Geriatrics and Palliative care in Belgrade and 58 institutionalized old people (at the Gerontology Center of Karaburma).

[9] Tilovska-Kechedji, E. (2020) Human rights in times of pandemic. U: *Yearbook human rights protection "the right to human dignity".* Pavlović, Z. (ur.) Novi Sad: Provincial Protector of Citizens – Ombudsman. Belgrade: Institute of Criminological and Sociological Research, str. 617-628.

[10] Studies investigating the prevalence of loneliness have methodological shortcomings, and it is especially emphasized that people with cognitive deficits (e.g. dementia) and other health problems are left out in these studies. If they were also in the sample, the prevalence would undoubtedly be higher (Jansson, 2020).

of their stay at nursing home. A number of the elderly are disappointed, bitter, sad, and some of them wish for an early death[11] (Ajduković, Ručević, Majdenić, 2013).

The causes of such outcome, besides functional dependency and illness, should also be sought in the fact that the elderly face relocation to a completely unknown place, with the potential loss of previous roles, status and identity, with the deprivation of their security and autonomy[12] (Todorović, Trmčić, Janković, 2017.) Moreover, they usually have to deal with the death of loved ones and separation from family and friends, with the task of adapting to life at nursing home. This task is quite challenging, and failure to adapt to life in an institution can produce negative thoughts and emotions (Tobis et al, 2021), because it convinces the old persons they have no longer control over their life, which ultimately leads to feelings of helplessness (Theurer et al, 2015) and inferiority (Todorović, Trmčić, Janković, 2017).

However, in spite of the fact that there are discouraging factors standing in the way of adaptation to life in nursing home, such as: 1. a restrictive home environment in which there are certain rules the residents were not aware of and consulted about, but agree to them upon entering the institution (O Neil et al, 2022); 2. Abolition of residents' autonomy (Stikić et al., 2017); and 3. The paternalism applied by the staff to the elderly (Vaismorade et al, 2016), a number of them manage to turn nursing home into a real one. Such an outcome is influenced by a positive relationship with the staff, other residents who help the elderly person feel less lonely, and also by his/her own personal strategies, such as daily self-negotiation and searching for good sides of living in nursing home (O Neil et al, 2022). Rinjaard et al. (according to O Neil et al, 2022) note 2016 that successful adaptation to life at nursing home largely depends on the feeling of autonomy and control over one's own life, maintaining previous habits and relationships with people outside the nursing home and physical environment in which one lives as well - from the possibility to keep privacy and personal belongings in the possession. O Neil et al. (2022) find that the circumstances that preceded admission to the institution also play a significant role. This is how it was found that old people will adapt more successfully, if their everyday life before coming to the home was burdened with fears, for example, of falling or being

[11] The authors came to these results based on research that included 56 respondents placed in the so-called state and 45 respondents placed in private nursing homes for the elderly. It was also found that, in addition to the listed factors, depression was also influenced by high functional dependence and social isolation of the old person, whose contacts have been limited to the medical staff and other residents of the nursing home.

[12] Todorović, Trmčić and Janković (2017) draw particular attention to the fact that old people cannot exercise their previous life habits after relocation to a nursing home, and that this is one of the factors contributing to unsuccessful adaptation to life in an institution.

too old to live alone, who made the decision to go to the institution on their own or in agreement with their relatives (not under their pressure) and who visited the nursing home before admission.

At this point, we would like to draw the reader's attention to one more fact: domestic studies on the quality of life of elderly in nursing homes and on how they adapt to life in an institution are relatively rare. This, in turn, can speak about the insignificant importance given to the topic of age and aging in the institutional setting in our country. It seems that nothing has changed in this respect significantly since the 1960s, when nursing homes for elderly in the former SFRY were first mentioned in the national press (Milosavljević, 2010). Old age is still invisible, and it is far from being classified as a social problem that requires prompt solutions. Institutionalization is one of them, but we know little about whether it is suitable for the majority of old people and what they would have to say on this topic.

We believe that these issues need to be opened and discussed with those who are most concerned - the elderly, for at least three reasons. First, because they are not a homogeneous population in terms of health, finances, social support, motivation for coming to the institution or, for example, the way they adapt to life at nursing home. Second, due to the fact that life in the home is extremely stressful for a number of the elderly, it results in depression, further deterioration of physical health, and loneliness; and finally, third- since our society belongs to the aging one, thus in the absence of other solutions, a further trend of institutionalization can be expected.

Our study represents a small step towards opening of perspectives - giving the elderly a voice to talk about some topics that concern them. Although we know that research like ours cannot move mountains (Pitts, Smith, 2007), we believe that we will motivate other researchers to follow in our footsteps and ask the right questions.

2. Methodological framework of the study

2.1. Aims and objectives

The aim of our study was to use a qualitative methodology to investigate the life in the nursing home as a total institution from the residents' perspective. The objectives were to describe the strategies that nursing home residents use to adapt to their new environment as well as to understand how their past, present experiences and the anticipated future shape the tactics of designing life in the institution.

We found the theoretical framework of the study in Goffman's concept of total institutions and adaptation to life in them. According to the definition left to us by this author: A total institution may be defined as a place of residence and work, where a large number of like-situated individuals cut off from the wider society for an appreciable period of time together lead an enclosed formally administered round of life (Gofman, 2009: 13). They can adapt to life in the institution using one of the adaptation alignments (Gofman, 2009: 66-68). These are: 1. situational withdrawal or self-exclusion from relationships with others; 2. rebellion or showing open hostility towards the staff; 3. colonization, the essence of the search for satisfaction within institutional life; 4. conversion, which is recognized by the fact that the resident of the institution accepts the truths about himself imposed on him by the staff; and 5. inaction, during which secondary adjustment tactics and all listed adjustment strategies are combined with the goal to leave the institution with the least damaged identity.

Since the study is qualitative, we have not used hypothesis, but hypothetical questions: 1. what preceded their arrival at the institution; 2. how they felt after the reception; 3. whether and how they adapted to the institution, 4. what are their expectations from the future.

We sought answers to these questions through an in-depth interview with eight of our interlocutors aged between 71 and 86 (Table 1). All of them are residents of a private nursing home near the capital. These were the criteria for the selection of respondents: they have been in the nursing home for at least six months, they are functionally relatively independent and cognitively preserved, and they have been willing to talk. The conversation lasted approximately two hours, it was written down, with a number of topics discussed.

Qualitative content analysis was used, while the hypothetical questions listed above were the units of analysis as well.

Name[13]	Gender	Age	Marital status	Number of children	Previous residential arrangement	Education	Income	Functional Independence	Length of stay in nursing home
Lila	Female	85	Divorced	One	Extended family	Primary education	Yes	Fully preserved	2,5 years

[13] We changed the names of our interlocutors to protect their anonymity.

Manojlo	Male	80	Widower	Two	Living alone	Tertiary education	Yes	Partially preserved	Six months
Mihajlo	Male	84	Widower	Two	Living alone	Tertiary education	Yes	Fully preserved	One year
Ana	Female	82	Widow	One	Living alone	Tertiary education	Yes	Fully preserved	Eight months
Danica	Female	79	Widow	One	Living alone	Tertiary education	Yes	Fully preserved	Six months
Zorana	Female	86	Widow	Two	Living alone	Tertiary education	Yes	Fully preserved	One year
Petar	Male	82	Widower	One	Living with a son	Tertiary education	Yes	Partially preserved	Six months
Pavle	Male	71	Divorced	Two	Living with a son	Tertiary education	Yes	Partially preserved	Seven months

Table 1. Sociodemographic characteristics of the interlocutors

3. Research findings

3.1. What preceded your arrival at the institution?

Almost all of our respondents, with the exception of Lila, Petar and Pavle, lived alone before coming to the nursing home. None of our interlocutors is in an intimate relationship: two are divorced, and the rest are widows/widowers. Without exception, they talk about their status with a lot of sadness. For instance, Mihajlo, talking about his wife, says that they spent their whole lives together and that when she passed away, four years ago, he felt empty and lonely. Zorana says “she lost herself ... had hallucinations” after the death of her husband, and Danica cries while talking about her late husband.

While the story goes on, we reveal that actually the death of the spouse, the loneliness and illness that followed, were the key reasons why most of our interlocutors decided to move to the nursing home. However, such a decision is generally not made independently, but through negotiations with relatives or under their pressure. For example, the choice to come to the nursing home in Mihajlo's case was preceded by numerous conversations with his children: although they suggested he should move closer to them, this man was convinced that he would both still spend most of his time alone and still feel lonely. That is why he rejected the proposal and gave priority to the nursing home. The decision was imposed on Danica and Zoran by their relatives who could not take care of them due to various reasons (living abroad, their family of procreation). As Danica was deeply depressed and Zorana was psychotic, they could not stay at home alone. The solution was

found in their institutionalization. The situation is similar with Pavle: after the amputation of his leg, he could not return home because no one could take care of him - the son lives on the top floor of a building without an elevator, and the daughter has her own family and small children. Manojlo also had no other option: after the surgical intervention, he became immobile person, and then he had Covid. As he lived alone, the only rational decision he could make was to move to a nursing home. Now he says that he could "return home ... since he feels well", but that he would be "lonely". Because of people who keep him company, he chooses to stay "for now".

Even Lila could not choose to go to the home on her own. The family didn't even talk to her about this, but her daughter-in-law told her that her grandson was getting married, that she had to "free up a room for him" and that "the smartest thing for he would be to go to the nursing home, unless she wanted to be thrown out on the street".

Only Petar and Ana made the decision to go to the home independently. Petar, who lived with his son, refused to stay at home because, as he says, "I was alone all day and couldn't function on my own, let alone heat a meal." That's why he said to his children: "Take me to the nursing home tomorrow, I can't live like this anymore." Ana made the choice to move to the nursing home after breaking four ribs. Two decisive circumstances definitely made up her mind: she knows the owner of the nursing home and the institution is not far from her house.

It is interesting that the stories about what preceded the decision to move to the institution- while being told by all our interlocutors, except for Manojlo, are interspersed with segments in which family members are mentioned: daughters, sons and grandchildren. These parents present their children in a positive light: their sons call them every day (Ana, Zorana), visit and take care of them. For example, Zorana is grateful to her son who organized her reception and placement in the institution and brought her personally important things from the family apartment, while Mihajlo underlines that his son and daughter respect him very much: they respect all his decisions.

Those parents who were forced to choose such a solution are especially trying to justify their sons and daughters. They insist that they were in poor health before their arrival, that if they had not gone to the nursing home, their children would have been burdened with taking care of them. Special criticism was directed at those residents of the nursing home who mistreat their children: "Their children go to work, and these people call them, cry, complain, and they are 80 years old. They should encourage their children and let them live their lives" (Zorana).

Pavle balances criticism and praise. Negotiating with the idea that he was abandoned by his family - no one visits him, his son and daughter appear only sporadically, and considering the less painful segments of reality, he finds that his family could not take care of him. Resignedly, he says: “Let’s see them when they reach my age”, then he revises his position faster and better, we assume, because he still hopes that at some point he will be “returned home”. He shows a picture of his family where they are all together. Lila offers a similar family narrative. She moves between criticizing her daughter-in-law and praising her grandson. She sees him as a kind of her hero: he got married, has his own family and a child, so her sacrifice - leaving the family home - makes sense. Manojlo does not mention his sons at all, probably because he was let down by their carelessness. He totally relies on himself and points out how he has recovered in the nursing home, how he is able to walk again, indirectly alluding that he doesn't need them.

3.2. Life in nursing home: arrival, adaptation and the future

The next topic we have opened is related to satisfaction with their life in the nursing home, and inevitably related to it - the question of how they felt after arriving at the institution.

It should immediately be underlined that our interlocutors talk about various aspects of life in the institution, almost every one of which they rate as highly satisfactory. Without exception, they point out that they are very satisfied with the staff. Danica says that “the doctor here cured her”, and that “now she can stand on her feet”, that she is most satisfied with “how the nurses and everyone treat us. When someone is sad, they try to calm him/her down.” Ana is also satisfied with the staff. She says that “they are kind and professional ... the nurses are willing to take care of them without complaining “ and illustrates this with an example: “even though a crowd of people is immobile, they change them carefully and neatly”. As a doctor, she recognizes that “the system in the nursing home is similar to the hospital system”, and she cannot say anything “negative about that”. She is satisfied with the “food” and the fact that “they drink coffee twice a day”. Manojlo says that “the place reminds him of a park, we can walk” and “the landlady (the owner of the nursing home) told them that they can pick the fruit when it is ripe”. Petar is “satisfied with everything, everything is fine, the staff works non-stop, there is nothing better than this”, and Lila agrees with him: everything suits her.

In addition to praise, we also recognize cautiously expressed critical notes. Some more, some less openly talk about the largest number of residents of the nursing home, who make life in the institution a little bit tough. They say that “ 80% of people are disabled”. These are immobile, demented and mentally ill people who disturb them. Mihajlo, for

example, says that “he cannot find peace because of other” residents. “Some cry, others wail, others call –Nurse, nurse! - not only during the day but also at night. These are seriously ill, mentally incompetent patients. They are banging, if not on the door, then on the walls. I can't sleep because of the noise they make. I cannot stand it.” Pavle says that they have “one patient who is here with her daughter, both of them are mentally ill. They shout all night long, get up, trying to see someone”. Ana is also bothered by such noise, and Petar says that the nursing home was built with poor-quality building materials, so you can hear everything. Such was Zorana's experience: she was criticized when she spoke to a nurse a little later at night: “in a normal tone, but everything was heard”.

However, all of them, with the exception of Pavle, say that they have adapted to life at nursing home. Adaptation required time and self-negotiation. Its outcome was influenced by their personal and family circumstances, as well as by the staff and other residents. Arriving at the home was a shocking experience for everyone. So when she came, Lila was “crying non-stop” because she didn't want to go to the nursing home. She did not know “what to expect”, and as none of the family members invited her to return home, she recognized that nursing home care was a permanent solution for her. Such circumstances led her to find the good sides of staying in the institution: “It's better to be in a nursing home than to pay rent”, “I was well received here”, “the staff respects me”, “I have someone to talk to, not to mention that the food is good”. She accepts the fact that she will be in the institution for the rest of her life (since the moment she was admitted, she has not visited her home even once).

Danica also “couldn’t stop crying” when she arrived at the nursing home, not so much because of entering the institution, but because of her husband's death. To recover mentally, she was helped by the staff: “Thanks to them, I managed to overcome depression”, she says, and says that she will stay in the nursing home for the rest of her life because she is no longer alone. Despite her independent decision to come to the home (on a temporary basis - until she recovers from her broken ribs), Ana had a hard time coping with the first few days until she adapted. “It was very difficult for me at the beginning,” she says: “I was helpless.” I know a nursing home is not a hotel, but this place smells like sewage” She wanted to ask the staff “what chemicals do you use to clean the toilets”, but she decided to let go. She then adds that “she is going home on Sunday” and that she “can't wait”. Manojlo was in a very bad health and mental condition when he arrived. He did not leave the room for days. “I was in diapers, disappointed with everything and everyone”, and then he reconciled that he “left his home and now it is what it is”. He believes that he has adapted well and that other users of the nursing home (those who are mobile, mentally preserved) as well as the staff have helped him in this.

He says that he is not thinking about returning home at the moment and that if he were to return, he would be lonely again. Mihajlo is determined to stay in the nursing home for the rest of his life, although it is hard for him to handle the lack of privacy and the terrible noise made by other "patients". Speaking in front of a like-minded group, he states, "We have no other choice! Whether we wanted or not, we have to (stay at nursing home)".

Zorana is the only one who accepted the nursing home as a solution from the beginning. She was "in a good mood" when she arrived, because "her son brought her, and she knew the owner from her school days." She felt great". He does not plan to leave the institution. "Nursing home is my new house," he says.

Pavle has a completely different attitude. "I feel that I don't belong here, please don't get me wrong", and he looks back on some identity threads of his previous life that speak in favor of that: he was a coach, who brought out 24 generations of handball players. He is the youngest resident of the nursing home. Nevertheless, faced with the possibility that he will never leave the institution (because there is no other solution), Pavle underlines that he coped well, that he adapted immediately thanks to his altruism and wit, that "time passes quickly for him", that he was accepted by the staff and has a special role in the home. He is a kind of "Mother Teresa who knows how to deal with everyone, jokes and comforts others when they are in trouble". He understands that there are two types of users of the home: those who came of their own free will and are returning to their home and those to whom this decision was imposed and who will die in the nursing home, but he is still not sure which group he belongs to (cries).

4. Discussion

From these life stories, we learn that our interlocutors generally have not made the decision to come to the nursing home independently. In fact, the choice to enter an institution is most often forced by relatives - future residents of homes for the elderly are faced with a fait accompli due to their illness and/or the fact that there is no more room for them in their home. Therefore, the finding that admission to the institution for most of our interlocutors was traumatic, is not surprising. They were moody, sad, worried, they noticed the negative aspects of life in the nursing home, but over time they learned to adapt. Their adaptation most often fits the image of colonization: they deny their dissatisfaction with the institution and make it their home. In this process, other residents play an important role - those who are mobile and in better health, with whom they can socialize and because of whom they feel less ashamed, the kind staff who helped them recover, behavior of their families, finally, themselves, negotiating with the

circumstances and giving meaning to the situation they have found themselves in. Thus, everyone accepts that staying in a nursing home is a permanent solution for them: Lila, for example, cannot return home - she is not invited or accepted there, so she tries to make the institution her new home. She recognizes many positive aspects: it is important for her that the staff treats her with respect, that the food is good and that she can socialize and chat. Having company to talk to is a key positive aspect of home for Manojlo, Danica, Zoran and Mihajlo, and for Pavle it is care which he doesn't have at home - his son is constantly absent, and he is too weak to help himself.

We have Ana and Pavle on the other side. Ana's adaptation comes down to a strategy of inactivity - she balances between loyalty to the staff and her peers, but due to a specific personal situation: she came to the nursing home to recover from an illness and did not intend to stay there longer, she does not make the institution her home. She is looking forward to returning home, and unlike the others, she does not point out either the staff or the hanging out as a reason why she could stay in the nursing home. Pavle has a strong feeling that „the nursing home is not a place for him": his belief is that he is essentially different from the other residents of the nursing home. However, he is forced to adapt, at least apparently, because he still does not have a clear plan as to whether he will leave the institution - he does not know if the children will accept him. His adaptation is therefore not complete, but represents rather a kind of secondary adaptation, which includes a combination of occasional situational withdrawal (e.g., through obsessive reading of books), conversion (always on the staff's side and helping them by engaging with other residents like "Mother Teresa") and occasional colonization (there is no better place than home).

Everything is just fine in the nursing home, as Lila says. However, we sense that satisfaction with the institution is overestimated, and thinking about why such a narrative is important for our interlocutors, we came up with two possible answers. The first one is: the story of satisfaction is a way of convincing oneself that everything is all right, when they have an audience in front of them - in this case researchers, their narrative spoken out becomes valuable and serious. Another possibility is that our interlocutors have, for reasons best known to themselves, consciously said something they did not really mean.

Instead of a conclusion

Despite the fact that the topic of old age and the elderly has been on the agenda of international bodies and organizations for the past two decades, little has changed in the social treatment of the elderly in practice. We still harbor numerous prejudices against

them such as: these people are no longer useful to society, they are a burden to younger generations, they have no big plans or desires, because in the future they can only expect to die. Therefore, institutional care continues to be imposed as the primary way of caring for the (powerless) elderly. If we leave aside the important fact for social policy planners that this type of protection requires significant financial investments, and pay attention to object of care - the elderly, it can be noticed that we know very little about how they perceive these institutions and life in them. From our perspective, such a lack of interest speaks of both the insignificant social importance of this issue and the constantly present prejudices against the elderly. According to these wrong beliefs, old people are useless, have no desires, nor plans, because they have no bright future as well - except to die.

Age discrimination is prohibited by international legal acts, yet its presence is constantly confirmed in practice. It is enough to point out two illustrative examples: 1) the majority of the elderly do not choose to move to an institution on their own, but are forced to do so by their relatives who do not want/cannot take care of them. 2) the nature of social attitudes towards age and the elderly in relation to corona virus pandemic is being exposed. In the context of the pandemic, the elderly are designated as the most vulnerable population - at high risk of getting sick and dying, but also accused of blocking the hospital capacities potentially needed by the younger ones to recover, the elderly have become an object of special social concern, i.e. supervision. They were deprived of freedom of movement and the right to make any choice, and the institutionalized elderly were particularly affected by these measures. The price of such an action is still unknown, but it can be assumed that securitization resulted in greater harm (deterioration of physical and mental health) than benefit (saved lives).

Finally, it turned out, one more time, that acute social problems can neither be solved by adopting many strategies[14] and so-called "road maps", nor by law reforms without being properly implemented and controlled by anyone (Ocić, 2014: 18). Trust levels in the institutions of our society went way down due to the fact that, in recent decades, our country has established a practice of adopting new norms whose implementation lacks material or human resources, instead of taking real actions that would bring to life international standards and domestic proclamations on the protection of human rights for the population that fall into the category of the deprived (vulnerable). In addition, whenever found appropriate and useful, it is pointed out loudly that "numerous laws and

[14] Ocić (2014: 18) states that since 2000, around 120 different strategic acts have been developed in Serbia.

their amendments were passed in the previous period"[15]. As long as the problems are solved by adopting unenforceable regulations and suitable proclamations, the situation, that our research is addressing, will not change. This fact only, is a reason enough to direct scientific researches towards old people placed in institutions where they spend their final days.[16]

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[15] It is intriguing no one has thought of a change that would certainly help the elderly who are not taken care of by their descendants or who are forced to move to nursing homes. In the conditions in which a large number of young people have left the country and do not show any concern for their parents, yet only asking their acquaintances whether they are alive or when to come to settle the formalities regarding the inheritance, none of the members of the legislative committees thought of such cases and changed the provisions on the legal order of inheritance, giving those neglected people greater freedom when it comes to disposition of their own property.

[16] This is, no doubt, a serious business - proven by the case of the nursing home owner's attack on a journalist who has recently reported on the real situation in one of those institutions in the newspaper article entitled "Torture in a nursing home" (https://www.politika.rs/scc/clanak/ 513658/).

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THE ROLE OF INFORMAL CAREGIVERS IN THE FULFILMENT OF THE RIGHT TO A DIGNIFIED OLD AGE IN SERBIA

After brief observations about the definition of the old age, as well as the right to a dignified old age and demographic trends in Serbia, the author of this paper defines informal caregivers and their main tasks when it comes to taking care of elderly persons. The author also explains the importance of the role, which informal caregivers have in the fulfilment of the right to a dignified old age. Furthermore, the author analyses key problems and challenges, which informal caregivers are facing in Serbia, and makes suggestions for the improvement of their position as well as the position of elderly persons that they are taking care of.

***Keywords**: dignified old age, informal caregivers, social welfare centre, elderly population, dignity*

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1. Introduction – Definitions and Perceptions of Ageing

Ageing is a complex and dynamic process that is not defined solely through passing of time (Solarević, Pavlović, 2018: 54). It is universal, it happens to everybody, it is inevitable, unstoppable and irreversible. There is no universally accepted definition or a general concept of ageing and, therefore, in order to understand the phenomenon of ageing, one should take into consideration physiological, social and cultural aspects (Petrušić, Todorović, Vračević, 2015: 27). Defining old age does not have only academic relevance, since different definitions of old age have different impacts on the way in which the society perceives and treats elderly persons, as well as on creation of public policies in the area of social welfare and health protection of the elderly (Petrušić, Todorović, Vračević, 2015: 27).

Ageing can be defined from chronological, physiological and social aspect. Chronological definitions are based upon the biological characteristics of old age and, according to them, old age begins at the age of 60 or 65, causing the change of person's role in the society, primarily in the sphere of labour and employment (Huenchuan, Rodriguez-Pinero, 2011 according to Petrušić, Todorović, Vračević, 2015: 27). Physiological definitions take the physical process of ageing as a starting point and, according to them, old age is related to chronological ageing, but does not depend directly and solely on that criterion (Huenchuan, Rodriguez-Pinero, 2011 according to Petrušić, Todorović, Vračević, 2015: 27). Physiological definitions of ageing are primarily related to the loss of functional capacities, gradual decrease in bones density and muscle tonus, changes in perception, as well as psychological changes on intellectual, emotional and motivational level (Huenchuan, Rodriguez-Pinero, 2011 according to Petrušić, Todorović, Vračević, 2015: 27). Social definitions of ageing are based upon cultural and historical approach and are related to the attitudes and behavioral patterns that are considered as suitable and typical for certain age (Huenchuan, Rodriguez-Pinero, 2011 according to Petrušić, Todorović, Vračević, 2015: 27).

Nevertheless, one should have in mind that ageing is an individual experience, which differs from one person to another, and which depends on person's genetics, environment, living conditions and lifestyle (Petrušić, Todorović, Vračević, 2015: 27). Some authors suggest that old age should be divided into 3 stages: 1) early old age (persons who have more than 65 but less than 75 or 80 years); 2) average old age (persons who have more than 75 or 80 but less than 90 years) and 3) late old age (persons who have more than 85 or 90 years) (Kostić, 2010: 18; Petrušić, Todorović, Vračević, 2015: 28).

2. Demographic picture – Ageing of Population

Demographic ageing seems to be one of the greatest social transformations in the 21st century with a strong impact on all the segments of the society (Janković *et al.*, 2018: 24). Ageing of the population is a universal phenomenon with a growing impact on all aspects of life and on all generations and their welfare (National Ageing Strategy 2006-2015, Official Gazette of the Republic of Serbia, No. 76/2006, hereinafter: NAS). Global population is experiencing an extraordinary and continuous change in the age structure, primarily due to rising levels of life expectancy and declining levels of fertility in the sense that people are now living longer and the share of older persons in the total population is rapidly increasing (UNDESA, 2020: 1). The increase in the duration of individuals' life has led to the increase of elderly persons worldwide (Kostić 2010: 19). According to World Population Prospects: the 2019 Revision[1], one in six persons worldwide will be over the age of 65 (16%) by 2050, up from one in 11 persons in 2019 (9%)[2]. Moreover, it is expected that by 2050, 1 in 4 persons in Europe and Northern America will be aged 65 or over.[3] Also, for the first time in history, in 2018, persons of 65 or more years of age outnumbered children under 5 years globally.[4] This data also indicates that by 2050 the total number of persons aged 80 years or over is projected to be 3 times larger, from 143 million in 2019 to 426 million worldwide.[5] In particular, the population over the age of 80 is also increasing and, associated with the increase of average life expectancy, there is also the increase in the number of elderly persons in the situation of dependence (Rocha, Pacheco, 2013: 51).

Today, the population of the Republic of Serbia is among the oldest populations in the world (NAS). Only six decades earlier, the population of the Republic of Serbia used to be among the youngest ones in Europe - its share of persons older than 65 was 5,6% of the entire population, average age was 29,1 years and ageing index was 0,19 (Devedžić, Stojilković Gnjatović, 2015: 21). Nowadays, the percentage of persons over 65 years of age in Serbia is 17,4%, average age is 42,2 years and ageing index is 1,22 (Devedžić, Stojilković Gnjatović, 2015: 21). This means that the population of persons over the age of 65 has almost doubled in the period between 1970 and the population census that took

[1] United Nations, Department of Economic and Social Affairs, Population Dynamics, https://population.un.org/wpp/, accessed on 02.06.2022.

[2] United Nations, Global Issues: Ageing, https://www.un.org/en/global-issues/ageing, accessed 02.06.2022.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

place in 2011 (Kozarčanin, Milojević, 2016: 5). The most intensive ageing of population in Serbia occurred as the demographic consequence of political and economic crisis during the last decade of the 20th century, followed by great emigration of younger population, delaying of childbirth and decrease in fertility (Devedžić, Stojilković Gnjatović, 2015: 21). The process of population's ageing in Serbia will continue in the future and the ageing of the already old population is expected to be particularly intensive, which means that the number of persons over 80 years of age will increase (NAS).

At the same time, significant weaknesses can be noticed in the when it comes to fulfilment of elderly persons' needs at the institutional level (NAS). Current demographic condition and projections for the future, together with flaws that still exist at the institutional level, indicate that the pressure on institutions in the field of social welfare and health care will continue to grow, which is the reason why the role of the family members taking care of their elderly relatives is becoming more and more important. Social welfare system and health protection system are under great pressure to minimise expenses and are often either insufficiently integrated or fragmented within their own frameworks, which questions their capability of providing all the necessary support (Matejić, Đikanović, 2019: 8).

As it is emphasized in NAS, demographic projections of population's ageing on the one hand, and limited resources of social protection on the other, impose the need for a new practical approach that would revive the substantial role and significance of the family when it comes to providing care and assistance for its oldest members (NAS). Accordingly, one of the goals of NAS is the re-affirmation of family's role and solidarity of family members in the promotion of elderly persons' life quality and community development (NAS). The increase of the number of elderly citizens causes an increase in the number of requests directed towards health services, retirement finds and social welfare centres, necessary for the fulfilment of these persons' needs (Kostić, 2010: 21). In the times when the sustainability of existing models of long-term care and the availability of formal institutional or non-institutional support of organised social systems is under question, the importance of informal caregivers is becoming more and more important (Todorović, Vračević, 2019: 11). This is the moment when the role of informal caregivers actually becomes essential for the fulfilment of elderly person's everyday needs (including both – physical as well as mental) and, in that way, for the accomplishment of elderly person's right to a dignified old age.

3. Ageing and Human Rights – the Right to Dignified Old Age

In the past couple of decades, there has been a growing interest in the improvement of human rights of elderly persons, on both – global and national levels, and the primary reason for that are the aforementioned demographic changes that include the increase in the number of elderly persons worldwide, requiring an adequate political response (Kostić, 2010: 21; Petrušić, Todorović, Vračević, 2015: 35). The second reason why the interest in elderly persons' human rights has been increasing is the presence of discrimination of elderly persons and prejudice about them (Petrušić, Todorović, Vračević, 2015: 35), also known as ageism (Solarević, Pavlović, 2018: 54; Ljubičić, 2021: 526). The latter causes their structural inequality among the rest of the population, in developing as well as in developed countries (Kostić, 2010: 29). During the 1980s, scientists began to study the population of elderly persons as a particularly vulnerable group, whereas in the 1970s the awareness of their human rights' violation is beginning to emerge (Kostić, 2010: 28). Nowadays, human rights of elderly persons are often not recognised and in some cases are severely violated (Petrušić, Todorović, Vračević, 2015: 35).

When discussing human rights of elderly persons, it should be highlighted that, first of all, elderly persons have all human rights that other persons have, because all human beings are born with the same rights and it is something that must not be changed as they grow older (Petrušić, Todorović, Vračević, 2015: 35). What does change is the way in which human rights are exercised, which should be intuitively recognised in the cases of elderly persons (HelpAge International and the Center for Financial Inclusion at Action, 2015 according to Petrušić, Todorović, Vračević, 2015: 35).

The United Nations began to deal with the phenomenon of ageing in the 1980s and, as a result, several international documents dedicated exclusively to the position and human rights of elderly persons have been adopted (Petrušić, Todorović, Vračević, 2015: 37). The most important of them include: 1) The Vienna International Plan of Action on Ageing (1982)[6], containing more than 60 recommendations for governments and civil society for more efficient resolving of issues related to the ageing of population; 2) United

[6] World Assembly on Aging, and Vienna International Plan of Action on Aging. (1983). Vienna International Plan of Action on Aging: [World Assembly on Aging, 26 July-6 August 1982, Vienna, Austria]. New York: United Nations, https://www.un.org/esa/socdev/ageing/documents/Resources/VIPEE-English.pdf, accessed on 02.06.2022.

Nations Principles for Older Persons (1991)[7], recommending the governments to create their national programmes dedicated to elderly persons through the respect of independence social participation, social care self-realisation and dignity of elderly persons; 3) The Madrid International Plan of Action on Ageing (2002)[8], advocating the establishment of society that is suitable for all ages and recognises three priority goals of action: elderly persons and development, improvement of health and welfare of elderly persons and providing supportive environment for elderly persons; 4) United Nations Economic Commission for Europe Regional Strategy for the implementation of the Madrid International Plan of Action on Ageing (2002)[9], containing several obligations for the Member States related to the ageing of the population (Petrušić, Todorović, Vračević, 2015: 37).

Some of the conventions of the United Nations explicitly mention elderly persons in their provisions: 1) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[10], which directly refers to discrimination based upon age; 2) Convention on the Elimination of All Forms of Discrimination against Women[11], which mentions the right of women to have to social security, particularly in cases of retirement and 3) Convention on the Rights of Persons with Disabilities[12], which mentions elderly persons in the context of the right to social security and access to health services (Petrušić, Todorović, Vračević, 2015: 37).

[7] United Nations Principles for Older Persons, adopted on 16 December 1991 by General Assembly Resolution 46/91, https://www.ohchr.org/sites/default/files/olderpersons.pdf, accessed on 02.06.2022.

[8] United Nations, The Madrid International Plan of Action on Ageing and the Political Declaration adopted at the Second World Assembly on Ageing in April 2002, Madrid, Spain. New York: United Nations https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf, accessed on 02.06.2022.

[9] United Nations Economic and Social Council, Economic Commission for Europe, UNECE Ministerial Conference on Ageing Berlin (Germany), 11-13 September 2002, Regional Implementation Strategy for the Madrid International Plan of Action on Ageing, 2002 ECE/AC.23/2002/2/Rev.6, 11 September 2002, https://www.un.org/esa/socdev/documents/ageing/unece-ris.pdf, accessed on 02.06.2022.

[10] United Nations General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, https://www.refworld.org/docid/3ae6b3980.html, accessed on 03.06.2022.

[11] United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, https://www.refworld.org/docid/3ae6b3970.html, accessed on 03.06.2022.

[12] United Nations General Assembly, Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, https://www.refworld.org/docid/45f973632.html, accessed on 03.06.2022.

At regional, i.e., European level, several documents containing provisions relevant to the protection of human rights of elderly persons have been adopted, including: 1) European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)[13], 2) revised European social charter (1996)[14], 3) New Strategy and Council of Europe Action Plan for Social Cohesion (2010)[15].

When it comes to the European Union, first of all, it should be underlined that the preamble of Single European Act (1986)[16] and Article 6 of Treaty on European Union (1993)[17] officially oblige European Union to respect the rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Petrušić, Todorović, Vračević, 2015: 38). Furthermore, Treaty of Amsterdam (1997)[18] prohibits all kinds of discrimination, including the one based upon age, whereas Charter of Fundamental Rights of the European Union (2000)[19] in its Article 34 proclaims the respect of the right to social security benefits and social services providing protection in the old age (Petrušić, Todorović, Vračević, 2015: 38). Also, Treaty of Lisbon (2007)[20] insists on eliminating exclusion and discrimination and on promoting intergenerational solidarity and equality (Petrušić, Todorović, Vračević, 2015: 38; see also: Simović, Simović, 2020: 380).

Another important document of regional scope of application is Recommendation of the Committee of Ministers to member States on the promotion of human rights of older

[13] 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, ETS 5, https://www.refworld.org/docid/3ae6b3b04.html, accessed on 03.06.2022.

[14] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, https://www.refworld.org/docid/3ae6b3678.html, accessed on 03.06.2022.

[15] Council of Europe, New Strategy and Council of Europe Action Plan for Social Cohesion approved by the Committee of Ministers of the Council of Europe on 7 July 2010, https://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/source/2010Strategy_ActionPlan_SocialCohesion.pdf, accessed on 03.06.2022.

[16] Single European Act, Official Journal of the European Communities L 169, vol.30, 29 June 1987, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1987:169:FULL&from=EN, accessed on 03.06.2022.

[17] Treaty on European Union, Official Journal C 191, 29/07/1992 P. 0001 – 0110, http://data.europa.eu/eli/treaty/teu/sign, accessed on 03.06.2022.

[18] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Official Journal C 340, 10.11.1997, p. 1–144, http://data.europa.eu/eli/treaty/ams/sign, accessed on 03.06.2022.

[19] Charter of Fundamental Rights of the European Union, Official Journal of the European Communities C 364/1, 18.12.2000., https://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed on 03.06.2022.

[20] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306, 17.12.2007, p. 1–271, http://data.europa.eu/eli/treaty/lis/sign, accessed on 03.06.2022.

persons, adopted in 2014[21], as the result of normative work conducted within the Council of Europe by the Steering Committee for Human Rights between 2012 and 2013[22]. This document is expected to raise awareness of public authorities and civil society to human rights and freedoms of elderly persons and to facilitate their protection. Its aim is to promote the dignity of elderly persons, their autonomy, independence and participation in the society, to provide them with adequate information, health care, social security and employment and to protect them from violence and abuse (Petrušić, Todorović, Vračević, 2015: 38).

In the Republic of Serbia, there are several legal documents the provisions of which are either of direct or of indirect relevance to the protection of the rights of elderly persons and the prevention of their discrimination, including: 1) Constitution of the Republic of Serbia[23], 2) Law on the prohibition of discrimination[24], 3) Law on the prevention of discrimination of persons with disability[25], 4) Law on health protection[26], 5) Law on health insurance[27], 6) Law on public health[28], 7) Law on the rights of patients[29], 8) Law on the protection of persons with mental health issues[30], 9) Law on social protection[31], 10) Law on pension and disability insurance[32], 11) Family law[33], 12) Law on education

[21] Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons (Adopted by the Committee of Ministers on 19 February 2014 at the 1192nd meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c649f, 03.06.2022.

[22] Council of Europe, Promotion of human rights of older persons, https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/promotion-of-human-rights-of-older-persons, accessed on 03.06.2022.

[23] Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 98/2006, 115/2021 and 16/2022.

[24] Law on the prohibition of discrimination, Official Gazette of the Republic of Serbia No. 22/2009 and 52/2021.

[25] Law on the prevention of discrimination of persons with disability, Official Gazette of the Republic of Serbia No. 33/2006 and 13/2016.

[26] Law on health protection, Official Gazette of the Republic of Serbia, No. 25/2019.

[27] Law on health insurance, Official Gazette of the Republic of Serbia, No. 25/2019.

[28] Law on public health, Official Gazette of the Republic of Serbia, No. 15/2016.

[29] Law on the rights of patients, Official Gazette of the Republic of Serbia, No. 45/2013 and 25/2019.

[30] Law on the protection of persons with mental health issues, Official Gazette of the Republic of Serbia, No. 45/2013.

[31] Law on social protection, Official Gazette of the Republic of Serbia, No. 24/2011.

[32] 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.

[33] Family law, Official Gazette of the Republic of Serbia, No. 18/2005, 72/2011 and 6/2015.

of adults[34], 13) Law on labour[35], 14) Law on gender equality[36], 15) Law on the prevention of family violence[37], 16) Criminal Code of the Republic of Serbia[38] etc.

There are also several strategic documents adopted in the Republic of Serbia that are either directly or indirectly relevant to the protection of the rights of elderly population, including: 1) Strategy for the prevention of and protection from discrimination for the period from 2022 until 2030[39], 2) Strategy of deinstitutionalisation and development of the services of social protection in the community for the period between 2022 and 2026[40], 3) Strategy for the improvement of the position of persons with disabilities 2020-2024[41], 4) Strategy for the prevention and suppression of gender-based violence against women and family violence for the period between 2021 and 2025[42], 5) Strategy of employment in the Republic of Serbia for the period between 2021 and 2026[43], 6) Strategy of public health in the Republic of Serbia 2018-2026[44], 7) National strategy for gender equality for the period from 2021 until 2030[45] etc. Republic of Serbia also adopted National Ageing Strategy for the period between 2006 and 2015[46] in 2006, but this document is no longer in force and a new strategic document that would be dedicated exclusively to the rights of elderly persons has not yet been adopted.

[34] Law on education of adults, Official Gazette of the Republic of Serbia, No. 55/2013, 88/2017, 27/2018 and 6/2020.

[35] Law on labour, Official Gazette of the Republic of Serbia, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018.

[36] Law on gender equality, Official Gazette of the Republic of Serbia, No. 52/2021.

[37] Law on the prevention of family violence, Official Gazette of the Republic of Serbia, No. 94/2016.

[38] Criminal Code of the Republic of Serbia, 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.

[39] Strategy for the prevention of and protection from discrimination for the period from 2022 until 2030, Official Gazette of the Republic of Serbia, No. 12/2022.

[40] Strategy of deinstitutionalisation and development of the services of social protection in the community for the period between 2022 and 2026, Official Gazette of the Republic of Serbia, No. 12/2022.

[41] Strategy for the improvement of the position of persons with disabilities 2020-2024, Official Gazette of the Republic of Serbia, No.44/2020.

[42] Strategy for the prevention and suppression of gender-based violence against women and family violence for the period between 2021 and 2025, Official Gazette of the Republic of Serbia, No. 47/2021.

[43] Strategy of employment in the Republic of Serbia for the period between 2021 and 2026, Official Gazette of the Republic of Serbia, No. 18/2021 and 36/2021.

[44] Strategy of public health in the Republic of Serbia 2018-2026, Official Gazette of the Republic of Serbia, No. 61/2018.

[45] National strategy for gender equality for the period from 2021 until 2030 Official Gazette of the Republic of Serbia, No. 103/2021.

[46] National Ageing Strategy 2006-2015, Official Gazette of the Republic of Serbia, No. 76/2006.

Human rights and freedoms guaranteed by the aforementioned documents belong to all citizens, including elderly ones. This is in accordance with the principle of equality, as universal ethical and legal principle of every modern society (Strategy for the prevention of and protection from discrimination for the period from 2022 until 2030).

Therefore, it can be said that these rights, together with the rights that are guaranteed particularly for elderly persons with the aim to prevent their discrimination, constitute the right to dignified old age. However, "formal" equality is not sufficient to facilitate the equal treatment of the members of all groups in one society (Strategy for the prevention of and protection from discrimination for the period from 2022 until 2030), including the elderly. It is the application of this normative framework that matters, and upon which the fulfilment of the right to dignified old age depends in everyday life. The increase in human longevity has imposed various challenges for the governments ant the community when it comes to ensuring the wellbeing of elderly persons and their families (Mendes *et al.*, 2019: 88). Having in mind a serious increase in the number of dependent elderly persons and insufficient capability of relevant institutions to meet all their needs, the informal caregivers appear to be key figures in the maintenance of the quality of life in a situation of dependence (Rocha, Pacheco, 2013: 51) and, hence, the dignity of elderly persons they take care of.

4. Informal Caregivers - Definition and Tasks

In Serbia, as well as worldwide, there is a large number of persons who take care of elderly family members in need of help with everyday activities significant for the quality of their lives (Todorović, Vračević, 2019: 11). Despite a growing interest in the topic of this spontaneous, i.e., informal caregiving, there have been very few studies providing information about who the persons engaged with this type of caregiving actually are and what their total number is (Matejić, Đikanović, 2019: 9). According to the definition given by Canadian Coalition of Caregivers, informal caregiver is a person providing constant care and assistance without receiving any compensation, to family members or friends who are in need of support due to physical, cognitive or mental health issues (Todorović, Vračević, 2019: 12). The terms: informal, non-paid and family caregiver are used as synonyms (Mendes et al., 2019: 88; Todorović, Vračević, 2019: 12). Although environment, education, economic status and professions of informal caregivers differ from one person to another, they all have one characteristic in common: they take care of a person that depends on their assistance and they wish to provide that kind of care in the best possible way (Todorović, Vračević, 2019: 12).

Informal caregivers represent a part of the so-called informal support network that includes: family members, acquaintances, friends and neighbours of the dependent elderly person (Mendes et al., 2019: 88). Most commonly, informal caregivers refer to: 1) parents who take care of their chronically ill or disabled children; 2) children and young persons who take care of their ill and functionally dependent parents or grandparents; 3) adults who take care of their own or their partner's parents; 4) elderly persons who take care of their partners; 5) brothers, sisters, cousins, neighbours and friends who take care of elderly persons and 6) volunteers from charity or religious organisations (Todorović, Vračević, 2019: 12). It is estimated that 8 out of 10 persons who take care of elderly persons are women between 45 and 60 years of age (Rocha, Pacheco, 2013: 51; Todorović, Vračević, 2019: 12, Matejić, Đikanović, 2019: 23-26). They typically have higher education level than average, they are usually employed and they mostly take care of their mothers (Matejić, Đikanović, 2019: 9).

There is a difference between informal caregiving and the care for elderly persons that is provided by relevant institutions, i.e., formal care. Informal care is provided within interpersonal relations that comprise emotional bonds, closeness, trust and love and the tasks and responsibilities that it includes go beyond regular reciprocal relations between adults, without any financial compensations (Pierson, Thomas, 2010: 65 according to Ananias, Strydom, 2014: 269; Todorović, Vračević, 2019: 15). This means that informal caregivers are not paid for the tasks they fulfil (Mendes et al., 2019: 88). The tasks within informal caregiving are adjusted to the needs of the dependent person, they can be gradually altered or adjusted, and they include emotional support, direct providing of services, communication with formal health and social welfare services and formal caregivers, as well as financial support (Todorović, Vračević, 2019: 15). In the majority of cases, informal care is provided by one caregiver to one person, without previous planning and specification (Todorović, Vračević, 2019: 15). Informal caregivers usually do not attend any professional education for their tasks and they are required to be available at any time, depending on the needs of the dependent person (Todorović, Vračević, 2019: 15). There are several reasons why informal caregivers take on their role, including: the obligation to care for a relative because of social rules of behaviour, bonds of affection, commitment, pity or altruistic reasons (Payne, 2010a: 240 according to Silva *et al.*, 2013: 792). Some persons become informal caregivers against their will, due to poor social and economic conditions and the necessity to care for an elderly member of their family (Ananias, Strydom, 2014: 275).

On the other hand, formal caregiving is based upon professional relation and rules of conduct, it includes financial compensation, the tasks of the caregiver are precisely

specified and his/her activities are planned, regulated and paid (Rocha, Pacheco, 2013: 51; Todorović, Vračević, 2019: 16). One professional caregiver takes care of several elderly persons, has defined working hours and right to vacation and free time (Todorović, Vračević, 2019: 16).

The following are the most common tasks of informal caregivers: 1) keeping up with person's medical condition and noticing any changes in that field; 2) assisting with everyday activities at home such as: cooking, laundry washing, cleaning, ironing, shopping, preparation of meals etc.; 3) supporting a person to continue with his/her activities as much and as long as it is possible; 4) assistance with personal hygiene; 5) helping a person to overcome physical barriers when walking or getting up; 6) assisting a person to manage his/her finances; 7) supervising and assistance with intake of medicines; 8) assistance when it comes to person's communication with friends and family members via internet or telephone; 9) assistance with transport; 10) communication with social welfare and health care institutions and other entities relevant to the fulfilment of person's physical, mental and social needs; 11) assistance when it comes to making medical appointments and using other e-portal services; 12) providing emotional support; 13) providing support for persons experiencing changes in behaviour and decision making due to of dementia (Todorović, Vračević, 2019: 26-27).

There are five types of informal caregiving of elderly persons: 1) anticipatory, 2) preventive, 3) supervisory, 4) instrumental and 5) protective (Bowers, 1987 according to Matejić, Đikanović, 2019: 13-14).

In anticipatory informal caregiving, the caregiver notices the potential needs of the dependent person and gradually starts preparing the conditions for the indispensable changes of life organisation (Bowers, 1987 according to Matejić, Đikanović, 2019: 13). This type of informal caregiving most commonly emerges when children do not live with their parents and it has a strong impact on the planning of their future – for example, the children plan to stay close to their parents despite their professional obligations, knowing that their parents might need their assistance in the future (Bowers, 1987 according to Matejić, Đikanović, 2019: 13). Anticipatory caregiving of elderly persons is considered almost invisible, since children consciously avoid to discuss these issues with their parents in order not to insult or disturb them (Bowers, 1987 according to Matejić, Đikanović, 2019: 13).

Preventive informal caregiving consists of the activities that younger family members take with the aim to prevent illness, injuries or any kind of physical and mental

degradation of elderly ones (Bowers, 1987 according to Matejić, Đikanović, 2019: 13). Compared to anticipatory, preventive caregiving includes more intensive supervision of elderly persons, the adjustment of physical surroundings to their safety needs, frequent conversations about their health etc. (Bowers, 1987 according to Matejić, Đikanović, 2019: 13).

Supervisory informal caregiving of elderly persons involves a more active and direct participation of their younger family members in their care. It includes the organisation of various activities for elderly persons and further supervision of their condition and its development (Bowers, 1987 according to Matejić, Đikanović, 2019: 13). Itcan be performed when the elderly person is aware of the assistance provided or when he/she is convinced that he/she is independent (Bowers, 1987 according to Matejić, Đikanović, 2019: 13).

Instrumental informal caregiving is an active form of caregiving that comprises the activities that are commonly recognised as caregiving, i.e., everything that caregivers usually do with the purpose to maintain health and physical integrity of elderly persons (Bowers, 1987 according to Matejić, Đikanović, 2019: 14). It is usually conducted in the case of an elderly person who already has health issues and is directed towards the preservation of his/her physical capacities (Bowers, 1987 according to Matejić, Đikanović, 2019: 14).

Protective informal caregiving refers to the activities that the majority of caregivers consider the most important and, at the same time, the most difficult ones – the activities that have the aim to preserve elderly person's emotional state and to protect them from events and circumstances that might have a negative impact on their self-confidence (Bowers, 1987 according to Matejić, Đikanović, 2019: 14).

When types of informal caregivers are concerned, one can also distinguish: 1) main or primary caregiver and 2) secondary caregiver (Rocha, Pacheco, 2013: 51). The main or primary caregiver is the person who is the most responsible for everyday care of the dependent elderly person and he/she fulfils the majority of daily tasks therein (Rocha, Pacheco, 2013: 51). The secondary caregiver is the person who also performs the tasks related to the care of the dependent elderly, but he/she does not do that on a regular basis and does not have much responsibility or power of decision (Rocha, Pacheco, 2013: 51). Secondary caregiver assists the primary caregiver with complementary activities and may appear as a significant source of support to the main caregiver (Rocha, Pacheco, 2013: 51).

All the aforementioned types of informal caregiving for elderly persons imply that informal care is much more than helping an elderly person with basic daily activities (Matejić, Đikanović, 2019: 14). Moreover, a simplified view of informal caregiving may lead to the neglect of potentially harmful behaviour of the caregiver such as: raising one's voice, insulting, threatening by placement into an institution, hitting, slapping or other violent, disturbing or activities by which pain and suffering are caused to already vulnerable elderly persons (Matejić, Đikanović, 2019: 14), recognised as "elder abuse" (Kostić, 2010: 28; Ananias, Strydom, 2014: 269). Namely, it is estimated that almost 10% of elderly persons who are cared for by their family members are exposed to the risk of elder abuse (Strydom, 2003: 77 according to Ananias, Strydom, 2014: 268). That is the reason why it is important to emphasize that informal care of elderly persons goes beyond the assistance with the fulfilment of their basic and instrumental needs and functions and also includes the emotional aspect embodied in tactical and patient care of elderly person and the protection of his/her safety and self-confidence (Matejić, Đikanović, 2019: 14).

