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THE RIGHT TO LIFE AND BODY INTEGRITY

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The right to life and body integrity

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The right to life and body integrity

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FOREWORD

The international scientific thematic conference “The right to life and body integrity” is organized by the Institute of Criminological and Sociological Research and Vojvodina Bar Association, with the support of the Ministry of Science, Technological Development and Innovation and branch of Serbian Academy of Sciences and Arts in Novi Sad. It took place on 24th and 25th October 2024 in Novi Sad, Serbia and brought together experts from various fields regarding this year topic. This scientific monograph entitled as „The right to life and body integrity” contains contributions not only from the authors that presented their papers at the conference, but also from the authors who were not able to attend the conference.

The aim of the monograph is to present current trends when it comes to the right to life and bodily integrity protection, based on human rights paradigm and through a discussion organized in several thematic chapters. In this regard, thematic units have been determined around the related areas in which the topic in question is presented. Since the authors from a various scientific fields and academic environment (more than 10) have contributed, the monograph is offering an important comparative and multidisciplinary view.

At the time of wars and bestial aggression that are taking place around the world, the importance of this year's topic is particularly important. Regardless of the fact that the process of implementation of the of human rights doctrine into the national legislations and international documents has long gone through the phase of institutionalization, constitutionalization, and even internationalization, there are still so much opened issues that need to be continuously discussed. There is no unanimous academic and normative position even when it comes to the sole nature of the right to life in terms of the question whether this right is of an absolute character. Furthermore, there is no doubt that the implementation of human rights standards at the national level is largely influenced by historical, cultural and political determinants what make the issue more demanding and

complex. Having that in mind, as well as the fact that the right to life requires a certain quality of life, and that the new age technologies come with the further necessity of rethinking right to life, the paper contributions are divided into two thematic chapters: *The right to life - the right to survive* consists of the papers that provide a comprehensive and wide consideration of the right to life issue and *The right to life and bodily integrity in the context of family and sexual freedom* consists of the papers oriented around specific issues of the sexual freedom and family in light of the right to life concept.

Hopefully, this monograph will answer at least some of the numerous current questions concerning human rights' protection regarding right to life and the text below offers a short overview of the papers presented at the Conference and contained in the publication:

Chapter 1

The right to life - the right to survive

PhD Vlado Kambovski, retired Professor at the Faculty of Law "Justinianus Primus" in Skopje and member of the Macedonian Academy of Sciences and Arts presented the paper THE RIGHT TO BODILY INTEGRITY AND BODILY AUTONOMY in which he analyzed the new challenges regarding legal interpretation of the term bodily integrity which are related to the dynamic nature of human rights and the social environment for their embodiment. He was considering issues such as the human body and its bounderies in the light of the development of new technologies that enable the use of various implants and prostheses and other devices that help a person to function normally ("bionic man"), the understanding of bodily integrity as a symbiosis of the biological and mental components of the person and on that basis connecting of these rights with similar personal rights and finally, bodily autonomy and its transformation of its basis from the ownership right ("my body my property") to the freedom of choice ("my body my choice").

PhD Mario Caterini, Professor at the Faculty of Law, University of Calabria, Director of the Alimena- Criminal Studies Institute (ISPA), Interdepartmental Research Centre of the University of Calabria and **Morena Gallo**, PhD

candidate in Criminal Law at the University of Calabria presented the paper, LIFE: RIGHT OR DUTY? REFLECTIONS ON CERTAIN 'END OF LIFE' ISSUES THAT HAVE ARISEN IN ITALY and investigated the most recent Italian constitutional jurisprudence on the subject of the 'end of life' and the effects on the presumed obligations of penal protection of life, with an overlapping, if any, of the judgement on the 'meritability' of punishment to that on the 'necessity' of the same, which instead should be referred to the discretionary evaluation of the legislator and, a fortiori, to the will of the people in the event of a referendum.

PhD Dragana Kolarić, Professor at the University of Criminal Investigation and Police Studies and a Judge of the Constitutional Court of the Republic of Serbia, presented the paper NEW TENDENCIES IN THE PROTECTION OF THE RIGHT TO LIFE IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS - challenges for the Republic of Serbia, in which a comprehensive judicial decisions and practice of the European Court of Human Rights have been analyzed.

PhD Aleksandar Stevanović, Assistant professor of the University Business Academy in Novi Sad, Faculty of Law, provided the paper THE ETHICAL BASIS OF THE RIGHT TO SELF-HARM in which the author analyzed the interesting question regarding right to self -harm from the philosophical point of view within the context of the right to life.