5. Key Challenges for Informal Caregivers

Taking care of a dependent elderly person is a situation of crisis, causing significant changes in the course of caregiver's life, where the care emerges as the stressor agent, disturbing or threatening caregiver's daily activities (Rocha, Pacheco, 2013: 51). The demand for special care and a variety of daily tasks, may be worrying for a family member who has a dependent elderly person at home (Mendes *et al.,* 2019: 88). However, caring for a dependent elderly person does not necessarily have to be a source of emotional, physical, financial and social difficulties (Rocha, Pacheco, 2013: 51). It can also be followed by the reward of satisfaction and improve the quality of caregiver's life (Rocha, Pacheco, 2013: 51) But, no matter how rewarding caring can be considered, it is also very challenging in physical, social and financial sense (Payne, 2010a: 240). Playing the role of an informal caregiver is not an easy task and it is commonly followed by physical and psychological demands as well as by numerous sociocultural difficulties (Rocha, Pacheco, 2013: 51), including physical, psychological and social isolation (Mendes *et al.*, 2019: 88)

There are several circumstances that might affect the needs of caregivers, including: the characteristics of the dependent elderly person, the type of elderly person's illness, the context in which the caregiving is being provided, the motivation for caregiving, as well as the characteristics of the caregiver (Silva *et al.,* 2013: 800). Studies confirm that informal caregivers in general mostly need: 1) psychological support (emotional, bereavement, social, as well as spiritual), 2) information, 3) assistance when it comes to

personal, medical and nursing care for the elderly person, 4) out-of-hours and support during the night, 5) respite care and 6) financial assistance (Payne, 2010b: 286). A review by Silva *et al.* confirms that the most important needs of informal caregivers of elderly persons living at home include: 1) information and training, 2) professional support, 3) effective communication with professionals, with dependent elderly persons and with their families and 4) financial and legal support (Silva *et al.*, 2013: 800).

The situation is similar in Serbia, where the majority of informal caregivers point out the following needs as the most essential ones: 1) financial and legal support; 2) better availability of information; 3) improving informal caregivers' knowledge and skills; 4) increasing the visibility of informal caregivers within the community; 5) stronger institutional support; 6) including local community in providing support for informal caregivers; 7) psycho-social support for informal caregivers (Matejić, Đikanović, 2019: 65).

The term "burden of caregiving" is used to describe the caregiver's subjective, personal perception of the difficulties related to caregiving. The burden of caregiving is defined as the degree in which the caregiver estimates that his/her engagement related to taking care of a dependent person negatively affects his/her emotional, social, financial, physical and spiritual functioning (Adelman *et al.*, 2014: 1052-1057 according to Matejić, Đikanović, 2019:15). Also, the burden of caregiving is described as resistance to care caused by the inclusion of new or the expansion of the existing activities related to care, and it depends on several circumstances including: the characteristics of the elderly person, the degree of his/her dependence, and the social support of both – the care giver as well as the care receiver (Rodríguez-González *et al.*, 2017 according to Mendes *et al.*, 2019: 88).

When it comes to caregivers' physical problems, the most common include: back, shoulders and neck pain due to physical activities such as assisting elderly person with getting up, taking a bath or similar activities, whereas psychological problems include: lack of energy, sleeping disorders, stress, panic attacks, depression, lack of concentration, feeling of sadness, guilt or insecurity (Todorović, Vračević, 2019: 19). The caregivers are also at greater risk of depressive disorders and anxiety and of substance abuse such as hypnotics, anxiolytics and smoking (Valle-Alonso *et al.*, 2015 according to Mendes *et al.*, 2019: 88).

Research confirms that between 15% and 32% of all informal caregivers feel great burden of caregiving, particularly in the cases of caring for elderly and seriously ill persons (Matejić, Đikanović, 2019:15). The burden of caregiving increases when caregivers have

financial problems, when they are less educated, when they share the household with the dependent person, when they dedicate more hours to caregiving and when the condition of the dependent person is getting worse (Matejić, Đikanović, 2019:15). The burden of caregiving is often associated with the feeling of stress due to the changes in caregiver's life and functioning, additional financial obligations, managing the actual and potential problems of the dependent person and it significantly differs from one caregiver to another (Sundar, Fox, Phillips, 2014: 750-765 according to Matejić, Đikanović, 2019:16). This is of particular importance since the stress that the caregivers feel can often be a risk factor for elder abuse, particularly in the form of verbally abusive behaviour (Ananias, Strydom, 2014: 277).

When it comes to financial issues, it should be emphasized that research conducted by Matejić and Đikanović in 2019 suggests that more than 1/2 of informal caregivers in Serbia assume that the financial resources that they have are not sufficient to cover the needs of the person they care for and that they do not receive any kind of additional financial support (Matejić, Đikanović, 2019: 48). According to the aforementioned study, informal caregivers in Serbia consider the following expenses as the greatest ones: medications, additional services of professionals such as health protection in private sector, adult diapers, nutrition, hygiene and transport of the dependent person (Matejić, Đikanović, 2019: 50).

Employed informal caregivers often cannot organise their working engagements on the one hand and obligations related to the care for the dependent person on the other, and they feel as if they were failing in both – their job and their duties as caregivers (Todorović, Vračević, 2019: 18). That is the reason why informal caregivers often have to shorten their working hours or quit their jobs, which causes them additional financial difficulties (Ananias, Strydom, 2014: 277; Mendes *et al.*, 2019: 92; Todorović, Vračević, 2019: 18-19).

Another important need of informal caregivers of elderly persons is the need for information, including: 1) information on the condition or diagnosis, the evolution of the illness, symptoms and prognosis of the person they care for; 2) information on medications, treatments, nutritional needs and rehabilitation of the person they care for and 3) information about the services available for the elderly such as disease-specific services or daytime activities for elderly persons (Silva *et al.,* 2013: 799). It is estimated that in Serbia almost 2/3 of informal caregivers assume that they have sufficient knowledge and skills as well as relevant information to take care of and communicate with the dependent person (Matejić, Đikanović, 2019: 56). At the same time, the majority

of informal caregivers in Serbia claim that they need somebody that they could talk to or from whom they could ask assistance and advice, for example, via telephone line for support and help (Matejić, Đikanović, 2019: 57). Informal caregivers in Serbia are also in need of information on how to access the services of social welfare and health protection (Todorović, Vračević, 2019: 19).

When institutional support is concerned, it is important to mention that in Serbia, the traditional model of caring for elderly persons, which is conducted within the family is still the most frequent one (78% of elderly persons), whereas only 2,3% of elderly persons have the access to paid assistance and only 0,7% to the assistance provided by the state (Matejić, Đikanović, 2019: 15; compare with: Mendes *et al.,* 2019: 91). A rather small percentage (15%) of informal caregivers of elderly persons in Serbia admitted that they would consider placing the person they care for in an institution, whereas the majority did not consider such option, claiming that the conditions are better at home, that they can still handle everything or that they cannot afford the cost of institutional care (Matejić, Đikanović, 2019: 51; see also: Mendes et al., 2019: 88).

Informal caregivers in Serbia are in particular need of stronger professional support, including the services of professional caregivers (Matejić, Đikanović, 2019: 70). However, the social service of home assistance for elderly persons provided by local self-government units is present in only 85% of these units (Strategy of deinstitutionalisation and development of the services of social protection in the community for the period between 2022 and 2026). Moreover, in 2018 social service of home assistance for elderly persons provided by local self-government units was continuously provided for all 12 months in only 51% of cities and municipalities that send reports about these services (Matković, Stranjaković, 2018). This type of assistance was provided continuously between 6 and 8 months in 39% of local self-government units and less than 6 months in 9,8% of them (Matković, Stranjaković, 2018). These data show that the principles of availability and continuance are not fulfilled in approximately 50% of local self-government units, which indicates that assistance at home in not a permanent and sustainable social service in many cities and municipalities (Matković, Stranjaković, 2018).

One aspect of support for informal caregivers that is often overseen and neglected is emotional support from both – their families as well as professionals. Even when they are satisfied with their role of caregiver, family members who take care of elderly persons are exposed to constant sources of stress, including the roles and tasks they are not prepared for (Mendes *et al.,* 2019: 91). A review study from 2013 showed that there are

several researches confirming that informal caregivers of elderly persons need emotional support provided by professionals, particularly in identifying the strategies for managing and coping with stress (Silva *et al.*, 2013: 799). This study also confirmed that some informal caregivers felt like crying and needed an opportunity to be heard, whereas some highlighted the need for assistance in resolving emotional issues, burnout and creating support groups (Silva et al., 2013: 799). In Serbia, more than 2/3 of informal caregivers feel that they lack company and approximately 1/2 of informal caregivers feel excluded from the society and isolated from other people (Matejić, Đikanović, 2019: 62-63). Despite this feeling of isolation, sadness and loneliness (Todorović, Vračević, 2019: 18), only 26,4% of informal caregivers in Serbia admit that they have the need to be heard and understood (Matejić, Đikanović, 2019: 60).

6. Conclusions and Recommendations to Improve Informal Care in Serbia

The support that should be given to families that take care of their elderly and dependent members is not yet sufficiently defined and developed in Serbia (NAS). The families that take care of their elderly members, especially of those suffering from dementia, are still in need of better support, which requires the planning of improvements in the development of the capacities of all institutions in the area of social welfare and health protection (Kozarčanin, Milojević, 2016: 31). The network of at home care and various social welfare services such as daily centres and at home assistance should be further developed and a more efficient coordination between public, private and non-profit sector as well as family, friends and neighbours in providing services for elderly persons should be established (NAS).

Moreover, it is necessary to enhance informal education of both – informal caregivers as well as professionals, in the field of providing assistance for elderly persons suffering from dementia and other serious illnesses (Kozarčanin, Milojević, 2016: 31). For that purpose, workshops, courses and trainings, including those that can be attended on-line, should be organised. An example of good practice in that area is the program od Belgrade Red Cross entitled as “Support for Assistants”, which provides free practical training for informal caregivers who take care of elderly persons, free advice via telephone and e-mail as well as educative video materials available via YouTube (Matejić, Đikanović, 2019: 73).

Also, the rights of the families with informal caregivers to obtain financial support should become broader and the services of caregiving at home and palliative care should be further developed (Kozarčanin, Milojević, 2016: 31). One form of financial support could

be to minimise the prices of some basic products that are necessary for a dignified life of immobile persons or persons who have difficulties to move (in general, and particularly elderly ones) such as, for example, adult diapers (Matejić, Đikanović, 2019: 71).

Informal caregivers should be given the opportunity to have flexible or shorter working hours, or to be able to work from home, so that they could adjust their professional obligations to the needs of the person they are taking care of (NAS; Kozarčanin, Milojević, 2016: 31; Matejić, Đikanović, 2019: 70).

Volunteers in the community are an important source of support for both – informal caregivers as well as elderly persons who do not have anybody to rely on. However, it seems that their potentials are not being used sufficiently in our country, which is the reason why a support mechanism for volunteers and intergenerational solidarity should be encouraged (Matejić, Đikanović, 2019: 72). So, as a way to support families with elderly members, volunteers should be more intensively involved with taking care of them, particularly elderly volunteers who would be able to help by sharing their own experiences (NAS; Kozarčanin, Milojević, 2016: 31).

The number of available informal caregivers is expected to decrease in the future due to the changes in family structure, higher divorce rate, delayed marriages, increase in unemployment rate, larger number of households with only one member, larger number of women at the labour market etc (Lowenstein, 2010: 219 according to Ananias, Strydom, 2014; Todorović, Vračević, 2019: 10). Another reason for a potentially smaller number of informal caregivers and the transfer of the responsibility for taking care of elderly persons from their families to the community lays in gradual disappearing of moral responsibility, traditional forms of family functioning and affirmation of individualistic approach to life (NAS). That is the reason why informal caregiving and taking care of elderly persons not only by their closest family members, but also by their friends and neighbours, should be promoted via various campaigns and activities (NAS). In order to contribute to the increase of interest in informal caregiving, positive aspects of this experience should be emphasized, including the sense of additional life purpose and quality and the satisfaction that many informal caregivers feel because they can do something for their closest ones (Buyck *et al*, 2011 according to Matejić, Đikanović, 2019: 16). Emphasizing positive aspects of informal caregiving should encourage a larger number of persons, who are potential informal caregivers, to take this important role in some period of their life.

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Slađana Jovanović*

ELDER ABUSE IN DOMESTIC SETTINGS

According to World Health Organization elder abuse is a significant public health problem, predicted to increase as many countries are experiencing rapidly ageing populations. Although Serbia is undoubtedly one of those countries, the problem of elder abuse has not yet been given as much attention (as it does when it comes to women and children as victims of violence). The National Strategy on Ageing, in which one of the goals is action against elder abuse, particularly domestic violence, expired in 2015, and new one has not yet been adopted. There are no surveys at the national level on the issue of elder abuse (in domestic settings), even though the Strategy has raised that topic. Therefore, the author analyzes the available data on the elder abuse prevalence, and response to it, adding the results of her own research (conducted through questionnaires filled out by older respondents, and interviews with professionals from the social welfare system, prosecutor's office and courts from Belgrade). Special attention is paid to economic violence against the elderly and criminal offenses - family violence and violation of family duty. The factors of non-reporting of abuse and inadequate reaction are also addressed, as well as the possibility of a better social and institutional response to the problem.

Keywords: *elder abuse, domestic violence, economic abuse, violation of family duty*

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1. Introduction

Violence against the elderly (elder abuse) was noted for the first time in British scientific journals in 1975. The definition established by the World Health Organization has also British origin (deriving from UK Plan of Action on Elder Abuse, 1995) (WHO, INPEA, 2002: 2). Elder abuse is defined "as a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person (60 years and older[1])".

This type of violence constitutes a violation of human rights of the elderly, a form of discriminatory treatment, resulting in serious loss of dignity, emotional and physical harm. The consequences are even more painful for the elderly when the perpetrator is someone close and loved by them, as children, in the first place. The elder abuse includes physical abuse, emotional/psychological abuse, sexual abuse, financial exploitation, and neglec**t**. Risk factors are mapped as: profile of perpetrator (usually emotionally unstable person, with problems such us drug addiction, personal or/and financial crisis, criminal record), lack of professional care services, ageism, dependence (economic, emotional or dependence on other people's care and assistance) and poor economic situation (Ignjatović, Patić, 2011: 70-71).

Definition focusing on "expectation of trust in a relationship" could be criticized as a narrow one, as older person could be an easy victim of robbery in the street (Jovanović, Knežić, 2003) or of other type of violence, and the perpetrator could be utterly unrelated to victim. However, the WHO definition is one that fits perfectly with the issue of elder abuse in domestic setting, one of the most prevalent, but also most underreported, under investigated, although increasing type of violence.

Elder abuse in general (in domestic as well as in institutional settings) is widely recognised as a growing problem, due to ageing of population. Unfortunately, the prevalence of this phenomenon is difficult to measure due to extreme underinvestigating, different definitions of (elder) abuse, as well as definition of an old or older person

[1] It is worth mentioning that International Network for the Prevention of Elder Abuse (INPEA) supports a single age based standard of 60 years and older only in developed countries. In the case of less developed countries, where old age starts at a younger age any definition of age should allow for a lower floor as appropriate. In the case of widows living in less developed countries, no minimum age should apply. See: INTERNATIONAL NETWORK FOR THE PREVENTION OF ELDER ABUSE (INPEA) INPUT FOR OPEN-ENDED WORKING GROUP ON AGEING REGARDING HUMAN R (un.org). However, the general public (in most developed countries) typically defines aging as processes that begin after the age of 65, or after retirement. On more dilemmas about "old age": Pavlović, 2019: 171-172.

(Solarević, Pavlović, 2018: 58-59), and unwillingness (or inability) of victims to report abuse and cooperate/participate actively (especially in cases of domestic violence) in legal or other procedures aiming to resolve the problem. Older persons won't report incidents of abuse because of their dependence on the caregivers, fear of retaliation, to protect their family secrets or simply because they care about the perpetrators. The situation can be particularly complicated if the older person has cognitive impairments limiting his or her ability to report incidents of abuse and seek help. According to WHO statistics, 90% of abusers are family members (adult children, partners/spouses), but only 4% of abuse of older people is reported (WHO, 2022). The absences of accurate statistic data and/or relevant, comprehensive national research surveys could also be indicators of insufficient care or capacity of state/social agencies to tackle the issue adequately.

Having all previously mentioned in mind, it is not surprising that in Serbia, one of the most rapidly ageing populations in the world, burdened by poverty, poor social care system, patriarchal heritage, tolerance toward violence in general, and complicated political situation, the problem of elder abuse has been brought to light recently, much later than in other, more developed countries.

2. International perspective: relevant institutions, documents and research results

According to the World Health Organization elder abuse is an important public health problem, predicted to increase as many countries are experiencing rapidly ageing populations[2]. The recent surveys indicate that around 1 in 6 people 60 years and older experienced some form of abuse in community settings during the past year; rates of abuse of older people are high in institutions such as nursing homes and long-term care facilities, with 2 in 3 staff reporting that they have committed abuse in the past year; rates of abuse of older people have increased during the COVID-19 pandemic; the most prevalent form of abuse in community settings was psychological abuse, followed by financial abuse and neglect (reported by older adults); in institutional settings all forms of abuse are much more frequent, especially physical violence (it is six times more often reported related to institutional settings then in community settings (reported by older adults and their proxies) (WHO, 2022). The WHO data suggest that cases of elder abuse in institutional settings are more visible, more often reported than violence in domestic

[2] The global population of people aged 60 years and older will more than double, from 900 million in 2015 to about 2 billion in 2050. (WHO, 2022)

settings, which is not unexpected as domestic violence in general is marked by very high dark figure.

International organizations such as the United Nations and the International Network for the Prevention of Elder Abuse (INPEA)[3] have been engaged in various activities related to raising awareness of the factors and consequences of the elder abuse, asking all states for better recognition, acknowledgment of the problem, and primarily more efficient prevention actions. In 2006 International Network for the Prevention of Elder Abuse and the World Health Organization established World Elder Abuse Awareness Day (WEAAD) on June 15th[4]. The United Nations General Assembly set up that date in its Resolution 66/127 (2011)[5] as a day on which the entire world expresses its opposition to any type of elder abuse. The A/RES/66/127 is not the first international document related to problems of ageing. It was preceded by UN Resolution 57/167 of 18 December 2002, endorsing the Political Declaration and the Madrid International Plan of Action on Ageing (2002)[6]; Resolution 58/134 of 22 December 2003, and resolutions 60/135 of 16 December 2005, 61/142 of 19 December 2006, 62/130 of 18 December 2007, 63/151 of 18 December 2008, 64/132 of 18 December 2009 and 65/182 of 21 December 2010[7] – all of them emphasised the problem of elder abuse, asking the Member States to design and implement more effective prevention strategies and stronger laws and policies to address the problem and its underlying factors. In 2010, the UN General Assembly established the Open-Ended Working Group on Ageing[8], which examines the international framework of the human rights of older persons, and in May 2014 Ms. R. Kornfeld-

[3] INPEA is a non-governmental organization (founded in 1997, USA) with special consultative status to EcoSoc, UN Department of Economic and Social Affairs. See more about it: INPEA - Learn about INPEA and how to participate, accessed on: 28. 7. 2022.

[4] Much earlier, the General Assembly of the United Nations (on December 14th, 1990) established October 1st as the International Day of Older Persons.

[5] UN, General Assembly, Resolution adopted by the General Assembly on 19 December 2011, UNITED, accessed on 1. 8. 2022.

[6] The Madrid International Plan of Action on Ageing and the Political Declaration adopted at the Second World Assembly on Ageing in April 2002 mark a turning point in how the world addresses the key challenge of "building a society for all ages". Madrid Plan of Action and its Implementation | United Nations For Ageing, accessed on: 29. 7. 2022.

[7] UN General Assembly - Resolutions, accessed on: 1. 8. 2022. This document addresses necessity to raise awareness and protect older persons from physical, psychological, sexual or financial abuse, emphasising specific risks faced by women due to discriminatory societal attitudes and the non-realization of the human rights of women (p. 31 and 49).

[8] United Nations Open-ended Working Group on Ageing, accessed on: 1. 8. 2022.

Matted was appointed by the UN Human Rights Council as Independent Expert on the rights of older persons[9].

The Ministerial Conference on Ageing held in Rome (from 16 to 17 June 2022) by the United Nations Economic Commission in Europe (UNECE) mapped the progress made under the Madrid International Plan of Action on Ageing (MIPAA) in the UNECE region. The conference led to the adoption of two complementary declarations: one adopted by the Ministers, reaffirming the commitment towards positive ageing policies; second which was adopted jointly by civil society and researchers. One of the main topics was promoting healthy and active aging, and the protection from abuse was discussed within that context. The United Nations General Assembly declared 2021–2030 the Decade of Healthy Ageing and asked WHO to lead the implementation (WHO, 2021).

Some studies in Europe (the Council of Europe Member States) suggest that the abuse of older people leads to an estimated 2,500 homicides every year in Europe. Furthermore, one in four older people needing high levels of support may be victim of mistreatment[10]. The very name of the event related to World Elder Abuse Awareness Day (June 15th, 2015) "Elder abuse – Europe's hidden shame" depicted (quite well and honestly) the state of affairs in the field of elder abuse, its prevalence, consequences, and lack of adequate responses. Namely, although the first special document concerning the elderly (and their protection from exploitation, physical and mental abuse) was adopted in 1994[11] and the last one in 2014 (Recommendation CM/Rec(2014)2 on the promotion of human rights of the older persons)[12] much more has to be done for the elderly in practice. The most important legally-binding document - the Council of Europe Convention on preventing and combating violence against women and domestic violence[13] does not mention explicitly elder abuse as a form of domestic violence, but its Explanatory Report pays

[9] OHCHR | Independent Expert on the enjoyment of all human rights by older persons, accessed on: 1. 8. 2022.

[10] Council of Europe (2015) Elder abuse - Europe's hidden shame - Events (coe.int), accessed on: 1. 8. 2022.

[11] Council of Europe, Committee of Ministers, Recommendation No. R (94) 9, Result details (coe.int), accessed on: 1. 8. 2022.

[12] Council of Europe, Commiteee of Ministers, Recommendation CM/Rec(2014)2, Prems 39414 GBR 2008 CMRec(2014)2etExposeMotifs TXT A5.indd (coe.int), accessed on: 1. 8. 2022.

[13] Council of Europe Treaty Series - No. 210. More about requirements of the Convention and their implementation in criminal law and judicial practice in Serbia, see: Jovanović, Vujičić, 2022.

attention to this form of violence, emphasizing it as a form of inter-generational domestic violence[14].

The situation is similar within European Union where the elder abuse has been considered a growing concern as EU countries face irreversibly transformed age pyramids (Georgantzi, 2012: 1; 2018) with the ageism as one of the most common experienced form of discrimination (Georgantzi, 2018: 362; European Commission, 2019).

In USA, up to five million older Americans are abused every year and the annual loss by victims of financial abuse is estimated to be at least $36.5 billion. Approximately one in 10 Americans aged 60+ has experienced some form of elder abuse. One study estimated that only one in 24 cases of abuse are reported to authorities. (National Council on Ageing, 2021). It is very interesting that NCA emphasizes financial abuse as a form of elder abuse providing precise estimation of annual financial loss, without indicating perpetrators or typical offenses. Indeed, financial abuse is very often related to older persons, either the perpetrators are family members or strangers.

Elder abuse has been an issue of social interest for very long time, and various specific legal instruments and institutional mechanisms have been created for the prevention and victim of elder abuse support and protection. For example, the Administration on Aging (AOA) is the principal agency of the U.S Department of Health and Human Services designated to carry out the provisions of the Older Americans Act of 1965. The AOA established National Elder Abuse Resource Centre (NCEA) in 1988. The NCEA provides the latest information regarding research, training, best practices, news and resources on elder abuse, neglect and exploitation to professionals and the public.[15] Undoubtedly, USA example could be considered as one of good practice, showing interest for problems of the elderly, and providing specific mechanisms to protect them from abuse.

3. State of Affairs in Serbia

As elder abuse in domestic settings is inseparably linked to the context of domestic violence, it is necessary to consider it in the same light. It is dangerous, hidden phenomenon, good example for dark figure of crime, but still not enough in focus as

[14] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, p. 8, CETS 210 - Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (coe.int), accessed on: 1. 8. 2022.

[15] See: Administration on Aging | ACL Administration for Community Living; NCEA - Home (acl.gov), accessed on: 5. 8. 2022.

domestic violence against women and children is. Namely, domestic violence against children is widespread and studies have revealed the link between domestic violence against women and child physical abuse, as well as the trauma that witnessing violence in the home causes in children, but for elderly abuse - reliable data are relatively scarce[16]. There are much more policies and legal instruments created or implemented in the field of domestic violence in order to protect women (especially from gender-based violence) and children. Much more media attention has been paid to domestic violence against women and children. Old persons remained somehow forgotten in that context, slowly being recognized as victims that are very often in vulnerable position similar to children's (regarding their vulnerability and powerlessness due to old age, weakness, incapacity and dependence on abusers).

It is already well known that domestic violence is an ongoing problem in Serbia (as well as ageing of population[17] alongside widespread and growing ageism (Ljubičić, 2021: 526; Radaković, 2020: 551-567; Solarević, Pavlović, 2018: 61-62)) despite of the development of different legal and other protective mechanisms, especially when it comes to women and children. So, it is not difficult to assume how grim the situation of the elderly abused in the domestic settings is. The National Strategy on Aging[18], in which one of the goals is an action against elder abuse, particularly domestic violence, expired in 2015, and new one has not been adopted. There are no surveys at the national level on the issue of elder abuse (in domestic settings), even though the Strategy has raised that topic. In the National Strategy for Prevention and Elimination of Violence against Women in the Family and Intimate Partner Relationship[19]- which also has expired - older women are mentioned as particularly vulnerable category of victims.

[16] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, p. 1

[17] The average age of the population in the Republic of Serbia increased from 42.1 years (2011) to 43.4 (2020). Statistical Office of the Republic of Serbia (2021) Statistical Yearbook, Belgrade, p. 25. With almost 20 per cent of its citizens being 65 and older, Serbia's proportion of elderly people is among the highest in the world. See more detailed statistics for 2011-2021: • Serbia - age structure 2011-2021 | Statista, accessed on: 2. 8. 2022. Also: Statistical Office of the Republic of Serbia (2022) Natural Changes of Population, 2021, available at: Dissemination database search (stat.gov.rs), accessed on: 2. 8. 2022.

[18]Government of the Republic of Serbia, National Strategy on Aging 2006-2015, available at: https://gs.gov.rs/lat/strategije-vs.htm, accessed on: 29. 7. 2022.

[19] Government of the Republic of Serbia, National Strategy for Prevention and Elimination of Violence against Women in the Family and Intimate Partner Relationship, Official Gazette of the RS, No. 21/2011, available at: https://gs.gov.rs/lat/strategije-vs.htm, accessed on: 29. 7. 2022.

However, older men could also become victims of domestic violence, even of its severe forms (leading presumably to prosecution and judicial epilogue). Namely, one research conducted prior to the introduction of domestic violence incrimination into criminal law suggests that older people are more often victimized by more severe forms of violence (serious bodily injury) in the family context than outside it. It also points to greater percentage of men as victims, while on the other hand, sons are most often perpetrators. Female partners (older persons, too) are also among perpetrators. One of the explanations for this phenomenon could be that older male victims are ageing *pater familias* figures who, while at full strength, practiced violence as a form of communication with their spouses/partners and other family members. (Lukić, Jovanović, 2001: 44-45).

Similar results related to older men – victims of domestic violence have emerged from the survey on domestic violence in judicial practice in Vojvodina: compared to women of the same age category, men are slightly more frequently victimized at the end of the sixth decade of life or later (after the age of 65), and are most often victims of their children – sons (Jovanović et al., 2012: 70). The same survey also indicates that the structure of the imposed criminal sanctions is depending on the relationship between the perpetrator and the victim. Namely, the prison sentence was more frequently imposed in cases of offenses of domestic violence (Article 194, paragraphs 1 and 2 of the Criminal Code of the Republic of Serbia[20]) commited against parent (truth to be told - in more then twice as many cases as those who abused wives, those who abused their parents were recidivists: 51,7% : 21:7%) (Ibid: 100).

The latest survey on domestic violence in judicial practice (Petrušić, Žunić, Vilić, 2018) points out to an increase in the number of elderly as victims compared to previously conducted similar surveys (Konstantinović Vilić, Petrušić: 2004, 2007) and the presence of the aggravated circumstances as "the offense was committed against an older person". The children were (continuously) violent towards their old parents, and the most of them had problems with drug/alcohol addiction (Petrušić, Žunić, Vilić, 2018: 95, 111, 113, 140). These findings don't differ much from those previously mentioned, though, in cases of victimization of parents, courts found aggravating circumstances linked to the specific quality of relation between perpetrator and victim: "perpetrator committed the offense against mother, woman who gave birth to him and raised him" or "perpetrator committed the offense against mentally ill mother" (Jovanović, 2011: 204).

[20] Official Gazette of the RS, Nos. 85/05, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

As it was said before, elder abuse has begun to be recognized as a social and scientific problem in last decade (Knežić, 2010) very slowly and inconsistently. According to the data presented by the Provincial Protector of Citizens – Ombudsman the statistical curve for elder abuse has been increased significantly since 2018. One of the analyses suggests that psychological violence against the elderly is most present, while an analysis of electronic media coverage found that the media reported predominantly on physical violence. Victims of violence are mostly women, in a much higher percentage than men of older age[21].

The Red Cross of Serbia seems to be very committed to the issue of elder abuse. On the occasion of the International Day of Older Persons in 2021 it was reported that according to the survey of the Red Cross of Serbia from 2016 (conducted in nine municipalities in Serbia; 616 respondents) 18.6% of the elderly experienced some form of abuse (in the first place psychological violence, and neglect) (Maričić, 2021). The latest research was focused on gender-based violence against older women. It pointed out that 16% of older women (65-74 years of age) experienced some form of violence after the age of 65 (in the year that preceded the survey), more often by partners (in the first place psychological violence), and victims were mostly women from rural areas, burdened with patriarchal attitudes and prejudices, reluctant to report violence due to fear, shame, economic dependency, patriarchal upbringing (Todorović et al: 2021: 68-69). It should be also noted that they are even more reluctant to report their children who mistreat and abuse them.

Some authors noted the increase in domestic violence cases emphasizing again violence against women, but mentioning also elder abuse during pandemic/lockout period (Mršević, 2020: 717; Knežić, 2021). Undoubtedly, social exclusion that is common experience for many old persons even in regular occasions is very important factor in the context of victimization by domestic violence, its incidence and intensification, as well as non-reporting.

The elderly in Serbia are still facing poverty (in spite of popular occasional governmental financial help, gifts in vitamins or other goods or even pension increases), discrimination, marginalization, and abuse. Great problem is the lack of special services and support at

[21] Data were presented at the roundtable "Right to Old Age – Elder Abuse" organized by the Provincial Protector of Citizens – Ombudsman on the occasion of October 1st – International Day of Older Persons, 2021.

home (especially in rural areas), and also well regulated and supervised network of nursing homes, free of abusive practices, and mistreatment of the elderly[22].

Protector of Citizens also noted in the Annual Report for 2021 that violence against the elderly is still not sufficiently reported, due to the fact that the elderly cannot report it, do not have support or do not want to report the violence they suffer from their closest family members, most often children, and due to insufficient recognition of emotional, social and economic violence. He emphasized that the problem is especially widespread in rural areas, where older women living alone in households are in a particularly difficult position, or they are most often dependent on other family members in meeting their needs, given that most often they do not have property rights on real estate and movable property, income, nor is their access to community-based services adequately provided in places where the transportation and public transportation structures are not in place (Protector of Citizens, 2022: 21). The fact that in general the least complaints came from the elderly indicates that presumably they are not able, do not know (how or to whom) or don't want to report violations of their rights (Ibid: 28). The Protector of Citizens himself spoke for the media (RTS, 2022) that in the coming period the care of the elderly will be set in focus, especially in the institutional settings. The triggers for the Protector of Citizens' previously mentioned statement/decision presumably were cases of violence against the elderly in private nursing homes presented in media. The similar statement was given by the Belgrade City Secretary for Social Welfare who announced on 15th of June, 2021 that special programmes would be created to protect elderly from abuse, as well as activities to raise awareness of the problem (Maričić, 2021).

It seems that decision makers think about the elderly and their problems most frequently (and conveniently) on special occasions as on October 1st or June 15th when they prepare suitable speeches, declarations and promises.

Author of this paper has conducted her own mini-survey on the issue of elder abuse in domestic settings. The interviews were conducted with 15 professionals (from prosecutor's offices, basic courts and social welfare system from Belgrade). Respondents were selected by random selection method, and the criterion was professional experience in domestic violence cases. The interviews were conducted on the basis of questions with open answers thus giving respondents the opportunity to express their views, comments,

[22] The most drastic cases of violence in institutional settings in Serbia have had media coverage, thus initiating discussions on elder abuse and necessity to control better (especially) private nursing homes. The headline in one daily newspaper reads: "This isn't a nursing home for the elderly, it's a torture chamber! The old ones starve, tied to the bed; when they're sick, no one's allowed to call an ambulance! Hell in Krnjača!" (Ogarević, 2022)

observations and explanations. Thirty people over the age of 65 (15 men, 15 women) filled out the questionnaires on the issue of elder abuse in domestic setting. Respondents were selected by the method of snowball sample. Twenty were from the rural area and ten were from Belgrade.

The main findings are similar to those previously mentioned: most victims are women; psychological violence was most frequently mentioned; women are more often willing to talk/complain about violence they suffer from their partners, but officials (prosecutors, judges) are more often in contacts with victims of serious forms of violence committed by children toward their parents (and they think that old fathers are at almost the same risk of victimization as mothers are). The older men (fathers) are more often complaining on neglect, ungratefulness, and financial abuse committed by their children. A universal finding is the refusal of the elderly to report violence to authorities and seek help, and when the case gets a judicial epilogue they very often refuse to testify and/or insist on the treatment of a violent child (who often have problems with addiction and very often combine different forms of violence toward parents to get money or other financial gain).

The answers of all respondents made basis for the undoubted conclusion that there is still widespread sacrifice of parents for the welfare of their children, and the permanent justification for their actions (even violence) with a bad economic situation, the inability to find employment, while neglecting of old parents is justified by the duties and tasks children have at work, their need to take care of their own children, tiredness, etc. Children's mistreatment of parents in old age most likely has roots in the primary family in which parents did not demonstrate adequate parenting capacities and skills being either overprotective towards their children (thus continuous giving and caring from the parents have been taken for granted, despite the fact that the parents became old and they themselves need care and attention) or continuous violence has got reversed direction (former (now old and weak) perpetrators have become victims of domestic violence[23]. It is interesting (and entirely expected) that all of the old respondents stated that they knew other old people who were being abused by their children even very severely. Respondents verbally condemn such acts, but did nothing in practice even when violence happened to their friends or acquaintances (except advising victims in several cases). All of the respondents made complaints about lack of visitation and/or desired attention of their children, and some kind of insufficient gratitude for everything they as parents have provided for them. But, some kind of justification usually comes alongside such answers

[23] About minors' violence towards parents and inadequate parenting styles, see: Jovanović, Sofrenović, 2016.

(which has already been discussed). Interestingly, there is also no criminal offense in prosecutorial and court statistics for a violation of family duty (Article 196 of the Criminal Code of the Republic of Serbia) that could be rightfully applied in the case of the neglect of old parents by children who are obliged to take care of them. It is an offense that is essentially a form of violence against the elderly, but there is no application of it presumably due to the powerlessness of the victims themselves, as well as the insufficient activity and care of the system.

4. Concluding remarks

Old age more often has been defined as an indicator of incapacity, unproductivity, dependency, impairment, and even burden for family, society, and even for old persons themselves. The burden becomes much heavier when the abuse by family members, the most loved ones occurs. Violence against children and women is still in the focus of the professional and public's interest to the extent that domestic violence is often identified with violence against children or women. All respondents-professionals (from the survey previously mentioned) said that domestic violence is primarily violence against women and children, and that the most common perpetrators are men – spouses/intimate partners and fathers. Most of the international and national policies and legal instruments emphasize women and children as victims. Public discourse is on the same line.

In international frame, elder abuse has become an important issue more than 20 years ago, but in Serbia it has recently been open as an important subject- still more declaratively, on special occasions (on October 1st and June 15th) or in connection with tragic events (brutal elder abuse cases) portrayed in the media in a sensationalist manner. Serbian society, impoverished and burdened by all sorts of problems, seems to be too tired to pay more attention to those who are perceived as burden in its own families, and society as a whole. Movements that would stand up for protecting the elderly from domestic violence are not so visible, nor is legislative or any other activity (except for occasional governmental financial contributions, gifts in vitamins and other goods, free public bus transportation). On the other hand, the society seems to be very hypocritical in its reluctance to legalize euthanasia that would secure the right to a dignified death especially for the elderly who are terminally sick and deprived of adequate medical and other types of care, tired of undignified life (Jovanović, 2020: 547-548).

Ageism in Serbia is booming and violence against the elderly must be seen in that context, especially violence in domestic settings, as it is very well hidden and underreported form of abuse, although according to some researchers – most prevalent form of elder abuse.

Elder abuse in domestic settings is inseparable from the context of domestic violence, too. It is necessary to pay more attention to it (as it was done in case of women and children) having in mind that old men are also victims of violence, and that very often the position of an old person (woman, man) is the same as the position of a child (helplessness due to different reasons). Judicial epilogues (and responses of the professionals) showed that just the most serious cases of elder abuse (with severe consequences and/or after a long time after first incident) in domestic settings are brought to daylight (the same happens with media attention – just the most sensational cases are presented in order to increase circulation or ratings).

It is unnecessary to say that the prevention must be priority, and the efforts must be taken in the sphere of education and raising awareness on zero tolerance on violence, on adequate, balanced parenting skills in primary family, on deconstruction of myths of unquestionable parental self-sacrifice for children underlined with unjustifiable excuses and self-neglecting, and in general healthy and active ageing emphasizing social inclusion of the elderly. The services for professional care at home and regulated and supervised institutional settings are of the great importance, as well as proactive social services sensible to detect and report perceived elder abuse in domestic settings.

The age of violence against the elderly is yet to come, according to data showing an ageing population globally. The number of old (at 60 years and more) will more than double by 2025 compared to 1995 in both developed and developing countries (WHO, 2002a). It is very clear that the absence of adequate family and social care for the elderly, and the lack of effective protective strategies will only foster a wave of elder abuse.

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AGEING OF THE PRISON POPULATION – CHARACTERISTICS, ISSUES AND PERSPECTIVES[1]

One of the major topics in contemporary prison studies refers to the worldwide ageing of the prison population. Generally, prisons are designed for younger people and consequently overlook the characteristics of the elderly. This literature review presents distinctive characteristics of this population and key research issues and perspectives, relying on the findings of the prison studies. As a result of a comprehensive search, 1256 publications were identified. The selection process resulted in 46 studies published in the last two decades. A wide range of issues was confirmed, primarily those related to the specific needs of health care and treatment, special preparations for release, challenging contact with family and the outside world, and the infrastructure that does not meet the movement restrictions or reduced functional mobility. Examples of good practice include specific interventions and resources, with future perspectives on the needs of convicts and possibilities of adapting the prison conditions and provided content.

Keywords: *convicts, older prisoners, vulnerable prisoners, adapted programs, health and social needs*

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Introduction

Across the world, the prison population is ageing. Older prisoners became the fastest-growing age group in prison (Doron & Love, 2013; Forsyth et al., 2015; Wilkinson & Caulfield, 2020; B. A. Williams et al., 2012). There is considerable evidence to indicate that the growth of the older prisoner population, both in absolute terms and as a proportion of the prison population, has been much greater than that of the general population in many countries: France, Australia, Japan, the United Kingdom, Canada, and New Zealand (Baidawi et al., 2016; Combalbert et al., 2017; Stevens et al., 2018; Wilkinson & Caulfield, 2020).

In the USA, the number of older prisoners increased by 181% between 2000 and 2010, in contrast to the overall prison population which increased by only 17% (Bureau of Justice Statistics, 2011). As presented, 19% of the current US prison population is aged over 50 years (Wilkinson & Caulfield, 2020). When data on older offenders (55+ years) in the USA from 1971–2004 were explored, the 55–64 age group showed an increase in the number of violent, property and drug crime arrests during 2000–2004 (Gross, 2007). In the same period, property and drug crime rates remained relatively stable for those aged 65+, and the violent crime rate decreased slightly for this age group (Gross, 2007). In France, the prisoners aged 50–59 and those over 60 represent 7.7% and 3.5% of the general prison population, respectively (Combalbert et al., 2017). In England and Wales, the number of prisoners aged over 55 years increased by 200% in the decade before 2018. Additionally, the number of prisoners aged 40–49 increased by around 75% (Ministry of Justice, 2018). In Australia, the number of prisoners aged 50 and over increased by 37% between 2000 and 2010, with the greatest growth among those aged over 65 whose proportion rose 142%, in contrast to the increase in the general prison population by 36% (Baidawi et al., 2011). In Serbia, official statistics show that convicted persons aged over 50 accounted for 14.7% of the total number of convicts admitted to serving their sentences in 1999, 18.8% in 2006, 19.1% in 2015 and 20.1% in 2020, which represents an empirical increase in their percentage representation (Statistical Office of the Republic of Serbia, 2004, 2011, 2016, 2022).

The increase in the number of older prisoners can be explained by the lengthening of prison sentences and the increase in the number of criminal acts committed by individuals aged 50 and over (Combalbert et al., 2017). Similarly, changes in prosecution and sentencing laws and practices, mandatory minimum sentencing and reduced chances for early release might have contributed (Baidawi et al., 2011). Moreover, a comparison of

the proportion of the older persons in the general population and the prison population ruled out general ageing as a cause of this increase (Baidawi et al., 2011).

The most expanding portion of the prison population is composed of older prisoners. Their number is doubled during the last two decades (Turner et al., 2018). However, their complex health and social care needs resulting from ageing and frailty and poor physical and mental health are characteristics that make them differ considerably from young inmates (Hayes et al., 2012). As noted by Turner et al. (2018), these needs are less visible, even unnoticeable, compared to violence and disruption and present a far-reaching problem to health and justice. Moreover, an exponential rise in the number of older prisoners challenges not only the criminal justice system but state economies and communities to which older former prisoners should return at one point in time (B. A. Williams et al., 2012).

When referring to individuals in the criminal justice system, the meaning of the term "older prisoner" varies considerably (Baidawi et al., 2011; Chiu, 2010; Stevens et al., 2018; Trotter & Baidawi, 2015; Wilkinson & Caulfield, 2020). In one literature review, which included 24 original research, it was found that the definition of older prisoners ranged from 45 years and older to 65 years and older, with 50 years and 55 years and older as the most common age thresholds given (Baidawi & Totter, 2016). In particular, the functional definition refers to "older prisoners" as being 50 years of age and over (Kerbs & Jolley, 2007; Stojkovic, 2007). The discrepancy between the overall health of prisoners and that of the general population is the main underlying reason for this gap in the implied age thresholds (Aday & Krabill, 2013; Baidawi et al., 2011). It is important to understand that some key features in prison accelerate the ageing process. Greene and Gibson (2012) mentioned low levels of self-care, high psychiatric conditions, social and emotional affects, victimization, cut-off contact to reduce their suffering, and negative self-reflection of their lives. More precisely, the physical and overall health of prisoners aged 50 to 59 years and their social needs are comparable to that of those aged over 60 years (Hayes et al., 2012). In other words, prisoners are functionally older concerning their chronological age, which can be attributed to their previous lifestyle, lack of medical care, and the experience of incarceration in general (Omolade, 2014; Stevens et al., 2018; Trotter & Baidawi, 2015; Veković et al., 2021).

Consequently, the ageing of the prison population is a contemporary phenomenon that has opened various issues, questions and challenges for experts and scholars in prison study. This paper aims to identify and present distinctive characteristics and key research

issues and perspectives related to older prisoners and the ageing of the prison population by conducting an extensive literature review and synthesizing the findings in this field.

Methods

An extensive literature search was performed to identify relevant studies conducted to explore different aspects, topics and issues related to the ageing of the prison population and the characteristics and needs of older prisoners. The comprehensive search was performed by using Google Scholar – Advanced Scholar Search. Scholarly manuscripts published in English since January 1, 2000, were included. The following keywords were used with multiple combinations: "older", "elderly", "ageing", "geriatric" combined with "prisoner", "convict", "offender" and "inmate". Next, studies citing detected research were explored further at the level of titles and abstracts. The following studies were considered eligible: studies focused on characteristics and issues related to ageing in prisons; published in English; including males, females, or both; and original, peer-reviewed articles or doctoral dissertations. The literature search resulted in 899 citations, and an additional 357 were screened at the title and abstract level. Using the above criteria, and after excluding the duplicates, 46 studies were included in this literature review. The search was completed in May 2022.

Characteristics and specific needs of older prisoners

Considering their characteristics, older prisoners represent a heterogeneous population (Solares et al., 2020). Within this prison population, there are additional differences in the needs, physical, psychological and mental abilities of older prisoners. Therefore, older prisoners often represent a group that is additionally endangered in the prison institution (Jovanić & Ilijić, 2015).

Following previous studies, three subgroups of older prisoners are identified (Baidawi, 2016). One subgroup includes prisoners who first enter prison at an older age and comprise less than half of the total geriatric prison population. They are more likely to commit violent crimes, including murder or sexual offences against another person compared to the other prisoners (Aday & Krabill, 2013). Another group consists of prisoners who arrive at a prison before age 50 and grow old while incarcerated for long terms (twenty or more years). These prisoners experience complex problems related to external and internal relations, lack of social skills and resources needed for successful community transition, fear of dying in prison, inability to make decisions due to mental health disorders such as dementia, lack of self-esteem and fulfilment of life purpose

(Aday & Krabill, 2013). The third group includes ageing chronic offenders or multiple recidivists who enter and exit prison and spend a significant amount of life in prison, usually due to crimes similar to those of a younger offender (Aday & Krabill, 2013).

On the other hand, the Prison Reform Trust (2016, as cited in Turner et al., 2018) presented a different approach. According to this classification of distinct characteristics of older prisoners, there are four subgroups: repeat prisoners, grown old in prison, first-time prisoners given a short sentence, and first-time prisoners were given a long sentence. The first subgroup of repeat prisoners includes those in and out of prison, usually convicted for less serious offences, who return to prison at an older age. The second subgroup of prisoners who grow old in prison are those convicted of a long sentence before turning 50 and aged in prison. The last two groups consist of first-time prisoners given a short sentence and first-time prisoners given a long sentence, for example, high profile celebrities sentenced for the first time at an older age for sexual offences (Turner et al., 2018).

A recent systematic literature review noted a lack of clear understanding of older prisoners and their characteristics, although the ageing of the prison population is an international issue (Wilkinson & Caulfield, 2020). Previous studies stated some contradicting conclusions about older offending patterns in general as either being relatively stable over time or increased in certain types of crime committed by older people (Wilkinson & Caulfield, 2020).

Highlighting some main characteristics of older homicide perpetrators, Hunt et al. (2010) explained that these offenders had high rates of affective disorder and were more likely to be mentally ill at the time of the offence, and the victim was more often a female and a family member or spouse. Reutens et al. (2015) later confirmed this finding. When it comes to older first-time sex offenders (65+ years), a systematic review conducted by Chua et al. (2018) revealed that their victims were often vulnerable, such as minors or with intellectual disabilities.

According to Curtice et al. (2003), the majority of older prisoners (65+ years) were first-time offenders with no previous history and no diagnosis of mental disorder, yet with confirmed alcohol or drug use history. It is noteworthy that older homicide perpetrators (60+ years) were less likely to have a prior violence offence record than adults (25–59 years) and more likely to commit suicide at the scene (Block, 2013). Earlier, one comprehensive and critical review indicated that older prisoners tended to be unmarried

white men, employed before incarceration and never graduated from high school (Lemieux et al., 2002).

Overall, homicide offending by older people is rare (1.7%) (Block, 2013). Evidence to date suggests that in the case of older people committing a homicide, the victim is most likely their intimate partner, acquaintance or friend (Block, 2013; Wilkinson & Caulfield, 2020).

Based on this 11-year survey of referrals to regional forensic psychiatric services, sexual offending was the most common offence, followed by violent ones, murder or manslaughter and attempted arson (Curtice et al., 2003). When data on older people (60+ years) in police custody were examined, the majority of suspected crimes were related to physical assaults, including domestic violence, drunk driving or driving without a license, traffic accidents, threats, thefts or robberies and sexual assaults (Beaufrère et al., 2014). Minor offences and alcohol-related violations also dominated trends in older prisoners (55+ years) crime rates over 25 years (Feldmeyer & Steffensmeier, 2007). When career criminals and older prisoners without previous criminal offending (60+ years) were compared, older homicide perpetrators with previous criminal offending had higher rates of alcohol abuse and were diagnosed more often with a personality disorder (Putkonen et al., 2010).

Generally, older prisoners have a high prevalence of chronic health conditions (Merten et al., 2012). Dementia was the most common diagnosis among older prisoners (65+ years), followed by depression, schizophrenia, and mild learning disability (Curtice et al., 2003). According to Overshott et al. (2012), almost half of older perpetrators (65+ years) suffered from depression at the time of the offence, whereas rates of schizophrenia and alcohol dependence were low.

The studies included in the review paper published by Booth (2016) were summarized to highlight the characteristics of older people who have sexually offended. The authors noted that these individuals experienced issues and difficulties solving interpersonal situations and had a high prevalence of psychiatric disorders, dementia and cognitive impairment, and severe mental illness, including depression, schizophrenia and bipolar illness. Moreover, two types of older first-time sex offenders (65+ years) were recognized: repeat offenders but not detected until later life and late offenders with a higher proportion of neurocognitive disorder (Chua et al., 2018). Screening or psychological and cognitive assessments of these older offenders were occasional, revealing physical disorders such as mobility problems, chronic respiratory failure,

difficulties in verbal communication, and urinary incontinence. Psychiatric diagnoses included dementia, depression, vascular dementia, Alzheimer's disease, frontal lobe dysfunction and chronic schizophrenia (Chua et al., 2018). More importantly, communication deficits may restrict the participation of older offenders (50+ years) in prison activities that could prevent, in return, their cognitive decline (Combalbert et al., 2018).

Similarly, Putkonen et al. (2010) found that older homicide perpetrators (60+ years) were more often diagnosed with dementia and physical illnesses and less often with drug dependence and personality disorders compared to their gender-matched younger homicide offenders. In general, older homicide perpetrators (55+ years) were more likely than younger ones to have cognitive impairment or psychotic illness (Reutens et al., 2015). Earlier, Fazel and Grann (2002) explained that dementia or affective psychoses were more likely diagnosed in older prisoners (60+ years) and schizophrenia or personality disorder in younger prisoners.

In a systematic review with a meta-analysis that included 55 publications, a higher risk for physical health outcomes among older prisoners (50+ years) was confirmed (Solares et al., 2020). These were hypertension, cardiovascular, respiratory, and arthritis diseases. The most frequently reported mental health problems were alcohol and substance abuse, depression, personality disorders, anxiety, psychotic disorders and dementia (Solares et al., 2020). The health-related quality of life in the physical health domain is lower in older prisoners and is associated with several health conditions (Togas et al., 2014). Perceived health and quality of life of older prisoners (50+ years) are lower than the health and quality of life of the comparison men of similar ages in the general population (Combalbert et al., 2018). Health-related quality of life of imprisoned middle-aged and older persons with higher education levels, family support, and high-quality medical care is higher than average among prisoners (Kosilov et al., 2019). Other findings suggested that older prisoners were more satisfied with their quality of life and well-being in an open prison regime than in training and high security (De Motte, 2015).

Unconformity of treatment and prison living conditions for older prisoners

Many international conventions and declarations guarantee certain standards of behaviour and treatment for all people, especially persons deprived of their freedom (Jovanić & Ilijić, 2015). Respect for human dignity is a basic principle, mentioned in all the most important international documents since World War II (Obradović, 2020). More precisely, the right to human dignity is formulated in all international documents related

to human rights. Following the most important domestic legal act, the Constitution of the Republic of Serbia,[2] protection of persons deprived of liberty is provided through the provisions relating to human rights and freedoms (Obradović, 2020). Furthermore, a whole series of international provisions and legal acts[3] regulate the standardization of living and working conditions in prison, the maintenance of hygienic needs, nutrition and health care, and working and educational training (Pavlović, 2020, p. 54). However, the protection of a person‘s dignity while serving a sentence and the context of the execution of criminal sanctions are particularly challenging fields that lead to a re-examination of the limits of respect for human dignity (Pavlović, 2020). The defined rights are often present at the declarative level only, that is, without guarantees of humane treatment and adaptation of treatment in accordance to the needs and abilities of a specific category of convicts, especially older ones.

Among the crucial issues, some authors identified diverse healthcare needs, end-of-life care, social security and medication provision, wills, trusts and probate planning, deteriorating cognitive impairment, guardianship and elder abuse (Greene & Gibson, 2012). The main social and custodial needs of older adults in prison are accommodation, social contact, activity, and transitions in custody (Hayes et al., 2013). However, the ageing prisoners are often referred to as “the most care demanding and expensive group to house in prison” (Doron & Love, 2013, p. 322). Provision of different health care services is challenged since chronic diseases, physical disabilities, and cognitive impairments require long-term care or mental and hospice care (Kakoullis et al., 2010). Additionally, comprehensive data on older offenders are often not available, which makes planning and organizing adequate services and addressing their specific needs inadequate and less achievable (Ginn, 2012). Access to different services is reduced, not available or missing, including access to mental health, physical disability, and incontinence services, in contrast to the availability and adequacy of similar services to older people outside of prison (J. Williams, 2013).

For older persons, prison is a “difficult place in which to be old” (Ginn, 2012, p. 2). The prison regime, treatment and rehabilitation programs are not sufficiently modified to their abilities, needs and capacities (Jovanić & Ilijić, 2015). This position is supported by the

[2] The Constitution of the Republic of Serbia, Official Gazette of the RS, nos. 98/06.

[3] The Standard Minimum Rules for the Treatment of Prisoners is a document made at the UN level that defines the necessary level of conditions for achieving the goals or aims of penal policy with an obligation to treat all prisoners with respect for their inherent dignity and value as human beings, and to prohibit torture and other forms of ill-treatment.

claims of numerous authors that prison environments are designed for healthy men of a younger age (Baidawi et al., 2011; Wilkinson & Caulfield, 2020).

The prison environment, either social or physical, is often not prepared or adapted to the particular cognitive, functional or motor disabilities and needs of older persons, for example, those who require help with activities of daily living (Ginn, 2012). Prison treatment programs and actions should be adapted to meet specific needs regarding health and medical care and education opportunities, work engagement and meaningful participation in leisure activities (Jovanić & Ilijić, 2015, p. 163). Contradictorily, older prisoners are often described as unwilling or unable to participate in correctional, criminal or probation programmes (Greene & Gibson, 2012).

Adaptation of the surroundings, provision of a more active role of the older persons, social and cultural inclusion and participation, along with the understanding of the needs and respecting the rights and specificities of older persons are characteristics of intergenerational solidarity in society (Solarević & Pavlović, 2018). Comparable to the prison environment, the regimes and treatment programmes are managed and organized following the needs of younger people as the prevailing subgroup of the prison population (Veković et al., 2021). Accordingly, vocational training, education and recreation should be the centre point of treatment programs to contribute to reducing the recidivism rate. However, social, educational and recreational programs are suitable for younger prisoners. Older prisoners are usually not interested in developing new work skills or reaching higher education levels due to their general unemployment. On the other hand, their poor physical and mental health and complex care needs, including frailty and reduced functional mobility, may limit, reduce or restrict their engagement in physical activities and recreation. Some of the factors to consider when creating a program are as follows: the personality of older prisoners, their age, health and other specific needs, and the length of the sentence (Veković et al., 2021, p. 180–181).

Due to institutionalization and the lack of skills for independent living, loss of family ties and contacts or loss of possessions while incarcerated, the release is often described as a complex and challenging process that requires timely multi-disciplinary planning (Forsyth et al., 2015; Ginn, 2012). Lack of formal communication and continuity of care after release is a reported cause of high anxiety levels (Forsyth et al., 2015). Prison conditions and family contacts are recognized dimensions of the quality of prison life (Ilijić et al., 2020; Liebling et al., 2012).

Another challenging circumstance for older prisoners is the loss of family ties and contacts, especially for those who have spent many years in prison (De Motte, 2015). Limited contact with friends and family is listed as one of the major unmet needs of older prisoners (Hayes et al., 2013). The loss, restrictive or limited contact with family or friends, including grandchildren, leads to reduced satisfaction with the quality of life and well-being of the older prisoners (De Motte, 2015). In other words, maintaining contact with important persons outside the prison environment is one of the starting points in preserving the dignity of older prisoners. Therefore, it is necessary to note that contact with family can restore a personal sense of dignity and has a beneficial effect on their rehabilitation and reintegration into society after release, with a far-reaching impact on the prevention of recidivism (Testoni et al., 2020; Tucker et al., 2021).

Contact with friends and family is essential because social support and care for older persons are based on strengthening cohesion between the generations and family members (Solarević & Pavlović, 2018). Factors affecting the maintenance of family contacts are mentioned in the literature. For instance, type of crime since domestic violence or crime against a family member(s) results in the absence of family visits. Among others, the age of family members, place of residence, socioeconomic status, and the availability of material and financial resources for travelling from the place of residence are often listed (Veković et al., 2021).

Key issues and perspectives for promoting treatment and health and social care for older prisoners

Humane, dignified and professional incarceration should be guaranteed to prisoners of all ages, while rehabilitation, education and recreation programs should be built according to individual characteristics, such as physical condition, disability, mental status, or risk to self or others (Doron & Love, 2013). One of the main dilemmas concerning the treatment and health care for older prisoners is whether the prison environment should be age-segregated or integrated (Doron & Love, 2013; Kerbs & Jolley, 2007). Overall, both the integrated and segregated prison environment has limitations and advantages (Danely, 2022).

Kerbs and Jolley (2007) found that a majority of older prisoners (50+ years) supported the use of age-segregated living arrangements to prevent victimization by younger prisoners. As further noted, proponents of segregation consider age-segregated units and facilities safer, more accommodating and necessary to improve older prisoners' physical safety and security, justifying by the older prisoners' vulnerability and preferable living

with the same-age inmates (Kerbs & Jolley, 2007; Stojkovic, 2007). Next, this could help to target services and medical care programs (B. A. Williams et al., 2012) and provide centralized, cost-effective healthcare for the older prisoner (Kerbs & Jolley, 2009). Finally, an age-segregated prison environment improves rehabilitation by promoting treatment opportunities (Kerbs & Jolley, 2009).

Critics of the idea of a segregated setting indicate that unjustified segregation could lead to various problems, including indifference, exclusion from different programs such as mental health services, rehabilitation, employment, and education, and denial of services to older prisoners (Doron & Love, 2013; Stojkovic, 2007), highlighting that it could mean ignoring their preferences (B. A. Williams et al., 2012). One study showed that older prisoners and prison staff were reluctant to segregation as they assumed those prisoners would automatically be labelled as sex offenders (De Motte, 2015). Furthermore, Doron and Love (2013) argued that an integrated prison environment might provide opportunities for breaking down prejudices, negative stereotypes, attitudes and biases towards the oldest members of the community and the old age itself, that is, ageism. Such an approach has starting points in the concept of social inclusion and participation and intergenerational solidarity in society (Solarević & Pavlović, 2018).

The expert meeting held in 2011 and which included a group of specialists in correctional health care, academic medicine, geriatrics, nursing, and civil rights, resulted in guidelines for improving practice (B. A. Williams et al., 2012). Their main goal was to identify priority areas and knowledge gaps and propose a series of actions to improve the care of older prisoners. The main recommendations were focused on the nine-priority areas for a policy agenda related to older prisoners.

First, the term “older prisoner” should be defined as 55 years or older, or in case of cognitive or functional impairments in activities of daily living, younger than 55 years. Second, correctional staff training is recommended, with programs focused on familiarizing with the common age-associated conditions, age-related clinically diagnosed cognitive conditions and the challenges that such conditions can pose in the custodial setting and ways to identify prisoners who need assessment by a health care provider. Third, prison-based functional impairments and activities of daily living that are necessary for independence in prison should be defined because they might be different from those fundamentally required in the community. Fourth, cognitive impairments should be recognized and assessed, with specific attention focused on potential adverse effects of screening, including stigma, vulnerability or parole denials associated with a cognitive deficit. Fifth, the needs of older female prisoners should be

identified to recognize their unique health and social issues. Sixth, it is relevant to create uniform policies for geriatric housing units and facilities, as available to older prisoners but not mandatory. Seventh, identifying challenges for older adults upon release is needed to understand the role of transitional programs in improving outcomes after release, especially for older prisoners with cognitive impairments. Eighth, it is imperative to improve medical early release policies, particularly to address the procedural barriers related to accessing the early release application process. Finally, enhancing the prison-based palliative medicine programs should be encouraged (B. A. Williams et al., 2012).

The organization of training programs, capacity building, provision of adequate support in the prison environment and sensitization of employees, primarily treatment officers and members of security services, has already been recognized as elemental for prisoners with disabilities (Milićević & Ilijić, 2022). Although correctional officers often present a connection between prisoners and the healthcare system, research shows that officers' assessment of disability in their assigned geriatric prisoners still needs improvement (B. A. Williams et al., 2009).

Conclusion

Older prisoners are noticeably the fastest-growing subgroup of the prison population. Since incarceration has far-reaching consequences on all prisoners, worsening of the health and social outcomes of older convicts and additional requirements and costs are not unexpected. The complications are further deepened by taking into consideration the specificities of the older prison population. The challenges imposed by the contemporary increase of the older prisoner population provide further support to the proposition that examining the different characteristics of this population as distinct phenomena is justified. This literature review presented some of the characteristics of this population and main research issues and perspectives, including various dilemmas, questions and challenges for experts and scholars in prison study.

Based on the presented findings, it can be concluded that there is an evident need to differentiate more clearly the age limit of ageing in the prison environment compared to ageing in the general population. Additionally, a transitionary period should be taken into consideration, as well. Next, older prisoners have a complex set of health and social needs, and there are two distinctive approaches to overcome the resulting difficulties and complications – an age-segregated or integrated prison environment, each of which has its own limitations and advantages. Finally, the training of correctional staff and officers should be intensified and include awareness of older prisoners' needs.

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Veljko Turanjanin[*]

RIGHT TO DIGNIFIED DEATH AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The right to life is one of the fundamental human rights, guaranteed primarily by the European Convention on the Protection of Human Rights and Fundamental Freedoms. The legalization of compassionate killing is a spectrum of issues that have been dealt with in very different ways from state to state. Legislators very rarely dare to complete decriminalization, so this solution is represented in the Benelux countries, while in the highest percentage of countries this form of deprivation of life is viewed as a privileged form of murder. In recent years, the question has been raised more and more frequently, both before the national and the European Court of Human Rights, whether the right to life can be derived from the opposite right, that is, the right to die. As a result, proceedings were conducted before the European Court on the issues of alleged violations of the state against the applicants. The author based his considerations in this paper on the positions of the European Court, expressed through several decisions, primarily through judgments in which he decided on the merits, but also in those cases in which he rejected petitions as inadmissible.

Keywords: *euthanasia, medically assisted suicide, right to life, right to a dignified death, patient.*

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1. Introduction

According to the European Convention on Human Rights and Freedoms right to life constitutes the most significant human right, which is considered a fundamental natural human right (see European Convention on Human Rights and Fundamental Freedoms; Report of the Ministry for the human and minority rights of the Serbia and Montenegro, 2006, 10-11) and is the first among the rights of citizens, which is why its criminal-law protection must be set appropriately. In theory, we can find many attitudes that point out that the way one dies is part of one's personal autonomy (Marshall 2009: 197). However, as Daniel Rietiker points out "To talk about suicide is not an easy task, even in a modern and open society. It is even more difficult for a judge to deal with this issue. More difficult still is the task of deciding such a case on an international level, far from the realities of the facts and the suffering of the people concerned (Rietiker, 2012: 85)." The European Court of Human Rights observes the right to life as an absolute right that can under no circumstances be interpreted negatively and adopted diametrically opposed right to death, nor can be established the right to self-determination in the sense of adopting the power of individuals to choose death instead of life (Pretty v. United Kingdom, 2002). Of course, this judgment will later be analyzed in detail. The right to death is particularly topical in regulating questions of euthanasia (Pavlović and Živković, 2015; Lazović, 2021), when dealing with the question of whether the life of a seriously ill and incurable patients should be medically ended or they should be enabled to exercise the right to life only for natural causes, i.e. whether to give preponderance to the right to life at all costs or to the right to death (Jotanović, 2010: 180; Petrović, 1995: 93-103). European Convention on Human Rights has a great influence on the regional legislators and legislatures, so, it is unavoidable to reconsider points of view of the ECHR about euthanasia and physician-assisted suicide.

The Council of Europe has made a clear stance on euthanasia, prohibiting active, but not its passive variant, believing that the suspension of treatment that the patient does not want must be allowed, because it prolongs the suffering, hence, such proceedings are not seen as a mercy killing but as letting the disease take its course (Jušić, 2002: 305). This can best be seen from the 1418/1999 Recommendation that encourages member states to decriminalize indirect active and passive euthanasia, while direct active euthanasia should remain prohibited. However, the Council of Europe in 2009, made a step forward to the adoption of direct active euthanasia by adopting *Recommendation on the principles regarding the authorization and the anticipative statements in the event of disability*, which along with the principle of autonomy would provide that any person may in advance, in case of later disability, authorize another person to decide on certain issues

instead of him, and indirect active and passive euthanasia appertain to these matters, while the possibility of application of direct active euthanasia remains open (Turanjanin and Mihajlović, 2014: 55). In this regard, in Hungary there is a legal possibility to write a so-called living will, wherewith a person can in advance refuse certain forms of treatment, and appointed person is in charge of the implementation of this decision. This decision must be renewed upon the expiration of every two years, while its withdrawal is possible at any time (Jušić, 2002: 305).

The European Court of Human Rights has dealt with applications related to the deprivation of life from compassion on numerous occasions, whereby some of them were rejected as inadmissible. In couple of cases, ECHR dealt with the current state laws, which are not sufficiently clear, on controversial issues (Interian 2015, 20). For example, one of the most famous decisions was in the case *A, B and C v. Ireland*. Given the systematics of this work in the first place we will briefly explain the cases in which a court has issued a decision on inadmissibility, and thereafter will be elaborated cases in which it was decided on the merits. It is interesting to note that the number of cases the European Court decided is at the same time the most famous cases in this domain in countries against which the application was filed. In some cases the euthanasia appeared only as a side element of the facts, wherewith we begin the analysis of the practice of the European Court.

However, when we deal with this issue, it is unavoidable at the beginning to point out the most significant articles of the European Convention on Human Rights and Fundamental Freedoms. Those are articles 2, 3, 8, 9 and 14. Those are the key articles based on which the applicants claimed violations of the Convention. On the first place, the relevant part of the Article 2 provides (right to life):

1. Everyone's right to life shall be protected by the 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 in 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 defense of any person from unlawful violence;*

b) *In order to effect a lawful arrest or to prevent the escape of the person lawfully detained;*

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 and closely linked in many areas with Article 3 (Turanjanin, 2021; Matić Bošković and Gál, 2021; Paunović and Pavlović, 2021; Jovašević and Radulović Glamočak), it enshrines one of the basic values of the democratic societies making up the Council of Europe.[1] 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 (Banović and Turanjanin, 2021; Vandenhole, 2016: 49; Turanjanin, Banović, & Ćorović, 2018).[2] Then, the Article 3 (prohibition of torture) provides: *No one shall be subjected to torture or to inhuman or degrading treatment or punishing*. The next relevant article is Article 8 (right to respect for private and family life):

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. 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, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

An Article 9 protects the right to freedom of thought, conscience and religion:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in a community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of

[1] See, for example, Andronicou and Constantinou v. Cyprus, § 171; Solomou and Others v. Turkey, § 63 and Giuliani and Gaggio v. Italy, § 174.

[2] Some authors believes that this article refers only to intentional deprivation of life (see Hessbruegge, 2017: 177).

public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Finally, the Article 14 prohibits discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, natural or social origin, association with a national minority, property, birth or other status.

The State in principle has positive and negative obligations. As Erdmane states, although most civil rights, such as the right to liberty, the right to private life and prohibition of inhuman and degrading treatment for the greater part require the State to fulfill its negative duty to refrain from unjustified interventions, the positive duty of the State to ensure certain guarantees and choices in respect of some civil rights is often more present than it might seem to be (Erdmane, 2010: 124).

2. Euthanasia as a sporadic issue

First, the case *Lind v. Russia* (Lind v. Russia 2007) will be presented, in which the applicant, a Russian and a Dutch citizen, considered his right to family life violated because he was not released from custody to attend the farewell ceremony of his father who was dying of cancer and requested the application of euthanasia in the Hague, which was approved, but was only allowed a phone call. The court unanimously ruled that there was a violation of applicant's rights, explaining the decision by the fact that Netherlands through the ambassador provided a guarantee that the applicant would be returned to Russia, which the Russian authorities have not considered, and one-minute conversation, which was interrupted by the staff of the detention facility, did not constitute a replacement for personal contact, whereby Russia has violated Art. 8 of the Convention. Or, in the case of *Zoon v. Netherlands* (Zoon v. Netherlands, 2000), the applicant was convicted for practicing of euthanasia, whereat he reported that the patient had died of natural causes.

In the following case, *Glass v. the United Kingdom* (Glass v. the United Kingdom 2004), the physicians applied the medications to the child, despite the opposition of the mother, as a legal representative. Namely, as the applicants in this case have appeared the child and his mother. The first applicant was severely handicapped child, who in 1998 underwent surgery because of respiratory problems. The physicians were of the opinion

that the patient was dying and that further intensive measures were inadequate, and, as his condition improved, he returned home. The child was repeatedly re-admitted to the hospital due to respiratory infections, whereby it came to major disagreements between the mother and physicians about the way the child should be treated. During one of the worst crises of the child, physicians were of the opinion that he was terminally ill, and, in spite of his mother's will, and in order to alleviate distress, injected diamorphine and in the medical records of diseases noted that the patient should not be resuscitated, also, without consulting the mother. The child survived, and mother initiated proceedings before national courts, which did not result in proceedings against a physician, whereupon she referred to the European Court of Human Rights. This Court, however, as opposed to national, unanimously took the view that Article 8 of the Convention had been violated. Its position, the court based on the fact that the imposition of medical treatment of the child despite constant opposition of the mother represents an interference with the child's right to respect for private life. Since the national legal framework is in accordance with the standards of the Convention, the Court nevertheless emphasized that the conduct of medical workers had a legitimate aim, because the physicians thought it was in the best interest of the child. However, the hospital was obliged to ask the court to intervene because of disagreements with the mother of the child, instead of trying to impose their view of the best interests of the child, which resulted in a violation of Article 8 of the Convention.

3. Inadmissible applications

In Spain, one of the most famous cases, which sparked a debate about the legalization of euthanasia, is the case of Ramon Sampedro, after whose death his sister initiated proceeding before the European Court.[3] In this case, *Sanles Sanles v. Spain*, the Court

[3] Spain is a unique country in Europe for specifically defining euthanasia in the Criminal Code (Criminal Code of Spain - CCS (Código Penal Ley Organica, no. 10/1995 of 23 November 1995)). According to Criminal Code of Spain, euthanasia represents causing or aiding another person directly causing the death of a person, at the express, serious and unequivocal request of that person, in the event of the victim suffering a serious disease that would unavoidably lead to death, or that causes permanent suffering that is hard to bear. (Art. 143.4. CCS). However, fulfillment of these conditions does not lead to impunity of the person who performed euthanasia, but the definition draws a distinction between the deprivation of life from compassion and other forms of killing, and provides that the punishment imposed for this form of killing is lower by one or two degrees to the ordinary murder (Groenhuijsen, 2007: 8). Thus, despite the fact that there is a large number of supporters of legalizing euthanasia among the citizens of Spain (which is reflected in acquittals for 15 physicians in early 2008, who were charged with the execution of euthanasia (for more on this, see the document News 2009), in the positive law euthanasia occupies place of a privileged murder, which is punishable by a lower prison sentence compared to ordinary murder. The debate over the legalization of euthanasia in Spain has been going on for many years, and, according to many, can be divided into a phase before the case of Ramon Sampedro and after it. Namely, Ramon Sampedro had been suffering from quadriplegia for 29 years, from which he fell ill during a dive when he was only 25 years old. The last years of his life he fought before the courts for his right to die, since he was

ruled on the inadmissibility on the 26th of October 2000. Previously, the applicant had continued the proceeding before the Constitutional Court of Spain, which, after the death of the appellant, suspended the proceeding, rejecting the request of the patient's sister to continue the proceeding as his successor. The proceeding before the European Court had the identical outcome, since the Court found the application inadmissible due to incompatibility ratione personae with Articles 2, 3, 5, 6, 8, 9 and 14 of the Convention, taking the view that the applicant was not directly affected by the alleged violations of the Convention and, therefore, could not have victim status. The ECHR considers

....that the rights claimed by the applicant under Articles 2, 3, 5, 8, 9 and 14 of the Convention belong to the category of non-transferable rights. Consequently, the applicant cannot rely on those rights on behalf of Mr Sampedro in the context of his action in the domestic courts (Sanles Sanles v. Spain 2000).

Here, we have to emphasize another Court's conclusion:

The Court concludes that the applicant cannot act on Mr Sampedro's behalf and claim to be a victim of Articles 2, 3, 5, 8, 9 and 14 of the Convention, as required by Article 34 (Sanles Sanles v. Spain 2000).

Mr Sampedro died before the end of the proceedings in the Spain and due to that fact the applicant could not be regarded as a victim before the ECHR. However, this case opened the issue of the criminal responsibility of the person who assists someone who is willing to end his life (Rietiker, 2012: 111).

In December 16, 2008, the European Court ruled on the inadmissibility in the *Ada Rossi and Others v. Italy*. In this case, a central issue concerned the admissibility of passive euthanasia. In January 1992, the patient, 20-year-old girl, fell into a coma as a result of head injuries in a car accident. Soon after, the situation has drastically deteriorated, because the patient fell into a vegetative state, devoid of most cognitive functions. After seven years, her father brought proceeding before the court in order to obtain authorization for the physician to discontinue the artificial nutrition procedure, basing the

not physically able to commit suicide, and euthanasia was prohibited. In January 1998, Ramon Sampedro, having previously ensured that he was being filmed, committed suicide by slurping the cyanide through straw. Of course, he had helpers who were not found, so criminal proceedings were suspended. After this case the number of supporters of euthanasia has grown significantly. For more on this issue see Guerra, 1999: 426-432. Here we should not forget the fact that, while in Greece operates a strong Orthodox church in Spain a major influence has Catholic Church, which considers euthanasia anti-social and immoral phenomenon, which should be tried as an ordinary murder (Turanjanin and Mihajlović, 2014: 60-61; Turanjanin, 2014: 199-215).

request on the alleged conversations, desires and ideas that his daughter had expressed in relation to a dignified death. After being rejected by the Court of first instance, and twice (1999 and 2003) in appeal procedure, the Supreme Cassation Court in 2005 abrogated the verdict, and again, in 2007, abrogated the latest decision of the Court of Appeal and stated that legal authority may authorize termination of artificial nutrition procedure, when the patient is in constant vegetative state and if there are evidence that, he would oppose to further medical treatment if he was able to do so. Subsequently, the Court of Appeal of Milan has given the required authority and the Supreme Court on November 11 dismissed the appeal of the Public Prosecutor against the decision of the Court of Appeal, explaining that the public prosecutor's office had no grounds for the appeal. The petition was filed to the European Court by six Italian nationals, represented by associations consisting of family members of persons with serious disabilities. The complaint was against the decision of the Milan courts, arguing that their rights were compromised. The Court reiterated that, in principle, mere existence of a law was not enough for a person to appear in court as applicant, but the same law must be applied to his detriment. Therefore, the decision of the court is a single legal act which has the effect only between the parties, and therefore, applicants are not directly damaged by the said judgments. The Court therefore held that neither the applicants nor the organizations that represented them, in the present case could be considered claimants.

Here, we could mention the case *Burke v. the United Kingdom* (Burke v. the United Kingdom 2006), in which the applicant suffered from an incurable degenerative brain condition and feared that the guidance applicable in the United Kingdom could lead in due course to the withdrawal of his artificial nutrition and hydration. The Court declared his application, lodged under Articles 2, 3 and 8 of the Convention, inadmissible as being manifestly ill-founded.

The last case in which the court made this decision is the *Nicklinson and the Lamb v. the United Kingdom*.[4] After Niklinson's death, his wife filed the application, holding that

[4] It was a joint case of Tony Nicklinson, Paul Lamb and a person marked only as Martin. All three patients had suffered a stroke, but they were not terminally ill. Although they undoubtedly had relatively long period of life left, each of them was in a different life situation and sought a way out. Niklinson asked his physician to help him commit suicide, because the only way he could do this alone was by refusing the food and beverages. Therefore, his primary request was focused on freeing physician of criminal responsibility, and the other to the fact that the law was contrary to the guaranteed right to a private life. Martin wanted to be allowed to travel to the Swiss clinic *Dignitas*, although his wife, who was a nurse by profession, was against it. Martin's request was aimed at the published policy of Public Prosecutions about prosecuting accomplices not being clear enough. Both requests were dismissed, after which Niklinson died of pneumonia. The wife of the deceased, and the other patient filed a complaint, and Lamb joined the complaint. In a judgment of 132 pages, all appeals were dismissed, although Martin had partial success, since the Court of Appeal nonetheless concluded that the

national courts did not determine the compatibility of the legislation regulating the assistance in suicide to the right to respect for private and family life. The second applicant, who was paralyzed and wanted to end his life, based his application on the fact that the state did not allow the authorization granting another person the power to inject him a lethal dose of medicament, with his consent. Both applications were rejected. The first application was rejected because the European Court held that Article 8 of the Convention did not impose an obligation on the state to examine the merits of the complaint, and that applicant failed to prove that there was any relevant progress since the judgment in the case Pretty v. the United Kingdom. Regarding the other application, the court held that the applicant complained only about the ban on assisted suicide, not stressing the argument that the procedure to legalize active euthanasia under certain conditions should be initiated.

4. Admissible applications

4.1. Pretty v. The United Kingdom

A very interesting case in this domain is the case of *Pretty v. the United Kingdom*, in which the subject of the dispute was the refusal of the state to provide warranties not to prosecute applicant's husband if he helped her commit suicide. Applicant is 43-year-old woman, who was suffering from complete paralysis, which would eventually lead to her death. Despite the extremely difficult physical condition, her intellect and capacity to make decisions were unaffected. In the terminal phase of the disease, she suffered a great deal from pain and considered that such death was undignified, and she wanted to commit suicide. But because of her physical condition, that was impossible without help. Assistance in suicide, however, in the UK is a criminal offense. Therefore, she addressed to the Director of Public Prosecutions, demanding guarantees that there would be no criminal proceedings against her husband if he helped her with the plan. Her request was dismissed in all instances. The application to the European Court of Human Rights was based on a violation of Articles 2., 3., 8., 9. and 14. of the Convention.

On the first place, the applicant submitted that permitting her to be assisted in committing suicide would not be in conflict with Article 2 of the Convention; otherwise, those

prosecution ought to better clarify its policy. A judgment may be found at: *supremecourt.uk/, accessed October 2014.* Also, for more on the subject see Lipscombe and Barber, 2014; Turanjanin, 2014: 287-302; case: *Nicklinson and Lamb v. the United Kingdom*, Decision date 2015/06/23.

countries in which assisted suicide was not unlawful would be in breach of this provision. However, the Court held

...that the first sentence of the Article 2 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. This obligation extends beyond a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed-up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; it may also imply in certain well- defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual... The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that "the right to life" guaranteed in Article in Article 2 can be interpreted as involving a negative aspect (Pretty v. United Kingdom 2002: 38, 39).

Secondly, the applicant argued that there was no room under Article 3 of the Convention for striking a balance between her right to be protected from degrading treatment and any competing interest of the community, as the right was an absolute one. In any case, the balance struck was disproportionate as English law imposed a blanket ban on assisting suicide regardless of the individual circumstances of the case. Here, we have to say that medical treatment is closely linked to the at least two human rights: the right to private life and prohibition of inhuman and/or degrading treatment and both of them are derived from two fundamental values: human dignity and personal autonomy (Erdmane, 2010: 125). As a result of this blanket ban, the applicant had been denied the rights to be assisted by her husband in avoiding the suffering awaiting her without any consideration having been given to the unique facts of her case, in particular that her intellect and capacity to make decisions were unimpaired by the disease, that she was neither vulnerable nor in need of protection, that her imminent death could not be avoided, that if the disease ran its course she would endure terrible suffering and indignity and that no one else was affected by her wish for her husband to assist her save for him and their family who were wholly supportive of her decision. Without such consideration of the facts of the case, the rights of the individual could not be protected.

The Court found no violation of the Article 3 of the Convention, in which case the applicant extended the notion of the 'treatment' to the refusal of the prosecuting authority to make an undertaking not to take proceedings against her husband (Schabas, 2015: 172) and stated:

As regards the types of "treatment" which fall within the scope of Article 3 of the Convention, the Court's case-law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering... In the present case, it is beyond dispute that the respondent State has not, itself, inflicted any ill-treatment on the applicant. Nor is there any complaint that the applicant is not receiving adequate care from the State medical authorities (Pretty v. United Kingdom 2002: 52, 53).

The applicant argued that the State violated the Article 8 of the Convention. According to her, it was clear that the right to self-determination encompassed the rights to make decisions about one's body and what happened to it. She submitted that this included the rights to choose when and how to die and that nothing could be more intimately connected to the manner in which a person conducted her life than the manner and timing of her death. It followed that DPP's refusal to give an undertaking and the State's blanket ban on assisted suicide interfered with her rights under Article 8. We may say that it is true, because choosing the way on which a person wishes to die is a private matter (Minelli, 2008: 150-151). However, the Court stated:

The very essence of the Convention is respect for human dignity and human freedom. Without any negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude, which conflict with strongly held ideas of self and personal identity... The Court concludes that the interference in this case may be justified as "necessary in a democratic society" for the protection of the rights of others and accordingly, that there has been no violation of Article 8 of the Convention (Pretty v. United Kingdom 2002: 58, 78).

Then, the applicant submitted that the Article 9 protected the right to freedom of thought, which has hitherto included beliefs such as veganism and pacifism. In seeking the assistance of her husband to commit suicide, the applicant believed in and supported the notion of assisted suicide for herself. In refusing to give the undertaking not to prosecute her husband, the DPP has interfered with his right, as had the United Kingdom in imposing a blanket ban that allowed no consideration of the applicant's individual circumstances. For the same reasons as applied under Article 8 of the Convention, that interference had not been justified under Article 9 paragraph 2. The Court's understanding was very clear:

The Court does not doubt the firmness of the applicant's views concerning assisted suicide, but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9 paragraph 1 of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance... As found by Commission, the term "practice" as employed by a religion or belief (Pretty v. United Kingdom 2002: 82).

The final claim was related to the discrimination. The applicant submitted that she suffered from discrimination because of her being treated in the same way as those whose situations were significantly different. Although the blanket ban on assisted suicide applied equally to all individuals, the effect of its application to her when she was so disabled that she could not end her life without assistance was discriminatory. She was prevented from exercising a right enjoyed by others who could end their lives without assistance because they were not prevented by any disability from doing so. She was therefore treated substantively differently and less favorably than those others. The Court decided:

For the purposes of the Article 14, a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justifications that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. Discrimination may also arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different... In the Court's view, objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide (Pretty v. United Kingdom 2002: 87, 88).

Here, it is unavoidable to connect the certain Court's view that will be relevant in the future jurisprudence, especially regarding the case *Lambert and Others v. France*:

In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention. As recognized in domestic case-law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his

life. The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity. (Pretty v. United Kingdom 2002: 63, 65).

As a conclusion, the Court found no violation of Convention on any ground. In the first place, the Court pointed out that the concept of the right to life does not include its negative aspect. In the opinion of the court, quality of life of individuals and decision on what they want to do with their lives, do not fall within the scope of Article 2 of the Convention, which is why it cannot, without distortion of the sense, be interpreted as a right to die, nor create a right to self- determination. In other words, the right to die cannot be derived from Art. 2. regardless of whether suicide assistance is provided by a third party or by the state. Secondly, the Court rejected the argument that the State had violated its obligations guaranteed by the Convention, because it allegedly failed to provide adequate medical care for applicant. Essentially, there was no medical treatment, because the claim that the refusal of a guarantee not to prosecute constituted inhuman and degrading treatment, for which the state was responsible, was untenable, since it represents a new and expanded construction of a treatment, which is far from the usual meaning of the word. The most detailed explanation the court gave regarding the violations of the right to respect for private life, where he stressed that the concept of autonomous will was an important principle. In addition to the fact that in such case a person manages his life in his likeness, this principle can lead to activities that carry a risk to the health of the individual. Respect for private life is one of the key parts of the Convention, and without denying the sanctity of life, the court took the view that quality of life is part of the article 8. However, the country has the obligation to assess the potential abuse if there was a mitigation of rules prohibiting assisted suicide or exception for certain groups of patients. Therefore, the court held that the State did not violate its obligations neither by incriminating assisted suicide, nor by denying the guarantee that there would be no criminal proceeding, because there were strong reasons, based on the rule of law, against the exclusion of individuals and groups of law enforcement, which is why the behavior of the state could not be considered arbitrary nor irrational. In this case, the decision not to prosecute was entirely discretionary and there was little certainty as to when a prosecution would take place. It was possible that this uncertainty represented an

infringement of Article 8, the right to respect for private life, leading to unpredictability in the law. The House of Lords in *Pretty* had dismissed any argument on Article 8 but the ECHR appeared to decide otherwise (Loveless, 2012: 281). Finally, the Court drew attention that there were two categories of people who wanted to commit suicide, and these were people who were able to do so independently and those that were not, whereby the boundary line between them was usually subtle.

4.2. Haas v. Switzerland

The next case in which the applicant referred to the violation of the right to family life under article 8 of the Convention is *Haas v. Switzerland*. The applicant in this case has suffered from bipolar affective disorder for about twenty years, resulting in the conclusion that it has become impossible to live with dignity, which is why he addressed to the Swiss organization that offers assistance to persons in ending their lives. However, he had no success in finding a psychiatrist willing to prescribe a lethal dose of medication (sodium pentobarbital), after which he tried to procure the medicine, without a prescription, through the association, from federal and cantonal authorities, also without success. Then, the applicant addressed courts, which dismissed his request on the grounds that distinction should be made between the right to decide about one's own death, which was not the subject of the proceeding, and the right to assistance in committing suicide by the state or a third party, and such right does not arise from the Convention. Before the European Court, the applicant stated that his right to a safe and dignified way to end life had not been respected in Switzerland, basing his argument on the fact that, according to him, conditions for prescription of medication were fulfilled based on a psychiatric evaluation. In fact, the applicant alleged that he was the victim of interference with the exercise of his right to respect for his private life within the meaning of Article 8 of the Convention. He considered that the ingestion of sodium pentobarbital was the only dignified, certain, rapid and pain-free method of committing suicide. The applicant further submitted that the Government had ignored the fact that he had been suffering from serious psychiatric problems for many years. Therefore, the subject of dispute in this case is whether, under Article 8 of the Convention, the State must ensure that the applicant can obtain a lethal substance, sodium pentobarbital, without a medical prescription, by way of derogation from the legislation, in order to commit suicide painlessly and without risk of failure (Haas v. Switzerland 2011: 52). His intention to end his life was unambiguous, as was clearly shown by his previous suicide attempts and his efforts to obtain legal approval for his decision. It was not therefore necessary for him to prove that he was serious in his intent, through either an in-depth psychiatric assessment or psychiatric assistance over a prolonged period. The Court noted that

...In the light of this case-law, the Court considers that an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention. With regard to the balancing of the competing interests in this case, the Court is sympathetic to the applicant's wish to commit suicide in a safe and dignified manner and without unnecessary pain and suffering, particularly given the high number of suicide attempts that are unsuccessful and which frequently have serious consequences for the individuals concerned and for their families. However, it is of the opinion that the regulations put in place by the Swiss authorities, namely the requirement to obtain a medical prescription, pursue, inter alia, the legitimate aims of protecting everybody from hasty decisions and preventing abuse, and, in particular, ensuring that a patient lacking discernment does not obtain a lethal dose of sodium pentobarbital. Such regulations are even more necessary in respect of a country such as Switzerland, where the legislation and practice allow for relatively easy access to assisted suicide. Where a country adopts a liberal approach in this manner, appropriate implementing measures for such an approach and preventive measures are necessary. The introduction of such measures is also intended to prevent organizations that provide assistance with suicide from acting unlawfully and in secret, with significant risks of abuse. In particular, the Court considers that the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated. Like the Government, it is of the opinion that the restriction on access to sodium pentobarbital is designed to protect public health and safety and to prevent crime. In this respect, it shares the view of the Federal Court that the right to life guaranteed by Article 2 of the Convention obliges States to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will of the individual concerned. It considers that the requirement for a medical prescription, issued based on a full psychiatric assessment, is a means enabling this obligation to be met. Moreover, this solution corresponds to the spirit of the United Nations Convention on Psychotropic Substances and the conventions adopted by certain member States of the Council of Europe (Haas v. Switzerland 2011: 56-58).

So, in this case the court summoned that the individual's right to decide how and when to end their life, provided that he or she was capable to be aware and have free will and to act in accordance with it, is one of the aspects of the right to privacy. However, in the present case, the Court considers that the focus of the problem is on the applicant's claim whether the state has a positive obligation, brought under Art. 8 of the Convention, to ensure that the applicant obtains without a prescription, substance that would allow him

to end his life without pain and the risk that he will fail to successfully perform the death-causing act. Here, the Court distinguished *Haas* from *Pretty*. Then the court drew attention to the fact that members of the Council of Europe were far from consensus on the individual's right to decide when and how to end life, and even though some states have decriminalized assisted suicide, most of them are still inclined to the protection of life. Therefore, despite accepting the applicant's desire to commit suicide in a safe and dignified manner, the Court considers that the Swiss legislator's demand to procure medical prescription for the purpose of obtaining sodium pentobarbital makes a legitimate aim, which is reflected in people protection from sudden decisions and abuse prevention, which is a risk that should not be underestimated in any legal system where access to assisted suicide is mitigated. The European Court shared the position of national courts that there should be a clear procedure able to ensure that the decision of the person who has decided to end life is a reflection of their free will. Switzerland has to clarify its position on assisted suicide (Interian, 2015: 23). The required medical prescription, issued on the basis of a psychiatric assessment, is an instrument which meets the above requirements. The only thing in this case that remained disputable is whether the applicant had effective access to medical assessment, on whose basis he would obtain sodium pentobarbital, and if the answer to this question was negative, then the question of choice of manner and the moment of death would be theoretical and illusory. Based on the facts of the case, the court was not convinced that the applicant found it impossible to find a psychiatrist willing to help him, and accordingly unanimously ruled that Switzerland has not violated its obligations in this case, even if the claim that it had an obligation to take measures and to facilitate a dignified suicide was accepted. *Haas* has a great influence on Swiss law, which will be discussed later. However, according to the ECHR's interpretation, a mentally ill patient in not precluded from assisted suicide by the law.

4.3. Koch v. Germany

In the case *Koch v. Germany*, the applicant referred to art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, basing his application on the fact that his wife, following the refusal of the German authorities to allow her the prescription of a medications for the purpose of comitting suicide, traveled to Switzerland, where, at a special clinic, founded for such purposes, committed suicide, whereby the German courts did not enter into the merits of the case when deciding on her request. In fact, in 2004, while suffering from quadriplegia[5], she filed a petition to the

[5] Quadriplegia is damage to the spinal cord in the neck area of the spine, resulting in paralysis of the upper and lower extremities.

Federal Institute for Pharmaceutical and Medical Products (Federal Institute for Pharmaceutical and Medical Products), in order to obtain authorization for the possibility of prescribing lethal doses of the medicine she would use to commit suicide at home. The applicant pointed out that his wife had been prevented from ending her life within the privacy of their family home, as originally planned by the couple, and instead he had been forced to travel to Switzerland to enable his wife to commit suicide. The lethal dose of medication requested by the applicant's wife would have been necessary in order to allow ending her life by a painless and dignified death in her own family home. There were no other means available that would have allowed her to end her life in her family home. In particular, the pertinent rules would not have allowed her to end her life by interrupting life-supporting treatment in a medically assisted way, as she was not terminally ill at the time she decided to put an end to her life. The applicant accepted that a measure of control was necessary in order to prevent abuse of lethal medication. However, suicide should be allowed if it was justified on medical grounds. The applicant further considered that assisted suicide was not incompatible with Christian values and was more broadly accepted by society than the Government might assume. The applicant considered that the instant case fell to be distinguished from the *Sanles Sanles* case. In particular, he shared a much closer relationship with the deceased person than the sister-in-law who lodged the complaint in the above-mentioned case. Furthermore, the applicant, in the instant case, could claim a violation both of his deceased wife's rights and of his own rights under Article 8. However, the Institute has dismissed the request, and after that the complaint against the decisions taken as well. In February next year, she traveled with her husband to Switzerland, which was followed by a described outcome. Thereafter, the applicant has sent several requests and complaints to the courts in Germany, in order to prove the unlawfulness of the decisions of the Institute, but all his acts were dismissed as inadmissible.

In a judgment issued in favor of the applicant, the court stated that this case is different from cases that had previously been resolved, in which the successor of the deceased or her close relatives appear, since the applicant considered that in this case his rights guaranteed by the Convention were violated. The Court particularly took into account the fact that the applicant and his wife had been married for 25 years and had been extremely close, which, among other things, reflected in the fact that the applicant has experienced her suffering, ultimately accepting and supporting her desire to end her own life, and in the journey to Switzerland to grant her wish, and after that, in initiating proceedings before national courts, in his name. According to Court's opinion, it is precisely these

circumstances that showed that the applicant had a strong and persistent interest in resolving the case on its merits. The Court stated:

Having regard to the above considerations, in particular to the exceptionally close relationship between the applicant and his late wife and his immediate involvement in the realization of her wish to end her life, the Court considers that the applicant can claim to have been directly affected by the Federal Institute's refusal to grant authorization to acquire a lethal dose of pentobarbital of sodium... Having regard to the principle of subsidiarity, the Court considers that it is primarily up to the domestic courts to examine the merits of the applicant's claim. The Court has found above that the domestic authorities are under an obligation to examine the merits of the applicant's claim. Accordingly, the Court decides to limit itself to examining the procedural aspect of Article 8 of the Convention within the framework of the instant complaint. It follows from the above that the domestic courts' refusal to examine the merits of the applicant's motion violated the applicant's right to respect for his private life under Article 8 in of the Convention... The Court concludes that the applicant's complaint about a violation of his late wife's rights under Article 8 of the Convention is to be rejected under Article 34 as being incompatible ratione personae *with the provisions of the Convention* (Haas v. Switzerland 2011: 50, 71, 72, 82).

This case re-opened fundamental questions concerning the patient's decision to end his own life. Based on the foregoing, the Court concluded that the applicant was directly affected by the refusal of the competent institution to help him and his wife, which is inextricably mixed with the right to family life. Furthermore, given the procedural branch of Article 8 of the Convention, the Court took the opinion that the rights of the applicant were not sufficiently protected in Germany, and that he could not rely on national legislation, because he did not have *locus standi*, since only the first instance administrative court held that the conduct of the Institute was legitimate and in accordance with Art. 8 of the Convention, while the court of second instance and the Federal Constitutional Court did not go into the merits of the dispute. Thus, the European Court of Human Rights unanimously took the view that the refusal of the courts to go into the merits of the dispute did not have a legitimate aim, and that there was a violation of the applicant's rights. However, when it comes to violations of the rights of the deceased wife, the court unanimously ruled that the rights protected by Art. 8 of the Convention were not transferable, and that in this part the application was inadmissible as incompatible *ratione materiae* with the Convention.

4.4. Gross v. Switzerland

Another case, that has caused more attention lately, also in connection with the Swiss legislator, is the case Gross v. Switzerland (Gross v. Switzerland 2014). The verdict caused a huge controversy, on the one hand because the court derogated from the opinion expressed in the previous judgment, and on the other hand, because the case was referred to the Grand Chamber after issuing the judgment, which rejected the application as inadmissible due to the death of the applicant. In this case the applicant has, for many years, desired to end her own life, as she has become weaker and sleazier over time, without the wish to prolong the suffering caused by declining physical and mental capabilities. After unsuccessful suicide attempt, she decided to ask for a prescription for sodium pentobarbital. However, four physicians refused to issue a medical prescription, justifying such decision by various reasons, especially the fear of the criminal proceedings, the prohibition imposed by the Code of physicians and potential negative professional consequences. The Administrative Court has also dismissed the plea.

The Court considered that the central question in this case was whether the applicant's desire to be supplied with sodium pentobarbital for the purpose of ending her life appertained to the rights to private life under Art. 8 of the Convention, and further, whether the State failed to provide sufficient guidelines that would define whether physicians were obliged to issue a prescription, and under what conditions. According to Swiss law, inciting and assisting in suicide are punishable only in the event that this act is committed for selfish motives. The Swiss Federal Supreme Court, through its decisions, set the rules and conditions under which a physician had the possibility to prescribe sodium pentobarbital to the patient for the purpose of suicide. The guidelines are related to the care of patients who are terminally ill, and were later issued by some non-governmental organizations, but do not have the power of law. They apply to patients whose physician has come to the conclusion that the disease would inevitably lead to their death within a few days or weeks. The applicant, however, was not terminally ill, thus her case did not fall within the scope of application of the guidelines, but the state did not submit any other material that could serve as a guideline, whose absence, in the opinion of the court, prevented the physicians from issuing a prescription, which they would otherwise be inclined to do. In the opinion of the Court, it is this uncertainty that has caused the applicant a noticeable degree of pain, which would not be the case if the state prescribed the conditions under which physicians were authorized to issue a prescription to individuals who have freely made that difficult decision, whereby their death would not be the result of specific medical state. Therefore, the Court took an opinion:

Turning to the circumstances of the instant case, the Court observes at the outset that in Switzerland, pursuant to Article 115 of the Criminal Code, inciting and assisting suicide are punishable only where the perpetrator of such acts is driven to commit them by "selfish motives". Under the case-law of the Swiss Federal Supreme Court, a physician is entitled to prescribe sodium pentobarbital in order to allow his patient to commit suicide, provided that specific conditions laid down in the Federal Supreme Court's case-law are fulfilled The Court observes that the Federal Supreme Court, in its case-law on the subject, has referred to the medical ethics guidelines on the care of patients at the end of their life, which were issued by a non-governmental organization and do not have the formal quality of law. Furthermore, the Court observes that these guidelines, according to the scope of application defined in their section 1, only apply to patients whose physician has arrived at the conclusion that a process has started which, as experience has indicated, will lead to death within a matter of days or a few weeks. As the applicant is not suffering from a terminal illness, her case clearly does not fall within the scope of application of these guidelines. The Court further observes that the Government have not submitted any other material containing principles or standards which could serve as guidelines as to whether and under which circumstances a physician is entitled to issue a prescription for sodium pentobarbital to a patient who, like the applicant, is not suffering from a terminal illness. The Court considers that this lack of clear legal guidelines is likely to have a chilling effect on physicians who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription. This is confirmed by the letters from Drs B. and S., who both declined the applicant's request on the grounds that they felt prevented by the medical practitioners' code of conduct or feared lengthy judicial proceedings and, possibly, negative professional consequences. The Court considers that the uncertainty as to the outcome of her request in a situation concerning a particularly important aspect of her life must have caused the applicant a considerable degree of anguish. The Court concludes that the applicant must have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, State- approved guidelines defining the circumstances under which medical practitioners are authorized to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition. The Court acknowledges that there may be difficulties in finding the necessary political consensus on such controversial questions with a profound ethical and moral impact. However, these difficulties are inherent in any democratic process and cannot absolve the authorities from fulfilling their task therein. The foregoing considerations are sufficient to enable the Court to conclude that Swiss

law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right. There has accordingly been a violation of Article 8 of the Convention in this respect (Gross v. Switzerland I 2013: 64-67).

The Court, however, pointed out the difficulty of reaching a political consensus on these deeply moral and complex issues, but it did not relieve the states of fulfilling their obligations, whereby the Swiss legislator, which allowed the prescription of the drug, at the same time did not provide sufficient guidance to clarify the scope of this right. On that basis, in the judgment of May 14 2013, with four votes in favor and three against, Court held that the state violated Article 8 of the Convention. In the same time, in this verdict, three judges gave the dissenting opinions. According to them, there was no violation of the article 8 of the Convention. The applicant in this case was not suffering from any serious illness, but rather does not wish to continue living while relying on physical and mental faculties that are impaired through old age and she was not been not terminally ill.

However, in a Grand Chamber judgment passed on 30 September 2014, the Grand Chamber rejected the application as inadmissible. Namely, in January 2014, the Swiss government informed the court that it had found out that in October 2011 the applicant acquired a prescription for sodium pentobarbital, and died on the 10th of November of the same year, and according to the report which dates back to November 14, the state has failed to identify the relatives of the deceased, nor one person could be blamed for the death of the applicant. The Court noted that one of the reasons for rejecting the application, *inter alia*, is the abuse of the right since applications were based on untrue facts that the applicant knew about. Despite the obligation, the legal representative of the applicant failed to inform the court about all the facts relevant for its decision, and the court has established with certainty applicator's intent to mislead. The representative explained that he has had contact with the client only through an intermediary who had the explicit prohibition of informing the representative about death. Therefore, the Court raised the question of what was really the representative's role in the entire procedure given the sensitivity of the case like this, when even the legal representative had no true knowledge of the health situation and the intentions of his client.