PhD Marina Matić Bošković, Senior Research Fellow at the Institute of Criminological and Sociological Research, presented the paper RIGHT TO BODILY INTEGRITY AND CRIMINAL JUSTICE aiming to contribute to the more comprehensive understanding of ethical and legal dimensions of the right to bodily integrity, by examining theoretical frameworks and practical implications.

PhD Laura Maria Stanila Assoc. professor at the Faculty of Law, West University Timisoara and Director of the Center for Research in Criminal Sciences analyzed the case-law of the European Court of Human Rights with regard to the Romanian State in paper THE RIGHT TO BODILY INTEGRITY AND HEALTH AND THE RIGHT TO LIFE IN THE LIGHT OF THE ECHR CASE-LAW AGAINST ROMANIA considering those decisions pronounced against Romania through which the Court found violations of the rights provided for by the Convention which also affected the bodily integrity, health or life of a person.

PhD Miloš Babić, Professor at the Faculty of Law, University of Banja Luka and **PhD Ivanka Marković**, Vice President of the Constitutional Court of the Republic of Srpska, Full Professor at the Faculty of Law, University of Banja Luka, presented the paper CRIMINAL LAW PROTECTION OF THE RIGHT TO LIFE IN THE LEGISLATION OF THE REPUBLIC OF SRPSKA, and analyzed the situation in Bosnia and Herzegovina regarding the system of parallel and divided jurisdiction in criminal legislation, stated that the criminal law protection of the right to life belongs to the entities and the Brčko District of Bosnia and Herzegovina. The authors analyzed the criminal law protection of this right in the legislation of the Republic of Srpska, pointed out the differences that exist in this area within the criminal laws of Bosnia and Herzegovina.

PhD Zoran Pavlović, Professor of the University Business Academy in Novi Sad, Faculty of Law, presented the paper MULTIPLE HOMICIDE AND THE PUBLIC PERCEPTION, in which the author considered the specific form of the aggravated murder - criminal offence proscribed in the Criminal Code of the Republic of Serbia, from criminological and criminal law point of view.

PhD Jelena Kostić, Senior Research Associate, Institute of Comparative Law, Belgrade contributed with the paper OBLIGATIONS OF INSTITUTIONS REGARDING THE PROTECTION OF THE RIGHT TO LIFE started from the assumptiom that at the level of various institutions there is no awareness of the need to establish mechanisms for the protection of life, as well as the potential responsibility for not establishing them and violating the aforementioned values.

Aleksandar Stevanović, Research-associate of the Institute of Criminological and Sociological Research, contributed with the paper THE RIGHT TO LIFE: HUMAN RIGHTS APPROACH IN CRIMINAL LAW and considered the right to life within the relationship between criminal law and human rights law, especially the role and importance of human rights doctrine in criminal law when it comes to the protection of the life within criminal law.

PhD Yuriy Pudovochkin, Professor and Chief Researcher of the Criminal Law Research Department at the Justice Issues Research Centre of the Russian State University of Justice, contributed with the paper SYNTHESIS OF CRIMINOLOGICAL-HISTORICAL KNOWLEDGE AS A DEVELOPMENT PERSPECTIVE OF A CRIMINAL LAW SCIENCE in which the author underlined the importance of the multidisciplinary approach in criminal law science,

and particularly analyzed the relationship between criminology and history in that context.

PhD Elek Balázs, Head of Criminal Procedural Department Debrecen University Faculty of Law, contributed with the important comparative insight into Hungarian criminal law with the paper THE THREE STRIKES PENALTY AND THE RIGHT TO LIFE IN HUNGARIAN LAW and analyzed provision of the Criminal Code according to which, if at least three of the offences in the group of offences are completed offences of violence against a person committed at different times, the maximum penalty for the group of offences is doubled. If the maximum sentence thus increased would exceed twenty years or if any of the offences in the group of offences is punishable by life imprisonment, the offender shall be sentenced to life imprisonment.

PhD Elena Tilovska Kechedji, Professor of the Faculty of Law, University "St. Kliment Ohridski" - Bitola, North Macedonia, contributed with the paper VIOLATION OF THE BODILY INTEGRITY AS A VIOLATION OF THE FUNDAMENTAL HUMAN RIGHT, oriented around discussion on the importance of the right to bodily integrity as an inherent part of the right to life.