The Court has taken note of the explanation submitted in reply by counsel for the applicant that he had been unaware of his client's death because he had only had contact with her via an intermediary, Mr. F., who – at her request – had purposely refrained from notifying counsel of her death. According to Mr F., this was because of her fear that the

disclosure of such a fact might prompt the Court to discontinue the proceedings in her case. As her spiritual adviser, he had considered himself bound by a professional duty of confidentiality preventing him from disclosing that information against her wishes. However, in the Court's view, and bearing in mind the particular nature of the present case, the fact that counsel for the applicant had no direct contact with his client but agreed to communicate with her indirectly through an intermediary gives rise to a number of concerns regarding his role as a legal representative in the proceedings before it. In addition to the duties of an applicant to cooperate with the Court (see Rule 44A of the Rules of Court; see also Rule 44C on "Failure to participate effectively", including the possibility of drawing inferences from the failure of a party "to divulge relevant information of its own motion") and to keep it informed of all circumstances relevant to his or her application (see Rule 47 § 7, former Rule 47 § 6), a representative bears a particular responsibility not to make misleading submissions (see Rule 44D). It transpires from her counsel's explanation that the applicant had not only failed to inform him, and by implication the Court, of the fact that she had obtained the required medical prescription, but had also taken special precautions to prevent information about her death from being disclosed to counsel and eventually to the Court in order to stop the latter discontinuing the proceedings in her case. Against this background, the Grand Chamber considers that the fact and the circumstances of the applicant's death did indeed concern the very core of the matter underlying her complaint under the Convention. It is also conceivable that had these facts been known to the Chamber they might have had a decisive influence on its judgment of 14 May 2013 concluding that there had been a violation of Article 8 of the Convention However, there is no need for the Grand Chamber to speculate on this since in any event, in accordance with Article 44 § 2 of the Convention, the Chamber's judgment of 14 May 201 3 has not become final. According to Mr. F., the applicant's motive for withholding the relevant information had been that, regardless of the fact that the ongoing grievance arising from her own personal situation had ceased, the proceedings in her case should continue for the benefit of other people who were in a similar situation. Whilst such a motive may be understandable from the applicant's perspective in the exceptional situation in which she found herself, the Court finds it sufficiently established that by deliberately omitting to disclose that information to her counsel the applicant intended to mislead the Court on a matter concerning the very core of her complaint under the Convention. 37. Accordingly, the Court upholds the Government's preliminary objection that the applicant's conduct constituted an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention (Gross v. Switzerland II 2014: 32-37).

If these facts were familiar to the court before, they would be of decisive influence on the first instance judgment, which is now repealed. Her motive for concealment of relevant information, regardless of her personal situation, can be found in desire to continue the proceeding for other people who are in the same situation. While this motive can be understood from the perspective of the applicant, the Court holds that applicant wanted to deceive the court by concealing the information. That is why his behavior is an example of abuse of rights, whereupon the Court decided by nine votes in favor and eight against that the application was inadmissible. At the end, we should mention the concurring and dissenting opinions in this judgment. In the first place, judge Silvis has the opinion that there was no need to establish with "sufficient certainty" the applicant's personal intentions, assuming – implicitly – that she herself was fully aware of the requirements of the Rules of Court. It is preferable for the Court not to enter into the particular way clients and their professional representatives before the Court communicate with each other, as it is clearly set out in Rule 44C of the Rules of Court that they must participate effectively. Knowledge of the client's circumstances could therefore legitimately be imputed to her counsel. As a professional, acting on behalf of his client, counsel bears the responsibility of disclosing relevant new information When this responsibility is not adequately assumed, without sufficient explanation, and the new information in question concerns the core of the complaint, then I would think that the conclusion that there has been an abuse of the right of petition should inevitably follow (Concurring opinion of judge Silvis). Besides that, in this judgment there is joint dissenting opinion of judges Spielmann, Ziemele, Berro-Lefèvre, Zupani, Hajiyev, Tsotsoria, Sicilianos and Keller. According to them, *the decisive factor here should not be the intent of the applicant's representatives. Whatever their role in concealing the applicant's death from the Court, this cannot be attributed to the applicant. Furthermore, we draw attention to the pejorative nature of the majority's finding. The inadmissibility of an application due to the abuse of the right of individual petition carries a certain stigma. Ms Gross, deceased, was unable to submit her own views regarding the majority's assessment and her memory is now burdened with the stigmatizing effect of the present judgment*.

4.5. Lambert and others v. France

The latest judgment in this domain was made in 2015, in the case of *Lambert and Others v. France* (Lambert and Others v. France, 2015), and is a typical case of approval of passive euthanasia. Namely, in this case the applicants were parents, brother and sister of Vincent Lambert, who suffered a head injury in a car accident in September 2008, whereupon he remained paralyzed and in a state of total dependence on others. After five years, acting physician raised the issue of ending the patient's life, in accordance to the

prescribed procedure. He consulted six physicians, one of whom selected by applicants, team that nursed the patient and held two meetings with his family, which consisted of patient's wife, parents and eight brothers and sisters. The final result was that the patient's wife, six brothers and sisters and five physicians voted for opting out of further medical treatment, while others were against. Acting physician decided to abandon further artificial nutrition of the patient. After several tests and medical examinations conducted by medical experts, on 24th of June 2014 the final decision was made that the act of the acting physician was lawful. The applicants in a complaint to the European Court alluded to the violation of Article 2 of the Convention.

One of the basic Court's observations was the question of the victim, which concept has to be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. However, an exception is made to this principle where the alleged violation or violations of the Convention are closely linked to a death or disappearance in circumstances allegedly engaging the responsibility of the State. In such cases, the Court has recognized the standing of the victim's next-of-kin to submit an application (Lambert and Others v. France 2015: 90; Nencheva and Others v. Bulgaria 2013; Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania 2014). The Court further concluded that where the application is not lodged by the victims themselves, Rule 45 § 3 of the Rules of Court require a written authority to act, duly signed, to be produced. It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim on whose behalf they purport to act before the Court (Lambert and Others v. France 2015: 91). Primarily, the Court bore in mind two facts, on the risk that the direct victim will be deprived of effective protection of his or her rights, and the absence of a conflict of interests between the victim and the applicant (Lambert and Others v. France 2015: 102). Then, the applicants propose that the Court should apply the criteria set forth in *Koch*, which, in their submission, they satisfy because of their close family ties, the fact that they have a sufficient personal or legal interest in the outcome of the proceedings and the fact that they have previously expressed an interest in the case. However, the Court observes that in *Koch* the applicant argued that his wife's suffering and the circumstances of her death had affected him to the extent of constituting a violation *of his own rights* under Article 8 of the Convention. Thus, it was on that point that the Court was required to rule, and it was against that background that it considered that account should also be taken of the criteria developed in its case-law allowing a relative or heir to bring an action before it on the deceased person's behalf. In the Court's view, these criteria are not applicable in the present case

since Vincent Lambert is not dead and the applicants are seeking to raise complaints *on his behalf* (Lambert and Others v. France 2015: 99-101). Finally, the Court emphasized:

The Court points out first of all that it is the patient who is the principal party in the decision-making process and whose consent must remain at its centre; this is true even where the patient is unable to express his or her wishes. The Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations" recommends that the patient should be involved in the decision-making process by means of any previously expressed wishes, which may have been confided orally to a family member or close friend The Court also observes that, according to the comparative-law materials available to it, in the absence of advance directives or of a "living will", a number of countries require that efforts be made to ascertain the patient's presumed wishes, by a variety of means (statements of the legal representative or the family, other factors testifying to the patient' s personality and beliefs, and so forth). 180. Lastly, the Court points out that in its judgment in Pretty it recognized the right of each individual to decline to consent to treatment which might have the effect of prolonging his or her life (Lambert and Others v. France 2015: 178-180).

So, the Court first found that there was no mentioned risk, and then, that there was no convergence between the applicants' claims and what the patient would want. Then, the court found that the Rachel Lambert, the wife of the patient, could not participate in the proceedings as an intervener on the side of the patient. Finally, the court held that the application could be based on a violation of art. 2 of the Convention, regardless of the fact that the patient's death would occur quickly even without interruption of artificial feeding. Both the applicants and the Government make a distinction between the intentional taking of life and "therapeutic abstention" and stress the importance of that distinction and the Court noted it. The Court took into account the national legislation and practice that is compatible with the requirements of Art. 2 of the Convention, the opinion of the patient, persons close to him and opinion of the medical team, and the criteria of the Council of Europe. Although most European countries legalized passive euthanasia, there is still no consensus on this issue. Unanimously, the Court found application admissible as regards the applicants' complaint rose under Article 2 on their own behalf and inadmissible regarding the others alleged violations.

In France, this matter is primarily regulated by the Leonetti Act, which is sufficiently clear legal framework for the conduct of physicians when it comes to deciding on withdrawing of the medical treatment. Before the other, the Courts emphasized that the law allows physicians, in accordance with a prescribed procedure, to discontinue

treatment only if it demonstrates continuing unreasonable obstinacy. The Court emphasized that despite several consultant phases, taking into account the wishes of the patient, the physician as individual should make such a decision. In this case, the physician has done much more than required of him by law, whereby in its explanation, in the length of thirteen pages, could not be found any irregularity. The physician conducted the procedure donnishly over a longer period of time, and although the applicants did not agree with the result, the court found that the procedure was conducted in accordance with Article 2 of the Convention. The Court particularly took into consideration patient's wishes, obtained from the testimony of his wife, who said that she had talked to her husband about that on several occasions during his life, since both of them were medical workers, whereby he clearly expressed his desire not to be artificially kept alive in case of deep-dependent state. Consequently, the Court dismissed the application by twelve votes for and five against.

5. Conclusion

Deprivation of life from compassion and physician-assisted suicide has been subsisting in the focus of scientific and lay public for many years. Extremely wide range of different solutions, which vary from state to state, indicates that a consensus on these issues is difficult to reach. The European Court of Human Rights has dealt with petitions in several cases, whose central issue was the right to a dignified death. The Court rejected most of the complaints as inadmissible or dismissed, and in some of them determined the violation of applicant's right. It is interesting to note that the largest number of applications is filed against Great Britain, in which the deprivation of life from compassion is equated with an ordinary murder, and Switzerland, where the legislator has prohibited euthanasia but in a specific way decriminalized assisted suicide, which made the Switzerland ultimate destination for, usually, citizens of Britain, Germany and the United States, who seek a dignified death. The European Court has, on the one hand, held that the right to life is a central human right, from which it could not be derived a right to die. On the other hand, countries which intend to decriminalize euthanasia and assisted suicide should provide optimally specific conditions that must be met, in order to provide the patient with this type of service.

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TRANS – INSTITUTIONALISATION OF DISABLED PEOPLE. A CRITICAL APPRAISAL OF SOME DEINSTITUTIONALISATION STRATEGIES IN SOUTH AFRICA AND EUROPE.[1]

Countries around the world have applied various strategies to deinstitutionalise some of the assessed 1.7 million children with disabilities and an unknown number of adults. International human rights law rules and standards obligate and guide state parties to ensure the realization of life in a family, within the community for children and independent living for adults with disabilities, which is commonly operationalized through a process of deinstitutionalisation (DI). "Life Esidimeni" is a case of attempted transition of children and adults with disabilities from a large institution to smaller residential care and homes, which ended with the tragic death of 144 people. The present article critically addresses the issue of small residential care as part of DI reforms. The case illuminates some systemic issues in the approach to the protection of rights of persons with disabilities and the regulation of care in South Africa.

Keywords: *disability, deinstitutionalisation, trans-institutionalisation, CRPD, South Africa*

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Introduction

The Convention on the Rights of Persons with Disabilities (CRPD hereafter) has set fundaments in the international human rights law for the process called deinstitutionalisation (DI hereafter). DI is a commonly used term to describe the transition from institutional living and care for persons with disabilities (PWD hereafter) to living and support in the community, on an equal basis with other citizens. We use a broader understanding that encompasses a process of legal, political, and economic reforms that are aimed at realizing rights and supporting PWD in their natural environment and the local community, as opposed to living and care in institutions. A stricter understanding, mostly abandoned nowadays due to possible negative consequences, is focusing on DI as a process of shutting down large institutions without necessarily enabling support and services in the community for those that had lived in institutions, and/or substituting large institutions with smaller, better resourced ones. In the present paper, the former meaning is adopted and strongly asserted as the only viable option, whilst the latter if integrated into policies can cause detrimental effects on the livelihoods and rights of many PWD. Understandings of what constitutes institutional living have changed through time, and have evolved from the famous definition of a "total institution" by Erving Goffman (Goffman, 1968). Goffman focused on the size of the institution (a large number of residents), alongside the formalized regime of living, individuals sharing some personal characteristics and the segregation from the general population (Goffman, 1968). "Total institutions" entailed also prisons, workhouses and other establishments alike, according to Goffman. With the efforts of disabled people's movements (DPM) across the world and the evolution of human rights protection of PWD, the understanding of what constitutes an institution has changed. Although contested, most disability studies scholars, the Committee on the Rights of Persons with Disabilities (CRPD Committee hereafter), and the Special Rapporteur on the Rights of Persons with Disabilities (Special Rapporteur hereafter) agree on a broader, more subjective description of an institution. Hence, institutions are primarily characterized by the lack of autonomy of people living there. Institutional living for PWD is, alongside the lack of autonomy, commonly coupled with sharing assistants/carers, living with a number of other disabled people, the facility being run by a state or a private entity, lack of privacy, *de facto* deprivation of liberty (not necessarily formal), etc.

The pull for DI, generated primarily by DPM and international and national non-governmental organizations (NGOs hereafter), has gained significant traction in the last several decades, in some countries sooner than in others. In most Balkan countries, DI programs were developed in the last 15 years, while in South Africa those discussions

started in the late 1980s and early 1990s, but gained significant public and political attention only recently.[2] The relative recentness of DI initiatives, different local contexts and contested understandings of that process and what constitutes institutional living that should be abandoned, has given birth to different views and strategies of DI. Roughly speaking, there are at least two strides concerning what is and what is not an institution that have implication on the policies and DI processes. Those two strides overlap significantly when it comes to the need to develop and provide sustainable support and services to PWD in the community and increase their autonomy. On the other hand, some states have pushed for and applied strategies that included the development of facilities for long-term care that are smaller and that should be better resourced than the traditional, normally large institutions (housing over 25 or 50 residents, and sometimes over 1000), that are associated with bad material conditions, poor hygiene, understaffing, neglect and abuse etc. Those smaller facilities for long-term care are called different names such as small group homes, small residential care, *habitat inclusive*, *habitat partagé* etc. However, these forms of living and care for PWD are seen negatively by the CRPD Committee (CRPD Committee, 2017), the Special Rapporteur on the rights of persons with disabilities (Devandas-Aguilar, 2020) and the Special rapporteur on the right to health (Puras, 2020), disabled people's organisations (DPOs hereafter) and some NGOs for the rights of persons with disabilities (2019, Mladenov and Petri, 2020, Allen et al., 2020, Rosenthal, 2021). The critique of small residential care, or small institutions, is supported by arguments that such living perpetuates exclusion, segregation, the lack of autonomy, that it is discriminatory against PWD and that it produces the same negative effects as long-term care in large institutions, especially in the case of children. Despite the criticism, those small institutions were developed in many European countries, including recently in Bulgaria, Hungary and North Macedonia, and much earlier (and still ongoing) in Austria and France. On the other hand, Serbia has largely refrained from the development of such facilities, and focused on foster care and prevention of institutionalisation for disabled children (Stefanovic, 2022). Although, criticisms on Serbia's uneven DI reflected in a high percentage (despite a low total number) of children with disabilities in the total population of children in institutions are well founded (Republic Institute for Social Protection, 2019, Stefanovic, 2021). The progress of DI in

[2] Gauteng Province Mental Health Strategy and Action Plan 2019 - 2023, 2019, Department of Health Gauteng Province. P. 29

the case of disabled adults has been stalled and small group care has not featured as a DI element (Stefanovic, 2021).[3]

In the following chapters, the paper firstly analyses the CRPD through a descriptive approach, primarily art. 19 on living independently and being included in the community, art. 23 on family life. Also, the doctrine of the CRPD Committee is revisited to clarify the position of the treaty body on the issue of residential care and their interpretations of relevant CRPD provisions. Following that, the article explores the case of DI of PWD from a large, long-term care hospital in Gauteng Province in South Africa that ended tragically. More than 140 adults lost their lives after being transferred to small residential care, run by NGOs in Gauteng, which caused a public outcry and state inquiries into the tragedy to shed the light on the circumstances of those deaths and to determine the responsibility of actors in the process. The paper finishes with a conclusion on the issues of a DI strategy taken in the "Life Esidimeni" case and its implication for DI in the future in South Africa and beyond.

The paper takes a mixed, descriptive and normative approach to the analysis of the CRPD. The normative approach has shown to be necessary due to ambiguities existent in the relevant provisions that can produce almost contradicting interpretations. Hence, the author also disentangles what law "ought to be", using primarily legal arguments and interpretive techniques commonly applied in an international human rights law (IHRL hereafter) regime. It is regarded that the human rights regime is a specialized regime of international law (IL hereafter), hence treaty interpretation should be sensitive to the specificities arising from IHRL law-making and the implementation of its rules worldwide (Çalı, 2020). The general rules of treaty interpretation of the Vienna Convention on the Law of Treaties (art. 31-33)[4] (VCLT hereafter) are taken as a general framework for the extraction of meanings of relevant CRPD provisions. An evolutionist approach to human rights treaty interpretation is given priority over exceedingly originalist ones, due to the nature of such treaties, the doctrine of regional and international courts that favour dynamic interpretation of human rights and the VCLT art. 31 ¶3 (Levit, 2007). To avoid a purely doctrinal approach, which commonly fails to grasp the realities of international law-making, interpretation and implementation, the author considers the roles of non-state actors. These non-state actors are primarily treaty bodies and international NGOs, who are seen as relevant stakeholders that have the potential to

[3] Concluding observations on the initial report of Serbia: Committee on the Rights of Persons with Disabilities, CRPD/C/SRB/CO/1, 2016. Para. 39-40.

[4] Vienna Convention on the Law of Treaties UNTS, 1155, p. 331., 1969.

shape the law and influence its implementation. Such an approach corresponds to the New Haven School of IL.

The analysis of the "Life Esidimeni" case comprises multiple methods including analysis of data gathered through in-depth interviews with professionals in the sphere of the rights of persons with disabilities and children in South Africa, discourse analysis, and doctrinal analysis of case law. Academic papers, grey literature and media content on the "Life Esidimeni" are also taken into account.

Convention on the Rights of Person with Disabilities and institutions

A focal CRPD provision concerning the problem of institutionalisation is art. 19 on living independently and being included in the community. This provision is seen as a backbone of the "paradigm shift" that the CRPD is supposed to bring to the world, together with art. 12 on equality before the law. The purpose of this provision was to get in the way of many centuries long practices of segregation and institutionalisation of persons with disabilities. The provision prescribes obligations to stop forced institutionalisation,[5] ensure the provision of services that should support PWD living in the community and prevent segregation,[6] and make general services available and appropriate to PWD.[7] The art. 19 is built around the intention to stop institutionalisation and transfer decision-making powers about how, where and with whom to live to PWD. The Ad hoc Committee named that the essence of this right and the core of community living. Hence, community living is not merely physical presence in a place where other people live, work and go to school but it also entails the element of personal autonomy about one's living.[8] Another important aspect of the right to choose how, where and with whom to live is the provision of conditions that make this choice a reality (Fiala-Butora, 2018). In other words, if not adequately provided for community living, some PWD will simply have no other choice than to live in an institution. Therefore, one of the objectives of art. 19 is to make the right to live independently effective, which is expressed through the states' obligation to provide conditions for independent, community living. Hence, art. 19 is a central (but not the only) building block for any DI strategy: establish the right to choose, prohibit forced institutionalisation, provide individualized support and services to PWDs (especially

[5] Convention on the Rights of Persons with Disabilities, UNTS, 2515, p. 3, 2006, United Nations. Art. 19 ¶1(a)

[6] Ibid. Art. 19 ¶1(b)

[7] Ibid. Art. 19 ¶1(c)

[8] Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities: Sixth session A/60/266 2005, United Nations.

personal assistance, housing, and a range of in-home services), and make general services (education, administration, medical protection, culture, leisure, sport etc.) available to PWD. Any DI strategy that lacks any of the three elements will likely fail.

Alongside art. 19, art. 23 – respect for the home and family, is especially relevant concerning institutionalisation. Living in institutions is antithetical to living in a family. A person in residential care, child or adult, is severely limited in realizing any of the rights related to family life. The first paragraph (art. 23 ¶1) prescribes an obligation to eliminate discrimination concerning entering a marriage, founding a family, and retaining fertility for all PWD. Also, states are obligated to assist parents with disabilities in their child-rearing responsibilities and ensure the rights of PWD concerning guardianship over children and adoption (and other institutions found in different jurisdictions).[9] Paragraph 3 of art. 23 obligates states to "undertake to provide" different support, services and information to prevent institutionalization of disabled children.[10] The following paragraph obligates states to resort to the separation of children with disabilities from their parents only where this is in the best interest of the child and after a process conducted by competent authorities and subject to judicial reviews.[11] Another norm of this paragraph is a prohibition of separation of children from their parent on the basis of disability either that of a child or his/her parents (para. 4).

Finally, the art. 23 CRPD finishes with a critical, but also relatively ambiguous provision:

States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.[12]

This paragraph is arguably most directly addressing the problem of pervasive and widespread institutionalisation of disabled children. The institutionalisation of disabled children is happening under the framework of the provision of (residential) alternative care. Knowing this it is clear that to tackle this phenomenon it is needed to delve into issues of alternative care, as it is done in art. 23 ¶5. The CRPD prescribes states to provide alternative care, primarily in a wider family, and "failing that" in a family setting within

[9] Convention on the Rights of Persons with Disabilities, UNTS, 2515, p. 3, 2006. Art. 23 ¶2

[10] The terms "institutionalisation" or "deinstitutionalisation" are not explicitly mentioned here or elsewhere in the CRPD.

[11] Convention on the Rights of Persons with Disabilities, UNTS, 2515, p. 3, 2006. Art. 23 ¶4

[12] Ibid. Art. 23 ¶5

the community, to address the historical injustice of placing children in institutions as a form of alternative care.

However, although seemingly clear and to the point, art. 23 ¶5 has a rather vague wording and for a reason. This vague wording can easily accommodate different reductionist and expansionist interpretations. The purpose of vagueness is to accommodate different interpretations, enable larger numbers of ratification of a treaty, and to make room for evolutionary interpretations in the future. Precisely, art. 23 ¶5 can be interpreted to create an obligation for states to provide alternative care exclusively in a family setting. On the other hand, it can also be understood as an obligation to undertake every effort to provide such care, but that a state is also allowed to provide care in a non-family setting, or institutions (large or small).

The former interpretation fulfils the purpose of the provision and the CRPD as a whole more effectively. Notwithstanding, this effectiveness comes at a slight expense of the wording as an interpretive element. In other words, an interpretation that states are obligated to provide alternative care to children with disabilities *exclusively* in a family setting within the community, corresponds with an effectiveness approach to interpretation. This approach is characteristic for the explication of meanings of human rights treaties, and was commonly used by international and regional human rights courts. The idea behind the effectiveness approach is to produce a meaning that provides real and effective protection of human rights, a meaning that can bring a needed change, rather than a futile one that does little or contributes to perpetuating the *status quo* (Çalı, 2020).

In the present case, meaningful protection of the right to family life and protection from institutionalisation can be understood as possible only when states are obligated to provide care in a family setting. A norm that would allow for exceptions in providing care in a family, that is a norm which would open a possibility for placements in institutional care as a "last resort" is seen as too soft to bring a change by many actors including the CRPD Committee, DPOs and disability rights NGOs. In fact, provisions of domestic law that allow for placements in residential care as a measure of last resort, or only when it is in the best interest of a child, have largely failed to stop the institutionalisation of disabled children. This was also the case in Serbia, where the Law on Social Protection contains a provision under which institutional care is not provided to children under three years of age.[13] However, the following paragraph allows exceptions to this rule, and the youngest children are still being institutionalized regardless from the rule (Rosenthal et al., 2021).

[13] Law on Social Protection, Official Gazette "RS", Nr. 24/2011.Art. 52 ¶2-3

Hence, a more far-reaching obligation, such as an obligation to provide care solely in a family setting could be a more effective one.[14] Della Fina, in her commentary on the CRPD, argued that this provision should be interpreted to obligate states to provide alternative care solely in a family setting, as its purpose is to prevent institutionalisation (Della Fina et al., 2017).

An effectiveness approach places an emphasis on a purposive element of treaty implementation and its context, while it slightly departs from the wording in this case. This common type of interpretation is in line with the VCLT which stipulates that interpreters shall interpret a treaty in line with its wording, context and object and purpose. The weight that is given to each of the three elements differs from one interpreter to another, and from one IL regime to another. The so called "specialized" or "self-contained" human rights regime is commonly regarded as a "safe space" for an effectiveness approach, which does not always go without criticism. A common critique is related to the expansiveness of such an approach, in other words, interpreters sometimes tend to create obligations that parties had not originally agreed. This is more typical in a purely teleological approach, or the one that places most emphasis on the purposive element sometimes largely neglecting the wording of a provision or its context. In the case of art. 23 ¶5 CRPD, the proposed interpretation reached by an effectiveness approach gives a lot of weight to the internal context of the treaty – primarily the remainder of art. 23, art. 19, art. 5 on non-discrimination and the Preamble which all of them provide a strong basis for such interpretation.

The CRPD Committee on institutional care

The CRPD Committee has shown a rather decisive and clear position on institutions – all persons with disabilities, children and adults, must be allowed and supported to live independently or in a family, within the community. General Comment No. 5 on article 19 Living independently and being included in the community (2017) (GC 5 hereafter) provides a most detailed and comprehensive account of the Committee's views on institutional care and interpretation of relevant CRPD provisions.[15] Alongside the background information on historical exclusion and segregation of persons with disabilities (which is a basis for the following interpretation),[16] the Committee makes

[14] Still, despite the presumed effectiveness of any single provision, real and meaningful impact is hard to imagine without a set of legal, policy and societal reforms.

[15] General comment no. 5 (2017) on living independently and being included in the community: Committee on the Rights of Persons with Disabilities, CRPD/C/GC/5, 2017.

[16] Ibid. paras 1-5.

clear that this right means living outside of institutions of any kind (large or small, family-like etc.) for all PWD.[17] Concerning solely children with disabilities, the Committee ascertains that any placement in residential care as a form of alternative care constitutes discrimination. This is supported by General Comment No. 4 on persons with disabilities (1994) of the Committee on Economic, Social and Cultural Rights, which similarly asserted that any segregation of PWD amounts to discrimination.[18] The CRPD Committee could not have been any clearer concerning their position on residential care for disabled children.

For children, the core of the right to live independently and be included in the community entails a right to grow up in a family. (para. 37)

Large or small group homes are especially dangerous for children, for whom there is no substitute for the need to grow up with a family. "Family-like" institutions are still institutions and are no substitute for care by a family. (para. 16(c))

The wording of the cited sentences indicates that the CRPD Committee had intended to address the issue of residential care, including small residential care (small group homes, family-type homes etc.), as a matter of priority and without any ambiguity. This treaty body had, without a doubt interpreted the CRPD in a way most suitable to fulfil the purpose – protection of the right to live in a family for all children with disabilities and the right to live independently, in the community for adults. The CRPD Committee had also immersed art. 19 and art. 23 CRPD to produce such interpretation and indeed proved that those provisions are indivisible. In a later General Comment No. 6 on article 5 on equality and non-discrimination (2018), the CRPD Committee reinforced its position against any forms of institutionalization.[19] The institutionalization of CWD was described as a denial of the right to grow up in families as a consequence of the discrimination.[20] The discrimination is found in the failure of responsible authorities to ensure support and services in the family and the community, due to which persons with disabilities are forced to abandon family and community living for institutions.[21]

[17] Ibid. para. 16 (c).

[18] General Comment No. 4 (1994) on the rights of persons with disabilities: Committee on Economic, Social and Cultural Rights, 1995, UN. Para. 15

[19] General comment no. 6 (2018) on equality and non-discrimination :Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, 2018.

[20] Ibid. Paras 38 & 62.

[21] Ibid. Para. 58.

Tensions between the CRPD and the CRC

The interpretation that renders the obligation of providing an alternative for CWD exclusively in a family environment does not go without a problem with regard to its external context – the Convention on the Rights of the Child (CRC). Although the CRC strongly favours care in a family environment for all children, it also allows for an exception when children can be placed in institutional care (art. 20 ¶3 CRC):

Such care (alternative care) *could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*[22]

Hence, it could be argued that, in line with this provision of the CRC, the CRPD art. 23 ¶5 should be interpreted to allow the provision of residential care to disabled children "if necessary". Thus, the meaning of the "borderline" provision of art. 23 ¶5 CRPD should be sought *lex ferenda*, or what the law ought to be, through the interpretation that can be taken in different directions. An outcome of the application of an effectiveness approach to the interpretation of the norm in art. 23 ¶5, would most probably be an obligation to provide alternative care only in a family setting, as already explained above. The wording of the norm can accommodate such interpretation, the purpose of the norm (to prevent institutionalisation of CWD), and the internal context that clearly favours life in a family environment (art. 23 ¶1- 4, art. 19, Preamble (x)), all point in that direction. The external context that needs to be taken into account (in accordance with art. 31 ¶3 VCLT), primarily the CRC, also favours the family (art. 5, 7, 8, 9, 18, 20, 37(b) CRC, and the Preamble), by establishing obligations to states to provide and protect family life of children. The norm of art. 20 ¶3 CRC, although it names institutional care as a conditioned option, it still clearly favours placements in family settings.

There are two arguments in favour of not considering art. 20 ¶3 CRC as a decisive element for the interpretation of art. 23 ¶5 CRPD – other applicable rules of international public law should not override text, internal context and the purpose, and secondly, art. 20 ¶3 provides and optional list of alternative care forms and does not create an obligation (nor a right), unlike art. 23 ¶5 CRPD. The external context, considering its ordering in art. 31 VCLT, according to Sorel and Boré Eveno, should primarily have a supporting rather

[22] Convention on the Rights of the Child, UNTS 1577, p. 3, 1989. Art. 23 ¶3

than a crucial role in the interpretation of a treaty (Sorel and Boré Eveno, 2011). On the other hand, the existence of the permission to provide institutional care, despite its optionality and the lack of prescriptiveness, should not be neglected. Resolutions on the right of the child of the United Nations General Assembly have further crystalized and solidified this provision of the CRC (art. 20 ¶3).[23]

The CRPD Committee and the CRC Committee have decided to work together and issued a Joint statement on children with disabilities.[24] One of the issues the two treaty bodies tackled was institutionalisation. The content of the statement, however, did not offer a solution to the "apparent conflict" (Pauwelyn, 2003) between the two committees who still from time-to-time issue differing recommendations to states parties concerning institutions. Recently, while CRPD Committee has been calling only for the provision of alternative care in families,[25] the CRC Committee recommended small group homes in its concluding observation to Czechia.[26] On the other hand, the CRC Committee has also recognized the problem of replication of institutional culture and reliance on small residential care in two recent concluding observations on Hungary and Chile.[27]

A gradual affirmation of the CRPD and the position of the CRPD Committee concerning residential care for children with disabilities is evident in UN General Assembly (UNGA hereafter) resolutions on the rights of the child. From a complete omission of any reference to the CRPD, some newer UNGA resolutions on the rights of the child at least partially integrate this treaty and positions of the CRPD Committee, DPOs and disability rights NGOs concerning small group homes.[28] Notwithstanding, the issue of two positions on the permissibility of some forms of small-size residential care for children is still open and further discussion and harmonization is needed. A discussion about a potential conflict between the CRPD (art. 19 and art. 23 ¶5) and the CRC (art. 20) on the

[23] Guidelines for the Alternative Care of Children, A/HRC/RES/11/7, 2009.

[24] Joint Statement of the CRC Committee and the CRPD Committee: The rights of children with disabilities, 2022.

[25] For example: Concluding observations on the initial report of Switzerland*: Committee on the Rights of Persons with Disabilities, CRC/C/CHE/CO/5-6, 2022., Concluding observations on the initial report of France*: Committee on the Rights of Persons with disabilties, CRPD/C/FRA/CO/1, 2021., Chataika, 2018, The Routledge handbook of disability in Southern Africa.

[26] Concluding observations on the combined fifth and sixth periodic reports of Czechia*: Committee on the Rights of the Child, CRC/C/CZE/CO/5-6, 2021.

[27] Concluding observations on the sixth periodic report of Hungary**: Committee on the Rights of the Child, CRC/C/HUN/CO/6*, 2020., Concluding observations on the combined sixth and seventh periodic reports of Chile*: Committee on the Rights of the Child, CRC/C/CHL/CO/6-7, 2022.

[28] 74/133. Resolution on the Rights of the Child, A/RES/74/133, 2019, UN General Assembly.

permissibility of some forms of institutional care is out of the scope of this paper. A thorough analysis of the interactions between the CRC and the CRPD is needed, as well as ascertainment of a possible conflict and an exploration of conflict management avenues.

Trans-institutionalization

In the present context, the term "trans-institutionalization" refers to practices of transforming systems of care in large residential institutions to smaller residential facilities, and/or transfer of children and adults from large institutions to smaller institutions (sometimes called small group homes, *habitat inclusive* etc.).[29] The term is used as a critique of the described processes and is not used by those who are conducting or promoting such reforms. Instead, states and non-state actors who instruct and endorse trans-institutionalisation commonly refer to that process as deinstitutionalisation. By contrast, there should be a clear distinction between those two phenomena for a good reason. Looking from a human rights perspective, the trans-institutionalisation, or the transition to care in smaller residential facilities cannot bring the transformation intended by the CRPD, even when those new facilities are well resourced and safer than old, large institutions. It fails to ensure the right to life in a family environment for children, to ensure the right to self-determination and independent living for all PWD, end segregation and social exclusion.[30] In other words, it perpetuates the system of exclusion and objectification of persons with disabilities, despite potentially (but not necessarily) being well resourced and organized in smaller groups. Apart from the CRPD Committee, concerns over trans-institutionalisation in smaller institutions were conveyed by many, including by Nowak in the UN Global Study on Children Deprived of Liberty (Nowak, 2019), Special Rapporteur on the rights of persons with disabilities (Devandas-Aguilar, 2020), Special Rapporteur on the right to health (Puras, 2020), scholars (Dozier et al., 2014, Rutter et al., 2007, Smyke et al., 2012), NGOs and others (Allen et al., 2020). The trans-institutionalisation is an issue that exists in the Balkans (especially Bulgaria and

[29] In another context the term was used to mark the transfer of patients with mental illnesses from institutions to prisons. See for example: Primeau, Ashley, Thomas G. Bowers, Marissa A. Harrison, and XuXu. "Deinstitutionalization of the Mentally Ill: Evidence for Transinstitutionalization from Psychiatric Hospitals to Penal Institutions." *Comprehensive Psychology* 2 (2013).

[30] Any institutional care is shown to be detrimental to a child's development, especially in the young age. See for example: Rutter, 2008, Implications of attachment theory and research for child care policies., Dozier, Kaufman, Kobak, O'Connor, Sagi-Schwartz, Scott, Shauffer, Smetana, van Ijzendoorn and Zeanah, 2014, Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association.

North Macedonia), the rest of Europe and other continents. It is commonly promoted as DI by those who manage it and support it, as was the case in South Africa.

Trans-institutionalisation in Gauteng, South Africa

The "Life Esidimeni" case is a tragedy in which 144 people with disabilities lost their lives after being transferred from a large institution to a number of smaller ones. The case is named after an institution for long term residential care for children and adults with disabilities situated in Gauteng Province, South Africa. Life Esidimeni is a private service provider, that provides care for over half a century under a public-private partnership agreement with the Department of Health, according to the information on their website.[31] This institution works in five provinces in South Africa, and provides almost 3000 beds in 10 facilities.[32] They offer several types of care services, including long term "frail care" which is provided to persons with physical and intellectual disabilities and older persons.[33] The care and rights of persons with mental health issues, psychosocial disabilities, older persons with disabilities, children and adults with physical and intellectual disabilities, are all falling under Mental Health Care Act in South Africa.[34]

The tragedy occurred after the South African government, the Health Department of Gauteng Province, transferred around 1800 residents with different disabilities from Life Esidimeni to small residential care (1200), specialized hospitals (275) and families (300).[35] The contract between the Health Department and Life Esidimeni was terminated in 2016, on a pretext of providing residents care in a least restrictive circumstances and reintegrating them in the community, in accordance with Mental Health Care Act.[36] Justifying the move, the Health Department cited a provision that endorses the use of community services and prescribes that "every mental health care user" should develop full potential and be integrated into the society.[37] A Member of the Executive Council (MEC) of the Health Department claimed, prior to the tragedy, that the Government wanted to provide Life Esidimeni residents treatment closer to or at their homes, and

[31] https://www.lifehealthcare.co.za/about-us/life-esidimeni/, Accessed on: 3rd September, 2022.

[32] Ibid.

[33] Ibid.

[34] Mental Health Care Act, Government Gazette, No. 17/2002, 2002.

[35] Gauteng Province Mental Health Strategy and Action Plan 2019 - 2023, 2019. P. 29

[36] https://www.gov.za/speeches/gauteng-health-terminates-life-healthcare-esidimeni-contract-21-oct-2015-0000, Accessed on: 3rd September, 2022.

[37] Mental Health Care Act, Government Gazette, No. 17/2002, 2002. Ch. 2 art. 6.

reintegration in the community.[38] Those who were not fit to go back to their homes were sent to other (state-run) hospitals and small residential care, in order to receive care closer to their homes, according to MEC.[39]

Apart from DI, the Government stated that reasons for the termination of the contract was to cut costs, which according to them were too high at Life Esidimeni, although an expert body found that the Life Esidimeni contract provided good value for money.[40] The saved amount would be "reprioritized accordingly", claimed MEC.[41] The Government openly spoke about defunding the long-term care for persons with disabilities and using these funds elsewhere. Such a strategy could have been expected to have detrimental effects, despite being justified with the quest for ensuring community integration, treatment closer to homes and human rights of disabled persons. Only 300 individuals were transferred to their homes, while those who according to Health Department needed further treatment were transferred to 27 service providers of residential care in smaller groups and other special hospitals (W Makgoba, 2016). The providers of small-group residential care were registered as non-profits, and all of them have had invalid license (W Makgoba, 2016). The decision and execution of the contract termination was made abruptly, without proper planning and research (W Makgoba, 2016). Soon after the transfer, people were dying at a very high rate and under "unlawful circumstances" in small group homes, said Health Ombud in his report on 94 deaths (known at that time) (W Makgoba, 2016). People transferred to NGOs' small group homes died at a rate seven times higher than those transferred to the state hospitals (Robertson and Makgoba, 2018). Families of Life Esidimeni residents were not properly consulted in the process, let alone the residents.[42] For that reason, families launched litigation in December 2015 and reached an agreement with the Health Department to postpone the transfer until June 2016.[43] The Department, however, breached the agreement and started moving residents out already in February 2016, while the first death was recorded in March 2016.[44] Many more people died in the

[38] https://www.gov.za/speeches/gauteng-health-terminates-life-healthcare-esidimeni-contract-21-oct-2015-0000, Accessed on: 3rd September, 2022.

[39] Arbitration Families of Mental Health Care Users affected by the Gauteng Mental Health Marathon Project and the Government of South Africa and Gauteng Province, 2018. Para. 28.

[40] Ibid. Para. 33

[41] https://www.gov.za/speeches/gauteng-health-terminates-life-healthcare-esidimeni-contract-21-oct-2015-0000, Accessed on: 3rd September, 2022.

[42] Arbitration Families of Mental Health Care Users affected by the Gauteng Mental Health Marathon Project and the Government of South Africa and Gauteng Province, 2018. Para. 52

[43] https://www.lifeesidimeni.org.za/what-happened/timeline, Accessed on: 4th September, 2022.

[44] Ibid.

following months, in total 144, while 44 people are still missing.[45] Arbitration awarded compensation of 1.200.000 ZAR, as well as counselling support to the families of deceased.[46] The National Prosecuting Authority launched an inquiry into the causes of each of 144 deaths, after which the prosecutor will decide if criminal charges will be raised.

Flaws of the Life Esidimeni DI plan

Considering that it is almost impossible to detect the strengths of the Life Esidimeni DI plan, its flaws are abundant and only some of those will be analysed here. Justice Moseneke, the judge in the arbitration, argued that the plan executed by the Health Department was not really DI. On the other hand, respondents argued that one of the reasons for the Life Esidimeni transfers was DI, in accordance with the law and the National mental health policy framework and strategic plan (2013-2020).[47] The judge's argument that what was done in Life Esidimeni case is not an actual DI is an important point of this discussion too.

The old Mental Health Policy 2013-2020 had foreseen the development of "community residential care services", under which it accentuated "halfway houses, assisted living and group homes".[48] This policy document also referred to those transferred from hospitals to group homes (and other forms of care) as "deinstitutionalised service users". This indicates that a prevailing understanding of DI is the one that includes trans-institutionalisation, even when most of all the people participating in the programme get (forcibly) transferred to another form of residential care, and not actual family homes (or another housing in the community).[49] Although Justice Moseneke argued that the Mental Health Policy 2013-2020 was in line with international standards, this was hardly the case considering that the CRPD and the CRPD Committee prescribe and recommend that states ensure that persons with disabilities can choose where and with whom to live and not to be coerced to live in any particular living arrangement and many other rights whose realization is not consistent with this policy. The CRPD Committee was clear on the issue

[45] Ibid.

[46] Arbitration Families of Mental Health Care Users affected by the Gauteng Mental Health Marathon Project and the Government of South Africa and Gauteng Province, 2018, ibid. Para. 226 (1-6)

[47] National mental health policy framework and strategic plan (2013-2020). 2013, Department of Health Republic of South Africa.

[48] Ibid. p. 37

[49] See note 33

of group homes,[50] although several years after the Mental Health Policy 2013-2020 was adopted, hence it is possible that legislators were not aware of the prevailing interpretation of the CRPD.

On the recommendation received at the arbitration, the Health Department developed a recovery plan for the mental health care system and adopted a new Gauteng Province Mental Health Strategy and Action Plan 2019 – 2023 (Strategy 2019-2023 hereafter).[51] The new strategy document heavily relies on the development and expansion of small-scale residential care, hence the trans-institutionalisation will certainly continue. The Strategy 2019-2023 does not propose consultations with PWD in the implementation phase, neither it elaborates on the establishment and funding of personal assistance or "home-based" support and services (at an individual's home). It also does not propose measures for DI of children such as the development of services for families, nor objectives such as reintegration with biological families or foster care.

Issues concerning people with intellectual and physical disabilities are conflated with issues of mental health both on the level of policy and legislation but also in practice in South Africa. It is likely that the reforms take an overly medical approach to disability, whilst a social approach is completely neglected due to this fusion.[52] The reforms are less concerned with accommodating the environment to PWD, and more with providing PWD with medical care and survival. In relation to the human rights of PWD, it seems that these documents are not interested in a plethora of rights such as non-discrimination, equality before the law, the right to family and privacy, inclusive education, right to work etc. The mention of the CRPD seems tokenistic rather than substantive as virtually none of the norms and standards are incorporated in these documents. The Policy Guidelines for the Licensing of Residential and /or Day Care Facilities for Persons with Mental Illness and/or Severe or Profound Intellectual Disability adopted in 2018 prescribe that residential care in the community must have walls and/or fences, and security, confirming

[50] See chapter The CRPD Committee on institutional careConvention on the Rights of Person with Disabilities and institutions

[51] Gauteng Province Mental Health Strategy and Action Plan 2019 - 2023, 2019.

[52] For a review on approaches to disability with a focus on children see for example: Milicevic, M. (2019) Protection of children with disabilities as viewed from the aspects of different models of disability. *Yearbook Human Rights Protection: Protection of the Rights of the Child*. Provincial Protector of Citizens – Ombudsman and Institute of Criminological and Sociological Research in Belgrade, 185 – 198.

that these are places of deprivation of liberty, in the same way as a large institution. Such a reform of care cannot be called DI in a proper sense.[53]

Conclusion

The CRPD has set norms that are aimed at ensuring that children and adults with disabilities are not coerced to live in any particular living arrangement, have the right to live independently and be included in the community, as well as to receive alternative care only in a family setting. The CRPD Committee has interpreted CRPD in a way to enhance the effectiveness of those provisions and prevent institutionalisation - the historical issue that persons with disabilities have faced through centuries. An ongoing debate on the use of small residential care (or small group homes) for the care of disabled children is based on a slight divergence between the CRPD Committee's and the CRC Committee's interpretations and views of the permissibility and role of residential care for children. The CRC Committee has condemned reliance on such form of care in Hungary but still recognizes that it might be constructive for some children,[54] while the CRPD Committee completely dismisses the use of such care.

The Gauteng Province attempted a reform that was labelled as DI, however, it could have barely carried that name due to its focus which was primarily on trans-institutionalisation. The tragedy that followed this utterly flawed process has steered debate about the feasibility and validity of such reforms in South Africa. Some interviewees, professionals at human rights and children's rights NGOs, expressed concerns in relation to the resourcefulness of communities and lack of awareness, implying that there is little trust in the success of future DI processes in South Africa. This is not surprising considering the severe consequences of the reforms that were labelled as DI, although the previous reforms grossly neglected fundamental elements of a proper DI process, such as detailed planning that should include, as a minimum, individualized plans for the transition for each resident of an institution, the development of individualized support services and making general services inclusive of persons with disabilities.[55] The DI might be seen by the public in South Africa as essentially cost-cutting measure, instead of a desperately needed reform to ensure rights of persons with disabilities and improve their livelihoods, and an obligation of the state under international law, again due to the tragedy that has

[53] Policy Guidelines for the Licensing of Residential and /or Day Care Facilities for Persons with Mental Illness and/or Severe or Profound Intellectual Disability, 2018, Health Department Gauteng Province.

[54] In accordance with Guidelines for the Alternative Care of Children, A/HRC/RES/11/7, 2009.

[55] General comment no. 5 (2017) on living independently and being included in the community: Committee on the Rights of Persons with Disabilities, CRPD/C/GC/5, 2017. para. 57-58.

scarred the local and international community. Hence, the sustainability of large, old institutions is sometimes more cherished than the unstable (and mostly inadequate) community-based services. Unfortunately, despite the lessons learned from the Life Esidimeni case, the newer policy framework also heavily relies on small residential care and endorses a completely medical approach to disability. Perhaps, the fact that regulation of social protection and rights of persons with intellectual and physical disabilities is conflated with mental health (the Mental Health Act, and the above-mentioned policies) prevents decision-makers and other stakeholders from looking into these distinct issues separately. Instead, an approach to the social protection and the rights of persons with disabilities resembles (also flawed) approaches to the treatment and care for patients with severe mental illness – it is overmedicalized, focused on security, and after the Life Esidimeni tragedy – on survival.

On the other hand, Bulgaria has recently heavily relied on small group homes for children with disabilities in the process of transformation of child care that started approximately 15 years ago. Although the process in Bulgaria was characterized by abundant funding, including from the European Union and other external donors, and the development of infrastructure in the form of a large network of hundreds of small group homes (both for children and adults), accusations were plentiful.[56] A report by a human rights NGO on the situation in Bulgaria's small group homes uncovered the replication of practices from large institutions, where children previously lived, with similar or same consequences (Rosenthal et al., 2019). Therefore, even heavily funded and scrutinized reforms that rely on trans-institutionalisation cannot deliver satisfying results, avoid the negative effects of living in group homes, especially for children, and fulfil some of the fundamental norms of the CRPD. Further thinking and planning of care reforms worldwide should include an especially critical perspective of residential care in small facilities, while including disabled people in all stages of planning and execution, and following the latest developments of international standards, scientific evidence and knowledge accumulated through practice.

[56] For example: https://enil.eu/bulgaria-must-suspend-the-construction-of-68-institutions-for-the-disabled/, Accessed on: 5th September, 2022, https://balkaninsight.com/2016/12/22/past-still-haunts-bulgaria-s-disabled-children-12-21-2016/, Accessed on: 5th September, 2022.

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István László Gál*

PROTECTION OF VICTIMS OF SEXUAL OFFENCES

Sexual freedom and sexual morality are among the legal objects that the legislator has included in every era some level of protection, from the advent of criminal law to the present day.

The common legal object of the crimes classified in the XIX. chapter is sexual freedom, which is part of human freedoms, and the order of sexual relations adopted in society. Grouping these crimes somewhat arbitrarily, we can form the following criminological categories:

- *violent sexual crimes: sexual exploitation and sexual violence,*
- *crimes related to paedophilia: sexual abuse, exploitation of child prostitution, child pornography,*
- *crimes based on prostitution: pandering, procuring for prostitution or sexual act, living on earnings of prostitution,*
- *crimes that violate the order of sexual relations adopted in society (that is, the category "other": incest and indecent exposure.*

In 2019, child pornography was among the three most common sexual crimes, as out of 1138 sexual crimes, 250 were sexual assault, 398 were indecent assault, and 248 were child pornography.[1]

Keywords: *sexual offence, victim, sexual freedom, sexual morality, victimology.*

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[1] https://jogaszvilag.hu/szakma/hatalyba-lepett-a-pedofil-torveny/ (02.08.2022.)

1. Victim protection and crime policy

One of the main aims of victim protection is to promote the rights of victims of crime. In addition to providing adequate information to the victims, it is also very important to compensate for the damage caused or to make amends and reparations for the harm caused by the crime in other ways. Not all crimes have a victim, but many crimes are directed against several victims at once. The essence of victim protection also means state assistance to victims of crime. Other criminal and procedural instruments should be used to enforce the rights of victims of different types of crime (such as crimes against the person, traffic, sexual morality, property and economic crimes) and, if possible, to repair. In a broader sense, the family members of the victim are also considered victims, and thinking along the lines of a correct crime policy concept, it would also be the duty of the state to promote their interests. The protection of victims must also start with crime prevention, because repairing harm caused by crimes that have occurred is not always a realistic alternative.

Criminal law is a set of laws that deal with crimes, offenders and sanctions (substantive criminal law), defines the procedure by which the perpetrators of crimes are to be held accountable (criminal procedure law) and, finally, includes the provisions on the basis of which the sentences imposed must be enforced (penitentiary law). It is a fact that criminal law can only be a last resort, an ultima ratio, and its use as a means of influencing behaviour is justified only in the fight against the most serious violations.

The set of criminal law laws that are binding on everyone, on the contrary, the science of criminal law is a systematized set of knowledge about criminal law, its main task is to study crime from a legal point of view. There are other criminal sciences, the connecting link between them is that they all deal with crime, just from different perspectives. For example, criminology interprets and investigates crime as a social phenomenon, while forensics summarizes investigative science, that is, scientific knowledge on the detection, collection and evaluation of crime. Crime policy is a 4th crime science, an emerging discipline, perhaps not even a science in its own right. The main objective of crime policy is to reduce the level of crime as much as possible. It is part of the general policy of the state, such as economic policy, education policy and social policy. Today, there is a consensus that there is no crime policy that can be used to completely eliminate crime and reduce it to zero. The aim, therefore, can only be the optimal reduction: taking into account the social damage caused by crime and also the state costs of reducing crime.

It seems reasonable to assume that people who are threatened with harsh punishment for a certain behavior will obviously refrain from that behavior. However, a scientific examination of the issue has revealed that the opposite is true: it is precisely in people who are threatened with mild punishment that an aversion to prohibited behavior develops".[2] To this we may add the opinion of the father of criminal law science, Cesare Beccaria, put on paper in 1764, that it is not the severity of punishment but its insurmountability that has a deterrent effect.

More and more politicians are demanding that criminal liability be enforced and that legislation be tightened up today. The economic crisis did not come as a result of lightning strikes from the sky, but as a result of mistakes made by the leadership levels. – nyilatkozta Alexander Dobrindt told to newspaper called Hamburger Abendblatt. The aim of politics here is to clearly name those responsible and to draw conclusions. This includes criminal liability too.[3]

We mentioned that crime policy is not yet considered an independent science, it is just a self-governing subfield within the criminal sciences. It is part of the general policy of the state, including legal policy. An umbrella term for strategies to respond to crimes that have already been committed. Crime policy governs criminal legislation (e.g. creating new offences, raising or lowering sentences, etc.), but it has only a moderate role in the application of the law.

Protecting the interests of society, ensuring social coexistence is the task of state power. However, the means of accomplishing this task, which are by no means negligible, fall within the field of criminal law. The conditions and manner of using these instruments are criminally determined. The task of crime policy is, inter alia, to develop the aspects to be taken into account in the application of criminal law.[4] Crime policy is always a dynamic activity adapted to the quantitative, qualitative change in crime and the sense of security of society, which is therefore constantly changing, the means of which are

[2]Elliot Aronson: A társas lény (The social being) KJK-Kerszöv Jogi és Üzleti Kiadó Kft. Budapest, 2001. 28. oldal

[3]http://www.abendblatt.de/politik/deutschland/article607692/CSU-fordert-strafrechtliche-Aufarbeitung-der-Wirtschaftskrise.html (19.08.2012.)

[4]Földvári József: Kriminálpolitika (Criminal policy) Közgazdasági és Jogi Könyvkiadó, Budapest, 1987. 32-33. oldal

determined not by quantitative and qualitative changes in crime, but by the level of civilization of society.[5]

Crime policy is mainly in the area of legislation. In the application of law (at least in the constitutional rule of law), only criminal policy, enshrined in criminal law as a legislative will, can prevail, that is, it is not possible to directly control the courts. This is because the judiciary is an independent, independent branch of power, and judges are subject only to the law.[6] For this reason, we do not mention sentencing (criminal sentencing) policy as a separate area within criminal justice policy.

The aim and purpose of crime policy, in my view, from the point of view of victim protection, may be primarily that by minimising the number of crimes (reducing it to zero would be an impossible expectation!), the personal and material harm caused to the victims can also be reduced. Criminal legislation must therefore create effective and dissuasive legislation that serves specific and general prevention, and in the application of the law, while applying these rules with consistent rigour, the use of a specific set of instruments for crime prevention can help to minimise the grievances of victims.

2. Criminology and victimology

Criminology is one of the main branches of the criminal sciences, the "light cavalry" of the criminal sciences. It does not have a uniform definition, in a narrower sense it can be considered a discipline that deals with the empirical research of crime and delinquency and the person of the perpetrator, and its method is the analysis of the total crime and the dynamics and structure of each crime, as well as the scientific description of certain crimes.[7] According to some authors, victimology (that is, the science that deals with victims of crime) is a completely independent discipline, but according to others, it can be considered much more as part of criminology. There is no unified theory. Agreeing

[5]Farkas Ákos: A kriminálpolitika és a büntető igazságszolgáltatás hatékonysága (Crime policy and the effectiveness of criminal justice) (=Tanulmányok Szabó András 70. születésnapjára Magyar kriminológiai Társaság Budapest, 1998. 81. oldal)

[6]Finszter Géza: Kriminálpolitika tegnap és ma (Crime policy yesterday and today) (=Rendészeti Szemle 2006. 12. szám 77. oldal)

[7] Korinek László: Kriminológia I. (Criminology I.) Magyar Közlöny Lap- és Könyvkiadó Budapest, 2010. 19. oldal

with academic László Korinek, we can classify the majority of victimological research as criminology.[8]

Criminology is a discipline in its own right within criminal law, which at the same time, as it fades through the web of law, establishes connections with other sciences. It is not only related to the social sciences (sociology, psychology), but - especially in its early stages of development - it has also been endowed with behavioral and biological aspects.

It took about 100 years for the development of the modern, far from clear concept of victimology. Mendelsohn's concept of victimology is much broader than the legal definition used today. Mendelsohn, pointing out a lack of a legal approach, expanded the concept of victimology. In his view, it is just as wrong to apply victimology only to victims of crime as to say that criminology confines itself to examining the circumstances of homicides.[9]

Research on victims of crime was also aided by the interdependence of criminology and psychology at the end of the XX century. In the twentieth century, advances in both sciences have contributed to the increase in knowledge about crime and perpetrators, even if the most important questions (concerning the causes of crime and the best solutions to dealing with it) have not been answered by all and verified in practice. Another trend was the expansion of the areas of interest of criminology, the approach to problems from a new side. Examples include examining the role of crime control institutions, victims, and turning to the wider social environment (integration of the results of law enforcement science, victimology, research into fear of crime, etc.).[10]

In order to do any scientific research on victims of crime, it is necessary to know victimology. One of the best literature summaries on this topic is given by Ilona Görgényi's book.[11]

Practical results of victimological research can also be presented in our country. These include Act CXXXV of 2005 on assistance to crime victims and state compensation. In

[8] Korinek László: Kriminológia I. (Criminology I.) Magyar Közlöny Lap- és Könyvkiadó Budapest, 2010. 339-342. oldal

[9] Parti Katalin: Benjamin Mendelsohn (1900-1998) a viktimológia atyja (Benjamin Mendelsohn (1900-1998) the father of victimology) (=Jogtudományi Közlöny, 2001/9., 388. oldal)

[10] Korinek László: A kriminológia és a pszichológia kapcsolatáról (On the relationship between criminology and psychology) (Jogtudományi Közlöny, 2011/7-8., 361. oldal)

[11] Görgényi Ilona: A viktimológia alapkérdései (questions of victimology) Osiris Kiadó Budapest, 2001.

the context of the Hungarian protection against violence legislation, it is also worth mentioning that from the first of January 2008, the criminal law of harassment appeared. The provision aims to protect privacy - even by using the tools of state punitive power. Under the provision, a harasser is punishable if he harasses or harasses his victim with the aim of intimidating him or interfering in his daily life. A qualified case of harassment occurs when the offender commits the act to the detriment of his or her ex-spouse, former registered partner or ex-partner, or to the detriment of a person under his or her upbringing, supervision, care or treatment.

The Criminal Code also contains the facts of domestic violence. Domestic violence is based on the principle of equality of cohabitants. In addition to the special subjects named in the statutory facts, the coexistence of the victim and the offender as an additional condition is necessary for the realization of the crime. In order to establish a crime, the offender and the victim do not need to live together at the time of the commission, it is enough that they have lived together before, and the regular commission is part of this situation.[12]

3. Protection of victims of sexual offences

Sexual freedom and sexual morality are among the legal objects that the legislator has included in every era some level of protection, from the advent of criminal law to the present day. In order to determine who is considered to be the victim (victim) in this context, we must also take into account the current value judgment of society when setting the boundaries of criminal protection. Thus, the rules of criminal law also depend on the current moral value judgment of society, so they have undergone and are undergoing constant changes both in their content and in the language of regulation (see, for example, in the terminology of previous laws the terms “against nature” or “lust”, which are no longer included in the current Criminal Code). Our new Criminal Code also changes the title of the chapter, the former Chapter XIV, Title II of the Criminal Code regulated “Crimes against sexual morality”, the new Chapter XIX of the Criminal Code is entitled “Sexual freedom and sexual offenses”. This is another way that our new law expresses that the protection of sexual morality is not the primary and only protected legal object, but also the protection of sexual integrity, sexual self-determination, sexual freedom.

[12] Csemáné Váradi Erika - De Negri Laura: Az áldozatvédelem új irányai Ausztriában. Az új osztrák erőszak-ellenes törvénycsomag tanulságai (New directions of victim protection in Austria. Lessons learned from Austria's new anti-violence package) (Miskolci Jogi Szemle, 2020/1., 241. o.)

In the Middle Ages, when the roots of criminal law regulation began to take shape, the regulation of sexual crimes was extremely closely related to Christian religious moral norms. To date, there has been a continuous "secularization" in this area. In the middle of the XX century, the rules on the criminalization of sexual intercourse outside of marriage disappeared, it was constantly weakened, and then radical changes also took place in the criminal persecution of homosexuality. Act V of 1961 (the second Hungarian Criminal Code) abolished the general criminalisation of homosexual acts between men. The provision that only such acts between men can be punished has now been superseded and is not in accordance with the prevailing principles of criminal law science or medicine, but it has been replaced, without any restriction, by a new principled regulation of the issue.[13] – we can read it in a contemporary monograph. The culmination of the decriminalization of homosexuality was the constitutional court's decree No. 37/2002 (IX. 4.) AB's decision completely removing the possibility of criminal prosecution of homosexuality from Hungarian criminal law, partly due to the development of medicine and partly due to eu expectations.

In the 1950s, prostitution was ordered to be punished in the spirit of the so-called "socialist morality", and after the change of regime, in 1993, prostitution (then used in criminal law terms: businesslike lust) was removed from the horizon of criminal law. However, we have continued to punish abusive behaviors based on prostitution and those seeking to profit from it ever since, and our new law of 2012 also allowed (with some modifications) prostitution crimes in Hungarian criminal law.

Sexual morality is nothing more than society's conception of the genesis and satisfaction of sexual desires.[14] Sexual offences are actually those that conflict with the concept of morality in the field of sexual life. These crimes directly or indirectly violate morality.[15] Crimes against sexual freedom and sexual morality thus criminalize behaviors that are also condemned by the moral norms of the majority of society. In addition to (criminal) law, sexuality also appears in the other system of social norms, morality. The question in this regard is to what extent the moral and criminal judgments of sexual conduct and acts fall or may coincide, to what extent moral prohibitions mean or may also constitute

[13] Schultheisz Emil: A nemi erkölcs elleni bűntettek de lege lata (Crimes against sexual morality de lege lata) Közgazdasági és Jogi Könyvkiadó Budapest, 1966. 11. oldal

[14] Merényi Kálmán: A szexuális erőszak (Sexual violence) Közgazdasági és Jogi Könyvkiadó Budapest, 1987. 26. oldal

[15] Lukács Tibor – Traytler Endre: A nemi erkölcs elleni bűntettek (against sexual morality) Közgazdasági és Jogi Könyvkiadó Budapest, 1963. 153. oldal

criminal prohibitions.[16] Due to the subsidiary nature of criminal law, we do not punish any behavior that the majority of people consider immoral. (For example, sexual relations between siblings are condemned by the majority of society, but only intercourse is punishable by our current law.) Criminal law is a last resort and should only be used where the system of instruments provided by other branches of law no longer provides sufficient protection. For this reason, for example, some aspects of prostitution fall within the field of misdemeanor law, and criminal law sanctions only the most serious of them.

Criminal law is a last resort and should only be used where the system of instruments provided by other branches of law no longer provides sufficient protection. For this reason, for example, some aspects of prostitution fall within the field of misdemeanor law, and criminal law sanctions only the most serious of them.

When drafting our new Criminal Code, we paid particular attention to the provisions of the relevant international conventions in the codification of crimes against sexual freedom and sexual morality. The most important of them are:

- the International Convention for the Suppression of the Trafficking of Persons and the Exploitation of the Prostitution of Others, done at New York on 21 March 1950 (hereinafter referred to as the 'New York Convention', promulgated by Decree-Law No 34 of 1955),
- ILO Convention No 182,
- the Optional Protocol on the Rights of the Child,
- The Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse,
- Directive 2011/93/EU,
- the Convention on preventing and combating violence against women and domestic violence.

These documents define the structure and content of the facts, which therefore require significant changes. New conduct cannot be introduced one-on-one into the conceptual system and content of the facts in force, as they stretch the framework of current facts and new facts must therefore be introduced. The chapter takes into account the international

[16] Szomora Zsolt: A nemi bűncselekmények alapkérdései (Fundamental issues of sex crimes) Rejtjel Kiadó Budapest, 2009. 17. oldal

expectation and social need to give priority to protecting (also) persons under the age of eighteen in the event of such crimes. In view of this, for example, the Criminal Code defines sexual violence committed against a person under the age of eighteen as a qualified case, or if the offender is wholly or partly engaged in prostitution with a person under the age of eighteen, and regulates the exploitation of child prostitution in an independent situation.[17]

The chapter contains the following offences (it can already be seen from the names of the offences that the relevant criminal law has been renewed):

- Sexual Exploitation,
- Sexual Violence,
- Sexual Abuse,
- Incest,
- Pandering,
- Procuring for Prostitution or Sexual Act,
- Living on Earnings of Prostitution,
- Exploitation of Child Prostitution,
- Child Pornography,
- Indecent Exposure.

The common legal object of the crimes classified in the XIX. chapter is sexual freedom, which is part of human freedoms, and the order of sexual relations adopted in society. Grouping these crimes somewhat arbitrarily, we can form the following criminological categories:

1) violent sexual crimes: sexual exploitation and sexual violence,
2) crimes related to paedophilia: sexual abuse, exploitation of child prostitution, child pornography,

[17] A 2012. évi C. törvény javaslatához fűzött indokolás alapján. (Based on the explanatory memorandum to the proposal of Act C of 2012.)

3) crimes based on prostitution: pandering, procuring for prostitution or sexual act, living on earnings of prostitution,

4) crimes that violate the order of sexual relations adopted in society (that is, the category "other": incest and indecent exposure.

The legislator expresses not only in the Criminal Code, but also in our Code of Criminal Procedure that these crimes are extremely dangerous for society. The Be. Section 64/A(a) states that criminal proceedings for offences against sexual freedom and sexual morality committed against a minor shall be conducted as a matter of priority.

The regulation of crimes against sexual morality was tightened by the legislature in 2021, primarily for so-called paedophile offenders. The explanatory memorandum of Act LXXIX of 2021 highlights that sexual crimes against children clearly provoke contempt in society, but also in criminal circles, their social perception is extremely negative. This type of crime can cause an unpredictable fracture in children's lives, irreversibly negatively affecting their physical and mental development. Sexual crimes against a child can have serious psychological and physical consequences. Among sexually abused children, 51 to 75 percent develop psychological problems later on. Moreover, these consequences are even more frequent and serious if the offender is a family member, a close acquaintance, or a person with whom the child has a personal relationship, or towards whom he or she feels that he or she can have unconditional confidence in view of his or her social situation or because of his or her role in the child's life.[18] The law created a register of paedophile offenders, mainly based on Western examples. The rules on disqualification from occupation have also been tightened. Paragraph 52(3) of the Criminal Code has been replaced by the following: „(3) connection with any criminal offense against sexual freedom and sexual offenses, if at the time when the crime was committed the victim is under the age of eighteen years, the perpetrator may be banned from the exercise of any professional activity where it involves the responsibility for providing education, care, custody or medical treatment to a person under the age of eighteen years, or if it involves a recognized position of trust, authority or influence over such person." The statute of limitations of the Criminal Code has also been tightened: according to this, in the case of sexual offences against minors punishable by no more than five years' imprisonment, the limitation period rests until the victim reaches the age of 21.

[18] https://jogaszvilag.hu/szakma/hatalyba-lepett-a-pedofil-torveny/ (01.08.2022.)

The law also aims to reduce child pornography. In 2017, the number of crimes against sexual freedom and sexual morality was 2760, of which 1439 were cases of child pornography. Bár a Kúria a 2/2018. In a criminal law uniformity decision, it stated that one crime occurs even if several pornographic images are acquired (made, marketed, traded, etc.) and, in view of this, the number of cases of child pornography decreased in 2019, but in proportion it still shows an outlier. In 2019, child pornography was among the three most common sexual crimes, as out of 1138 sexual crimes, 250 were sexual assault, 398 were indecent assault, and 248 were child pornography. The law significantly increases the penalties for child pornography offenders and introduces new classified cases, including crimes committed in an official personal capacity.[19] More than a decade and a half before the creation of the new Criminal Code, the abuse of illicit pornographic images was already punishable by Hungarian criminal law. In Hungary, the abuse of prohibited pornographic images has been included as a separate fact in the Criminal Code since 1997, when the legislature, in view of the promulgation of the UN Convention on the Rights of the Child in Hungary, ordered the creation, trafficking and placing on the market of pornographic imagery of a person under the age of 18 to be punished as an independent act. The legal object of the crime is the healthy sexual development of persons under the age of 18 and the social interest in combating organised crime groups based on child pornography. The legal facts of the crime have been constantly expanded and tightened, most recently by the already mentioned Act LXXIX of 2021.

The new law is also in the crosshairs of daily political struggles, but we must recognise that the protection of child victims from sex offenders does indeed justify stricter criminal law. Beccaria's famous book on crimes and punishments, published in 1764, lays down as an axiom that crimes are deterred from committing crimes by the severity of the expected punishment and its inability to attend (the likelihood of the application of punishment). By changing either factor, we can have an impact on crime and provide more effective protection for potential future victims.

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[19] https://jogaszvilag.hu/szakma/hatalyba-lepett-a-pedofil-torveny/ (02.08.2022.)

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PATIENT RIGHTS AND STANDARDS OF HUMAN RIGHTS PROTECTION IN THE HEALTH CARE SYSTEM OF THE REPUBLIC OF SERBIA

Starting from the fact that citizens have a need for health care from childhood to old age, the authors deal with the issue of protecting patients' rights in the Republic of Serbia, presenting and analyzing in detail the provisions of the Law on Patients' Rights. The authors pay special attention to their compliance with the European Charter on Patients' Rights and the recommendations of the Council of Europe in this area. The aim of the paper is to, through the consideration of de lege lata provisions in this area, point out the existing ambiguities, as well as the shortcomings of the law, and offer de lege ferenda solutions for the improvement of legal provisions concerning the protection of patients' rights and standards of human rights protection in the health care system of the Republic Serbia.

***Keywords**: human rights, patients' rights, health care, healthsecurity.*

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1. Introduction

As it was noted by George J. Annas in introductory part oh his book „The Right of Patients: the basic ACLU guide to patient rights" the most powerful concept shaping the practice of modern medicine is the recognition that patients have human rights. Respects for these rights can transform the doctor-patient relationship from one characterized by authoritarianism to a partnership and simultaneously improve the quality of medical care… By demanding that patients be treated as unique human beings, the recognition of human rights in health care can humanize both the hospital and the encounters with physicians and other health care professionals" (Annas, 1992:viii). The concept of human rights in patient care is rooted in the health and human rights framework and builds on the more than two decades of work by the health and human rights movement (Mann, 1997:113). When we speak about legal perspective of patients' rights it should be noted that it consider that medical law governs professional conduct in the patient care sphere primarily through civil law focusing on the obligations of the care taker in the process of providing of health care. Such understanding of concept of patients' rights makes it relevant and applicable in cases where the individual—receiving or seeking treatment—suffers direct harm, due to a breach of his right to good care. According to this concept good care has been viewed to consist of not only competent and skilled practices but also of respect of patients' rights – their ability to lead treatment decisions instead of being led through them, to maintain control of the information divulged to the mand to others, to receive equal care in a non-discriminatory fashion, and to leave the health care facility when desiring so and so on (Peled Raz, 2017). The central position of the patient in health care has been stressed in international regulations and set out in several specific treaties, regulations and directives such as the European Social Charter of the Council of Europe[1] and the Declaration on the Promotion of Patients' Rights in Europe of the World Health Organization[2] (Hermarns, 1997:12). The rights of patients in Europe have been defined by the European Charter of Patients' Rights[3], which was drafted in collaboration with 12 citizens' organizations from different EU countries in 2002 (Kračić, Viđak&Mrušić, 2021:). The European Charter on Patients' Rights, which was ratified in Brussels at the end of 2002, has become the basic document for healthcare reform in Europe. According to the Charter, everyone has the right to information related to their state of health, health

[1] European Social Charter. Strasbourg: Council of Europe, European Treaty Series 35 (1961).

[2] A *Declaration on the Promotion of Patients*' *Rights in Europe*: *European* Consultation on the *Rights* of *Patients*, Amsterdam 28-30 March 1994.

[3]European Charter of Patients' Rights.
https://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf. Accessed 01.09.2022.

services and the way they are used, but also to all the opportunities provided by scientific research and innovative technologies. Likewise, everyone has the right to the availability of health services in accordance with their health problems, regardless of the patient's financial capabilities, place of residence or the nature of the disease. Adopted in 2002 by the Active Citizenship Network, a European network of citizen, consumer and patient organisations, it is part of an original Europe-wide movement that encouraged patients to play an active role in shaping healthcare delivery. It also represented an attempt to transfer regional documents related to the right to health care into special provisions. Although this document is not legally binding, a strong network of patient rights groups across Europe has successfully influenced their national governments to recognize and adopt these rights. It has also been used as a standard for monitoring and evaluating healthcare systems across Europe (Ayala et al., 2015:119). The patient has the right to actively participate in decisions about his own health, to accept or refuse a medical procedure or intervention, the freedom to choose between different procedures and interventions, as well as to choose a provider of health services. Its second chapter, in which is specified in 14th right of patients is an integral part of the European Constitution. A number of countries have regulated the area of patients' rights with a special law. In this regard, the European Charter on Patients' Rights has become a fundamental document for the reform of legislation in the countries of the European Union, but countries that aspire to become members of the European Union. The Republic of Serbia is a signatory to this charter, and although it has not yet ratified it, with its Law on Patients' Rights adopted in 2013, it recognizes twelve of the fourteen rights prescribed by this charter, which implemented part of the fundamental document for healthcare reform in European countries into domestic legislation. union (Simić, 2013:154). In the next part of the work, we will present the rights of patients that are provided for by this law and point on some problems regarding its achieving.

2. Patients' rights in the Law on Patients' Rights of the Republic of Serbia

The rights of patients determined by the provisions of the Law are presented through 19 different rights set forth in 25 articles in the following order (Articles from 6 to 31): 1) The right to access to health care, 2) Right to information, 3) The right to preventive measures, 4) The right to the quality of health service provision, 5) The right to patient safety, 6) The right to notice, 7) Right to free choice, 8) The right to a second professional opinion, 9) Right to privacy and confidentiality, 10) The right to consent, 11) The right to inspect medical documentation, 12) The right to confidentiality of data on the patient's health condition, 13) The right of a patient participating in medical research, 14) The right of the child in stationary health institutions, 15) The patient's right to leave the inpatient

health facility at his own risk, 16) The right to alleviate suffering and pain, 17) The right to respect the patient's time, 18) The right to object and 19) The right to compensation for damages.

Among the listed rights, the majority are already known from the provisions of the Law on Health Care[4] (hereinafter: LHC) section: Human rights and values in health care and patients' rights, whereby some provisions have been reformulated, shortened or supplemented (eg: Right to information; Right to privacy and confidentiality; Right to consent; Right to confidentiality of data; Right of a patient participating in medical research; Right to object and Right to respect the patient's time) or the names of the members have changed (eg: Right to privacy and confidentiality - formerly Right to privacy and confidentiality) information; Right to consent - previously Right to self-determination and consent; Right to confidentiality of data on the patient's health condition - previously Right to confidentiality of data; Right of a patient participating in medical research - previously Right of a patient who is controlled this medical trial).

The Law on Patients' Rights of the Republic of Serbia introduces certain rights for the first time in our legal system: 1) The right to preventive measures (Article 8), 2) The right to the quality of health service provision (Article 9), 3) Right to patient safety (Article 10), 4) The right to a second expert opinion (Article 13), 5) The right of the child in stationary health institutions (Article 26), 6) The patient's right to leave the inpatient healthcare facility at his own risk (Article 27), and 7) The right to alleviation of suffering and pain (Article 28).

Article 6 of the Law establishes the right to access to health care, as the right to available health care of the highest possible level of quality, in accordance with the patient's health condition, without discrimination in relation to financial possibilities, place of residence, type of illness, time of access to health services or in relation to some other difference that can be a cause of discrimination (Popesku, 2017:177).

It is good that the legislator recognizes the problem that a wide range of people are discriminated against when using medical services, and states *"... that the right to available health care of the highest possible level of quality has been established... without discrimination... or in relation to some other difference that may be cause of*

[4] Law on Health Care ("Official Gazette of RS", no. 107/2005, 72/2009 - other laws, 88/2010, 99/2010, 57/2011, 119/ 2012 and 45/2013 - other law).

discrimination." However, the Law on Prohibition of Discrimination[5] uses the term "*personal characteristic*" and not *"...some other diversity..."*. The legislator therefore, in accordance with the Law on Prohibition of Discrimination, should have defined "... *in accordance with the patient's health condition, without discrimination in relation to financial possibilities, place of residence, type of illness, time of access to health services or assumed personal characteristics that may be the cause of discrimination*."

Article 7 of the Law establishes the right to information, as the patient's right to all types of information about his health, the health service and how he uses it, as well as all information that is available based on scientific research and technological innovations. Within this right, the patient is also guaranteed the right to information about the name and professional status of health workers, i.e. health associates who participate in the undertaking of medical measures and the procedure of his treatment in general, which is the standard prescribed by the Principles of the World Health Organization (WHO).

Article 8 of the Law establishes the right to preventive measures, as the right to appropriate health services for the preservation and improvement of health, prevention, suppression and early detection of diseases and other health disorders, which is achieved by raising people's awareness and providing health services at appropriate intervals for population groups that are exposed to an increased risk of disease. In this way, patients are guaranteed various programs for early detection, e.g. cervical, breast or colon cancer, etc (Batićević & Kubićek, 2021:641).

In Article 9 of the Law, the right to the quality of the provision of health care services is established, as the right to timely and high-quality health care services, in accordance with the state of health and established professional standards and a humane attitude towards the patient. This right is defined in accordance with the quality provisions of the European Charter of Patients' Rights, WHO Principles and the Declaration on Patients' Rights of the World Medical Association[6] (hereinafter: Lisbon Declaration of WMA).

Article 10 of the Law establishes the patient's right to safety, the right to safety in the provision of health care, in accordance with the modern achievements of the health profession and science, with the aim of achieving the most favorable treatment outcome

[5] Law on Prohibition of Discrimination ("Official Gazette of RS", No. 22/2009).

[6] *World Medical Assembly Declaration of Lisbon on the Rights of the Patient, adopted September/October 1981, available at:* https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/.

and reducing the risk of unwanted consequences for the patient's health to the minimum possible measure.

Article 11 of the Law establishes the right to notification. According to the Council of Europe Convention on Human Rights and Biomedicine[7] (hereinafter: CoE Convention), which Serbia ratified in 2010, this right includes the patient's right to receive receives the notice he needs to make a decision to consent or not to consent to the proposed medical measure.

In accordance with the provisions of the European Charter on the Rights of Patients, the competent health care professional is obliged to give that notification in a timely manner, in a way that is understandable to the patient, and therefore it was determined that the notification should be given orally by the health care provider, so that the condition of adaptation of the notification to each individual could be fulfilled to the patient. In order to protect patients with special needs, the obligation of a healthcare institution to provide an interpreter to a deaf patient has been established.

The content of the notification that the healthcare worker is obliged to give is defined in accordance with the provisions of the CoE Convention, the European Charter on Patients' Rights and the WHO Principles that speak about the content of the notification. The patient's right to waive notification is established in accordance with the European Charter on Patients' Rights, but there is also a limitation that he cannot waive notification that the proposed medical measure is necessary and that it is not without considerable risk, i.e. that it is risky not to undertake it.

The possibility for the health care worker, exceptionally, to keep silent or reduce the notification, is given, in accordance with the provisions of the WHO Principles and the Lisbon Declaration of WMA, in cases where there is a serious risk that the notification would significantly harm the patient's health. This provision applies primarily to cases of communicating diagnoses of the most serious diseases.

As part of the right to notification, the child's right to confidential counselling during health care, even without parental consent, when it is in the best interest of the child, is established. This provision follows the recommendations of the Committee on the Rights of the Child in Commentary no. 12 to the United Nations Convention on the Rights of the

[7] Council of Europe Convention on Human Rights and Biomedicine ("Official Gazette of RS - International Treaties", No. 12/2010).

Child[8] (hereinafter: Convention on the Rights of the UN child), which states that states are obliged to provide children with access to confidential counselling without parental consent, regardless of the child's age, in the case when the child is a victim of violence or abuse in the family, in the case of conflict between parents and the child regarding access to health care services or when a child is in need of reproductive health services or education, emphasizing that this right is distinct from the right to consent and therefore should not be limited by age.

Article 12 of the Law establishes the right to free choice, which includes the right to free choice of a doctor of medicine, that is, a doctor of dentistry, as well as a free choice of proposed medical measures, in accordance with the law governing the field of health care and the law governing the field health insurance. This right is related to the right to a second professional opinion and puts the patient's autonomy of will, his right to choose who will treat him, as well as the right to ask for another professional opinion when it comes to making important decisions concerning his life and health to request another opinion before the final decision on the proposed medical measure.

Article 13 of the Law establishes the right to a second professional opinion, as the right of a patient to request a second professional opinion on the state of his health from a doctor of medicine or dentistry who did not directly participate in the provision of health services, in accordance with the provisions of the WHO Principles and the Lisbon Declaration of WMA. In order to facilitate this right of patients, the obligation of health institutions to highlight the list of health workers who provide health services in a certain organizational unit, and who can therefore provide the patient with a second expert opinion, has been established.

Article 14 of the Law establishes the right to privacy and confidentiality, as the right to the confidentiality of all personal information communicated by the patient to the competent healthcare worker, i.e. healthcare associate, including those related to the state of his health and potential diagnostic and therapeutic procedures, as and the right to protect your privacy during diagnostic tests and treatment as a whole.

In accordance with the provisions of the European Charter on Patients' Rights and the WHO Principles, only those healthcare workers, i.e. healthcare associates who directly participate in the patient's examination and the undertaking of medical measures, can

[8] United Nations Convention on the Rights of the Child ("Official Gazette of the SFRY - International Treaties", No. 15/90 and "Official Gazette of the FRY - International Treaties", No. 4/96 and 2/97).

attend the examination of the patient and the undertaking of medical measures, while the consent of the presence of other persons is given by the patient himself. The provision that the patient has the right to refuse to have his examination and other medical measures attended by pupils and students of the health profession for the purpose of conducting practical classes, as well as health workers and health associates during internships and professional training, was included in the text of the Law in accordance with the provisions of the WHO Principles and the Lisbon Declaration of WMA, which establish this right of the patient.

In article 15 to 19, the right to consent was established. These provisions stipulate that a medical measure can only be taken based on the informed consent of the patient (Vujović, 2021:571).

The legislator especially emphasizes the necessity of the written consent of the patient, that is, his legal representative, when it comes to undertaking proposed invasive diagnostic and therapeutic medical measures (Article 16). The provision that a medical measure is taken against the will of the patient, i.e. the legal representative of a minor, i.e. a patient deprived of legal capacity, can be taken only in exceptional cases, which are established by law and which are in accordance with medical ethics, established in accordance with the standards of the Lisbon Declaration of WMA.

The patient has the right to revoke the consent given at any time, as well as to refuse the proposed medical measure, whereby the competent health worker is obliged to warn the patient of the consequences of refusal (Jovanović, 2020:541).

On a patient who is unconscious, or for other reasons is unable to communicate his consent, an emergency medical measure can be taken without his consent. In accordance with the provisions of the Ottawa Declaration of the World Medical Association on the Rights of the Child to Health Care (hereinafter: the Ottawa Declaration of the WMA) and the Lisbon Declaration of the WMA, the same can be done in the event of the need to undertake an emergency medical measure when a legal representative is not available or refuses the proposed emergency medical measure.

If the patient is a child or is deprived of legal capacity, medical measures can be taken with the notification and consent of his legal representative. In addition, the legislator justifiably stipulates that a child, that is, a patient deprived of legal capacity, should be involved in making a decision on consent to the proposed medical measure, in accordance with his maturity and ability to judge.

In the event that the competent healthcare worker believes that the patient's legal representative is not acting in the best interests of the child or a person deprived of legal capacity, he is obliged to immediately notify the competent guardianship authority.

Comment no. 12 of the Committee on the Rights of the Child to the UN Convention on the Rights of the Child established that states should determine the age limit of a child's ability to independently decide on consent. The Family Law[9] establishes that a child who has reached the age of 15 and who is capable of reasoning can give consent for a medical procedure. By the LHC, the age limit of 15 years and the capacity to reason were the conditions for the child's capacity to give independent consent to a medical measure, without parental consent. The same decision was retained in the Law.

The provision that, in the event that a child who has reached the age of 15 and is capable of reasoning refuses the proposed medical measure, the competent healthcare worker is obliged to request consent from the legal representative, is based on the best interests of the child, as the basis for decision-making by the competent healthcare worker, which is in accordance with the UN Convention on the Rights of the Child.

Article 20 of the Law establishes the right to access medical documentation, which includes the patient's right to access his medical documentation.

In articles 21 to 24 of the Law establishes the right to confidentiality of data on the patient's health condition. Data on the state of health, that is, data from medical records, belong to personal data and represent particularly sensitive data about the patient's personality. Competent healthcare professionals, i.e. healthcare associates, may be exempted from the obligation to keep this data only based on the written consent of the patient, i.e. the legal representative, or based on a court decision.

The patient, i.e. the legal representative, may, on the basis of written consent or authorization certified by the competent authority, allow the disclosure of information about his health condition. Exceptionally, in order to avoid a health risk for a family member, the competent health worker can communicate the data to an adult family member even if the patient has not given his consent.

The right to a copy of medical records is established in accordance with the European Charter on Patients' Rights and the WHO Principles. The costs incurred by the patient in

[9] The Family Law ("Official Gazette of the RS", no. 18/2005 and 72/2011 - other law).

this connection are limited only to the necessary costs of making a copy of the medical documentation.

Extracts, i.e. copies of medical documentation for a deceased family member, can be given to an adult immediate family member, i.e. a legal representative at his request, in order to exercise the rights established by law.

The right of a child over 15 years of age and capable of reasoning to the confidentiality of data in his medical documentation is established in accordance with Commentary no. 4 of the Committee on the Rights of the Child to the UN Convention on the Rights of the Child, the Ottawa Declaration of the WMA and the Lisbon Declaration of the WMA. The special protection of the child within this right is given through the duty of the competent health worker to, despite the child's request that information about his health condition not be disclosed to his legal representative, in the event of a serious threat to the child's life and health, to communicate the same to the legal representative. In this way, while respecting the child's right to confidentiality, his best interest is put in the foreground as the deciding factor in whether it is necessary to involve a legal representative, for the sake of additional protection of the child. In all cases of danger to the child's life and health, the health worker is obliged to inform the parents. This right, on the other hand, does not exclude the possibility that, with the child's consent, and in cases where there is no serious danger to the child's health, the parent himself has access to the data from the medical records.

Article 25 of the Law establishes the right of a patient who participates in medical research. Research involving an adult patient capable of business can be undertaken only with his written consent, after he has been sufficiently informed about the meaning, purpose, procedures, expected results, possible risks, unpleasant accompanying circumstances of the research, as well as that he is free to refuse participation in the research and to revoke consent at any time. The Law on Patients' Rights, Article 25 (6), stipulates that public health research may be approved, which includes a child who is 15 years of age and able to make judgments, which does not produce direct benefit or risk for the child, if it aims to contribute to a better understanding of the child health status of this population, with the written consent of the child or his or her legal representative (Ivanović & Ranđelović, 2019:214).

Exceptionally, medical research involving a child, i.e. a patient deprived of legal capacity, can be undertaken for the immediate benefit of the patient himself and with the written consent of his legal representative. The restriction that such research cannot be carried

out if the person himself objects to it was introduced in accordance with the ratified SE Convention and the Ethical Principles for Medical Research Involving Human Subjects of the World Medical Association (further: Helsinki Declaration of the WMA). In this way, the rights of persons who are not capable of making independent decisions about consent to medical research are additionally protected.

The possibility that, exceptionally, public health research involving a child who has reached the age of 15 and is capable of reasoning, and which produces no direct benefit and carries no risk to the child, may be approved if the research aims to contribute to a better understanding the state of health of this population, with the written consent of the child himself or his legal representative, was determined in accordance with the same provision provided for in the ratified Convention of the CoE, the Principles of the WHO and the Helsinki Declaration of the WMA. In all mentioned international documents, as a condition for such research, it was established that they carry only a minimal risk for the child, while the provision of this law is more restrictive in this sense, setting the condition that the research does not carry any risk for the child. Research in public health to which this provision refers, as a rule, involves research in the form of a survey and aims to research lifestyles and behaviour in order to prevent diseases and improve the health of this population.

Before the start of medical research, the Ethics Committee of the health institution makes a decision on undertaking medical research involving patients in the health institution.

Article 26 of the Law establishes the rights of children in inpatient health care institutions. It implies that a child up to the age of 15 has the right to be placed for hospital treatment accompanied by one of the parents, adoptive parents or guardians, whenever possible, and that the child undergoing hospital treatment has the right to visits as often as possible. measure, the right to play, recreation and education, in accordance with his age, needs and best interest and in accordance with his health condition.

Article 27 of the Law establishes the patient's right to leave the inpatient health facility at his own risk. This right derives from the patient's right to refuse the proposed medical measure. However, if the patient is a child or has no legal capacity, the competent healthcare worker is obliged to inform the legal representative of that patient, i.e. the competent guardianship authority, without delay. If the decision to leave an inpatient health care institution for a child, i.e. a patient deprived of professional capacity, is made by a legal representative, contrary to the best interests of the patient, the competent health worker is obliged to inform the competent guardianship authority about it without delay,

as well as in the case of any other decision of the legal representative that is against the best interest of the patient.

Article 28 of the Law establishes the right to relief of suffering and pain. This right implies the highest level of alleviation of suffering and pain, i.e. the right to pain therapy and humane palliative care, but not euthanasia.

Article 29 of the Law establishes the right to respect the patient's time. This right implies that in case there are no conditions for the medical measure to be provided immediately, the patient has the right to schedule examinations, diagnostic procedures, as well as other medical measures and procedures, in the shortest possible time, and that the health institution is obliged to respect the patient's time and to inform him in a timely manner about the change in the date of provision of the scheduled health service. When the council of doctors has proposed a certain diagnostic procedure in order to give an opinion on further treatment, the health institution is obliged to carry out the certain medical measure immediately, i.e. within the deadline set by the council of doctors, which means that such patients cannot be placed on the so-called waiting lists.

Article 30 of the Law establishes the right to object. The provisions of this article stipulate that a patient who believes that he has been denied the right to health care, or that he has been denied any of his rights in the field of health care due to the actions of a health worker, that is, a health associate, has the right to file a complaint with the health worker who manages the work process or to the director of a health institution, i.e. the founder of a private practice or an advisor for the protection of patients' rights (further: patient advisor).

The patient is left to decide for himself which of the listed persons he will contact. Such a provision, which prescribes alternative possibilities for submitting complaints to different persons/bodies, may lead to a situation where patients "walk" from one person to another to whom a complaint can be made, and this creates additional confusion for patients. At the same time, one gets the impression that the patient advisor is only one in a series and not the key factor in the protection of patients' rights, which it should certainly be.

Article 31 of the Law establishes the right to compensation for damages. This right implies that a patient who, due to the professional error of a healthcare worker, i.e. a healthcare associate, suffers damage to his body in the provision of health care, or whose health condition worsens due to a professional error, has the right to compensation for

damages according to the general rules on liability for damage, as and that this right to compensation cannot be excluded or limited in advance.

3. Addressing some issues regarding particular rights prescribed by the Law on Patients' Rights of the Republic of Serbia

In the next part of the work, we will point out some of the most common questions that arose when it comes to the application of the Law on Patients' Rights in practice and give answers to them. These are issues that have been recorded in the practice of the Ombudsman of the city of Kraljevo when it comes to the protection of patients' rights. At the same time, we would like to point out the problem that the issue of the realization of patients' rights prescribed by the Law on Patients' Rights is related to the necessary application of the provisions found in other laws, i.e. regulations, which makes it difficult for patients to understand these rights, and therefore their realization.

Regarding the right to access to health care, the following issues have been noted in practice. If the selected general practitioner does not work on a certain day, does a patient who needs therapy (lack of medication) have the right to be examined by another doctor on the same day? If a specialist doctor suggests treatment in an inpatient facility, can a general practitioner refuse to issue a referral?

In connection with the first question in terms of the right to access to health care, it should first be pointed out that Article 28 of the Rulebook on the method and procedure for exercising rights from compulsory health insurance[10], it was established that, in the case of a temporary inability to work for the selected doctor due to illness, use of maternity leave, professional training or other justified reasons, the health institution is obliged to provide the insured person with a doctor who will temporarily replace the chosen doctor. Too. Article 131 of the LHC, prescribed is the obligation of the director of the health institution to organize the work and manage the work process in the health institution, and therefore to appoint a doctor who replaces the selected doctor who is absent. Accordingly, if the chosen general practitioner is not working on a certain day, the patient has the right to be examined by another doctor.

Regarding the second issue related to this right, the patient's health condition is the basic criterion for determining his need for a diagnostic, therapeutic or rehabilitation procedure,

[10] Rulebook on the method and procedure for exercising rights from compulsory health insurance ("Official Gazette of RS", No. 10/10, 18/10 - correction , 46/10, 52/10 - correction, 80/10, 60/11 - US, 1/13).

and accordingly, the specialist doctor sets an indication for inpatient treatment in one of the health institutions. The chosen doctor of general medicine cannot refuse to issue instructions for inpatient treatment indicated by a specialist doctor, given that the specialist doctor's finding is an instruction to the chosen doctor for further treatment of the patient, according to Article 40 of the Rulebook on the manner and procedure of exercising rights from compulsory health insurance. The selected doctor is obliged to comply with the prescribed method and procedure for exercising rights from compulsory health insurance, and in accordance with Article 43 of the Rulebook on the method and procedure for exercising rights from compulsory health insurance, a referral is issued for the nearest health institution located on the territory of the parent branch The Republic fund of health insurance (hereinafter: RFHI) with which the RFHI has concluded a contract on the provision of health services, if it is possible to provide the necessary treatment in such an institution. When the selected doctor assesses that the insured person cannot be provided with appropriate health care at a health care facility in the home branch area, he is obliged to issue a referral to the nearest appropriate health care facility outside the home branch area that can provide health care to the insured person, and consent to the referral the selected doctor is given by the medical committee of the main branch of the RFHI, in accordance with Article 46 of the aforementioned Rulebook. Accordingly, the chosen doctor should follow the instructions of the specialist doctor for further treatment of the patient.

When it comes to the patient's opinion on the quality of health service provision, the following were the most frequent questions. Can the rudeness of healthcare workers be classified as a violation of patients' rights? Can the advisor for the protection of patients' rights, in the process of determining the factual situation regarding the quality of the health service, in addition to the statement of the head of the department and the director of the institution, turn to any other authority of the health institution and which one?

As for the first question, and taking into account the wording of Article 9 of the Law on Patients' Rights, which prescribes this parvo, we are of the opinion that the rudeness of health workers affects the patient's satisfaction and trust in the health service, and is a violation of the right to the quality of health care provision. Also, health care quality indicators are prescribed by the Rulebook on health care quality indicators. This rulebook established, among other things, that one of the indicators of the quality of health care is the satisfaction of health service users. In this sense, the discourtesy of healthcare workers is a violation of the right to the quality of healthcare service provision.

As for the second issue, the provisions of Article 9 of the Legal Code on the method of handling complaints, the form and content of the minutes and reports of the advisor for the protection of patients' rights prescribe that the patient advisor, in order to determine the factual situation regarding the allegations in the complaint, will request written information. data and opinions from the head of the organizational unit, health worker, or health associate whose actions the complaint refers to, as well as from the director of the health institution, or the founder of a private practice. The counsellor does not have the authority to request the opinion of the professional body of the health institution. If their opinion is required in the complaint procedure, the director of the institution will request their statement and submit it as part of his response to the patient advisor.

When it comes to parvo patients, the following issues were highlighted as significant. Does the dental service have to display the price list of services in a visible place? Does highlighting the price list of dentist services, incomprehensible to an ordinary citizen, violate the obligation to inform?

With regard to the first question, it should be noted that the decree of Article 62, paragraph 1, item 5) of the LHC establishes that a private practice is obliged to display the price list of health services and issue an invoice for the provision of health services, and the behavior of the founder of the private practice is contrary to the prescribed obligation is a misdemeanor, punishable by a fine of 100,000 to 500,000 dinars, according to Article 258, paragraph 1, point 5 of the LHC. Therefore, highlighting the price list of dental services is an obligation of dental practices and laboratories for dental technology. For healthcare institutions, even for those that have a dental service in their composition, the Law on Health Care does not explicitly establish the obligation to display the price list of services, but this should not diminish the right of the patients to be informed, which includes insight into the costs of treatment. Limiting or preventing the use of this right of a patient is a violation of a healthcare worker, punishable by a fine of 10,000 to 50,000 dinars, according to Article 46, paragraph 1, point 2 of the Law on Patients' Rights. On the other hand, the Rulebook on indicators of the quality of health care established that, among others, the indicators of user satisfaction with health services include: 1) a prominent notice on the type of health services that are provided to the patient as an insured person from the funds of the mandatory health insurance, and which are health activities institutions; 2) prominent notice on health services that are not provided at the expense of compulsory health insurance, and in accordance with the act regulating the content, scope and standard of the right to health care from compulsory health insurance; 3) prominent notice on the types and amount of participation of insured persons in health care costs, as well as exemption from payment of participation; 4) a prominent price list

of health services that are not provided from the funds of the mandatory health insurance, and which patients pay from their own funds. Therefore, highlighting the price list of dental services in healthcare institutions, although it is not an obligation, is an expression of respect for the patient's right to insight into treatment costs and the care of the institution to increase the satisfaction of users of healthcare services, as an indicator of the quality of the services provided. There is no obligation to display the price list of services, but it must enable the patient's right to insight into the costs of treatment.

In relation to the second question, it should first be pointed out that this parvo is prescribed by Article 11 of the Law on Patients' Rights. The competent healthcare worker gives the notification orally and in a way that is understandable to the patient, taking into account his age, education and emotional state. If the competent health worker judges that the patient, for any reason, does not understand the given notice, the notice can be given to a member of the patient's immediate family, if the patient does not know the language that is in official use on the territory of the health institution, he must be provided with an interpreter, and if is a deaf patient, he must be provided with an interpreter, in accordance with the law. As part of the right to notification, the right of the patient, that is, the legal representative, to notification and insight into the costs of treatment is established. Highlighting the price list of dental services, which is incomprehensible to the specific patient, without an oral explanation, given in a way that is understandable to the patient, is a violation of the patient's right to information. In this sense, the patient has the right to information and insight into the costs of treatment in a way that is understandable to him.

Regarding the right to free choice, the question was asked whether there is a limit of determined patients per selected doctor? The provision of Article 4 of the Rulebook on closer conditions for the performance of healthcare activities in healthcare institutions and other forms of healthcare services prescribes the required staff for the performance of healthcare activities, and as a criterion for determining the required number of healthcare workers in healthcare institutions at the primary level of healthcare, by individual areas , the number of inhabitants (children, school children, women, adult population) was taken. The number of required health workers is also determined depending on the type and scope of professional work, prescribed by enforcement measures, i.e. number of patient visits to the chosen doctor, on a daily and annual basis. From the aforementioned provisions, a conclusion can be drawn about the possible number of determined patients, but it is not prescribed as limiting in terms of the patient's right to free choice. Based on the above, we conclude that there is no prescribed limit of patients per selected doctor.

In relation to the patients' right to a second professional opinion, the following issues were highlighted. Does the right to a second professional opinion imply seeking a second professional opinion only within the same health care institution, or can the patient request to be referred to a doctor in a higher level health care institution? How can a patient exercise the right to a second expert opinion if there is only one doctor in a certain area in a health institution? If a patient in the same institution asks another doctor for an opinion, does that doctor have an obligation to give that opinion?

Regarding the first question, Article 13 of the Law on Patients' Rights stipulates that the patient has the right to request a second expert opinion on the state of his health from a doctor of medicine, that is, a dentist, who did not directly participate in the provision of health services. Therefore, the patient has the right to seek a second professional opinion not only within the same institution, but also in another health institution or private practice.

When it comes to the second question, if there is only one doctor in a certain area of health care in the health care facility, the patient will exercise the right to a second professional opinion by seeking a second professional opinion in another health care facility or private practice.

As for the third question, if the patient in the same institution requests the opinion of another doctor, who did not directly participate in the provision of health services to the patient, the doctor is obliged to respect the right of the patient and to give him the requested second expert opinion on the state of his health. In this sense, the doctor is obliged to give another professional opinion that the patient requests.

4. Instead conclusion

Although the Law on Patients' Rights is well aligned with The European Charter on Patients' Rights and regulates 19 patients' rights, the problem is that the law only partially regulates the exercise of these rights, i.e. the exercise procedure, while the material provisions regarding these rights are found in 18 laws, 29 regulations, 160 rule books, which greatly complicates its application, and especially the understanding of the scope of these rights by the patients themselves. It should also be noted that some of these acts date back to the sixties of the 20th century, and in this respect it is necessary to harmonize these acts with the current state of health care.

Also, at this point, we would like to point out certain coalitions of the Law on Patients' Rights with other laws, and above all with the Criminal Procedure Code[11] and the Law on Termination of Pregnancy Procedures in Healthcare Institutions.[12]

Namely, according to the provisions of the Law on Patients' Rights, data can be processed only on the basis of the freely given consent of the person, and exceptionally without consent, only if this is expressly prescribed by law. In the current situation, if he would respect the prosecution's request based on Art. 282, paragraph 1, point 3 of the Criminal Procedure Code (hereinafter - CPC) health institutions should submit medical documentation to the public prosecutor's office. However, if they were to do so, they would violate the duty to keep personal data from Article 22 of the Law on Patients' Rights and have committed a punishable offense established by this law". Also, by not acting according to the order of the prosecution in accordance with Article 282 of the CPC, the responsible person can be fined up to 150,000 dinars, and if even after that he refuses to provide the necessary information, he can be fined again with the same penalty

Prosecutor's offices base their requests on Article 282 of the CPC, according to which the public prosecutor can submit a request to state and other bodies and legal entities to provide him with the necessary information. At the same time, the Law on Patients' Rights establishes that health data is particularly sensitive data that all healthcare workers and associates are required to keep and in Article 22 establishes that these duties can only be released based on the written consent of the patient or on the basis of a court decision.

The new CPC introduced a "prosecutor's investigation", unlike the long-standing practice in which the court was responsible for the investigation, the fact that the processing of personal data from medical records is still expressly provided for by the court cannot be ignored in the Patient Rights Act. The protection of personal data and the needs of efficient, but legal criminal proceedings, require that the relationship between public prosecutor's offices and health institutions be clearly and unambiguously regulated by law and respected in practice.

Furthermore, the valid provisions of Article 19 of the Law on Patients' Rights prescribe the procedure for the actions of a health worker when undertaking a medical measure, in the event that the patient is a child or a person deprived of legal capacity, while paragraph

[11] Criminal Procedure Code ("Official Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.