PhD Vadim Vladimirovič Khilyuta, Associate Professor of the Department of Criminal Law, Criminal Procedure and Criminalistics, Yanka Kupala State University of Grodno (Republic of Belarus), contributed with the paper MAN AND CRIMINAL LAW IN THE SOCIAL DIMENSION. He considered the main problems of criminal law of post-Soviet states through the prism of global institutional transformations in politics and economy, development of new information relations and stagnation of society. The main features and ways of impact of criminal law on social relations are revealed, where criminal law is given a new global function - ensuring security. For this reason, attention in the paper is focused on the essence of crime and criminal law impact.

PhD Yang Chao, Associate Professor at Beijing Normal University, College for Criminal Law Science, China, gave the important comparative view in the paper THE LIFE IMPRISONMENT AND HUMAN SAFE GUARD IN EXTRADITION SYSTEM OF CHINA focusing on the life Imprisonment in Chinese law system, then by analysis the key cases of European Court of Human Rights, he considered the obstacles results by life imprisonment in extradition, and how could that legal obstacles be resolved.

PhD Adrian Stan, Teaching and Research Assistant, Faculty of Law,West University of Timișoara, presented the paper THE NEW AGGRAVATING CIRCUMSTANCES REGARDING HOMICIDE AND BODILY HARM, A NEW VISION OF THE ROMANIAN CRIMINAL LEGISLATOR, where he concluded that some of presented and analyzed criminal policy options are useful, but others raise serious problems of predictability and will lead to certain inequities.

PhD Jasmina Igrački, Research Associate at the Institute for Criminological and Sociological Research, Belgrade, analyzed in her paper LIFE SENTENCE AND THE RIGHT TO LIFE the life sentence within the protection of the right to life an gave important theoretical and comparative view in considered topic.

PhD Filip Mirić, Research Associate; Associate at Post-graduate Studies, Faculty of Law, University of Niš and **Bojana Kojić**, PhD Student, Faculty of Law, University of Belgrade, contributed with the paper MERCY KILLING IN LEGISLATION AND JUDICIAL PRACTICE aimed to draw attention to the complexity of the criminal act of mercy killing, taking into account its legal, social and ethical characteristics.

Túlio Felippe Xavier Januário, a PhD Candidate at the University of Coimbra - Portugal and **Renata da Silva Rodrigues**, PhD candidate University of Vale do Sapucaí - UNIVAS/Brazil, presented the paper ARTIFICIAL INTELLIGENCE AND MEDICALLY ASSISTED PROCREATION: AN ANALYSIS OF PREIMPLANTATION GENETIC TESTING (PGT) IN THE LIGHT OF BRAZILIAN CRIMINAL LAW focused on the legal limits of preimplantation genetic testing - PGT and their possible criminal implications under Brazilian criminal law.

Filip Novaković, Corresponding Member of the Bosnian-Herezgovinian-American Academy od Arts and Sciences, considered the issue of religious killing in the paper RELIGIOUS KILLING: A REVIEW OF THE MURDERS OF TYLEE RYAN AND J. J. VALLOW, focused on the case of taking the lives of Tyla Ryan and J. J. Vallow that was a complex illustration of criminal behavior motivated by religious beliefs.

Chapter 2

The right to life and bodily integrity in the context of family and sexual freedom

PhD Ranka Vujović, assistant professor at the Faculty of Law, Union University in Belgrade and assistant director of the Republic Secretariat for Legislation, presented the paper PERMISSION FOR UNDERAGE MARRIAGE: DENYING THE CHILD'S RIGHT TO PROTECTION with the to identify, through the analysis of the rules of court procedure and established practice, the various implications of the license for child marriage on the key players in the procedure - the child, the parents, the guardian, in order to provide additional insight into the way in which protection of children at risk of early marriage is organized and ensured in Serbian legislation, and to make a scientific contribution to the research of this topic on a critical, contextual and conceptual level and support the national implementation of the recommendations of the UN Committee on the Rights of the Child regarding the removal of exceptions that enable the conclusion of child marriages.

PhD Dragan Obradović, retired Judge at the Higher Court in Valjevo and Faculty of Health and Business Studies Valjevo, Singidunum University Belgrade, contributed with the paper CRIMINAL OFFENSES AGAINST SEXUAL FREEDOM - ASSESSMENT OF THE TESTIMONY OF JUVENILE VICTIMS and pointed to certain significant international regulations, as well as the most important domestic regulations that provide protection to victims of sexual violence. The question important for court proceedings is being considered - to what extent can the testimony of children or minor victims of sexual violence be believed, given the fact that these victims are usually alone against the perpetrator of the crime to their detriment, as a rule, a person older than them. Through examples from individual court cases, the importance of evaluating the testimony of that category of victims as acceptable evidence for passing a conviction is indicated.