[12] Law on Termination of Pregnancy Procedures in Healthcare Institutions ("Official Gazette of RS", No. 16/95 and 101/2005 - other law).

4 prescribes that a child who has reached the age of 15 and capable of reasoning can independently give consent to the proposed medical measure.

It is necessary to supplement the mentioned paragraph, i.e. to harmonize the Law on Patients' Rights with Article 2, Paragraph 2 of the Law on Termination of Pregnancy Procedures in Healthcare Institutions, which prescribes that for terminating a pregnancy in a person under the age of 16, the written consent of the parents or guardian is required.

The amendment is necessary in order to eliminate the collision of the above-mentioned laws and the Law on Patients' Rights, and thus for health workers to perform their duties with legal certainty.

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THE FUNDAMENTAL RIGHTS OF THE MIGRANT IN CRIMMIGRATION LAW: INTERPRETATION FAVORABLE TO THE MIGRANT IN ITALIAN AND AMERICAN PERSPECTIVES[1]

In a legal framework often lacking clarity and which is the result of choices in criminal law policy whose trend is geared to the removal of the 'undesired' alien, the courts should resolve doubts on the law in favor of the migrant, choosing the more favorable construction, thus implementing the principle of legality and the favor rei.

Especially when the judge orders removal, and this affects the fundamental rights of the migrant, Crimmigration laws inspired by constitutional principles should lead the judge toward constructions respectful of the principle of legality understood also as a guarantee of the migrant against arbitrary powers.

This paper examines the reasons that support the interpretation favorable to the migrant in the light of the American experience, which shows how constitutional principles, with respect to Criminal Law, should lead to the interpretation of ambiguous laws that provide for the non-criminal sanction of removal.

Keywords: *crimmigration- migrant- removal- doubt about law- favor rei*

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[1] Although the paper is the result of common considerations, the §§ 4, 5, 6 are attributable to Mario Caterini, and the §§ 1, 2, 3 are attributable to Diana Zingales.

1. The interpretation favorable to migrants as a canon to 'fill the gaps' in the crimmigration laws that provide for the removal of migrants

In the Italian legal system, crimmigration law is characterized by the centrality of deportation (Gatta, 2018: 682; Siracusa, 2019: 2019,277, 278): the removal of the irregular migrant is the target aimed at by the lawmaker, facilitated by that part of the jurisprudence that, among several interpretations, often opts for the one less favorable to the migrant, that is, which determines removal. In doing so, judges pander to the securitarian instances of recent years that have characterized Italian immigration law[2] and have resulted in a substantial subjugation of the criminal law of repression to the administrative law of prevention: the migrant is considered to be a threat to the identity of a Nation (Tilovska-Kechedji, 187: 2017), and Italian criminal law is subordinated to the purposes of administrative activity, and the state's interest in the 'protection' of borders is made a legal asset to protect[3], since administrative law is not, by itself, able to protect them (Savino, 2012: 326, 327). Circumscribing the subject of this paper to the reasons in support of the necessary rescue of the principle of legality - understood as a principle of guarantee (Ronco, 2006: 80) - we examine the jurisprudence on the application of removal provided for as an alternative to imprisonment under Art. 16, co. 5, of the Italian *Testo Unico Immigrazione* (hereinafter "TUI"), which is also applicable to an imprisoned migrant who is regularly residing in Italy, but who has been convicted, and because of this has become an 'irregular' migrant. We propose a canon grounded on *favor rei* to interpret the ambiguous laws that provide for this form of removal, especially in the event of reasonable doubt regarding the laws providing for removal, or those which regulate its prohibition. A legal system that places the human being at its center and protects fundamental rights cannot legitimize interpretations in *malam partem* for the migrant just because removal is included among the non-criminal sanctions[4]. We will argue the need to recover the principle of legality and its corollaries through the interpretation of the laws by looking to the experience of American jurisprudence In its long tradition pre-Chevron, American jurisprudence has shown that, in the field of Immigration Law, reasonable doubt about laws providing for the removal of the 'regular' migrants must be resolved in their favor. Therefore, overall, in the area of law called

[2] Already the European Union's policies regulate immigration as a security problem, because migrants are viewed as a threat to the stability of the European Union (Tilovska-Kechedji, 2017:187).

[3] In some types of offense, that causes punishments of conduct, which, taken in isolation, is not offensive (Cavaliere, 2022: 59).

[4] In the past, violations of inmates' fundamental rights concerning imprisonment also arose in the EU: EU Human Rights Watch research revealed that migrants in Greece and Spain are held in detention in substandard conditions and without the ability to exercise their procedural rights (Tilovska-Kechedji, 2017: 191,192).

"crimmigration"[5], where criminal law and administrative law intersect, and where removal, a formally non-criminal sanction, is the consequence of a conviction, the principle of *favor rei* should guide the interpretation of laws lacking in clarity. Indeed, the judge should interpret laws by not favoring, by default, the removal of the migrant who has become 'irregular' only because of a conviction, to protect both the principle of legality and the rights of human beings. In light of the principles expressed by the European Court of Human Rights, the Italian lawmaker recently enacted the "Lamorgese" decree, introducing a new provision to Article 19 of the *Testo Unico Immigrazione* that expands the situations obstructive to removal. Through this new provision, Italian law gives wider protection to the family, and the professional and social life of the 'regular' migrant integrated with the Italian State. Therefore, considering that it was necessary to make the legislative will explicit in law to introduce the principle of the necessary balance between the State's interest in regulating immigration, as an expression of its highest sovereignty, and the rights of the migrant integrated into the State, the canon of favorable interpretation to migrants demonstrates the importance of the canon. In fact, in crimmigration law – characterized by continuous references to administrative laws and laws which are often ambiguous - in cases of reasonable doubt about a rule that provides for judicial removal, the judge should resolve doubts in favor of the migrant. Thus, the judge would safeguard the principle of legality and prevent immigration laws from becoming a mere 'tool' in the hands of an authoritarian lawmaker, who aims at removing aliens considered 'undesirable' even when they are lawfully present in the State.

2. The judicial expansion of punitive law: the case of the removal provided for by Art. 16, para. 5, of the Italian *Testo Unico Immigrazione (TUI)*

Among the TUI laws subject to 'creative' interpretations favoring the removal of the migrant there is Art. 16, para. 5, TUI, which regulates removal as a measure alternative to imprisonment. The trend in the jurisprudence is toward the extension of the scope of execution of this sanction, either through broad interpretations of the law that provides for the removal, or by elaborating excessively strict interpretations of the conditions obstructive to removal. According to Art. 16, para. 5, TUI, the judge orders removal as an alternative to imprisonment against an imprisoned alien who must serve a prison sentence, even residual, not exceeding two years, for offenses other than those expressly excluded by the same paragraph. A requirement for the execution of this sanction is that the alien would be expelled in any case by the prefect (Art. 13, para. 2, TUI) as long as

[5] According to the term successfully used by an American scholar (Stumpf, 2006: 367 ff.).

there are no conditions obstructive to removal (Art. 16, para. 9, TUI). The sanction was introduced into the Italian legal system by law no. 189 of July 30, 2002 ("Bossi-Fini" law) as a means to contrast prison overcrowding[6], and the needs for resocialization that characterize 'traditional' measures alternative to detention are extraneous to this. Indeed, since this removal prevails over other alternative measures (Savino, 2012: 316), it is instrumental in removing the alien from the State (Savino, 2012: 327; Spena, 2019: 460, 461). Although formally qualified as an administrative sanction because its execution is left to the Quaestor and its effect is effectively one of administrative removal[7], the jurisprudence, for its part, highlights the 'atypical' nature of this removal[8]: precisely because of the peculiar aspects of this sanction, the application of which - ordered *de plano*, even if the migrant can exercise the right to the opposition - is subject only to prior verification of the conditions provided by law, which lead to mandatory application, regardless of evaluations concerning the possibility of rehabilitation of the convicted migrant[9]. Furthermore, this alternative measure does not require a prior assessment of the migrant's dangerousness. Therefore, the 'creativity' of the lawmaker is evident: the sanction uncouples from a prior evaluation of dangerousness, and thus the lawmaker favors the application of this sanction (Savino, 2012: 212,213). As mentioned above, it is in interpretation of the sanction's requirements that jurisprudence tends to choose the one that, among the others, implicates removal. When, in effect, the judge has to verify the existence of the obstructive conditions provided for by Art. 19, para. 2, lett. c) TUI, quoted by para. 9 of Art. 16, he or she generally chooses strict interpretations of the law, thus limiting the applicative scope of the causes for exclusion of removal. On the other hand, still following a strict interpretation, if there are clear arguments that should lead toward the exclusion of the removal, judges interpret the law broadly. We can cite, for example, that jurisprudence that restricts the operativeness of the obstructive conditions to removal (Art. 19, para. 2, lett. c) TUI), according to which the judge shall not apply the sanction against migrants cohabiting with second-degree relatives or with a spouse of Italian nationality. In fact, according to the Italian *Corte costituzionale*[10] and *Corte di cassazione*[11], such causes, obstructive to removal, were not susceptible to application by analogy because of their exceptional nature. It was necessary to wait for another law,

[6] Cass. pen., sez. I, 14 September 2021, n. 36513, in DeJure ; Cass. pen., sez. I, 16 February 2016, n. 44143, in C.E.D. Cass., rv. 268290.

[7] Corte cost., 14 July 1999, ord. n. 369, in www.giurcost.org.

[8] Cass. pen., sez. I, 11 January 2022, n. 15700, DeJure.

[9] Corte Cost., 8 July 2004, ord. n. 226, available at: www.giurcost.org.

[10] Corte cost., 26 September 2007, ord. n. 361, *Giur. cost.*, 5, 2007.

[11] Cass. pen., sez. I, 29 September 2015, n. 48684, *C.E.D. Cass.*, rv. 265387.

which is based on ECHR jurisprudence, for a change. In fact, it was only after the recent reform, that expanded the grounds for the conditions obstructive to removal by referring to family ties in Italy other than those already provided for (i.e., relatives within the second degree or with the Italian spouse who cohabits with the alien) that judges started to interpret more broadly the situations obstructive to removal. With the "Lamorgese" Decree, which became Law No. 173 of Dec. 18, 2020, the existence of the alien's family ties in the state's territory other than those already indicated by Art. 19, co. 2, lett. c), was introduced among the causes that could obstruct removal. According to para. 1.1. of Art. 19 TUI, the judge must now consider the consequences that the deportation of the convicted migrant would determine for their private and family life, recognizing relevance to relatives not provided for in Art. 19, para. 2(c). More generally, the provision expands the situations which are obstructive to all types of removal, except for those motivated by national security and public order and safety, making Italian legislation consistent with the legal principles established by the ECHR[12]. Therefore, the Italian lawmaker deleted the automatism of the main part of removals by replacing it with a prior judicial balance between the state's interest in expelling the migrant considered as dangerous because of crimes committed, and the latter's interest in continuing to live in the state (Siracusa, 2021:340). Thus, the lawmaker seeks to preserve the alien's private and professional life in Italy, guaranteeing the implementation of Article 8 ECHR. The importance of the standards of guarantee elaborated by the jurisprudence of the ECHR was then recently quoted by the *Commissione Nazionale Asilo del Ministero dell'Interno* in its circular of July 19, 2021[13], in the part reserved explicitly to "interpretative profiles". The new law marks "an afterthought concerning the forcing represented by the previous equalization between original irregularity and derived irregularity", from which unreasonable disparities derived: first, between citizen and alien; second, between the migrant regularly identified and integrated into the social context of the State, and the 'irregular' alien. Since the reform concerns all forms of expulsion (except those ordered for national security or public order and safety), it also determines the expansion of the conditions obstructive to removal to which art. 16, para. 5 and 9, TUI, refers. Thus, the lawmaker introduced a law that is more favorable to the migrant integrated with the State, and who has become 'irregular' because of a conviction. The trend in the jurisprudence of interpreting strictly the scope of laws favorable to the migrant is also evident in some

[12] See art. 19, co. 1.1., TUI. The new paragraph refers to the ECHR'standars, that is, the "Boultif" and "Benhebba" standards: see ECHR, 2 August 2001, Boultif v. Switzerland, and ECHR, 10 luglio 2003, Benhebba v. France, both available at: *www.hudoc.echr.coe.int*.

[13] Circolare del Ministero dell'Interno, Commissione Nazionale Asilo, 19 July 2021, available at: www.cir-onlus.org/wp-content/uploads/2022/02/circolarel1732020art19tui_19072021.pdf, pp. 11 ff.

recent sentences according to which Art. 16, para. 5, TUI does not include, as a situation obstructive to removal, dangers of discrimination in their own country, if not proven by the migrant[14]. Judges denied that dangers of persecution or discrimination exist if the migrant who has been living in Italy for a relatively long time had never initiated the procedure to be recognized as a 'refugee' or to obtain international protection, thus neglecting the migrant's condition. Moreover, if he or she is clandestine, indeed, the migrant may not be able easily to know the laws of a country other than his own. On the other hand, the jurisprudence held that family ties other than those provided for in Art. 19, para. 2, lett. c)TUI are irrelevant as conditions preventing removal, although such additional ties are taken into account by other TUI laws, and in particular by the laws governing prefectorial removal (Trib. di sorveglianza di Torino, May 27, 2020, in *De Jure*). Even in the light of the jurisprudence regarding removal as an alternative measure, then, crimmigration laws show all their inadequacy and inconsistency. If the punishment finds its constitutional grounds in the purpose of rehabilitation, a legal system that favors the removal of the migrant reduces criminal law to a mere 'tool' of coercion and, therefore, implicates problems of legitimacy that are difficult to overcome (Spena, 2019:461). In fact, the measure's requirements include a conviction, the competence of the judge who decides on the execution of criminal sanctions, and the application of some criminal procedural rules to the proceedings regarding the removal provided for by art. 16, para. 5, TUI. Therefore, we cannot support the definition of this sanction's nature as administrative, albeit 'atypical'[15]. Consequently, we should not forget the constitutional guarantees on criminal punishment which should be applied to this measure as well. Moreover, we can refer to the ECHR's jurisprudence, which, starting with the Engel case, extended the guarantees for legality under Article 7 ECHR to formally administrative but substantially punitive sanctions[16]. We can also quote the sentence of the Italian Constitutional Court, which in 2010 argued the non-retroactivity *in peius* of confiscation when it is the effect of a criminal conviction[17]. Furthermore, we cannot hold that the gaps in laws that provide for the removal requirements applied as an alternative measure can be interpreted against the migrant, insofar as it anticipates a measure that the migrant shall carry out in any case after the execution of the prison sentence. Overall, the new paragraph 1.1 of art. 19 TUI marks the lawmaker's will in recognizing a broader standard of

[14] Cass. pen., sez. I, 11 January 2022, n. 15700, in DeJure.

[15] Among the Italian scholars who argue the criminal nature of the removal, see Siracusa, 2021: 333. Furthermore, in France and Spain, some forms of removal have a criminal nature: see Siracusa, 2019: 282.

[16] Engel and others v. Paesi Bassi, 8 giugno 1976, ric. n. 5100/71; Ozturk v. Germania, 21 febbraio 1984, ric. n. 8544/79; A. Menarini Diagnostic s.r.l. v. Italy Corte EDU, 27 settembre 2011, ric. n. 43509/08.

[17] Corte cost., 4 June 2010, n. 196, in *Cass. pen.*, 2011, 2, pp. 528 ff.

guarantees to the migrant who regularly resides in the State and becomes 'irregular' as a consequence of a conviction. On the other hand, the argument of scholars who hold that not only the right to emigrate but the right to immigrate as well is a fundamental right of human beings derivable from constitutional and supranational principles (Ferrajoli, 2019) cannot be considered a single voice. We cannot disregard the scholar's opinion highlighting how anchoring the right to immigrate to the possession of status, such as citizenship, means that this right's acquisition depends on the will of the lawmaker. Finally, it means that the legal system follows a pre-constitutional state model that sacrifices freedom to legality and puts the protection of the public interest before that of the person (Savino, 2012: 28).

3. The immigration rule of lenity in American jurisprudence

When criminal law punishes conduct noncompliant with a measure of public authority and the link between criminal and administrative discipline is so strong as to give rise to a new area of law, "crimmigration", the administrative nature of the law can legitimize 'broad' interpretations, both by the authority that must apply it and by administrative jurisprudence. However, precisely because of the intersection of administrative and criminal laws, the use of broad formulas that refer to the violation of administrative rules based on excessively general requirements such as public order as recognized by an administrative authority, should instead lead the lawmaker to a necessary balance between these requirements and the principles of legality and offensiveness to which the criminal law should conform. The problem regarding the 'guarantees' that protect the migrant, when the ambiguous law is the result of criminal and administrative rules, has arisen also in the United States, where the legislature passed particularly strict norms - more efficient, moreover, than those of the Italian legal system (Gatta, 2018: 684) - especially to fight the phenomena of international terrorism. Beginning in the early 1980s, in the United States, federal laws intensified the priority of the identification and deportation of criminal aliens and lowered the level of seriousness of crime required for mandatory deportation (Simon, 1998:581). Especially in the past, courts resolved, in favor of the migrant, the reasonable doubt about the law that provided for removal of the convicted migrant, recalling the criminal rule of lenity[18]. In the U.S. legal system, the

[18] Bonetti v. Rogers, 356 U.S. 691 (1951), espec. 699. In Bonetti v. Rogers, judges recalled the principles held in Bell v. the United States 349 U.S. 81, 83 (1955), which concerned a criminal case. In Bell, the Supreme Court used the rule of lenity in the construction of the Mann Act violation, 18 U.S.C. § 2421, holding that transporting two women within the same vehicle, and thus during the same trip, constituted a single violation of the rule, and not a double violation: "when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity".

problem of clarity in immigration laws that provide for the removal of convicted migrants is linked to the identification of the canon that courts can use to interpret them. Even in the United States, the power of the State to 'defend its borders' produced ambiguous laws (Glen, 2021: 553; Slocum, 2003: 519), and, only in the case of the unreasonableness of law can Courts review the Agency's interpretation of immigration law. Therefore, the question regards the potential use of canons grounded on constitutional principles valid in criminal law while respecting the Agency's interpretation in case of the migrant's conviction for crimes such as an aggravated felony[19] or crimes of moral turpitude. Indeed, according to the Chevron doctrine[20], courts should defer the interpretation to Agencies, but according to some scholars, courts may also apply the rule of lenity (Slocum, 2003: 519)[21]. The problem of the vagueness of immigration laws in the U.S. legal system and the selection of the canons applicable to ambiguous laws and gaps in the legal system especially concerns the laws that provide for removal as a consequence of a criminal conviction. Indeed, because of the harshness of removals, American courts in the past interpreted laws in favor of the migrant. Although removal is a non-criminal sanction in the United States, the afflictive impact of removal[22] on the alien's rights led American courts to apply the immigration rule of lenity, which originates from the criminal rule of lenity. Courts used this canon especially for interpreting the Immigration and Nationality Act (INA)[23]. It is worth noting that today the American debate on the interpretation of immigration laws concerns the spaces reserved for the rule of lenity in light of the more recent Chevron deference and possible models of integration between the rule of lenity and the Chevron doctrine (Slocum, 2003: 576 ff.). Indeed, as mentioned above, in pre-Chevron judicial practice, cases of ambiguous laws that provided for alien deportation were resolved through the rule of lenity, defined by some scholars as the main hermeneutical canon of immigration law (Legomsky: 156). Even in the American crimmigration laws, therefore, the intersection of criminal and administrative laws expresses the tendential conflict between the state's power to regulate the alien's entry as

[19] 8 U.S. Code § 1101 (a) (43).

[20] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

[21] Otherwise, some American scholars argue that the Chevron deference would guarantee the rights of the migrant and that the rule of lenity, which played an important role in the past, may be replaced by the Chevron deference (Glen, 2021:536, 571).

[22] See Padilla v. Kentucky, 130 S. Ct. 1473 (No. 08-651).

[23] The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 (a) (3) definined the «alien» as «*any person not a citizen or national of the United States*». On the use of this canon to resolve doubts regarding the INA laws in favor of the alien, see *infra*, § 5.

the main expression of its sovereignty[24] and the respect for the constitutional principles valid in criminal law when removal is the consequence of a criminal conviction of the 'deportable' alien, that is, the alien who legally resides in the state[25].

4. The rule of lenity in the American criminal law system

In the U.S. criminal justice system, the ambiguity in criminal laws caused the problem concerning the Court's discretion in reconstructing the meaning of the laws. In case of reasonable doubt on the meaning of a criminal statute, a significant part of the American jurisprudence applies the rule of lenity, which resolves the doubt in favor of the defendant, and is based on respect for legality and separation of powers. The assumption is that in case of doubt, these principles reaffirm all their political-ideological value. In fact, the contemporary American criminal law system is grounded on the principle of legality, and it is distant from its original model inspired by the common law legal tradition in which crimes created by the courts by analogy had a place and the idea dominated that the lawmaker was the one who interpreted the laws and not the one who drafted them (Hoadley, 1958: 8). The principle of legality, the first principle of criminal law (Packer, 1968: 79), is established by the U.S. Constitution in Article 1, § 9, which provides for the prohibition of retroactivity for laws that limit civil and liberty rights (prohibition of *ex post facto* laws) (Krent, 1997: 43,44). Therefore, courts cannot create common law crimes derived from analogy and characterized by the unpredictability of sentences and the retroactivity of their effects, and the primacy of legislative power is affirmed[26]. In the

[24] Fiallo v. Bell, 430 U.S. 787, 796 (1977. Moreover, recognizing the broad power available to Congress in establishing the conditions for the entry and residence of aliens led American judges to declare their self-restraint in jurisdiction over immigration matters in Harisiades v. Shaughnessy, 342 U.S. 580, 596-97 (1952).

[25] The immigration rule of lenity would not work for all categories of aliens, especially for so-called "excludable" noncitizens, i.e., aliens under the INA laws who were not eligible for entry into the United States. Following the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the American law system now distinguishes between deportable and inadmissible aliens, contemplating the same "removal" procedure. Prior to this reform, the Immigration and Nationality Act (INA) provided separate procedural rules for deportation and exclusion, and judges gave the «deportable» alien broader rights than the «excludable» alien (Landon v. Plasencia, 459 U.S. 21, 24-25, 26-27, where broader constitutional rights in favor of deportables were explicitly recognized (Martin, 2001: 47; Slocum, 2012: 523 ff.). The IIRIRA, however, would not have eliminated the distinction between «deportable» and «excludable» but merely replaced the latter term with that of «inadmissible»; and since even today the American laws distinguish between aliens who have obtained admission to the state and those who lack it, the immigration rule of lenity might not apply to the "inadmissible" alien, to which judges apply different and lower-standard constitutional guarantees than those enjoyed by the "deportable" (Slocum, 2012: 525).

[26] In the American criminal law system, the definitive consolidation of the principle of legality as an organic set of corollaries is traditionally traced to the 1930s-1940s, following the publication of the contributions of J.D. HALL, Cases and readings on criminal law and procedure, Indianapolis, 1949, pp. 1 ff.; J. MICHAEL, H. WECHSLER, Criminal law and its administration, Chicago, 1940, 1072 ff.; J. ROBINSON, Cases on criminal

American criminal law system of the contemporary era, the rule of lenity developed in light of what, together with clarity, are the corollaries of the principle of legality, that is, the prohibition of *ex post facto* laws, *nullum crimen*, *nulla poena sine lege*, and fair warning (Hall, 1949:1 ff.). The criminal rule of lenity tends to show that, in the presence of vague and ambiguous laws, the more favorable interpretation is preferable to implement these constitutional principles, and in particular the Due Process Clause[27] (Eskridge, Frickey, Garrett, 2007: 907; Hopwood, 2020: 942, 943). The principle of legality provides that no one can be punished with a criminal sanction except after a fair trial, and it requires that the law clearly describe the conduct that the lawmaker aims to punish and that the law preexist said conduct[28]. Therefore, the respect for clarity by the lawmaker is significant in the American criminal law system as well. Indeed, if laws are clear, judicial discretion is already limited, and courts cannot define the crime. Applying the rule of lenity to resolve the doubts about ambiguous laws also means forcing the lawmaker to exercise more scrupulous legislative activity through clear-statement rules. Therefore, it means avoiding laws that are 'unfair' because they do not provide adequate and precise notice of what conduct is prohibited. In fact, only a clear law could achieve the purposes of legal goods' protection aimed by the lawmaker. Viceversa, the law's vagueness would impose strict interpretations that would be less useful to the more extensive protection purposes considered by the legislator (Caterini, 2019:330; Hopwood, 2020: 732; Price, 2004: 911). This aspect is linked to the respect of the *nullum crimen* principle: indeed, like Italian scholars, American scholars highlight a 'crisis of legality' caused by an intensification of laws made by the lawmaker which are often ambiguous because of general terms. On the other hand, the lawmaker would 'fail' his legislative role in the case of laws characterized by narrower formulations because they would leave even serious misconduct exempt from punishment [29]. Moreover, this would make the prosecutor's activity in attacking even serious misconduct, not included explicitly in the

law and procedure. Articles by Maurer Faculty. 2230, 1941, pp. 1 ff., available at: https://www.repository.law.indiana.edu/facpub/2230.

[27] Liparota v. United States, 471 U.S. 419, 427 (1985); United States v. Bass, 404 U.S. 336, 348 (1971).

[28] "No person can be criminally punished except by judicial process and unless the acts for which he is punished were clearly forbidden prior to the time he committed them", in Working paper of the National Commission on reform of federal criminal laws, Vol. I, Washington, 1970, p. 6.

[29] Some American scholars (Hopwood, 2020: 727) have argued that clarity in criminal law has a double role: it is useful both to remove the courts' impulse to create law and to remove Congress's temptation to delegate law-making to the Courts, although Congress shows the trend in making ambiguous laws: "*A criminal-law clear-statement rule would not only remove the courts' impulse to create law, but also remove Congress's temptation to delegate law-making to the courts. Congress generally has no incentive to craft criminal legislation narrowly because, if a noteworthy crime occurs and federal statutes do not accurately cover the conduct, then Congress is viewed as having failed to its job [...]. As a result, Congress pushes the bounds of statutory vagueness and ambiguity*".

statute, extremely difficult (Price, 2004: 911). In light of these considerations, some American scholars argue that the rule of lenity would have a limited application when the law is ambiguous since courts would tend toward broader interpretation to enact the supposed lawmaker's will, that is, maximizing the punishment by broad formulations (Allen, 1987:402). We should, however, consider that resolving the law's ambiguities in favor of the defendant means ensuring that criminal law will reflect majoritarian preferences (Price, 2004:911). Moreover, the rescue of the rule of lenity canon is linked to another constitutional principle: 'fair warning' or 'notice'. From this corollary - which derives from the legality and the due process principle[30]- it follows that conduct is not punishable except by a clear and preexisting law: this is the way to enact the guarantees of legality and due process (Lafave, Scott, 1986: § 3.1). The American Supreme Court affirmed the principle of fair warning as far back as 1954 in United States v. Harriss, stating that "No man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed"[31] . Convicting a defendant who violated an unclear law at the time he or she acted and that became criminally relevant just by the more unfavorable interpretation may mean punishing behavior that was not misconduct when it was committed[32] (Westen, 2007: 229 ff.). Finally, if a court interprets the criminal law choosing, among plausible others, a more unfavorable interpretation, this means overlapping the lawmaker's role, established by the American Constitution through the separation of powers derivable from its Articles 1[33] , 2[34] and 3[35], because courts would act beyond their powers. The ground of the rule of lenity, in essence, is the respect for the separation of powers (Hopwood, 2020:933; Romantz, 2018:524), which forbids the court from 'creating law'. According to the prevailing approach, the separation of powers, from

[30] XIV Amendment, Section 1, US Constitution: «[…] 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». The same principle is established at the federal level by XV Amendment.

[31] United States v. Harriss, 347 U.S. 612, 617 (1954).

[32] According to some scholars (Allen, 1987: 404), though, such an approach could determine an expansion of the excusability due to supposed error or ignorance of the law, in violation of what the Model Penal Code states, because conduct could be held despite the knowledge about its potential unlawfulness, and so without any violation of the fair warning: "This, of course, is not to say that there remain no serious problems of supplying adequate notice of the prospects of criminal punishment to potential offenders. For the most part, however, promising solutions to these difficulties lie not in the application of the strict interpretation standard in criminal cases but in more generously defined defenses of mistake or ignorance of law than we have thus far been willing to accept".

[33] Article I, Section 1, US Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives".

[34] Article II, Section 1, US Constitution: "The executive Power shall be vested in a President of the United States of America".

[35] Article III, Section 1, US Constitution: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish".

which the legislative supremacy originates, determines the exclusive competence in the legislative function in the hands of federal and state lawmakers: courts cannot define the crime[36]. In the light of another thesis, however, the separation of powers would require the exercise of the judicial power in compliance with the will of the Congress that made the statute: the preclusion for the courts works only for judicial innovations in evident conflict with the lawmaker's will (Jeffries, 1985: 205 ff.).

5. Reasons for and judicial applications of the rule of lenity in American Immigration Law.

In the past, American jurisprudence applied the rule of lenity when the law provided the non-criminal sanction of deportation. Because of its effectiveness, courts defined deportation as a measure equivalent to exile[37] and resolved the doubts about the law which provided for it in favor of the migrant[38]. Courts argued that considering the migrant's fundamental interests at stake, they could not hold that the lawmaker intended to affect the alien's freedom beyond the narrowest meaning of the words used in the statute[39]. In American immigration law, the rule of lenity thus finds its basis in the implicit will of the lawmaker. In the absence of clear elements in the statute that would lead to a more unfavorable conclusion, it would be the lawmaker that legitimizes the interpretation more favorable to the migrant. Therefore, before Chevron - whose doctrine is not subject to the constitutional limitations valid for criminal law and legitimizes the more unfavorable interpretation - the American courts extended the criminal rule of lenity to the interpretation of statutes that provided for removal. Furthermore, another reason justifying the rule of lenity despite the non-criminal nature of deportation is the need to protect the migrant from potentially arbitrary sanctions. Given that the migrant has no right to vote, he or she is considered a vulnerable person if laws are unreasonable and discriminatory (Eskridge, 1989: 1007; Slocum, 2003: 522). Therefore, if removal is the consequence of a criminal conviction, and thus when the intersection between criminal and administrative laws is evident, constitutional principles of criminal law should still be valid (Bleichmar, 1999:115), and courts who interpret the law that provides for removal should follow these principles. One of the leading cases in which U.S. jurisprudence resolved the doubt about the law in favor to the migrant is Fong Haw Tan

[36] United States v. Bass, 404 U.S. 336 (1971).

[37] Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).

[38] Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001); Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3rd Cir. 2002);United States v. Shabani, 513 U.S. 10, 17 (1994).

[39] Fong Haw Tan v. Phelan, supra note 37, at 10; Reno v. Koray, 515 U.S. 50, 65 (1995).

v. Phelan, where the Supreme Court interpreted § 19(a) of the Immigration Act of February 5, 1917[40]. On the other hand, in the post-Chevron era, one of the sentences that applied the interpretation favorable to the migrant was INS v. Cardoza-Fonseca[41], concerning the identification of the proof standard required for the migrant to benefit from withholding of removal, which is mandatory when repatriation would expose the migrant to the risk of threats to life or liberty based on discriminatory grounds[42]. In INS v. Cardoza-Fonseca, courts had to identify the rule applicable to the case: the Section 243 (h) of the Immigration and Nationality Act, which provides that the alien must show that his life or liberty would be threatened in his own country, according to a "more likely than not" standard, or Section 208 (a), that states that the Attorney General may discretionally grant asylum to a 'refugee' who under Section 101 (a) (42) (A) is unable or unwilling to return to his or her country because of a "well-founded fear" of persecution on the grounds of race, religion, membership of a particular social group, and other reasons. Opting for the law that required the burden of proof more favorable to the alien, the Supreme Court referred to the rule of lenity[43]. Therefore, still after Chevron, in INS v. St. Cyr.[44] the court held that when deportation is the sanction following a conviction if the law regulating deportation comes into force after the alien's conviction and deportation proceedings have yet to be carried out, the law more favorable to the alien will be applied. Furthermore, it is argued that the need to guarantee the non-retroactivity of the more unfavorable laws seems even more significant when they concern aliens, considered as vulnerable people and more exposed to the risk of arbitrary use of legislative power (Legomsky, 2000: 1615 ff.). More generally, the rule of lenity applied to crimmigration laws resolves the statute's ambiguities, avoiding the risk of a judicial power that disregards the constitutional guarantees valid for criminal sanctions, and it legitimizes the extension of these guarantees in the light of the harshness of the

[40] The statute provided for the deportation of any noncitizen who had been sentenced "more than once" in the United States to imprisonment for a crime of moral turpitude committed after entering the U.S. Noting that there seemed to be an absent congressional intent to give the statute a broader meaning than that expressed, the judges chose the interpretation more favorable to the alien, holding that a conviction imposed "more than once" means a conviction resulting by (at least) two separate trials and not by a single trial in which criminal responsibility (in that case, referring to a double murder) was ascertained.

[41] INS v. Cardoza-Fonseca, 480 U.S. 421(1987).

[42] 8 U.S.C. § 1253(h) (1984).

[43] INS v. Cardoza-Fonseca, supra note 41, at 431 and 449. In INS v. Cardoza-Fonseca, the Supreme Court decided by using other canons, quoting the rule of lenity though: "*the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [non citizen]*".

[44] 533 U.S. 289 (2001).

deportation and the conditions of the migrant's greater vulnerability. In conclusion, in a field of American law in which the terms used by Congress leave broad spaces for interpretation to allow the Attorney General the widest discretion in 'filling' the gaps in the law, the rule of lenity leads courts toward strict constructions to enact constitutional principles protecting the fundamental rights of the 'regular' alien convicted for a crime 'punished' through removal.

6. From indulgent 'squinting' towards the strong to an 'interpretative strabismus' favorable to the 'weak'.

In light of the Italian jurisprudence on removal as an alternative measure, one conclusion seems clear: the Italian legal system has evolved toward choices that in both the legislative and jurisprudential activities - with exceptions in both cases - have shown rigor against the category of migrants, toward the 'weak,' with choices that hide more or less evident inconsistencies with the principles of offensiveness, subsidiarity (Pulitanò, 2002: 973), *extrema ratio*, legality and clarity (Caterini, 2011: 159). On the other hand, still recently in Italy, milder criminal policy choices towards the 'strong' have often emerged, for example, with solutions aimed at narrowing the scope of the *Kavalierdelikte typical of "rich crime"*. We argue that the Italian lawmaker should not have emphasized economic crimes by expanding their scope but that this trend towards narrowing punishment should have affected above all those crimes that are a peculiar expression of misery. Such an 'unequal' legal system loses its aptitude for cultural orientation and can become a criminogenic factor. The words of Beccaria, according to whom "most laws are but privileges,", and the words of the liberal Mill, "wherever there is a ruling class, much of the morality of the country emanates from its class interests and its feelings of class superiority" (Mill, 1859: 50), still sound significant. If so, it is unlikely that, according to Baumann's expectations, criminal laws will succeed in not being only for the stupid and the poor. What emerges, then, is a 'strabismus' of the legal system that tends, though not always, toward a particular strictness of legal reactions when the misconduct is carried out by marginalized people or "superfluous beings" (Bauman, 2005: 18 ff. and 53 ff.; Id., 1999: 55 ff.; Id., 2003: 135 ff.). Vice-versa, this strictness is not so taken for granted when those who act are people who are well integrated into society. On the other hand, the 'squinting' that we wish to propose here is different. It aims to limit the most striking forms *in peius* of the creativity of jurisprudence; that is, those more intrepid expressions of the judicial activity that currently do not find effective limits despite their "obvious 'illegality" (De Francesco, 2019: 200-201). Although here is not the place to fully explain the outcomes of our previous research aimed at theorizing more effective limits on

judicial creativity (Caterini, 2016: 509 ff.; Id., 2017: 163 ff.; Id.,2012: 99 ff.)[45], we argue, however, that the judge should choose a strict interpretation, when more interpretative solutions are plausible, and which tend to expand the punitive reaction: in these cases, the judge should narrow the meaning of the law within its textual meaning. Otherwise, when the interpretation of the law can lead to solving the doubt in favor of the defendant, by narrowing the criminal relevance of the conduct, the judge should interpret the law even beyond the textual meaning, following the higher principles mentioned above (Caterini, 2017: 169 ff.). Indeed, the matter regards how to resolve the doubt about law, that is, *pro republica* or pro defendant. The reasons why the second option is preferable are already explained in previous works (Caterini, 2012: 118 ff.), and here it can suffice to cite Giuseppe Maggiore: "in case of legal uncertainty [the judge will abide] by the principle in *dubio pro republica*, which takes place, in the totalitarian state, of the ancient in *dubio pro reo*" (Maggiore, 1938: 159-161). Solving the doubt about laws in favor of the *Republica* clearly expresses the expansive vis of punitive law, precisely totalitarian, which unfortunately still appears in the present, albeit in different forms (Sgubbi, 2019).

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[45] Some Italian scholars have recently proposed similar arguments (Gallo,2022: 5 ff.).

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PROTECTION OF THE ENVIRONMENT AS A HUMAN RIGHT. THE IMPACT OF ECHR DECISIONS ON THE ITALIAN ENVIRONMENTAL CRIMINAL LAW

The present article intends to examine the role that the European Court of Human Rights has exercised and still exercises on domestic criminal system, highlighting how the protection of the environment through criminal law has become one of the main objectives of the Community legislation.

If it is true that the development of a close interrelation between humans and the environment has allowed the beginning of legal reflection on the need to protect it within the broader framework of the protection of human rights – precisely because of the close instrumental relationship between the first and the second one – it is also undoubted that a primary role in the fight against environmental degradation – as a form of protection of the human being – is covered by the European Court of Human Rights which, although starting with a restrictive approach, has progressively given – in an anthropocentric key – an increasing consideration to the issue of the protection of natural resources and has stating the existence of a human right to a healthy environment.

Keywords: *Human right; environment; health; European Convention of Human Rights; European Court of Human Rights; Italian Criminal Code; victims.*

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1. The human right to a healthy environment

The present article aims to take into consideration the impact of the decisions adopted within the European Council and contained in the European Convention on Human Rights (ECHR) on national environmental Criminal Law, in the view of the increasingly important role that fundamental rights enshrined therein – thanks to the activity of the Court of Strasbourg – have assumed in the protection of the environment and the human health, thus satisfying the requests made by States that claim its effective protection in carrying out dangerous activities for the environment.

If it is true that the development of a close interrelation between human and the environment has allowed the start of legal reflection on the need to protect it within the wider framework of the protection of human rights – precisely because the close instrumental relationship between one and the other – it is also undoubted that a leading role in the fight against environmental degradation, as a form of protection of the human being, is covered by the ECHR which – although starting with a restrictive approach – has progressively and in an exclusively anthropocentric key given increasing consideration to the issue of the protection of natural resources, expressly sanctioning the existence of a human right to a healthy environment.

Although the right to the environment is not expressly foreseen in the Convention (Mowbray, 2004), however it has gradually been recognised by the jurisprudence, which – relying on a system of fundamental rights guaranteed by the ECHR under a mechanism *par ricochet* (Galinsoga, 2007) – affirmed its existence both as a limit to the expansion of the right to property[1] and as an element characterizing individual rights, including, in particular, the right to domicile and to private and family life (Article 8) [2] and the right to life (Article 2) [3], but also the right to a fair trial and the right to have access to a court

[1] See the Hamer v. Judgment. Belgium of 2007, relating to a case in which the applicant – subjected to criminal proceedings for having built, in forest territory, against the proper legislation and for having undergone the demolition of the building – had complained about the violation of the right to the protection of property referred in Art. 1 Protocol No. 1 to the ECHR. The violation was excluded by the Court declaring the prevalence of the environment as a value in itself, even if not expressly provided by the Convention, with respect to which economic considerations are recessive as well as the right of property, especially when the State has legislated on this matter.

[2] Art. 8 ECHR, in paragraph 1, guarantees to every person the right to respect their private and family life, their home and their correspondence.

[3] The right to life pursuant to Art. 2 ECHR represented, in fact, the real test on which the Court was able to gradually modulate the intensity and type of obligations deriving from the violation of the treaty provisions, distinguishing from the "classic" negative content of fundamental freedoms in terms of duty to abstention

(Article 6)[4], the right to receive and transmit information and ideas (Article 10)[5], the right effective remedy (Article 13)[6] and the right to peaceful enjoyment of one's own property (Article 1 of Protocol No. 1)[7].

It is therefore considered appropriate to focus on the influence that the European Convention and jurisprudence implementing its rights have had on national criminal laws of limits to the exercise of the rights recognized by the Convention where they may harm the environment, and in the recognition of a specific obligation of protection by the signatory States of the same. As for the limits, the emergence of an environmental jurisprudence capable of evolving and transforming the European Convention into an "*absolutely living instrument to be interpreted in the light of the prevailing concepts in society*" (De Salvia, 1997), made the environment a social value, that justifies both a limitation of other rights recognized by the Convention and positive actions by individual States to ensure adequate protection. The needs of environmental protection have, in fact, contributed to the birth of a new value in the Court, contributing to a more balanced stability between the exercise of human rights expressly recognized by the Convention and the general principle of respect for the individual, to which the entire ECHR guarantee system is oriented. Even, thought, it is impossible to claim an autonomous right

(Abwerrecht) on the part of the State obligations to a positive content (Schutzplicht), having as their object, not a prohibition, but the protection and enjoyment of the right itself.

[4] The Court ruled that public authorities must comply with certain requirements in terms of information and communication, as well as participation in decision-making processes and access to justice in processes involving the environment. This right was recognized to an environmental association with reference to art. 6 ECtHR (*L'Erablière ASBL v. Belgium*, 2009).

[5] The right to freedom of expression in environmental matters has been affirmed by the jurisprudence of the ECHR under Article 10: the Court considers the environment a matter of general interest: it considers that everyone should be free to express about it. A first statement was made in the case *Vides Aizsardzibas Klubs v Latvia*, in 2004, concerning the publication, on a regional newspaper, of an assembly resolution, in which an association denounced the irresponsible and illegal activities of the municipal authorities. The association was sued for defamation, but the Court found, on the contrary, that Article 10 was violated and, therefore, there was a violation of the freedom of expression. In the case *Steel and Morris v. UK*, in 2005, a group of environmental activists was convicted for having prepared and distributed a leaflet attacking a multinational corporation. Lastly, in the case *Noël Mamère v. France*, in 2006, the journalist Noël Mamère had been subjected to a libel trial for having made on a television program comments regarding how some french authorities had handled the Chernobyl disaster; the Court held the right of freedom of expression has been violated: the protection of the environment and the public health are issues of general interest, so it is necessary to be able to express opinions on these issues without being threatened with prosecution.

[6] ECHR, *Guerra and other v. Ital*y, application no. 14967/89, judgment of 19 February 1998; ECHR, *Cordella and others v. Italy*, applications no. 54414/13 and 54264/15, judgment of 24 January 2019.

[7] ECHR *Boudaïeva and others v. Russia*, applications no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008, para. 166 s.; ECHR, *Kolyadenko and others v. Russia*, applications no. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 Febuary 2012, par. 207 and following.

concerning the quality of the environment as such – due to the instrumental value it has in the Convention, which allows its violation to be detected only where there is an effective intrusion into private life of the appellant that concretely jeopardizes the health or, at least, the normal condition of well-being – in that follows I will try to identify how these different rights contribute to the progressive emergence of an individual right to a healthy environment.

2. A few references to the positive obligations imposed on the States

As regard to the obligations imposed on States, it is sufficient here to recall that, in order to find a violation of a right enshrined in the Convention, it is necessary to ascertain that the State authorities have violated a specific obligation, positive or negative, provided by the provision which is assumed that it has not been complied with and that it is likely to affect the applicant. If, traditionally, the rights guaranteed by the ECHR are of a "negative" type – and therefore consist in freedom that the individual must enjoy and in respect of which there is an obligation of non-interference by the State – active participation by the States is also required to ensure effective achievement of the conventional objectives (Sudre, 1995).

With regard to positive obligations, the Strasbourg Court started to affirm that their foundation lies in the primary duty of ensuring the individuals with adequate preventive protection from illegitimate aggression by state agents and by any third party which is derived from the very beginning of the Convention, where Article 1 uses the term "secure" or "protect" and follows from the same requirement to make the protection guaranteed by the Court effective, and not merely declaratory.

Among the positive obligations, the doctrine is usual to characterize a primary level of protection, as the duty of the State to conform its legal system in such a way as to dissuade its associates from committing crimes, through the preparation of a legislative and administrative framework (*legal framework*) aimed at preventing violations of the Convention, and a secondary level, as a duty of the public authorities to prevent the violation in the specific case of infringement. With regard to the decisions in *Cestaro and Bartesaghi Gallo v. Italy* case[8], the judges of the ECHR – while not pronouncing themselves openly with an indication of duty to penalization – nevertheless suggest that, in the matter of criminal protection obligations, there is a real and proper "*duty to punish*" of a conventional matrix, which effectively deprives the national legislator of his own

[8] ECHR, *Giuliani and Gaggio v. Italy*, application no. 23458/02, judgment of 24 March 2011.

criminal policy choices both in the *an* in the *quomodo* (Pulitanò, 2013). The protection of the victim is the element that bases the matrix conventional obligation to penalize and that brings with it a profound transformation of domestic criminal law with a radical change in its role.

The protection of the human right to a healthy environment by the jurisprudence of the Court may take place in addition to obligations of a substantial nature, relating to the obligations of the States aimed at the protection of a specific legal asset (for example Article 2 relating to life or Article 8 concerning the protection of private and family life), also with procedural obligations, intended to operate *ex post* with respect to the violation of the law and aimed at ensuring the proper performance by the State, of certain procedures (such as Article 6, to guarantee a fair trial, and Article 13, which ensures an effective judicial remedy).

Such a rigid distinction, as can be noted, has gradually taken on less defined contours: through a process of "*proceduralisation of the substantive obligations*" (Flaus, 2007), conventional jurisprudence has in fact progressively elaborated and extrapolated procedural obligations from provisions of substantive nature, ending up – in the substance – to identify within the rights contained in art. 2, 8 and 1 of the First Protocol, the right to information, the right of appeal against administrative decisions and the corresponding duty of the State to carry out in advance appropriate studies and investigations in order to assess the risks posed by the implementation of activities dangerous to the environment. The justification for such a hermeneutic operation is found both, on the one hand, in the lightening of the burden of proof that the applicants have to fulfil in order to prove the violation of a substantive provision, and, on the other hand, the possibility of reducing the wide margin of appreciation that is recognized to States, especially with regard to environmental protection often balanced with interests of economic matrix.

3. The role of the right to life provided for by art. 2 of the EDU Convention on environmental protection and the scope of its obligation

Faced with disasters or in any case serious situations of environmental impairment, the absence of a specific right to the environment recognized by the Convention prevents the applicants to complain about a direct violation; this right is therefore protected only indirectly, using other rights and the creative work of jurisprudence. Thus, in an anthropocentric dimension, the environmental compromise assumes relevance only if and to the extent that it has interfered with the enjoyment of one or more human rights expressly protected by the Convention.

Article 2 of the ECHR, which may be invoked whenever life could be prejudiced, has been – albeit in a limited way – used by the jurisprudence on environmental matters mainly because of the peculiarity of the legal assets it protects, which has proved to be a harbinger of various difficulties in bringing situations of environmental degradation back into the category of violations of the right to life. However, in the wake of an evolutionary trend that has characterized the work of the Strasbourg judges in the interpretation of human rights, the Court also made situations in which the applicant's life have been even just endangerment. In the Strasbourg jurisprudence relating to Article 2, in fact, not only damage events, but also events endangering the protected right are taking under consideration.

This is demonstrated by the evolution of conventional jurisprudence in this matter, which has led to the assertion that serious attacks on the environment can integrate the violation of Article 2 to the extent that they are of such a magnitude as to cause harm to health or to endanger the lives of the persons concerned.

The leading case is represented by *Öneryildiz v. Turkey*[9], in which the Strasbourg Court has appealed to Article 2 to state the protection of the right to life in relation to an environmental pollution situation. By this decision, the Judges affirmed the positive obligation on the State to take all necessary measures to protect the lives of the people under its jurisdiction, also highlighting that «*this obligation must be applying as valid in the context of all public or non-public activities likely to constitute a danger to the right to life, a fortiori to industrial activities, which are dangerous by nature*». From the substantive point of view, the positive obligation imposes on the State «*the primarying duty to provide itself with a legislative and administrative framework functional to effective prevention and having a dissuasive capacity to endanger the right to life*»: this obligation is therefore also applicable in the specific sector of dangerous activities, which require special regulation, taking into account the interests at stake and the level of risk compatible with the protection of private interests. The Court also adds that the legislative/administrative regulation suitable for the management of environmental risk should, on one hand, regulate the authorization, operation, exploitation, safety and control of activities and, on the other hand, require all persons involved to take appropriate practical measures to ensure the effective protection of persons whose lives are at risk of being exposed to the typical risks of dangerous activities.

[9] ECHR, *Öneryildiz v. Turchia*, application no. 48939/99, judgment of 20 November 2004.

According to the ECHR, the substantive profile focuses on the identification of an organizational model of prevention of environmental crimes, according to the principles of corporate governance and, at a subsequent moment (eventually), in the assessment of the facts that have given rise to dysfunctions or failures, with the activation of controls and procedures aimed at ascertaining responsibility for who is involved.

The procedural profile is instead substantiated in the obligation to provide for an effective investigation, given that «*when the death of a man occurs in circumstances likely to involve the responsibility of the State, art. 2 of the Convention entails the duty of the same State to ensure, with all the means at its disposal, an adequate reaction, judicial or other response to ensure that the legislative and administrative framework established for the purpose of protecting life is effectively implemented and, if necessary, the violations of the law in question are repressed and sanctioned*».

The accusatory system outlined by the Strasbourg Court for the reactions to the most serious environmental violations is therefore based on two cornerstones: 1) on the provision – in terms of prevention – of a regulated organizational model legislatively and managed in accordance with the principles of public administration and 2) on the obligation of indictment and the exercise of criminal action, in terms of subsequent assessment of the responsibility (D'Avino, 2016).

Also in the case *Smaltini v. Italy*[10], despite having ruled with a rejection sentence, the Court recalled that, on the substantive side, the State, in order to prevent violations of the right to life, is required to provide a legislative and administrative framework designed to provide an effective deterrent against the threats and, in particular, to provide for «*(i) the regulation of the granting of licenses, the establishment, the functioning, the safety and the control of industrial activities in which the peculiarities of the activity and the level of potential risk caused by them for life must be taken into account; (ii) the adoption of concrete measures to ensure the effective protection of individuals whose lives could be endangered by the risks inherent in carrying out industrial activities; (iii) the provision of appropriate procedures to quickly identify the processes responsibilities and the errors committed; (iv) the need to guarantee the public's right to information on the risks to their health arising from industrial activities*».