PhD Milana M. Ljubičić, Full Professor, University of Belgrade, Faculty of Philosophy, contributed with the the paper SOCIAL MANAGEMENT OF PARENTHOOD: FORCED STERILIZATION OF MENTALLY DISABLED

WOMEN and presented a retrospective overview of the practices of forced sterilization of mentally disabled persons in the USA and European countries, while pointed out to ethical dilemmas accompanying this practice.

PhD Lorena Velasco, assistant professor at the University Francisco de Vitoria in Spain, opened up the issue of sterilization and disability in her paper STERILIZATION AND DISABILITY: FROM ATYPICALITY TO CRIMINALIZATION. This paper seeks to analyze the regulations related to the sterilization of judicially incapacitated people with disabilities in Spain, its origin and evolution, and to make a comparative analysis of the regulation in different European countries. The aim is to understand the changes that have occurred in the different legislations and the current legal framework.

PhD Slađana Jovanović, professor at the Union University Faculty of Law, Belgrade presented the next paper opened up the issue regarding femicid as a criminal offence in the paper FEMICIDE/FEMINICIDE IN CRIMINAL LAW: DO WE NEED A NEW CRIMINAL OFFENCE? She examines relevant definitions, surveys and actual legal responses to femicide, focusing on the state of affairs in the Republic of Serbia, especially dilemma about introducing femicide as a new, separate criminal offence.

PhD Zorica Mršević, retired principal research fellow at the Institute of Social Sciences, in Belgrade, gave one more insight on femicide as a possible criminal offence with the paper FEMICIDE AS A CRIMINAL LAW DEED - PRO ET CONTRA in which she considered arguments and counter-arguments for the legalization of femicide as a criminal offense.

Svetlana Janković, from Center for Encouraging Dialogue and Tolerance, Čačak, contributed with the paper THREATENING THE RIGHTS, HEALTH, AND LIVES OF WOMEN WHILE PROTECTING THEIR REPRODUCTIVE HEALTH in which she stated that obstetric violence is a global problem to which women are exposed in gynecological and obstetric institutions.

Chapter 1

The right to life - the right to survive

Vlado Kambovski[*]

Original Scientific Paper
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THE RIGHT TO BODILY INTEGRITY AND BODILY AUTONOMY

Respect for the natural and inviolable right to bodily integrity, understood as the right against significant, non-consensual interference with one's body, faces new challenges, which are related to the dynamic nature of human rights and the social environment for their embodiment. The debate about this right takes on new dimensions with the extensive development of sciences about the nature of the human being, such as bioethics or neuroscience, which extend bodily integrity to physical, biological or neurological implants embedded in the body. Man is more than a socialized individual and an individualized "socius", a biopsychological entity, so bodily integrity is necessarily connected to the state of his mental health as a condition of physical health and bodily integrity. This is the reason why criminal law is increasingly permeated by an attitude that calls for enhanced protection of mental integrity as a complementary element of the right to bodily integrity. In this context, the right to bodily integrity is a complex right, the content of which primarily includes the prohibition of inflicting physical or mental injuries, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of eugenic practices, in particular those aiming at the selection of persons the prohibition of slavery and forced labour, the prohibition on making the human body and its parts as such a source of financial gain, the prohibition of the reproductive cloning of human beings. But as a negative right, which implies all these prohibitions, it also suffers legal restrictions, such as forced castration in some legislations, physical injury in necessary defense, compulsory vaccination and other measures in case of a pandemic, etc. All limitations of this right require an indisputable justification, which often conflicts with hidden forms of its violation, especially when it comes to violations of mental integrity. As a positive right, the right to bodily integrity

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implies the right to bodily autonomy of the individual to make decisions about his body, and its interference means interfering with and limiting his free decisions. In modern criminal law, setting limits for bodily autonomy faces more complex questions, which have wider axiological implications: whether and to what extent acts of self-harm or destruction of personality, such as drug addiction, abortion should be banned, selling organs, selling one's own body, such as prostitution or hard manual labor, or to prohibit gender reassignment. Starting from the fact that the concept of the basic right to bodily integrity is not monolithic, answers to those questions should be sought starting from the higher postulate of human dignity, which is alien to the respect of this right as a property right.

Keywords: *the body, right to bodily integrity, bodily autonomy.*

1. The body

The body is precondition of human existence and reference point of many legal norms. But the law only rarely asks what the body is more precisely. According to the most basic definition, the body is the entire structure of a human being, composed of many different types of cells that together create tissues and subsequently organs and then organ systems. This definition implies the definition of the human body as a functional whole of parts that have a vital function, i.e. maintain human life. Therefore, when we talk about the right to bodily integrity, we mean first of all about the integrity of the body of a living person. In other words, the right to bodily integrity is a pendant to the right to life. But what is life?