On the basis of the principles outlined, it appears that the Strasbourg Court has adopted a sufficiently clear and precise position on substantive traceability, a form of State liability

[10] ECHR, *Smaltini v. Italy*, application no. 43961/09, judgment of 24 March 2015.

for violation of the right to life in cases of failure to take preventive measures. On the point, two hypotheses are distinguished according to whether the scientific knowledge related to the harmful consequences for people's lives deriving from exposure to dangerous substances is founded, known or, at least knowable, by the State or is uncertain on the basis of available scientific studies and knowledge.

With regard to the first hypothesis, the Strasbourg Court holds the State responsible for violation of the right to life to the extent that, "*while knowing or having been able to know on the basis of available scientific studies the danger to human health from harmful emissions related to dangerous activities, has failed to take preventive measures: in other words, the State has the duty to feed its scientific knowledge on the relationship between emissions of given industrial activities within its jurisdiction and the prejudice to health and well-being of the people and, on the basis of the acquired objective scientific knowledge available, must prepare effective measures to protect the right to life*".

Thus, in the case *Budayeva and others v. Russia*[11], relating to the loss of life of some individuals as a result of flooding occurred a short distance of time between them in a small Caucasus town, the Court – not focusing on the existence of the risk since the parties agree that the occurrence of such disasters was frequent in the affected area – stated that in order to be able to invoke the responsibility of the state the danger must be specifically identified, especially where it results from a recurrent natural disaster affecting a well-defined area. In that present case, the Government claimed that it had informed the inhabitants of the obligation to evacuate the area. However the Court noted that – even from the evidence gathered – the State Authority had not, in fact, provided adequate demonstrations and clarifications on how it would have given the warning to the population nor had it adopted any alternative and additional measures with respect to the evacuation order that could prevent or at least mitigating the disastrous effects of the flood, faced with in the absence of details on the part of the Government, it "may only assume" that the population has not been sufficiently warned. The Alsatian judges therefore considered the national procedure to be deficient partly because the courts did not make full use of the powers at their disposal to determine the circumstances of the accident, and did not hear to witnesses or seek legal expert opinion despite the requests made by the applicants; such denials are considered unjustified in the light of evidence provided by the latter which also included official documents.

[11] ECHR, Budayeva and others v. Russia, cit.

According to the Court, there is also a form of liability on the part of the State in terms of omitted information and preliminary analysis of actual and potential risks as indicated in the case *Tătar v. Romania*[12], in which the State was accused of infringement of the applicants' right to respect for private and family life on the ground that the public authorities had not carried out adequate studies to assets and prevent the effects of a dangerous activity on the rights of individuals.

In the face of a situation characterized by the absence of a reliable scientific basis capable of establishing, in the specific case, a causal explanation between the death event and/or the damage to health and exposure to a source of risk, the State cannot refrain himself from assuming "*a positive obligation to adopt reasonable and adequate measures capable of protecting the rights of the persons concern to respect their private life and home and, more generally, the enjoyment of a healthy and protected environment*". A further examples are the cases *Tauira v. France*[13] – relating to the effects on human health resulting from nuclear tests carried out in the Pacific Ocean of which France had announced the resumption, in which the applicants alleged infringement of the right to life as an effects of radiation related to the carried out of such activity (tumours, congenital malformations) were a consequence of the State's failure to comply with its positive obligation to take all necessary measures to protect their lives – and *L.C.B. v. United Kingdom*[14] – concerning the presence of radiation on Christmas Island which would have led to the death of the applicant's father. In both cases the Court focuses on situations in which cause-effect relationships are characterized by scientific uncertainty. Whereas in the first case the Court implicitly implements a conceptual operation such that the probability of a link between nuclear tests and the onset of diseases and damage to the environment is assessed, without indicating what is the threshold required for such a risk not take implied, but to be real, or for the evidence to be convincing, nor does it explain why it concluded that in the present case the causal link is not sufficient, in the second case – instead – taking into consideration the uncertainty regarding the dangerousness of radiation, the judges believe that the causal link between the toxic exposure and the death of the applicant's father was not established by the studies and documents submitted, therefore considers that the British Authorities were not obliged to take any measures. In short, according to the Court, is a duty of information incumbent on the State in the event that there is a serious danger to the environment and to the health of those who live there, the fulfilment of which should allow the persons concerned to assess the potential risks

[12] ECHR, *Tatar v. Romani*, application no. 67021/01, judgment of 27 January 2009.

[13] ECHR, *Noel Narvii Tauira and other v. France*, application no. 28204/95, judgment of 4 December 1995.

[14] ECHR, *L.C.B. v. United Kingdom*, application no. 14/97 and 798/01, judgment of 9 June 1998.

linked to proximity to a territory exposed to a pollution hazard (even if the available scientific data are not certain and are limited to producing statistical knowledge).

These arguments are at the basis of the case *Cordella and others v. Italy*[15], where – in the appeals lodges between 2013 and 2015 by a group of citizens living in the areas surrounding to the Ilva plant in Taranto – complained about the failure to take organizational and information measures to protect the population concerned, which was damaged by exposure to harmful emissions from the industrial activity of the plant Ilva, which have given rise to a situation of high risk that has lasted over time, despite a massive and severe intervention of the judicial authority.

Although the violation of art. 2 of the ECHR, the Alsatian judges condemned Italy for violation of Articles 8 and 13. As to the violation of Article 8, the Court notes that its grievance may "*arise if an ecological risk reaches a level of severity which significantly reduces the applicant's ability to enjoy his home or his private or family life*". Therefore, even in this case, it is a question of the protection of a right to a healthy environment, mediated through respect for individual privacy, since as mentioned above, there is currently no autonomous right to a healthy environment under the Convention. One of the strengths of the Cordella ruling is, however, the emphasis placed on the positive obligations of the State in favour of its citizens. In fact, the Court affirmed, among other things, that "*States have a positive obligation above all, particularly in the case of a dangerous activity, to implement a legislation suited to the specificities of that activity, in particular the level of risk that could ensure*» and that, in the present case «*the national authorities have failed to take all necessary measures to ensure effective protection of the data subjects right to respect their private life*". According to the Court, in the present case, Italy has not taken effective actions to improve the environmental impact of the plant, also due to the fact that the implementation of the plan of measures and activities for environmental and health protection is characterized by a "extreme slowness". Moreover, the Government has intervened several times to keep the business going, despite the serious risks to health and the environment; lastly, a criminal and administrative immunity was also introduced in favour of the provisional administration and the purchaser of the company. According to the judges, all of this contributed to a violation of art. 8 of the ECHR. There is also a violation of art. 13 as it is believed that there are no effective remedies for the applicants, since there are no instruments (of a criminal, civil or administrative nature) that meet the purpose of rehabilitation of the areas

[15]ECHR, *Cordella and others v. Italy*, applications no. 54414/13 and 54264/15, judgment of 24 January 2019.

concerned. Art. 13 of the ECHR is therefore violated when the failure to provide information on the state of the environment and on the preventive and remedial measures that the public system implementation or plants to implement prevents citizens from appealing to a judge "*against the impossibility of obtaining anti-pollution, thus violating their right to an effective remed*y".

4. The application of art. 8 ECHR in cases of environmental damage: the suitability of dangerous or destabilizing environmental conditions to negatively affect a person's well-being

The right to the environment, while not finding – as mentioned above – an express consecration in the Convention, has been progressively affirmed by the Court by relying on other rights enshrined therein by reason of their compatibility, *ratione materiae*, with disputes concerning problems of an environmental nature. This is demonstrated by the numerous decisions in which the Court held that the right to home and to private and family life guaranteed by Article 8 assure also the protection of the surrounding environment, thereby highlighting various profiles related to it: from the strictly home-based one – linked to the places where private life takes place – to that which concerns the space of autonomy and quality of the latter (which, in the environmental value, is resolved in the right to enjoy it without interference that alter the psycho-physical well-being of the individual), up to the protection of family relationships that qualify it and give it consistency.

Article 8 of the ECHR was, in fact, the provision that most lent itself to the evolutionary interpretations of the Court, which made it fall within the application field situations far from those typified by the signatories of the Convention, the latter interpreted as a living instrument[16], which therefore allows us to give an effective response to the new needs that emerge in social sensitivity.

The core of the right to home and to private and family life corresponds to a wide range of situations in which the environmental value of this right has been examined by the Court. And indeed, the protection granted by Article 8 of the Convention does not concern three different goods – *i.e.* private and family life, domicile and correspondence – but is an *unicum*, that has to be considered worthy of protection because it is the set of

[16] ECHR, Tyrer v. U.K., application no. 5856/72, judgment of 25April 1978, para. 31: "[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions".

relationships that revolve around the most intimate sphere of the person. The violation of this right is revealed under various profiles: from the strictly home-based one, linked to the places in which private life takes place, to that which concerns the space of autonomy and quality of the latter (which, in the environmental, value it is resolved in the right to enjoy it without interference that alter the psycho-physical well-being of the individual), up to the protection of family relationships that qualify it and give it consistency.

The compatibility, *ratione materiae*, of Article 8 in the event of environmental disputes, it seems immediately evident to the Court that made application of the "*right to respect for the home*" not only to safeguard the specific physical area in which an individual is, but – above all – to protect the domicile as a larger space, with the consequence that the violations of the enshrined right guaranteed in Article 8 have as their object both physical interference and other types of intrusion, such as those resulting from noise, odours and the diffusion, in the air and in the water, of harmful substances.

So, even in the first cases dealt with by the Strasbourg Judges, relating mainly to situations of noise pollution, they proved to be inclined to recognize the infringement of the right protected by Article 8, consisting in exceeding the noise tolerance threshold, through the comparative analysis of the disturbance complained of by the interested parties and the concrete measures adopted by the person responsibly input manager, in a perspective of balancing between opposing interests.

The positive obligation incumbent on the State to ensure positive environmental conditions, found for the first time affirmation in the case *Powell and Rainer v United Kingdom*[17], concerning a case of noise pollution made by planes in taking off and landing at Heathrow airport, in which the judges – while denying in the specific case the infringement of the rights protected by the conventional rules – attributed an extensive scope to Article 8, in order to understand the home not only as a place of residence in the

[17]*Powell and Reiner v. U.K.*, application no. 9310/81, judgment of 16 July 1986; in the same sense *Hatton v. U.K.* in 2003, *Flamenbaum and other v. France*, in 2012. In these both cases, the Court states that national authorities have made an appropriate balance of interests. A further case is represented by *Martínez Martínez and Pino Manzano v. Spain* case, of 2012, regarding the noise and the dust pollution caused by an active stone quarry to the habitants of the area, in which was excluded the violation for the location of the house in an industrial and non-residential area, and due to the outcome of the technical assessment which revealed that the noise and pollution levels were equal to or slightly higher than the norm, but were tolerable.

material sense, but also as a space of which the individual has the right to enjoy peacefully without interference that would lead to an alteration of his psychophysical well-being[18].

It is from the sentences handed down in the cases *Lopez Ostra v. Spain*[19] and *Guerra v. Italy*[20] , both adopted unanimously, that the Strasbourg Court not only limited itself to highlighting the needs underlying the protection of the home, as a relevant sphere of personal security and well-being, but also affirmed the right to effective protection of private and family life, recognizing the existence of an individual right to a calm environment, free from pollution and respectful of health.

Both cases, relating to episodes of industrial pollution, have seen the Judges affirm "*the obligation on public authorities, when operating polluting installations for the treatment of substances potentially harmful to health or to the environment [...] to operate a fair balance between opposing interests both worthy of protection: on the one hand, there is the interest of the community in the existence of the plant, in order to reduce overall pollution and implement the local economy*; *on the other hand, that of the individual inhabitants of the places adjacent to the plant to preserve a healthy environment and to ensure that their private and family life and the free enjoyment of their home are not overly upset"*. This fair balance entails, for the Authorities, a duty to take precautions to ensure that the operation of such installations does not have abnormal consequences on private and family life and on the right to enjoy the home of individual citizens, under penalty of infringement of art. 8 of the Convention, set up to protect those rights.

In the first case, a liquid and solid treatment plant of tanning companies – built with state subsidies and located in the city of Lorca, in Spain, just 12 meters away from the Lopez-Ostra family's home, which was necessary to satisfy a primary need of the Lorca community – had generated such serious levels of environmental pollution thought its emission as to cause serious inconvenience and health problems to the local population and this, in the substantial indifference of the city authorities, although they were aware of numerous tests relating to harmfulness of the plant and despite the absence of the required administrative authorizations to operate, for years they had not prevented its total closure (Scarcella, 2013).

[18] Ćorić, D. (2020) How Much Does Dignity "Cost"?, Yearbook Human Rights Protection- The Right to Human Dignity, publishers: Provincial Protector of Citizens – Ombudsman and Institute of Criminological and Sociological Research in Belgrade,31-44

[19] ECHR, *Lopez Ostra v. Spagna*, application no. 16798/90, judgment of 6 December 1994.

[20] ECHR, *Guerra v. Italia*, cit.

In the second case, the violation of Article 8 was considered integrated – also in the industrial field – by the failure to inform about the potential risks linked to continuing to live in a place exposed to the danger of pollution or contamination, as an element that negatively affects the enjoyment of the home, regardless of the effectiveness of the damage. to health.

In both cases, the Court considered that the serious attacks on the environment affected people's well-being and deprived them of the enjoyment of their home in such a way to harm the respect for their private and family life[21].

The importance of the decisions also lies in the fact that the Court has, in both judgments, recognized the existence of a positive obligation, i.e. an obligation to act, on the part of the State, which must not remain inert, but must take suitable measures to stop or reduce pollution, by also providing the population concerned with relevant information on the serious risks to which it is exposed.

And it is through the recognition of this positive obligation – existing even when the violation occurred in relations between private individuals – that the Court has made the State responsible for the environmental health situation.

It is clear from the survey that in order to frame a situation of environmental impairment under art. 8 of the Convention requires a deterioration in the quality of life of the applicant or a negative impact on the well-being of the same. The Lopez-Ostra judgment, in fact, reveals that "*severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health*".

The concept of "well-being" is evidently endowed with uncertain outlines as the Court itself reveals, which recognizes that this expression attributes an intrinsically subjective character to this form of prejudice, which depends on the interaction of countless factors, including the applicant's age, the work done by the same and the lifestyle conducted.

[21] A further step forward in the evolutionary interpretation of the Edu Court came, shortly after, with the sentence rendered in the case *Giacomelli v. Italy*. The story concerned the appeal brought by a citizen residing in the suburbs of Brescia, in which a violation of Article 8 ECHR due to intolerable noises and harmful emissions from a nearby plant for the treatment and transformation of special waste, initiated by virtue of an administrative authorization provision made in the absence of the required impact assessment and, in other respects, non-compliant to the Italian environmental legislation.

Consequently, the Strasbourg judges are concerned to objectify this parameter by identifying from time to time a series of symptomatic criteria of an objective impact of the source of risk on the quality of life of the applicant. If, therefore, the deterioration of the quality of life represents the minimum threshold, below which the scope of Article 8 ECHR, cannot be extended in order to avoid an irrelevant prejudices falling within the scope of the provision, to the maximum disvalue, *i.e.* the maximum degree of afflictively that this provision is able to contain, the same jurisprudence of the Court tends to find it within the scope of application of Article 2 of the Convention, which establishes the right to life, identifying a subsidiarity relationship of the first compare to the second, as stated in the case of *Brincat and others v. Malta*[22], concerning the exposure of some workers to asbestos fibres inside a shipyard. In this ruling, the Strasbourg judges identified, on the one hand, interference with the right to life in relation to the applicant who died as a result of mesothelioma and, on the other hand, interference with the right to the enjoyment of private life, for those who had developed different types of cancer as their health conditions, due to the contracted diseases, were not such as to endanger their lives. In this ruling, furthermore, the Court takes the opportunity to point out that for the applicability of art. 2 of the ECHR there is no need for a fatal event to occur, but it is at least necessary for the applicant's life is endangered and that art. 8 may be used as a subsidiary measures provided that the risk factor (in this case, asbestos) has in any case affected the enjoyment of private life (Ruozzi, 2009).

In the light of the evidence, it emerges that, in the matter under consideration, the scope of application of art. 2 is easily identifiable through the reference to a clearly defined legal asset, that is, the of life welfare, threatened or actually harmed.

Conversely, the scope of art. 8 is much less crystalline, being entrusted to the vaguest concepts of "well-being" and "quality of life", in turn defined by the Court by reference to a catalogue open to other interests – such as health, personal tranquillity, the enjoyment of home and family activities –likely to be compromised whenever man finds himself leading his life in a contaminated environment. This is a complex case-by-case judgment, aimed at establishing whether the aforementioned interests have been harmed beyond the minimum threshold of severity (in turn identified in relative terms, for example using as a parameter the environmental risks inherent to "life in modern cities").

[22] ECHR, *Brincat and others v. Malta*, application no. 60908/11, judgment of 24 June 2014.

5. Protection against environment crimes in Italy: among supranational influences, instances of criminalization and remedial proposals

From the second half of the last century in the Italian legal system, the intention to provide adequate criminal protection for the environment has led to the progressive proliferation of numerous provisions, aims to regulate any types of pollution that could affect the air, the atmosphere, the water, the seas and the soil.

Norms able to protect the environment can be found both in complementary laws – that is contained outside the criminal code, and especially in the Legislative Decree no. 152/2006 – and in Title VI bis of the Italian Criminal Code (Articles from no. 452-bis to 452-quaterdecies), where in 2015, following the Law no. 68/2012, specific crimes to protect the environment were introduced.

The provisions contained in the complementary laws are often misdemeanours, constructed as crimes of danger, abstract or concrete, where the interaction between criminal law and administrative law is strong and where the protection of the environment is instrumental to the protection of humans being and it is not protected as a good itself. The provisions contained in the Italian Criminal Code, on the opposite, are felonies that punished more severely the aggressions to the environment and are structured as crimes of event, that requires an effective damage to or a concrete danger of it.

The 2015 reform follows the numerous supranational solicitations, among all those of the European Community crystallized in Directive 2008/99/EU, showing that a specific assessment procedure, *ex post* monitoring that leads to the elimination of harmful consequences and to the reparation of the victims, gives a (severe) response to the protection needs expressed by the victim of the environmental crime. In order to achieve these goals, the prison sentence is essential, with maximum edictal ranging from nine to ten years of imprisonment, in case of very serious injury or death as consequences of the environmental crime pursuant, as it is stated in article 452-bis of the Criminal Code. Giving another example, in the case of an environmental disaster from which it derives a danger to public safety (*ex* art. 452-quater, co. 1, lett. c of the Italian Criminal Code), the reclusion is required and are also required many accessory penalties; furthermore, the criminal effects of the sentence are high, onerous, and penetrating, *i. e.*, moreover, of the provision of circumstantial hypotheses severely punished.

Therefore, in the Title VI-bis were introduced and punished the so-called eco-mafias – situations where the environmental crimes are exercised in an associated form (pursuant to art.452-octies of the Italian Criminal Code) – in order to prevent and contrast the most serious form of illegal transportation of waste, the creation of abusive waste disposals and the most dangerous aggressions of the environment committed by a group of people.

In addition to the punitive component, the protection of the legal environment and public safety are strengthened, above all, by the provision of further compensatory and restorative instruments that oblige the author to a greater awareness and responsibility towards the community and the environment, with the imposition of forms of procedural collaboration, remedial conduct and the safety of polluted sites (to which a significant decrease in the penalty pursuant to Article 452-decies of the Criminal Code is correlated, through the institution of remedial measures), to the confiscation of assets subject to a restriction of destination by the public administration for the reclamation of the places affected by the criminal proceedings (Article 452-undecies of Criminal Code). Furthermore, obligations of reparation are inflicted, in any case (even apart from a voluntary interest before the opening of the trial and provided that the accused either has taken steps to prevent the continuation of criminal activity from leading to further consequences or has actually secured reclaimed and, where possible, restored the state of the places), as a result of the sentence, also following a plea bargain by the parties (pursuant to Article 452-duodecies of the Criminal Code).

The relevance, in the context of the reform, of the obligations of restorative content are concretized in the case referred to in art. 452-terdecies of the Criminal Code, providing a crime in the case of non-compliance with the order of the judge (pursuant to Article 452-duodecies of the Criminal Code).

The need to protect the people exposed to environmental crimes (pursuant to articles 452-ter, 452-quater, 452-quinquies of the Italian Criminal Code), requires an important role of the injured person considerably enhanced in the dynamics of ascertaining the fact, right from the very first stages of the acquisition of the crime report in terms of notices and information and on the exercise of its faculties and forms of protection within the process (pursuant to articles 90-bis of the Italian Criminal Code and following). From a general assessment of the reform, therefore, two different components seem to emerge: on the one hand, a strongly punitive dimension, with predictions of new crimes, and on the other hand, with the introduction of compensatory/remedial mechanisms that open up the perspective of the crime (no longer oriented solely on the offender) towards the community and on the methods of participation of the author of the crime in the repair of

the environmental asset with forms of process collaboration with (concrete) commitments to secure and restore the state of the places compromised by conducts pollutants: if it is true that this perspective fits reasonably into a broader framework of reform of the system towards the strengthening of forms of collaboration of the accused both towards the victim and towards the community, placing this dimension in the trial there is the risk of weighing down the dynamics of the criminal trial and significantly lengthening its timing (i. e., with the suspension of the trial pursuant to Article 452-duodecies of the Criminal Code), distorting the fact and responsibility of the accused in the trial towards a procedural moment focused solely on the quantification of the damage and on the technical modulation of remedial and compensatory conduct (whose execution times are in reality long and not easily predictable).

6. Conclusions

If, in general, the impact of supranational jurisprudence on national legal systems has considerably changed relations between member States and the exercise of legislative discretion, requiring positive and active interventions by the legislator, also in environmental matters, in the case in which the legal asset to be protected is life, the Court of Strasbourg intervened to establish, albeit with weak pronouncements, a form of protection for victims damaged by exposure deriving from industrial activities and in situations in which scientific knowledge was proven with sufficient clarity, even in cases where there is no strong scientific significance.

In fact, what remains on the State, even in the case of lack of scientific knowledge about the risks from exposure from industrial activities, is a positive obligation of information and preventive investigation such as to allow potential victims to be aware of the possible environmental risks for their own health.

The Court, while never reaching the point of affirming the existence of an obligation to penalize environmental damage, relies on the need to prepare a corporate governance model that is able to provide for the methods of access to the exercise of dangerous activities, a specific regulation, with the distribution of responsibilities and the identification of the subjects responsible for the production cycles, the types of controls and monitoring by public authorities and a constant flow of communication between the public and the judicial systems, for the assessment, only eventual, (and after injury) of criminal responsibility (Manca, 2018).

The Court, however, uses criminal law only in relation to the ascertainment and punishment of serious environmental injuries that have been able to directly affect the good of life, as a form of ultimate guarantee, i.e. the leading case Öneryildiz c. Turkey: more than a real obligation to incriminate, in such cases, criminal law is referred to within a legal framework which must, according to the Court, be as effective as possible, providing, if necessary, also the most adequate protection tools to provide relief to the victim, compared to compensatory remedies.

If from a criminal point of view, the Italian legislator intervened with law no. 68/2015, with the introduction of crimes highly punished, such as, for example, the environmental disaster crime referred to in art. 452-quater of the Criminal Code, from a political point of view (understood as the public management of industrial activities of industrial importance), numerous gaps and serious deficits still seem to emerge, which could force the Italian State to resort to extraordinary and urgent interventions, which are reconciled with an integrated and eco-sustainable environmental policy.

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Vojin Grković*

ON HUMAN RIGHT TO ENERGY

An overview of all the main categories from the field of energy, which are essential for the analysis and consideration of specific issues of human rights to energy, is given. The types of energy were especially considered according to their place in the process of transformation from energy raw material to the final effect of energy consumption.

In accordance with the Universal Declaration of Human Rights from 1948, the concept of the human right to energy is presented; as a civilized right of the human race as a whole, but also as a right of each individual. A reasoned proposal was made to specify the human right to energy as the right to final energy. Certain limitations for the establishment and realization of the human right to energy, which arise from current international relations, are considered.

Keywords: *Right to energy, Final energy, Green energy*

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Introduction

The breadth of the title defined in this way indicates the need to first consider the most important aspects of the concept of energy, then to point out the possible ways of searching for answers to the questions that arise from this title; as well as to consider the main factors in the world that affect the realization of the human right to energy.

About energy, basic terms, categorical apparatus

Energy is basically a physical notion. Namely, in physics, energy represents the ability of a body to do work, or, in a general sense, the ability to do work, while power is the speed of doing work. Here, the term "work" in the general case represents the work of human muscles in the process of production of material goods, the work of machines and mechanisms, also, in the process of production of material goods, the work spent on movement - man or machine, tractor, car, or any other working, i.e. means of transportation, but also work spent in any other human activity to satisfy his needs. Given that such activities of man are numerous and fulfill all segments of his existence, we can conclude that having a sufficient amount of energy, all necessary types and kinds of energy is a condition, not only for the progress and development of humanity, but also for its survival in space and time, (Grković, 2020: 1).

Energy has very important physical properties. It cannot be destroyed or created from nothing, but can only be transformed from one form to another. When energy is lacking, we cannot replace it with any other commodity, any other raw material and any other product, except with other energy, where and when it is possible. We cannot recycle energy. Energy once used is "spent" forever. We can store energy for later use. However, all known energy storage technologies consume, to a lesser or greater extent, a part of the stored energy for the storage process itself. This means that in terms of energy, any energy storage is associated with certain energy losses. More precisely, energy storage is neither energy-wise nor economic-free.

Three basic forms of energy can be distinguished, from which all other forms of energy on Earth arise. These are, (Ristić, 1987: 20):

- The bond energy of atomic nuclei, it is released in the form of heat and radiation during the fusion and fission of atomic nuclei,
- Gravitational and rotational energy of heavenly bodies, and

- Chemical energy, it is released in the form of heat during chemical reactions, for example during fuel oxidation.

The sun is, in fact, a source of energy of electromagnetic radiation that is created during the fusion of light atomic nuclei, therefore, it is about the energy of the bond of atomic nuclei. Under the influence of the sun, fossil substances (secondary ores) were formed over time - today's reserves of chemical (fossil) fuels. Under the influence of the sun, winds and water currents are created, then, evaporation of water - rain - water flows - water power, further, biological receivers of solar radiation are created that participate in the creation of plant mass.

Under the action of gravitational forces (gravitational effects between the Earth and the Moon), originate the movement of huge masses of water in the seas and oceans and, as a final result, tidal energy.

Chemical energy from the fuel, during the combustion process, is directly converted into thermal energy. As for the overall conversion of chemical energy from fuel to electricity, it can only be done in one of the following two ways:

- To first convert chemical energy into thermal energy by burning fuel, then, in the next step, to convert the obtained thermal energy into mechanical energy and, then, finally into electrical energy or
- To convert chemical energy directly into electrical energy - using chemical current sources.

The basic forms of energy, viewed in a physical and chemical sense, are: mechanical energy, kinetic energy, potential energy, electrical energy, thermal energy, chemical energy and nuclear energy, (Ristić, 1987: 20). The basic forms of energy defined in this way are used to satisfy human needs for energy.

Not all forms of energy are equally capable of doing work and, therefore, not all forms of energy are equally usable. Mechanical and electrical energy do not have any theoretical limitations regarding the ability to perform work. Assuming that the machine for obtaining work is perfect, that there is no friction in the bearings of the machine, all the mechanical energy of the rotation of the turbine could be converted into useful work. Similarly, all the electrical energy supplied to the electric motor through the cables could be converted into work if the windings of the electric motor were made of super-conductors and if there were no friction in the bearings. In other words, if we exclude the

goodness of the machine itself, there are no natural, i.e. theoretical limitations to convert all mechanical energy and electrical energy into mechanical work.

On the other hand, it is not possible to convert the entire amount of thermal energy into mechanical work, even assuming that the machine for obtaining work is perfect and that there is no friction in it. Here there is a natural limitation derived from the second law of thermodynamics, according to which a heat source at a higher temperature and a heat sink at a lower temperature (which realistically cannot be lower than the ambient temperature) are necessary to obtain work from thermal energy.

Therefore, all forms of energy can be classified into two groups (Behr, 1965: 8) according to their transformability into: unlimited transformable energies and limited transformable energies. Unlimited transformable energies are electrical and mechanical energy and, therefore, they have a greater ability to perform work than thermal energy, which is limitedly transformable and, therefore, has a lower ability to perform work compared to the first two. Obviously, unlimitedly transformable energy is more "valuable" than limitedly transformable energy, in terms of energy and not only in terms of energy. Therefore, we can question the expediency of converting unlimited transformable energy, for example electric, into limited transformable energy, for example into thermal energy.

Energy carriers are closely related to the basic forms of energy. Namely, in a practical sense, each of the basic forms of energy must be viewed together with the corresponding energy carrier. Energy carriers are substance or some natural process, that is, a phenomenon that enables the transmission of a certain form of energy. Thus, heat energy carriers can be some gas (combustion product), hot water under pressure or water vapor. Carriers of chemical energy are individual chemical compounds, that is, mixtures of individual chemical compounds that can burn, which are actually fuels. The carrier of electrical energy is electricity, (Ristić, 1987: 20).

In the industrial sense, we produce energy from energy raw materials. The amount of energy obtained from a unit of raw material depends on the quality of the transformation process. In the processes of energy transformation, it is not possible, sometimes only technically, and sometimes not even theoretically, to transform the entire amount of one energy into another energy. The unused part of the energy represents a loss of energy. Improving the process of energy transformation, that is, reducing the amount of energy losses that occur during these processes, represents one of the main directions of energy development.

Energy resources represent the raw material base for obtaining energy in an industrial sense. We can classify all energy resources into six groups (Ristić, 1981: 19):

- Primary mechanical energy
- Fossil energy raw materials or fossil fuels
- Nuclear raw materials
- Geothermal energy
- Solar energy
- Secondary energy raw materials.

Primary mechanical energy covers hydro mechanical energy and aero mechanical energy. Hydro mechanical energy includes: river flows, rapids, tides and sea waves, while aeromechanical energy represents wind energy.

Fossil energy raw materials include all fossil fuels, namely: coal, crude oil, natural gas, and bituminous and gas-bearing minerals. The practical usability of fossil fuels is determined by its energy content and its chemical composition. The more combustible elements a fuel has in its composition, the higher the quality of the fuel and the more economical its transport over longer distances. The opposite is also true: the more non-combustible substances – water and ash – a fuel contains, the less economical its transport is.

Fuel combustion products: carbon monoxide, carbon dioxide, sulfur dioxide, sulfur trioxide and nitrogen oxides are harmful to the human environment. The amount of nitrogen oxides does not depend only on the amount of nitrogen in the fuel, but mostly on the applied combustion technology, because the total amount of nitrogen oxides is dominated by nitrogen from the air. The amounts of carbon monoxide, nitrogen oxides and hydrocarbons formed can practically be eliminated by choosing appropriate design solutions and proper exploitation of the thermal power plant. For the removal of sulfur dioxide and sulfur trioxide, as well as for the removal of the remaining part of nitrogen oxides, to the level that meets the regulations, special plants are built as functional parts of thermal power plants.

In terms of environmental impact, gaseous fuels are the most favorable of all fossil fuels. They, in addition to their usually low sulfur content and high heat capacity, have less

carbon and more hydrogen and, as a result, generate less carbon dioxide and, of course, no solid combustion products.

Nuclear raw materials mainly include uranium, thorium and lithium. The processing of uranium ore produces uranium oxide, the so-called "yellow cake", which actually represents the product, i.e. the nuclear fuel that is sold. About 200 tons of uranium oxide are needed to meet the burning needs of the 1000 MW nuclear power plant per year (Cassedy, Grossman, 1998: 181). For the sake of comparison, a lignite fired thermal power plant of the same power would require about 11 million tons of Kolubara lignite per year.

Geothermal energy can be: directly available and indirectly available. Directly available geothermal energy is the energy of hot water or water vapor that erupts on the surface of the earth's crust, while indirectly available thermal energy is the heat of rocks in the earth's crust.

Today, solar energy is most often understood as solar radiation that can be directly used by means of heat receivers and photovoltaic converters. Solar energy embedded in biomass on the ground can be used indirectly.

Energy resources are inexhaustible if the speed (power) of their renewal is greater than the speed (power) of exploitation. In contrast, with exhaustible resources, the speed (power) of renewal is lower than the speed (power) of exploitation. This practically means that resource exhaustion is a conditional category, because it is, in fact, conditioned by the size of the speed of exploitation in relation to the speed of renewal of the specific resource (Ristić, 1981: 2).

For the immediate consideration of the problem of the right to energy, it is very important to consider the typology of energy. It determines the types of energy according to their place in the process of transformation from energy raw material to the final effect of energy consumption. There are four-level and two-level energy typologies. The four-level typology divides energy into: primary energy, secondary energy, final energy and useful energy.

Primary energy is obtained directly from natural resources. The amount of primary mechanical energy is calculated in the balance (Ristić, 1981: 20), based on the capacity of facilities for the exploitation of hydro mechanical energy (power of hydroelectric power plants). Primary fossil fuel energy is the energy equivalent of prepared fossil fuels;

means the amount of fuel in the storages of mines, as well as of power plants. The primary energy of nuclear fuels is the energy equivalent of prepared uranium. Primary thermal energy (geothermal) is calculated according to the capacity of the facility for using geothermal energy. Obviously, the primary energy defined in this way differs from the previously defined concept of resources, because it represents only a part of energy resources. The difference between the estimated energy equivalent of the resource and the energy equivalent of the obtained primary energy represents the loss of resource energy. During the transport of primary energy to the place of its transformation into secondary energy certain energy losses also occur that include and energy consumption for the transport itself.

Secondary energy is obtained by transforming primary energy, with inevitable losses that follow this transformation. Therefore, secondary energy is less than primary energy by the amount of energy losses that occurred in the transformation process. Secondary energy is adapted to market requirements that apply to a specific type of energy. Those requirements are precisely specified in the respective standards. Secondary energy includes: fossil fuels (classified coal, briquettes, deep-dried lignite, semi-coke, coke, all petroleum derivatives and biological liquid fuels, all gaseous fuels ready for use), nuclear fuels (UF_6, UO_2, fuel elements), thermal energy, which is produced from primary energy, and of course electricity.

Final energy represents energy at the point of final consumption. It is electricity on our home electricity meter, oil derivatives at pump stations, heat energy at the entrance to our apartment. This means that the final energy balance is smaller than the secondary energy by the amount of energy losses incurred during transportation, i.e. transmission and distribution of secondary energy.

Useful energy is the part of the final energy that was used in the process by the end user. The second (unused) part of the final energy represents the loss of energy caused by the imperfection of the devices that use the final energy. For example, fossil fuel extracted from the ground and ready to be transported to a thermal power plant is primary energy. The electrical energy produced in the thermal power plant is secondary energy. Electric energy at the point of consumption - the one measured by our electricity meter in our apartment is the final energy. The work done by a household vacuum cleaner is useful energy. The difference between final energy and useful energy represents energy loss during energy consumption.

Similarly, oil extracted from the well and ready for transport is primary energy. Derivatives obtained from oil in the refinery are secondary energy. The gasoline that we pour into the car at the pump station is the final energy. The work done by the vehicle while driving is useful energy.

Energy as an industrial product is obtained using appropriate technologies. Here, the term "technology" includes the process of energy transformation, which is defined by the appropriate parameters of that process, and the equipment used to realize that process of production, i.e. energy transformation. Therefore, we can say that energy as an industrial product is inseparable from the technology used to create that product. This unity of energy and technology is very important for concrete considerations of certain types of energy as industrial products. Thus, we obtain primary fossil fuels using technologies for extracting coal, technologies for extracting oil, and technologies for obtaining natural gas. The transformation of the primary energy of fossil fuels into secondary electricity is carried out in thermal power plants, for which there are different technologies. Primary mechanical energy transformation technologies are hydropower plants and wind turbines. Primary nuclear energy transformation technologies are nuclear power plants, and primary solar energy transformation technologies are photovoltaic collectors and solar thermal power plants. Each of the mentioned technologies can be used for the production of secondary electricity, but with different energy, economic and environmental effects. The production of electricity without the emission of carbon dioxide can be achieved using hydroelectric power plants, wind turbines, solar power plants and nuclear power plants.

Technologies for the production of secondary energy of liquid fuels are oil refineries. The production of secondary gaseous fuel is currently being considered as a possible future technology for obtaining pure hydrogen by electrolysis of water using electricity produced by wind turbines or solar power plants. When burning pure hydrogen, there is no emission of carbon dioxide.

To obtain the final energy, we need the technologies of transportation and distribution of secondary energy. It means that, when we talk about the human right to final energy, we mean the prior necessity of using appropriate technologies for the overall transformation from primary to final energy.

It is often heard in colloquial speech: we will replace coal with natural gas. However, this implicitly implies the replacement of coal as the primary energy source with gas as the primary energy source, most often, for the production of secondary electrical energy. So,

here we are talking about replacing the carrier of primary chemical energy and not chemical energy as such. In developed countries, work is being done on the development of technologies that should enable gaseous fuel, for example hydrogen, to be obtained using electricity. But here, too, we are talking about transforming one energy into another, which is suitable for certain sectors of consumption, where we need gas as a secondary energy. To repeat, when one energy is missing, we cannot replace it with anything else, except another energy. Therefore, in periods of energy crises, we have a highly inelastic demand for energy. In other words, then the demand for energy practically does not decrease regardless of the price. In recent months, we have witnessed exactly this phenomenon. In addition, we see that the most industrially developed countries cannot replace the missing natural gas with anything other than other gas. Only in the part where the gas was used to obtain secondary electricity or secondary heat, it is possible to replace it with another fossil fuel, but even in that case it is necessary to have the technology that enables the production of electricity from that other fossil fuel. The same applies to the production of electricity from nuclear fuel, provided that, in addition to the appropriate technology, nuclear fuel is available, that is, it is possible to obtain nuclear fuel.

On human right to energy

The human right to energy, in a general sense, can be classified as one of the general civilizational human rights, such as the right to life, the right to health care, and the right to work. We derive this attitude from the Universal Declaration of Human Rights [9], where in Article 25, among other things, it is written that: “Everyone has the right to a standard of living that ensures the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, as well as the right to insurance in case of unemployment, sickness, disability, widowhood, old age”. In addition, Article 22 of the Declaration [9] states: “Everyone, as a member of society, has the right to social insurance and the right to realize the economic, social and cultural rights necessary for their dignity and for the free development of their personality”. Achieving these principles is practically not possible without the accessibility of people to the appropriate amount of energy. Furthermore, Article 23 of the Declaration [9] states: “Everyone who works has the right to fair and satisfactory compensation ... which, if necessary, will be supplemented by other means of social protection”; and we see this quote as the basis for the adoption of appropriate laws at the state level, and then for the adoption of a decision by the competent authorities for the subsidized price of electricity for the most economically vulnerable categories of the population. All this further points us to the fact that the human right to energy must be exercised within the legal system of the state.

General statement: "right to energy" is not precise enough for practical legal solutions. The phrase "right to energy" can formally include the right to energy raw materials, the right to primary energy, the right to secondary, the right to final energy. The expression: "right to energy raw materials" is not acceptable, because, from the above, it follows that it allows for very different interpretations, while the right to energy raw materials, by itself, does not mean much. To dispose of energy raw materials does not mean to dispose of final energy at the same time, for the disposal of which we need certain technologies and certain resources for their generation; and people directly consume the final energy.

In other words, it is necessary to specify what kind of energy the specific human right to energy refers to. The wording: "human right to the basic forms of energy", can hardly be a basis for the elaboration of appropriate legal solutions that would create a legal framework for realizing the human right to energy.

It seems very convenient to set the right to energy as a right to a certain type of energy as an industrial product. In this sense, it is very convenient to define the human right to energy as the human right to final energy in general. This would specifically mean the right to electricity in apartments, the right to the availability of oil derivatives at petrol pumps, the right to availability coal and wood on the market, including the right to thermal energy, but also the right to natural gas – where there is or can be gas under acceptable general conditions. Defining the right to final energy, as a basic human right to energy, enables very precise and practical concrete solutions in the direction of satisfying that right. Such a definition enables further elaboration of the steps that should be taken on the way to satisfying both the human right to energy in general, as well as specific solutions in the sphere of realizing the right to energy.

Limitations for the establishment and realization of the human right to energy

Certain international factors make it difficult to establish a universal human right to energy. First of all, it is a huge difference in energy consumption in the world. The average resident of the poorest country consumes annually a hundred times less energy than the average resident of the most developed country [10]. This is further reproduced in the low general availability of energy to the inhabitants of those countries. For example, the availability of electricity to the inhabitants of Africa is, on average, about 51%, while is in West Africa even less than 40% (Baruya, 2022: 80). It is difficult to talk about the human right to energy when every second inhabitant of a continent does not have access to electricity.

Very important international documents, which focus on climate change, such as the "United Nations Framework Convention on Climate Change", then the "Kyoto Protocol", the "Paris Agreement" and "COP 2021" in Glasgow introduce something fundamentally new, which is the so-called "green agenda". On the international level, the green agenda is reproduced as the obligation of all countries to contribute to the reduction of carbon dioxide emissions. That requirement practically boils down to abandoning coal as a primary energy source for obtaining secondary electricity, and, instead, to the massive use of renewable primary energy, primarily wind and solar.

In the final document of the G7 Summit [4], the first page emphasizes the principle: "rules-based multilateral order ". Furthermore, on the second page states: "combating climate change, biodiversity loss, and pollution requires mobilising private and public, domestic, and international financial resources" [4]. In the following, on the third page is highlighted: "efforts to delivering on the collective USD 100 billion climate finance mobilisation goal as soon as possible and through to 2025" for financing projects to replace coal-based electricity generation capacities with renewable resources, and in addition: "fossil fuel subsidies are inconsistent with the goals of the Paris Agreement … our commitment to the elimination of inefficient fossil fuel subsidies by 2025" [4]. This implies that the usable, still outstanding and may be not repaid capacities for the production of electrical energy from fossil fuels have to be replaced by new wind generators and solar power plants. This practically means new indebtedness of already indebted poor countries, which, further, would lead poorly developed and underdeveloped countries to an extremely unenviable, practically hopeless position. In addition, there are countries where coal production is of great importance due to the employment of labor and participation in the creation of GDP (for example India), which also cannot, or at least not so quickly, abandon coal as the primary energy for obtaining electricity.

The Green Agenda puts pressure on undeveloped countries to use significantly more expensive technologies for the production of electricity, and imposes special taxes on carbon dioxide emissions to producers of electricity from fossil fuels. So, for example, the International Energy Agency (IEA), in the materials prepared for COP 2021, predicts that producers of electricity from fossil fuels in developing and emerging countries pay a tax of 55 USD per ton of carbon dioxide, which is approximately at the level of the current tax in highly developed countries (Schiffer, 2021: 47). Truth be told, the same document stipulates that the richest countries should introduce a tax to 250 USD per ton of carbon dioxide. However, the essential problem is that even this 55 USD per ton of carbon dioxide is too high for the level of development of a large number of countries in the

world and represents a kind of brake for their faster development. Therefore, when it comes to the implementation of the "green agenda", it is necessary to take into account the differences that exist in terms of the level of development, but also in other structural parameters, between countries, so that the sustainable development of developing countries is not threatened. Today, the most developed countries, while passing through the level of development of today's underdeveloped countries, did not have to have costs in their economies for "green energy" even close to the size of the costs that are imposed on developing countries today.

The Kyoto Protocol, the Paris Agreement and COP 2021 in Glasgow do not go in the direction of defining the right to energy as a general human right, but rather go in the direction of defining obligations to preserve the environment. This does not mean that the human right to energy should be opposed to the right to a clean environment, but, above all, it illustrates the complexity of the problem of realizing the human right to final energy, bearing in mind the briefly presented view of some of the most developed countries.

If the desire, or goal, is to establish the right to "clean energy", then there are at least two problems. The first is the definition of "clean energy". Is it necessary and sufficient to define the acceptable limits of "pollution" of the environment during energy production? Can "clean energy" be that which, although it pollutes the environment, pollutes it ten times less than the average thermal power plants of today? Is "clean energy" just any electricity produced without carbon dioxide emissions? As a reminder, electricity produced in hydroelectric power plants, nuclear power plants, wind farms and solar power plants is carbon dioxide-free. Therefore, it is not clear why the concept of clean electricity is most often reduced to electricity obtained in wind farms and solar power plants, which is more expensive than electricity from hydropower plants and nuclear power plants. In addition, it is highly debatable whether wind turbines and solar power plants are more environmentally friendly than nuclear and hydropower plants. For the same annual production of electricity, it is necessary to install approximately three times the total power of wind turbines than in nuclear power plants. Given that approximately one hundred to one hundred and fifty units of wind turbines (due to their much lower power) correspond to one nuclear power plant, instead of one nuclear power plant we will have about 600 to 900 wind turbines. The lifetime of a wind turbine is twenty to twenty-five years, and the lifetime of a nuclear power plant is 50 to 60 years. End-of-life wind turbines cannot be recycled, so they must be disposed of in appropriate storage facilities, which will be a great burden on the environment. This points to another component of the complexity of realizing the human right to energy.

Realizing the right to energy should have absolute priority and that right should not be conditioned by the obligation that it must be the most expensive energy. By the nature of things, it should be the most affordable energy for the population. When it comes to electricity, therefore, it must be electricity obtained from cheap primary energy, using appropriate technologies.

Another question is who will define what "clean energy" is. Will that definition be only a recommendation or an obligation? If it is an obligation, who can impose it on free and independent states.

If we start from the already stated assessment that energy is a prerequisite, not only for the development of human communities on planet Earth, but also for their survival in space and time, then the right to energy, i.e. the right to the availability of energy, can be aligned with the human right to development and survival, that is, ultimately with the right to life.

The human right to development has been given a lot of attention at the political level for a long time, and especially recently. At one of this year's highest-ranking international gatherings - the 14th BRICS Summit in Bali, in the Declaration, in Point 9, specifically refers to the human "right to development" [11]. Furthermore, Point 48 of the same document emphasizes "the fundamental role of energy security in achieving sustainable development goals". In Point 53 of the Declaration [11], it is stated that "all parties to adhere to the principle of common but differentiated responsibilities and respective capabilities" to implement the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Contract. At the same time, the BRICS countries, in the same Declaration [11], in Point 54, express their opposition to "green trade barriers" and confirm their commitment to creating opportunities for coordination on these issues. All in all, from the final document from the 14th BRICS Summit [11], it follows that only with the satisfaction of the right to development, respecting the importance of energy security, other human rights can be available to the majority of people, such as the right to work, the right to healthcare, the right to education and the like. And right here we can add the right to energy.

Conclusions

The human right to energy, no matter how you define it, is essentially realized within the legal system of a country. It means that the legal system of the state should enable the realization of the right to energy of individuals, its citizens, in accordance with the general

principle of human rights given in the Declaration on Human Rights, and the specifically defined human right to energy.

The right to energy should be considered as the general civilizational human right. The human right to energy is most effectively defined as the human right to final energy.

The right to energy is closely related to the right to sustainable development.

The huge difference in energy consumption per capita per year in the world and the low access to electricity to residents, not only of individual undeveloped countries, but also of the entire continent objectively make it difficult to establish the right to energy. Also, insisting that electricity from fossil fuels be replaced by the most expensive electricity from wind generators and solar power plants, at the cost of additional borrowing by already over-indebted countries, makes it difficult to establish the right to energy. Therefore, a great effort should be made to overcome all these international factors that make it difficult to establish a universal human right to energy.

The right to energy should not, and must not, be an excuse for one country to threaten another independent country in any way.

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Dragan Obradović[*]

VIOLATION OF INDIVIDUAL RIGHTS OF TRAFFIC PARTICIPANTS IN SERBIA BY THE COMPETENT STATE AUTHORITIES

In the last few years, every day on the streets and roads, in the world and in Serbia, the appearance of electric scooters driven by people of both sexes, of different ages, is becoming more and more common. There have already been traffic accidents with various consequences involving drivers operating electric scooters. The increase in the number of electric scooters in traffic in Serbia is not accompanied by adequate legal or by-law regulations, because they are still not legally regulated. The paper points out the danger to safety, which for other traffic participants is represented by persons who use electric scooters in traffic in their daily life in the event of a traffic accident, considering the currently valid position of the Ministry of Interior of the Republic of Serbia. It was also shown through examples from practice how the human rights of those other road users are violated. This is also important for the judicial authorities who have begun to encounter electric tricycles, i.e. their drivers, in practice in connection with traffic accidents.

Keywords: *road users, drivers, electric scooters, human rights*

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1. INTRODUCTION

Traffic is a living 'organism,' it takes place every day all over the world by using the most diverse means of transport. One of the trends, so to speak, when it comes to traffic is the development of micromobility through a variety of small means of transportation. Apart from its positive features from the environmental aspect, which is much talked about, the development of micromobility also has some aspects that have not yet been clearly defined, which are related to the safe use of some of these means in traffic. In this paper, attention is focused on electric or e-scooters, one of the new means of micromobile transportation, which have become a traffic trend in the last few years not only in Europe and other continents, but also in the largest cities in Serbia, Belgrade, Novi Sad and Niš, as well as in the smaller towns. A new category of road users has appeared with the expansion of this type of transportation, for which the mode of traveling is not legally defined. However, electric scooters can be found on the road, as well as using pedestrian areas and bicycle paths in today's day (Antić et al. 2020).

The increase in the number of electric scooters has been tied in with an increase in the sales. Data from the media indicate that there are 20,000 users of e-scooters on the streets of Belgrade every day, and that by August 2021, according to the salesmen, about 80,000 e-scooters were imported, although that number is much higher as our citizens also buy them in other countries.[1]

However, the increase in the number of electric scooters on the streets in Serbia does not correlate with adequate legal norms or by-law regulations. There is no definition for electric scooters, or the surfaces on which they can travel, or the age of the electric scooter user, or how they should be equipped with regard to individual devices, whether they should be registered and in what way, as well as if insurance is necessary, whether the electric scooters users should wear protective helmets as they are so-called two-wheelers, if they should wear a reflective vest in night conditions, as well as many other questions. As a matter of fact, the rules for using electric scooters are regulated in different ways and are changing throughout Europe[2] and the world.

[1]https://backapalankavesti.com/info/srbija/od-pocetka-godine-ozbiljno-povredjeno-150-vozaca-trotineta/,, 18.8.2021., accessed on 3. January. 2022.

[2]https://www.fleeteurope.com/en/last-mile/europe/features/e-scooter-rules-still-varied-and-changing-across-europe?a=FJA05&t%5B0%5D=e-scooter&t%5B1%5D=legislation&curl=1, Published 5 July 2021, downloaded 13 November 2021.

Despite this increase in the number of electric scooters on the streets of Serbia, not enough attention has been given to the dangers that they, or those using them, represent every day in Serbia, primarily from the aspect of road traffic safety. One of the biggest problems with electric scooters is that the users of this means of transport represent another group of vulnerable road users (Graovac et al. 2020). In addition, people who use electric scooters in traffic compromise the safety of all road traffic users in different ways: the safety of pedestrians when these means of transport move silently along on sidewalks and other areas intended for pedestrians only, the safety of drivers of certain motor vehicles which are also put in danger, but also other drivers due to the emergence of this means of transport and their use on the road, that is, on surfaces intended for the movement of certain categories of two-wheelers.

All this is of particular importance due to the conscious violation of the civil rights of other road traffic users in favor of electric scooter users on the part of authorized representatives of the state, i.e. police officers and in connection with various aspects of road traffic safety, and especially when there are traffic accidents involving users of electric scooters. Because of this, some authors rightly ask the question: Are the police working in the public interest? (Cassan, 2017:535).

In connection with the participation of electric scooters in road traffic and how to regard them appropriately, especially in regards to the traffic accidents in which their users were involved, the police and competent judicial authorities are also in a quandary, something which will be discussed later in the paper. However, this lack of knowledge on how to regard users of electric scooters should not be a reason to violate the civil rights of other road traffic users, at least when it comes to traffic accidents.

The aim of the paper is to point out the problem of the violation of civil rights of other road traffic users at the expense of users of electric scooters, which means of transport is still not legally regulated in any way by the legislation of the Republic of Serbia, but is left to the arbitrary interpretation by the police. This is valid when it comes to judging which category of road traffic users e-scooters users belong to, especially in regards to road traffic accidents.

Thereby, it is necessary for the relevant state authorities to recognize and define electric scooters and the most important road safety regulations in the legal norms and by-law regulations as soon as possible, as in this way the violation of civil rights of certain categories of road users can be reduced or avoided. This is of special importance for the police and judiciary, for their response in situations when electric scooters users are

involved in traffic accidents, and above all as those who had caused traffic accidents, considering the increase in their number. This is relevant for the increase of overall traffic safety.

2. KEY REGULATIONS ON ROAD SAFETY IN SERBIA

The Law on Road Traffic Safety (hereinafter: RTSA or Road Traffic Safety Act),[3] which has been in effect in Serbia since 10 December 2009, has failed to define electric scooters, due to the fact that that time they were practically unknown. All subsequent changes and additions, including the most recent ones from 2019 which followed from the beginning of the implementation of the RTSA,[4] failed to recognize electric scooters or to define them in any way.

This is also confirmed by the works of some domestic authors, who have analyzed valid world experiences regarding the involvement of electric scooters in traffic (Bogićević et al., 2020). Other domestic authors in papers published in 2021 also state that electric scooters are still not legally defined in the Republic of Serbia, which has the consequence that road traffic accidents involving this means of transportation have not yet been recorded and there is no official data regarding the number of such means of transport (Živković, Velić, 2021); (Obradović et al., 2021).

From 2019 to 2021, the Serbian media have repeatedly reported that electric scooters would be regulated by the new Road Traffic Safety Act. This was announced in 2019 by Jasmina Milošević, then the Acting Director of the Traffic Safety Agency,[5] and the same sources from the Traffic Safety Agency (hereinafter: TSA), i.e. from the Working Group of the Ministry of Internal Affairs (hereinafter: MIA) of Serbia in charge of drafting the new RTSA, also referred to by the media during 2020 - in 2021, but the situation has not changed.[6]

The most important by-law relating to vehicles in Serbia is the Rulebook on the Classification of Motor and Trailer Vehicles and Technical Conditions for Vehicles in

[3]Road Traffic Safety Act, RS Off. Gazette no. 41/2009.

[4]Law on Amendments to the Road Traffic Safety Act, RS Off. Gazette nos. 53/2010, 101/2011, 32/2013 (Decision of the Constitutional Court), 55/2014, 96/2015, 9/2016 (Decision of the Constitutional Court), 24/2018, 41/2018 (other law), 41/2018, 87/2018, 23/2019 – cf. Article 7.

[5]https://www.propisi.net/elektricni-trotineti-ce-biti-regulisani-zakonom-od-iduce-godine/, Source: Politika, 19.avgust 2019.godine, downloaded 10 October 2021.

[6]https://balkangreenenergynews.com/rs/novi-zakon-o-bezbednosti-saobracaja-srbije-regulisace-upotrebu-elektricnih-trotineta/, Author: Balkan Green Energy News, 1 October 2021, downloaded 10 October 2021.

Road Traffic (hereinafter: Rulebook).[7] Furthermore, no progress had been made in terms of defining or attempting to define electric scooters in the most recent amendments and additions to the Rulebook during 2021 in the provisions related to the classification of vehicles.

3. ELECTRIC SCOOTERS – THEIR USE AND CASUALTIES AROUND THE WORLD

In its regulations on liability insurance for motor vehicles, the European Union, regardless of the differences in the legislation of individual countries and the still insufficiently precise definition of electric scooters, nevertheless defines them clearly and precisely and in such a way that are included in the category of a motor vehicle. Namely, European Union Directive no. 2009/103/EU of 16 September 2009 on civil liability insurance for damage from the use of a motor vehicle and enforcement of the liability insurance obligation determines the meaning of the term of a vehicle which must be insured.[8]

This regulation defines a motor vehicle as "any vehicle intended for use on the road, which is driven by mechanical power and which does not move on rails."[9] A member state of the European Union is obliged to take all appropriate measures to ensure that civil liability for damages caused by the use of such a defined vehicle, which is typically located on its territory, is covered by mandatory insurance.[10] From the above definition, it is clear that an electric scooter has the status of a motor vehicle given that it meets the above criteria, as well as that it moves on its own by electric power and it is intended for the transporting of people and does not move on rails.

Some European countries regulate the use of electric scooters in traffic in different ways. In France, in September 2019, a new mobility bill added e-scooters to France's traffic law with measures including a minimum age (children as young as 8) and guidelines on where they can be used. E-scooters are banned from pavements, their speed limit on roads is 20 km/hour and it is mandatory for helmets to be worn by children under 12 years of age. In Lyon, a shared e-scooter operator has introduced a speed limiter that is based on global

[7]Rulebook on the Classification of Motor Vehicles and Technical Conditions for Vehicles in Road Traffic, RS Off. Gazette no. 40/2012, ... 64/2021, Article 6 and 15.

[8]Directive 2009/103/EC of the European Parliament and Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and enforcement of the obligation to insure against such liability, OFL 263.

[9]Directive, Article 1.1.

[10]Directive, Article 3.1.

positioning system (GPS) where, within the city's pedestrian zone, vehicles are restricted to 8 km/hour[11].

In October 2021 in Denmark, the municipal authorities of Copenhagen changed the decision to ban the use of electric scooters from 2020 onwards, allowing their use on the streets once again albeit under strict conditions. "Electric scooters can be expected on the streets of Copenhagen already today. However, they will not be able to be driven around the city center and will have to be parked in places reserved for this type of vehicle."[12] Due to the new restrictions introduced in Sweden, Stockholm halved the number of electric scooters on the streets: namely, there cannot be more than 12,000 of these vehicles on the streets, compared to the previous 23,000, and only 3 companies are allowed to rent them out.[13] At last time on an EU level, the European Commission is looking at the possibility of drawing up guidelines, while technical standards are also being considered under possible plans for standardisation. Paris introduced new rules for rental e-scooters last year, after the death of a pedestrian hit by a scooter. The new regulations cap the speed limit for rental e-scooters at 10 km/h in some areas of the French capital, including around key tourist attractions such as the Eiffel Tower and the Louvre museum. In Norway, helmets are compulsory for riders up to the age of 15. The country has also introduced the same drink-drive limits as for car drivers[14].

The road traffic casualties incurred by the use of electric scooters have been pointed out in the 2016 papers by some foreign authors, and from 2020 by domestic authors. Also, foreign and domestic printed and electronic media are increasingly pointing to these types of road traffic accidents.

The first mentioned refer to the research carried out in Israel and the USA. Data from research in Israel show that in the period January - March 2013, 6 people on e-scooters were injured in road traffic accidents (0.3% of all those injured), while in the period October - December 2015, 123 people were injured (5.5 % of all those injured) (M Siman et al., 2017). Some 32,400 e-scooter-related injuries were reported in the US between 2013 and 2017. The estimated annual incidence of e-scooter-related injuries increased

[11] https://www.eltis.org/resources/case-studies/overview-policy-relating-e-scooters-european-countries, By Fiona Twisse / Updated: 05 Aug 2020, accessed on 13.January.2022.

[12]Danas, 24 November 2021, from Beta, 18 October 2021, 12:20, downloaded 13 January 2022.

[13]Blic, 24 November 2021, from Tanjug, 11 November 2021, 00:36, downloaded 13 January 2022.

[14] https://www.euronews.com/next/2022/06/27/from-speed-limits-to-mandatory-helmets-how-european-countries-are-regulating-e-scooters, By Nicole Lin Chang with **AFP** • Updated: 27/06/2022, accessed on 9.8.2022.

over time, with no fatal injuries (Aizpuru et al., 2019). In the world, data in the media indicate an increased number of fatal road traffic accidents involving electric scooters (Notopoulos, 2018).

In August 2019, one of the world's most prestigious media outlets, the BBC, announced that since January 2018, at least 11 deaths have been linked to the scooters in cities including Paris, Brussels, Barcelona, Stockholm and London. In August 2018 in Barcelona, an e-scooter user crashed into a 92-year-old woman while she was walking, resulting in her death. In May 2019, a 27-year-old man was killed in Stockholm while using an electric scooter along a bicycle lane. In June 2019, a young man driving an e-scooter was killed in Paris in a collision with a truck. In fact, hundreds of people have been injured in road traffic incidents involving electric scooters.[15] In Britain, the Royal Society for the Prevention of Road Accidents announced that Emily Hartridge (35), a well-known British presenter and YouTuber, was the first person to die while using an electric scooter. This occurred on 12 July 2019 in South London in the morning hours, when a truck crashed into the electric scooter that Emily was using in a busy street.[16] In early June 2021, the driver of an electric scooter hit and killed a pedestrian in Paris and fled the scene, but was identified after 10 days and charged with manslaughter. This was the third death from electric scooters in the capital of France since 2019.[17] In addition, according to the statistics of the British Home Office, during 2021, some 223 pedestrians were injured by electric scooters, including 63 with serious injuries, which is almost four times the number of injured pedestrians than in 2020, when 57 pedestrians were injured, 13 of which received serious injuries.[18] In 2019, 7 traffic accidents involving electric scooters were reported in Montenegro, in which 7 people were injured although there were no fatalities, according to data from the Police Administration.[19]

A new study from Finland has shown that you are more likely to be injured while riding an e-scooter than on a motorbike, or while cycling, driving or walking. The study

[15]https://www.bbc.com/news/world-europe-49248614, Electric scooters: Europe battles with regulations as vehicles take off, Published 6 August 2019, downloaded 3 December 2021.

[16]https://www.propisi.net/elektricni-trotineti-ce-biti-regulisani-zakonom-od-iduce-godine/,Source:Politika, downloaded 10 October 2021.

[17]https://www.fleeteurope.com/en/last-mile/europe/features/e-scooter-rules-still-varied-and-changing-across-europe?a=FJA05&t%5B0%5D=e-scooter&t%5B1%5D=legislation&curl=1, Published 5 July 2021, downloaded 13 November 2021.

[18]https://rs.n1info.com/auto/skoro-cetiri-puta-veci-broj-pesaka-povredjenih-u-sudaru-s-trotinetima-u-britaniji/

from Srna, 25 May 2022, 15:55, downloaded 13 August 2022.

[19] https://www.pobjeda.me/clanak/protekle-godine-sedam-nezgoda-sa-elektricnim-trotinetima, Published: 29 June 2020, 06:50, downloaded 13 August 2022.

identified 331 patients with e-scooter-related injuries who were admitted to the accident and emergency department in Tampere, a city of some 226,000 people, between April 2019 and April 2021. Over 60 per cent of patients were men, with around 51 per cent found to have been under the influence of alcohol or other substances when the injury occurred. The most common injuries were to the head or face, the study found[20].

On other continents, the competent authorities have also registered traffic accidents when electric scooters are involved. In Australia, according to media reports at least seven Australians have been killed through falls or collisions since their introduction in 2018, including a 15-year-old Queensland boy last week[21].

Some local authors have also indicated that as a result of a rapid increase in the number of scooters in road traffic, the number of traffic accidents involving electric scooters will inevitably increase (Dumić et al., 2020).

Certain domestic institutions in the field of health, such as the City Public Health Institute of Belgrade, have also warned that electric scooters represent a new risk factor for casualties in Serbia.[22] Domestic media also point to the consequences of events in which electric scooters have been involved in other countries. They cite research from the Centers for Disease Control and Prevention in Atlanta, USA, that the number of injuries caused by using electric scooters that require hospitalization or medical treatment is about 15 per 100,000 rides. The largest number of injuries sustained in falls or collisions involving electric scooters are head injuries - 40-45 percent, followed by hand injuries (almost one in three), and leg injuries (one in eight), while the average age of the injured persons was 29 years of age.[23]

[20] https://www.euronews.com/next/2022/04/21/e-scooters-cause-more-injuries-than-cycling-or-motorbikes-a-first-of-a-kind-study-finds, By Tom Bateman, Updated: 21/04/2022, downloaded 13.July.2022

[21] https://theconversation.com/whos-liable-if-youre-injured-or-killed-riding-an-e-scooter-187436

Published: July 26, 2022 6.32am BST, James Ross/AAP, downloaded 18.August.2022

[22] https://www.zdravlje.org.rs/index.php/aktuelne-vesti/924-elektricni-trotineti-i-povrede, Electric scooters – a new risk factor for injuries, downloaded 3 October 2021.

[23] https://www.danas.rs/vesti/drustvo/elektricni-trotineti-dve-strane-medalje, Danas Online, 23 September 2020, 15:00, downloaded 3 October 2021.

4. ELECTRIC SCOOTERS AND ROAD TRAFFIC INJURIES IN SERBIA

There is scant information about road traffic accidents involving drivers of electric scooters in the Serbian media. One of the rare facts published in the media was that from the beginning of 2021 until the month of August, some 150 e-scooter users were seriously injured, that they were treated by trauma doctors almost daily for injuries caused by falls, and that the most common cause of injuries was that they use their e-scooters without protective equipment.[24] Other domestic media reported the same facts by referring to data published on the national TV channel, RTS, with the addition that in that period, around 150 e-scooter users were seriously injured or were in need of surgery, while one user was killed.[25]

For now, in Serbia, there are no official data on the number of casualties involved with electric scooters, although injuries have been recorded in road traffic accidents involving users of electric scooters. One of those cases happened on 8 September 2021, when a 30-year-old man crashed into a vehicle with an electric scooter at 10:54 p.m. in Voždovac, Vojvode Sime Popovića Street, and was taken to the ER for resuscitation due to his serious injuries.[26]

Based on the request for free access to information of public importance to obtain data regarding the number of road traffic accidents in the past period in which users of electric scooters took part and how the police treat e-scooter users, the author received on 11 January 2022 from the RS MIA the response that until the adoption of the new RTSA, which will define the concept of a scooter as well as the rights and obligations of e-scooter users, a e-scooter user in accordance with the current regulations is considered a pedestrian, given that the RTSA has no definition for an electric scooter, nor does it prescribe the rights and obligations of e-scooters users.

In accordance with the definition of a road traffic accident by the binding RTSA, an e-scooter user is logged in road traffic accident records only in the event that, while using an e-scooter, the user had participated in an event that occurred on the road or started on

[24] https://www.b92.net/automobili/aktuelno.php?yyyy=2021&mm=08&nav_id=1909331 How (un)safe are electric scooters?, Thursday, 19 August 2021 | 13:36 ->14:00, downloaded 3 August 2022.

[25] https://backapalankavesti.com/info/srbija/od-pocetka-godine-ozbiljno-povredjeno-150-vozaca-trotineta/, 18 September 2021, downloaded 3 January 2022.

[26] https://www.rts.rs/page/stories/sr/story/135/hronika/4505720/beograd-trotinet-muskarac-nesreca.htmlhttps://www.rts.rs/page/stories/sr/story/135/hronika/4505720/beograd-trotinet-muskarac-nesreca.htmlčetvrtak, 9 September 2021, 06:32 -> 07:00 Source: Tanjug, RTS, Turbulent night in Belgrade – scooter runs into vehicle, stabbing, cyclist with 4.8 blood alcohol level, downloaded 3 October 2021.

the road and in which another road traffic user had participated with one of the vehicles prescribed by the Law (passenger vehicle, cargo vehicle, bus, etc.), but even in such cases it is logged that the user had participated in a traffic accident as a pedestrian (without any data on the e-scooter itself). The MIA keeps no separate records of events in which users of e-scooters were injured or had caused injuries to another person.[27]

5. THE IMPORTANCE OF REGULATING THE USE OF ELECTRIC SCOOTERS

Bearing in mind the response of the RS MIA and the data on the different categories of road users as reported by TSA in the last published annual report on the state of road traffic safety in Serbia for the year 2020[28] and before, as well as the mentioned data from the media about the casualties of users of electric scooters during the first eight months of 2021, the only appropriate conclusion is that there is an inaccurate and imprecise way of keeping data on certain categories of traffic road users in Serbia, as well as any injuries or casualties therein. The fact that there are no data on the injuries of e-scooter users for 2019 and for 2020 may be acceptable as their emergence in road traffic throughout Serbia is just beginning and in effect, spreading. However, the number of injured and killed users of electric scooters in less than eight months of 2021 - some 150 persons - deserves that in the 2001 RS MIA annual report, these road users should be labelled correctly and not as pedestrians.

It is certain that some e-scooter users were killed in traffic accidents not only due to a careless handling of electric scooters. What the situation will be in 2022 for the first eight months regarding the casualties within this category of road traffic users can only be guessed, as no data was found regarding that. According to the current regulations, it is not possible or acceptable to treat e-scooter users as pedestrians according to the meaning of the term *pedestrian* from Article 7 (69) of the RTSA. Also, it is not acceptable that in the case of an event in which the user of an electric scooter and another participant, regardless of who it was (if that event is a criminal offense by its consequences) the user

[27] The RS MIA of the RS Police Directorate Traffic Police Directorate response by the person authorized for acting on the request for free access to information of public importance 03.4 no. 07-422/21, dated 30 December 2021.

[28] Road Traffic Safety Agency, Statistical report on the state of road traffic safety in the Republic of Serbia in 2020 - Representation of different categories of participants in road traffic accidents, Republic of Serbia, period from 2016 to 2020, p. 15, Published on 24 December 2021.

is considered to be within the category of road traffic accident with the participation of a pedestrian pursuant to Article 7 (82) of the RTSA, as stated by the RS MIA in its response.

The **provision** of Article 7 (69) of the RTSA, defines **a pedestrian** as a person who travels on the road, i.e. who pulls or pushes a vehicle on the road under his own power, or a handcart, a child's pram, a wheelchair for disabled persons or a child in a pram or a person in a wheelchair who move under their own power or by the power of an engine, not including persons on the road who skate, ski, use a sled or skate on roller skates, skateboards, etc.

By analyzing the aforementioned provision, it can be concluded that a person who drives an electric scooter is not the following: a person who pulls or pushes a vehicle on the road under his own power, or a handcart, a child's pram, a wheelchair for disabled persons or a child in a pram or a person in a wheelchair who move under their own power or by the power of an engine, not including persons on the road who skate, ski, use a sled or skate on roller skates, skateboards, etc.

After the elimination of the previously valid parts of the definition of a pedestrian, according to the position of the RS MIA, it should be concluded that an electric scooter user is a pedestrian, or in other words, a person traveling on the road! However, this is not true, nor is it acceptable that an electric scooter user does not travel using his/her own power but rather, stands on a vehicle with two wheels which is driven by the power of its own engine and can move at different speeds depending on the power of the engine, which vehicle also has certain mechanisms for steering, braking, light signaling devices and which can travel on the road as well as on different surfaces off the road. Therefore, the current position of the RS MIA that the user of the electric scooter belongs to the pedestrian category, as a road traffic participants, is also unacceptable.

This is also shown by the data from a specific traffic situation on the occasion of a Niš-based event qualified as a traffic accident, whereupon the traffic police from PU Niš conducted an investigation, stating in the report section regarding the **circumstances** that it was a traffic accident involving a vehicle and a pedestrian; in the **vehicle and participants** section of the report, they provided information about the vehicle and the person driving the vehicle, while the second participant was a pedestrian; in the section **other traces,** they indicated that there was an electric scooter (trace no. 2) next to the other traces on the sketch and the situational plan, and the direction and course of pedestrian movement was marked as trace no. 4. In the report section that referred to the **other measures and actions** taken, it was stated that the person Z.S. (the pedestrian –

author's note) had operated a means of transport that was undefined by the RTSA, and thus he was excluded from traffic according to Article 289 (3) of the RTSA.[29]

In the report submitted to the Basic Public Prosecutor's Office of Niš by a police officer regarding the traffic accident on 10 December 2020, it was stated that a passenger vehicle and a pedestrian were involved in the accident, and that there had been contact between the vehicle and the electric scooter driven by Z.S., who received minor physical injuries.[30] In the memo delivered to the Basic Public Prosecutor's Office in Niš in connection with the mentioned traffic accident in which the electric scooter user Z.S. suffered minor physical injuries, it was precisely stated which written evidence had been submitted.[31]

This inconsistent terminology used by police officers when an e-scooter user appears as one of the participants in a traffic accident is also apparent in numerous other police reports throughout Serbia, of which we single out another one from the area of Niš with the same problems in the terminology of the designation of the electric scooter user (pedestrian - electric scooter user).[32]

Bearing in mind the meaning of the term used in the RTSA, it can be concluded that the electric scooter belongs to one of the categories of vehicles or motor vehicles, but its user cannot be treated as a pedestrian. This follows from the meaning of the following phrase: a **vehicle** is a vehicle which, by its construction, mechanism, assembly and equipment, is intended and capable of traveling on the road (Article 7 (31)), i.e. a **motor vehicle** is a vehicle that is driven by the power of its own engine, which is by construction, mechanism, assembly and equipment intended and equipped for the transportation of persons, i.e. things, or for carrying out certain tasks, i.e. for towing a trailer, except for rail vehicles (Article 7 (33)). Nothing should be added to these definitions of the phrase as defined by the legislator, as the proposer of the RTSA legal document was the RS MIA. It is clear that the electric scooter has all the elements which make it a vehicle, and certain elements that can be seen as a motor vehicle.

[29] Report on the investigation of a traffic accident, RS MIA, Niš, Police Unit Istok no. 280/2020 dated 17 February 2021, unpublished.

[30] Memo of RS MIA Report Niš PU, Traffic Police PU no. 280/2020 dated 29 December 2020, sent to the Basic Public Prosecutor's Office Niš, unpublished.

[31] Memo of RS MIA PS Niš, Traffic Police PS no. 280/2020 dated 15 December 2021, sent to the BPP Niš with addenda, unpublished.

[32] Report on the traffic accident investigation by RS MIA PU Niš, Police Station Istok Up no. 216/2020 of 23 September 2020, unpublished; Memo – report by RS MIA PU Niš, Police Station no. 216/2020 of 29 September 2020 sent to the Basic Prosecutor's Office in Niš, unpublished.

This is also valid when bearing in mind the definition of the term **traffic accident** from the RTSA, as follows: an accident that occurred or started on the road, in which at least one moving vehicle was involved and in which at least one person was killed or injured or material damage had occurred (Article 7 (82)). In the case of such an event in which the user of an electric scooter had been involved, such an event cannot be considered and recorded in official statistics as a traffic accident involving a pedestrian. There is an exception, possibly only if the user was pushing an electric scooter at the time of the traffic accident, and s/he was not on the electric scooter in motion.

However, the ultimate consequence of all traffic accidents in which an electric scooter user appears as one of the participants is the discrimination of other participants who were using other means of transportation. Namely, the police, as a rule, file criminal charges against the above or submit reports with accompanying documentation to the competent public prosecutor's offices, whereupon an investigation is regularly initiated or certain investigative actions are carried out against the subsequent participant in such an accident, the persons driving a vehicle, which in turn incites fundamental discrimination against these persons, even though they had suffered damage to their vehicle due to the carelessness of the electric scooter user. In this way, the second participant in the traffic accident, even though essentially a victim, is fundamentally discriminated against due to the basic constitutional principle that everyone is equal before the Constitution and thus, the law is violated.[33] As a rule, s/he becomes a suspect, that is, the accused, and in criminal proceedings, s/he usually has to prove their innocence with the help of a lawyer. The deficiency in the regulations in the field of road traffic safety in Serbia – RTSA or the Rulebook, when it comes to protecting the human dignity of other participants or the real victims/the victims of criminal acts are unquestionable. This is so especially bearing in mind that after the concluded criminal proceedings, two more proceedings await the injured party in order to eventually be able to collect damages resulting from the criminal proceedings (Obradović, 2020:229).

[33]The Constitution of the Republic of Serbia, RS Off. Gazette 98/06, Article 21.1.

6. Conclusion

The regulations of the European Union stipulate that electric scooters belong to the category of motor vehicles, although in most European countries there are still significant differences when it comes to the usage of electric scooters, as well as the traffic user category, and the given conditions.

In the current Serbian Road Traffic Safety Act, as well as in the consequent legislation in Serbia, electric scooters and electric scooter users are not yet recognized as an independent category of road traffic users, nor are the regulations that determine the rules of behavior of electric scooter users in traffic in place.

Although there are a large number of problems in the use of electric scooters, one of the key problems is the safety of electric scooter users themselves, especially those who behave without due care or attention and who are involved in road traffic accidents and thus endanger other road traffic users, as well as themselves. As a result, they also come into contact with the police, who are the first officials faced with the challenge of how to construe this category of road users. The behavior of competent judicial authorities in criminal proceedings depends on the actions of police officers, that is, competent public prosecutors and judges of certain regular courts in criminal proceedings, or judges in misdemeanor courts. For now, the RS MIA has a erroneous attitude, as it wrongly treats that category of road traffic users as pedestrians, which these persons are most certainly not. In this way, the police who conduct investigations in their reports regarding traffic accidents are also at fault, which can be seen in the examples pointed out in the paper.

The ultimate consequence of such an adverse solution applied in practice by members of the RS MIA is a violation of civil rights, or in other words, discrimination against users in traffic accidents driving other vehicles, againt which, as a rule, a criminal complaint is submitted or, in the best case, a report to the competent basic public prosecutor's office, which also violates the civil rights of these road traffic users as the criminal proceedings are lead against them exclusively. This occurs in spite of the fact that in a large number of cases it was the e-scooter users that had caused the traffic accident with their hazardous behavior, causing great damage to other road users.

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THE BACKGROUND, SIGNIFICANCE AND LEGAL APPLICATION OF SELF-MONEY LAUNDERING IN CHINA

The 11th amendment to the Criminal Law, which came into force in March 2021, criminalized self-money laundering under article 191, and had profound impact on the traditional theory of criminal law. There are no similar amendments to the other two crimes, namely article 312 and article 349, which lead to some confusion in judicial practice, especially in the understanding of the number of crimes, the meaning of proceeds of crime, and the difference between article 191, article 312 and article 349.

This paper introduces the international and domestic background of the criminalization of self-money laundering, demonstrates the theoretical basis and practical significance of the criminalization of self-money laundering, presents a comprehensive description of, and comments on the difference between the article 191 and its similar articles, namely article 312 and article 349, to put forward solutions to some controversial issues in judicial practice, which would be beneficial to theoretical researchers and judicial professionals.

Keywords: *self-money laundering, proceeds of crime, number of crimes.*

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The 11th Amendment to the criminal law, which came into force on March 1, 2021, has amended the Criminal Code in many aspects and attracted extensive attention. Undoubtedly, one of the most important changes is the amendment of the article of money laundering. Article 14 of the 11th Amendment has made five changes of money laundering, which are embodied as follows:

First, the legal term "knowing clearly" has been deleted from the article, which means the actor's subjective knowledge is no longer emphasized.

Second, the original provision of "be fined not less than 5% but not more than 20% of the amount of money laundered" has been revised to "be fined". That means the proportional fine system is changed to unlimited fine.

Thirdly, the word "helping" is cancelled to show that self-money laundering is an independent crime.

Fourthly, "remitting funds overseas" is changed to "transferring assets across borders", which means cross-border transfer of assets through underground banks is a way of money laundering.

Fifthly, the criminal liability of natural persons in the unit crime of money laundering has been improved, that is, the fine punishment of natural persons in the unit crime has been added.

Among the above five amendments, some amendments follow the ideas of the previous amendments to the Criminal Code. For example, the Eighth Amendment to the criminal law also modifies the originally relatively determined fine system to the unlimited fine system. Some amendments try to make the law more perfect and coordinated, such as the fine punishment of natural persons in unit crime, the improvement of money laundering behaviour, and the modification of subjective element of "knowing". These amendments of course have positive significance, but compared with the independent of self-money laundering, the latter has a more significant impact on the traditional theory and justice practice. Therefore, criminalization of self-money laundering attracted more attention and triggered a very heated discussion.

1. International and domestic background of criminalization of self-money laundering

It should be recognized that the criminalization of self-money laundering largely comes from the requirements of the international community. At the international level, there are mainly three international conventions related to money laundering: the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances in 1988(hereinafter referred to as the Vienna Convention), the United Nations Convention against Transnational Organized Crime in 2000 (hereinafter referred to as the Palermo Convention), the United Nations Convention against corruption in 2003(hereinafter referred to as the Convention against corruption). These conventions have permissive obligation to criminalize self- money laundering.

Under Article 3(1)(b) of the Vienna Convention, the crime of money laundering is:

(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin or the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, right with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

The provision of “assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions” indicates that the subject of money laundering is not the perpetrator of the predicate offences. However, the provision of “concealing or disguising the illicit origin or the property” in the article shows that the subject of money laundering could be the perpetrator of the predicate offences. It looks like that this Convention does not exclude the perpetrator of the predicate offences from the subject of money laundering.

Article 6 of the Palermo Convention and Article 23 of the Convention against Corruption also follow the above provisions. In addition, these two Conventions both provide that

money laundering may not apply to the persons who committed the predicate offence,[1] if required by fundamental principles of the domestic law of a State Party.

These Provisions illustrate that the basic attitude of the United Nations Conventions is to take the independent criminalization of self-money laundering as the general situation, while the non-criminalization of self-money laundering as the exception. As a party to these international conventions, China should fulfill its obligations under international conventions without conflict with the basic principles of its domestic law.

If the three United Nations conventions had a certain guiding role in China's criminalization of self-money laundering, the promotion and supervision of the Financial Action Task Force (FATF) is even more obvious. In the Third Mutual Evaluation Report on Anti-money laundering and Combating the Financing of Terrorism on 29 June 2007, FATF criticized the fact that China's self-money laundering was not an independent crime. FATF believed that the person who committed the predicate offence crime laundered the dirty money thereafter, he should be punished for both of predicate offence and money laundering since the legal principles of China do not prohibit such combined punishment.（FATF,2007）[2]

The Fourth Evaluation report on China's anti money laundering and combating terrorism financing issued by FATF on April 17, 2019 once again mentioned this issue. It pointed out that China had not criminalized self-money laundering, which did not meet the requirements of FATF, and assessed China's implementation of Article 3 “money laundering offence” in the forty recommendations as partially compliant.(FATF, 2019)[3]

FATF currently has 39 members. In addition to two regional organizations, FATF has 37 national or regional members from six continents, covering the world's major economies. According to the statistics of the evaluation report on anti money laundering and anti

[1] United Nations Convention against Transnational Organized Crime, article 6-2 (e). United Nations Convention against Corruption, article 23-2 (e).

[2] FATF(2007) ,Anti-money laundering and counter-terrorist financing measures-People's Republic of China, Third Round of Mutual Evaluation Report, FATF, Paris.

[3] FATF (2019), Anti-money laundering and counter-terrorist financing measures-People's Republic of China, Fourth Round of Mutual Evaluation Report, FATF, Paris). On October 6 2021, FATF released the second enhanced follow-up report after the fourth round of mutual evaluation on China's anti money laundering and combating terrorism financing. Since the 11th amendment to the criminal law criminalized self- money laundering, the rating of the third recommendation (money laundering offence) was adjusted from partially compliant to largely compliant. Today, China is compliant on 9 of the 40 Recommendations and largely compliant on 22 of them. It remains partially compliant on 3 Recommendations and non-compliant on 6 Recommendations.

terrorism financing issued by FATF, most members have been convicted of self-money laundering, and a few members have not fully solved the problem of self-money laundering. Thus, the criminalization of self- money laundering has become a common practice in major countries and regions in the world.

Different countries and regions have different ways to criminalize self-money laundering. Under common law system, the United States and Canada, have mainly established the legal principle that the money laundering can be applied to the perpetrator of predicate offence through judicial precedents. Britain has clearly stipulated the applicable principle in their laws. In civil law countries and regions, they mainly solve the problem of criminalization of self-money laundering by amending laws, which can be summarized in the following ways: first, it is clearly stipulated in the law that money laundering can be applied to the perpetrator of predicate offence. The countries that adopt this practice include Germany, Spain and so on. Second, the crime of self-money laundering is added separately in the law. The countries that adopt this method include Italy, Russia and so on. Third, the scope of the subject of money laundering is not limited. The countries and regions that adopt this method include Japan, Taiwan, etc.

2. Theoretical value and practical significance of criminalization of self-money laundering

According to the traditional theory of booty crimes, if the perpetrator harbors and sells stolen goods after committing a property crime, the perpetrator only commits the predicate offence, that is, the property crime. The follow-up acts such as harboring and selling are absorbed by the predicate crimes, and there is no need to convict the downstream acts. Money laundering is a kind of activity and process that covers up, conceals and disguises the proceeds of crime and to make them look legitimate. According to the traditional theory of "unpunishable afterwards behavior"[4], the subject of money laundering should not be the perpetrator of the predicate offence or its accomplice. The provisions of the 1997 Criminal Law on money laundering just adopted this point of view. However, with the development of criminal law theory, people realize that money laundering is different from the traditional booty crimes.

[4] It refers to the case that after a crime is completed, the perpetrator commits another criminal act, but the latter act will not be punished separately. The theoretical basis is that the second act does not infringe on new legal interests, neither has expectation possibility.

The traditional booty crime refers to the behavior that the perpetrator changes the place or possession of illegal proceeds after others commit a property crime. It is the follow-up helping behavior of the previous crime. The legal interests infringed by booty crime are the normal activities and order of judicial organs. From the perspective of expected possibility, it is human nature to evade legal investigation after committing a crime. However, money laundering is intended to "wash" dirty money rather than just "transfer" illegal proceeds. Money laundering is a process to legalize the dirty money generated from predicate offences. The legal interests infringed by money laundering are mainly the financial management order, which often go beyond the legal interests infringed by predicate offence itself. If the initial money laundering is mainly to launder the proceeds of drug-related crimes, and it is attached to drug-related crimes, the scope of predicate offences at this stage has greatly expanded. At the same time the independence and harmfulness of money laundering are greatly enhanced. Money laundering has gradually developed into a completely independent crime apart from the predicate offences. In view of this, the subject of money laundering should not exclude the perpetrator of the predicate offence. It is theoretically justified that self-money laundering is an independent crime.

Although the criminalization of self-money laundering comes from the pressure of the international community to some extent, its practical value and significance in combating crime is obvious. In the era of globalization, more and more offences contain transnational features. The demands for judicial cooperation and extradition requirements are increasing. (Yang, 2021:303) Money laundering has obvious international factors. On the one hand, predicate offence and money laundering are often distributed in different countries and regions. On the other hand, money laundering itself is often carried out throughout the world. The legislation of criminalization of self-money laundering can helps authorities to exercise criminal jurisdiction. For example, if the predicate offence occurs abroad and the perpetrator of predicate offence launders money in China, according to the 1997 criminal law, self-money laundering does not constitute an independent crime, then China can neither exercise jurisdiction over the predicate offence, because the place where the crime occurred is not in China, nor can it exercise jurisdiction over money laundering, because self-money laundering is not an independent crime. After self-money laundering is criminalized, this jurisdictional problem will be solved. In addition, the legislation of criminalization of self-money laundering is also conducive to transnational recovery of illegal proceeds and the pursuit of criminals. Due to different legislation stipulated by different countries, the predicate offences of money laundering provide in China's criminal law may not have the same provisions in other countries. After the independence of self-money laundering, if the perpetrator of predicate

offence goes abroad to launder money, China can request the relevant foreign authorities for judicial assistance based on money laundering. China also can request the extradition of the perpetrator and the confiscation of the property involved, which is conducive to the transnational recovery of illegal proceeds and the pursuit of the criminal.

3. Legal application of self-money laundering

3.1. Understanding the relationship between three similar crimes according to different stages

Under Chinese criminal law, there are three similar crimes related to the actions on disguising illegally acquired goods, namely money laundering (Article 191), crime of disguising or concealing illegally acquired income or proceeds (Article 312), the crime of harboring, transferring and concealing proceeds of drug offences (Article 349). The main difference between these three crimes lies in the different scope of the predicate offences, which is obvious from the three provisions.

As for whether there are differences in other aspects, the academic circles have different views.

In my opinion, we should consider this issue in different stages. When the criminal law was promulgated in 1997, money laundering (Article 191) and the latter two crimes were different in behavior and subjective aspects except for the scope of predicate offences. Money laundering is often a complex process, rather than a single action. The complete process of money laundering includes placement stage, layering stage and integration stage.(Gilmore,1995:37) Through complex criminal process, criminals intend to “clean” illegally acquired goods and make them look legitimate.

However, the latter two crimes are to change the place and possession of illegal property by harboring, transferring or other behaviors in an attempt to evade the investigation of judicial organs. “Money- laundering” is different from “money- channeling”. Of course, “money channeling” can be the preparatory act and the initial stage of money laundering.

If a criminal has carried out a whole set of behaviors for the purpose of legalizing “dirty money”, he undoubtedly commits money laundering. If a criminal only seek to evade the investigation of the judicial organs and have no intention to legalize dirty money, but only to harbor or transfer illegal proceeds, he violates the article 312 or article 349.

Nevertheless, with the promulgation of the sixth and the Seventh Amendments to the Criminal Law, Article 191 and article 312 are more and more similar with each other. When discussing the background of the Sixth Amendment to the Criminal Law on Article 312, the legislator pointed out that, "According to the criminal law, disguising or concealing the proceeds of several kinds of serious crimes violates the article 191 and meets the constitutive requirements of money laundering. It is an offence under article 312 to knowingly conceal, transfer, purchase or assist in the sale of any proceeds of crimes. In order to further clarify the boundaries of crimes and help to crack down on the acts of covering up and concealing illegal gains from all crimes, the sixth amendment of criminal law has made necessary supplementary changes to the provisions of article 312. In this way, those who cover up or conceal the proceeds of any crimes can be investigated for criminal responsibility. However, different provisions are applicable according to different predicate offences, and the charges and penalties involved are different." (Hu, Lang, 2006:290)

In addition, the Seventh Amendment to the Criminal Law adds unit crime to Article 312, because Article 191 already has the provision of unit crime. It can be concluded that the Seventh Amendment is just to coordinate Article 312 with Article 191 and make them more similar with each other.

It can be seen that before the Eleventh Amendment to the Criminal Law, the difference between Article 191 and article 312 only lies in the scope of predicate offences. There is no difference in the subject, intention and actions. Since there is no need to distinguish between Article 191 and article 312 in these aspects, there is no need for the existence of article 349. Article 349 is completely covered by Article 191because the seven types of predicate offences in Article 191 include drug crimes, and the predicate offences in article 349 are also drug crimes.

The Eleventh Amendment to the Criminal Law criminalizes self-money laundering, but it does not make a similar provision to Article 312, and does not cancel the Article 349. We must re-examine the relationship between Article 191 and Article 349, and the difference between Article 191 and Article 312.

In order to illustrate the relationship between Article 191 and article 349 of the criminal law, let's first show a typical case.

On March 19, 2021, Six Model Cases Involving the Punishment of the Crime of Money Laundering were Published by the Supreme People's Procuratorate and the People's Bank

of China. One of them is People v. Lin A Na and Lin A Yin et al. (case of money laundering)

The case is as follows: From 2010 to 2014, Lin A Na, with knowledge of proceeds of drug-related crime and income, assisted her brother Lin A Yong in using the above funds for property purchases and investments, and provided accounts to assist the transfer of funds, totaling more than 17.43 million yuan. In addition, from 2011 to 2014, Lin A Na hided proceeds derived from drugs for Lin A Yong three times, of which she kept cash for Lin A Yong at her residence for two times, and transferred the cash from the residence of Lin A Yong to her residence for safekeeping for once. The transferred and kept proceeds derived from drugs totaled about 24.6 million yuan.

On October 27, 2016, the court entered a judgment, convicting Lin A Na for the crime of money laundering and the crime of hiding and transferring proceeds of drug-related crime, deciding to impose combined imprisonment of five years for the crimes, in addition to a fine of 1 million yuan and confiscation of illegal income.

From the judgment of this case, we can draw the following conclusions: the difference between the Article 191 and the Article 349 is not only the scope of predicate offences, but also lies in the different actions. That is to say the behavior of Article 191 is mainly to legalize illegal proceeds, (Gal, 2018:349) while the actions of Article 349 means helping others to harboring or transferring proceeds generated from drug crimes. Prof. Wang Xin in Peking University said, the actions of Article 191 is a "chemical reaction" with the characteristics of covering up and concealing, (Wang, 2021) while the actions of Article 349 is only a "physical change" of transferring.

As to the Article 312, the actions of the crime are "harboring, transferring, purchasing, selling on behalf of any other person, or disguising and concealing by other methods". What are other methods? Under the Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Criminal Cases on Cover-up or Concealment of Crime-Related Income and Proceeds Therefrom[5], article 10 paragraph 2 of this interpretation provides that, providing intermediary services for the purchase and sale of, receiving and accepting, holding, using and processing, providing fund account, assisting in changing property into cash, financial bills, negotiable instruments, assisting

[5] In light of the practical needs of trials, as decided at the 1835th Session of the Judicial Committee of the Supreme People's Court, the Interpretation of Several Issues Concerning the Application of Law in the Trial of Criminal Cases Involving Cover-Up or Concealment of Direct or Indirect Proceeds of Crime (SPC Interpretation No. 11 [2015]) is amended on April. 7, 2021, and came into force on April 15, 2021.

in transferring funds and remitting them abroad, shall be determined as other methods prescribed in Article 312 of the Criminal Law.

The methods of providing fund account, assisting in changing property into cash, financial bills, negotiable instruments, assisting in transferring funds and remitting them abroad in the judicial interpretation come directly from the contents of Article 191 of the criminal law, while the methods of "providing intermediary services for the purchase and sale of, receiving and accepting, holding, using and processing" are consistent with the requirements of the UN conventions[6] for Member States.

In view of these articles and interpretations, the first difference between Article 191 and article 312 lies in the scope of predicate offences. The predicate offences under Article 191 are seven types of crime, while the predicate offences under article 312 include all crimes that generated proceeds. Secondly, the difference between these crimes lies in the actions. Actions under article 191 are mainly to disguise and conceal, while the actions under article 312 may be to disguise and conceal, or to harbor and transfer, or even just to acquisition, possession and use.

3.2. Correctly defining the concepts of "crime-related income" and "proceeds therefrom"

The predicate offences of Article 191 are seven types of crimes, namely drug crimes, organized crimes of underworld nature, terrorism, smuggling, crimes of embezzlement and bribery, crimes of Disrupting the order of financial administration, and crimes of financial fraud, which include about 80 specific crimes.(He, 2021:56) The object of article 191 is the income of these seven types of crimes and proceeds therefrom.

As for the connotation of "crime-related income" and "proceeds therefrom",

Article 10 paragraph 1 of the above-mentioned interpretation of the Supreme People's Court[7] clearly provides as the follows: the illegally obtained money and property directly obtained through criminal offenses shall be determined as "crime-related income"

[6] The three international conventions related to money laundering refer to the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances in 1988, the United Nations Convention against Transnational Organized Crime in 2000, and the United Nations Convention against corruption in 2003.

[7] The Interpretation of Several Issues Concerning the Application of Law in the Trial of Criminal Cases Involving Cover-Up or Concealment of Direct or Indirect Proceeds of Crime. According to the announcement of the Supreme People's Court on April 13, 2021, the 1835th session of the judicial committee of the Supreme People's court decided to amend the interpretation (FSHI [2015] No. 11), but the amendment mainly involves the threshold of constituting a crime, Other contents are still retained.

prescribed in Article 312 of the Criminal Law. The fruits and rents, among others, obtained by the offender committing the upstream crime after disposing of the crime-related income shall be determined as "proceeds from the crime-related income" prescribed in Article 312 of the Criminal Law.

Although this judicial interpretation is to interpret article 312, according to the systematic interpretation method, "the crime-related income" and "proceeds therefrom" stipulated in article 191 can also be interpreted in the same way, because article 312 and Article 191 are the relationship of general article and specific article.

There are about 80 specific crimes in the seven categories of predicated offences under article 191. Some crimes can generate criminal proceeds directly, such as the crimes of drug trafficking, corruption, bribery, fund-raising fraud, insider trading and so on. But some crimes do not directly produce criminal income, such as the crimes of luring, abetting, deceiving others to take drugs, harboring drug criminals. Some crimes cannot generate criminal gains. On the contrary, criminals need funds to support their crimes, such as organizing, leading or participating in terrorist organizations. All terrorist organizations are the same from one point of view: they need financial resources for the organization and the execution of the attacks.(Gal, 2017:423)

According to the provisions of United Nations Convention against Corruption ," Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence"[8]. That is to say, the proceeds of crime not only refer to the direct generation or acquisition from criminal acts, but also include the indirect generation or acquisition from criminal acts. Theoretically, any crime may indirectly produce or obtain property. From this perspective, the scope of proceeds of crime is very wide.

However, it is necessary to distinguish between the three concepts of proceeds of crime, object of crime and constituent object of crime. The object of crime is the person or thing directly affected by the crime. The constituent object of a crime refers to the indispensable goods that constitute the crime, such as gambling money in gambling and bribe in the crime of accepting bribe. (Zhang, 2011:163) Sometimes proceeds of crime, object of crime and constituent object of crime may overlap on the same object. For example, bribe

[8] Article 2 (e) of the United Nations Convention against corruption, also see Article 2 (e) of the United Nations Convention against Transnational Organized Crime, and Article 1 (p) of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances.

is not only the proceeds of crime, but also the object of crime and the constituent object of crime in the crime of accepting bribery.

However, in some crimes, the object of crime may also be the constituent object of crime, but it is not the proceeds of crime. For example, the goods and articles in the crime of smuggling ordinary goods and articles are the objects of crime and the constituent objects of crime, but they are not the proceeds of crime.

Whether the ordinary goods and articles in the crime of smuggling ordinary goods and articles are understood as the proceeds of crime will affect the judgment of this behavior, that is, whether the behavior of smugglers selling smuggled ordinary goods and articles can be evaluated as self money laundering?

The proceeds of crime refer to the goods or interests obtained by the perpetrator through the criminal act. The interests obtained by the smugglers in the crime of smuggling ordinary goods and articles are not the ordinary goods and articles, but the tax amount evaded or the profits after selling the smuggled goods and articles. In view of this, the act of smugglers selling smuggled goods and articles cannot be evaluated as self money laundering, which does not belong to the act of “converting property into cash” as stipulated in Item 2, paragraph 1, Article 191 of the criminal law.

It is to realize their criminal interests that smugglers sell smuggled ordinary goods and articles. This behavior can be evaluated as a terminal behavior in the process of smuggling crime. The legal interests infringed by smuggling crimes are mainly national foreign trade control. The sale of smuggled goods by smugglers is just a kind of trade behavior, which violates the legal interests of the crime of smuggling. It also needs to be clarified that the completion of a crime and the end of a criminal act may not coincide at the same time. Smuggling has been completed when smugglers evade Customs supervision and transport goods and articles into a country. However, the smugglers' behavior may not be really over, and the sale of smuggled goods and articles by smugglers is also a part of the complete smuggling process. Therefore, the sales behavior of smugglers cannot be evaluated as money laundering. Otherwise, the action of selling by smugglers is evaluated repeatedly, which is not reasonable.

3.3. The number of crimes after the criminalization of self-money laundering

The eleventh Amendment to the Criminal Code criminalizes self money laundering in Article 191, but does not make similar amendments in Article 312 and Article 349.

When a criminal has both upstream and downstream behaviors, the determination of the number of crimes becomes a problem. We should deal with different things in different ways according to different provisions of the criminal law.

The predicate offences of article 349 are limited to drug-related crimes. Besides, the behaviors under Article 349 are provided as "harboring and transferring". If the action of covering up or concealing is carried out, the perpetrator should be charge with money laundering under Article 191.That is to say, if a drug criminal harbors or transfers the illicit proceeds from drug-related crimes himself, his action only constitute drug-related crime, not a crime of Article 349 in addition. The reasons are as follows: on the one hand, Article 349 does not criminalize the behavior of self proceeds-harboring or self proceeds-transferring; on the other hand, it also conforms to the theory of "unpunishable afterwards behavior". However, if the criminals disguise or conceal the illicit proceeds of drug offences after committing drug-related crimes, they commit both drug-related crimes and money laundering, and should be punished for two kinds of crimes.

There are seven types of predicate offences stipulated under Article 191, while the scope of predicate offences is not limited in article 312. The actions stipulated under article 191 are mainly "disguising or concealing", while actions in article 312 include harboring, transferring, acquiring, possessing, besides the actions of disguising and concealing". In view of the general and specific relationship of article 312 and article 191, the actions of article 191 should also include these actions of harboring, transferring, acquiring and possessing.

The next question is, if the perpetrator commits money laundering after committing one of the seven types of predicate offences, should he be punished for two crimes? My view is as follows: if the perpetrator disguises or conceals the criminal proceeds after committing the predicate offence, he should be punished both for the predicate offence and money laundering. If the perpetrator only harbors, transfers or uses the criminal proceeds after committing predicate offence, the perpetrator only constitutes predicate offence. There is no need for him to be punished for two crimes.

In other words, the behavior of self-money laundering only refers to the actions of disguising or concealment. In addition to covering up or concealing, the actions of money laundering for others also include harboring, transfer, acquisition, possession and use.

The view of distinguishing the behaviors of self money laundering and money laundering for others is exactly consistent with the legislation of Taiwan's anti money laundering control law. Article 2 under Money laundering prevention act of Taiwan (modified on November 7, 2018) provides that,

Money laundering as mentioned in this Law refers to the following acts:

1. The transfer or conversion of proceeds of specific crimes, for the purpose of disguising or concealing the illicit origin of the property or of helping others to evade criminal charge.
2. The disguise or concealment of the nature, source, whereabouts, location, ownership, disposal right or other rights and interests of the specific criminal proceeds.
3. The reception, holding or use of the specific criminal proceeds of others.

It can be seen from the above provisions that the ways of money laundering in Taiwan include seven types of actions, including transfer, conversion, disguise, concealment, acceptance, possession and use. The first four types of actions of transfer, conversion, disguise and concealment cover both self money laundering and money laundering for others; while the latter three actions of acceptance, possession and using are only referred to money laundering for others.

In view of the provisions of Article 191 and relevant theoretical analysis, we can draw the following conclusion: with the knowledge of the property of other people comes from seven specific crimes, the perpetrator disguises, conceals, harbours, transfers, accepts, occupies or uses it, he commits the crime of money laundering. Knowledge, as an element of an offence may be inferred from objective factual circumstances. For the perpetrator's own proceeds of crime, if the “bleaching” method of covering up and concealing is adopted, the perpetrator commits the predicate offence and money laundering, and should be punished for both crimes; if the perpetrator uses the physical method of harboring and transferring, he only commits a predicate offence.

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