The definition of the life actually is varies much more than is exhausted by the legal approach, according to which life begins from the moment of birth, or from a particular legal aspect - pregnancy, and lasts until the moment of brain death. More than 100 definitions of life have been counted that lead to rather concise and inclusive definition, made by *Darwin*: "life is self-reproduction with variations" (Ćorić, 2021: 55). Life in the medical sense is different from life in the legal sense, or life in the biological or biochemical or ecosystem sense. Even after heart failure and brain death, the cells of the body are still alive and can remain that way for hours, which is what makes organ donation possible. These complications point out something fundamental about what "life" is in the biological sense. In addition to the right to real life, the concept of the "right to virtual life" also appears (Stănilă, 2021: 118).

Fluid understandings of the concept of life have a direct impact on the international human rights documents that declare the right to life as a fundamental, natural and inalienable right, but do not define its content. Thus, the Universal Declaration of Human Rights mentions in its Article 3 stating that "Everyone has the right to life, liberty and security of person", but it does not define the content of that right. The European Convention on Human Rights distinguishes four basic rights, which are considered central rights: the right to life (Article 2), the prohibition of torture, inhuman and degrading treatment or punishment (Article 3), the prohibition of slavery (Article 4) and the right to freedom (Article 5). But the right to life is not provided as an absolutely protected non-derogable right, and is

considered an absolutely protected but derogable right (Omejec,2014: 844). In article 2, paragraph 1, the Convention provides that: "Everyone's right to life shall be protected by law", but paragraph 2 contains exceptions in which deprivation of life will not be considered in conflict with this article.The Convention complicates the definition of life with the provision from Article 8, paragraph 1, which stipulates that "every person has the right to respect for his private and family life, home and correspondence". The question arises: what is "life" and what is "private and family life"? It is obvious that the definition of life in Article 2 implies its biological determinism, while private life in Article 8 includes the social status and relations of the individual with his social environment.

Other international documents on human rights do not go further; so the Universal Declaration of Human Rights (Article 3: "Everyone has the right to life, liberty and the security of person"); the International Covenant on Civil and Political Rights (Article 6 paragraph 1: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life", but provides exceptions in paragraph 2 (s. Bačić, 2021: 30). The vagueness of the concept of life has implications for determining the content of the right to the body, as well as the degree of its derogability.

In the absence of a generally accepted definition of life, from the legal and cultural point of view, the label "life" is an artificial binary construct invented by human culture that does not describe what is actually going on at the biological and biochemical level (Bublitz,2022:2).This approach leads to the observation of life as a biopsychological function of the human body, made possible by its integrity.The legal concept of life deviates from the biological concept in defining the right to life, considering the unborn child as alive, from the aspect of inheritance rights, or the occurrence of death by the cessation of all biological functions of the body. This applies primarily to those areas of the legal system that concern personal rights. But in certain areas of bioethics, medical law, even criminal and civil law, parts of the human body at the cellular biological or biochemical level become the subject of legal regulation (transplantation of body parts, changes in the structure of the genome, etc.). On the other hand, there are also legal rules that refer to the treatment of the human body even after the end of life (for example, penal codes provide for penalties for digging up a grave, or trade in vital organs removed from the body of a deceased person etc.).

Today, the generally accepted definition, which actually views the body as a biological framework for life, is the subject of numerous disputes, coming from the ranks of feminists, artists and disability theorists, who propose its post-human reconceptualization with potential legal implications. In addition to the views that support the expansion of the concept of the body, from the aspect of enhanced protection of cyborg bodies, some legal scholars suggest redefining or even dismissing the right to bodily integrity because of its uncertain foundations. Of particular importance is the question of the boundaries of the body because the legal treatment of prostheses and assistive devices depends on whether they are part of it.

The body has its upper boundary, which implies the existence of all organs of a human being with all their functions, while its lower boundary is the existence of vital organs and their functions, without which life ceases. The body exists, and thus life, even if there are no limbs, kidneys, eyes, or they don't work, etc. But in that case the question arises whether prostheses, and under what conditions, can be considered body parts. This issue is of key importance for legal, and especially criminal law considerations, in the light of the fundamental legal distinction between persons and things, and therefore human rights in relation to them. The difference in law between persons and things originates from Roman law (Gaius, Institutiones 1.8: *Omne autem ius quo utimur, vel ad personas pertinet vel ad res vel ad actiones*: All the law that we use refers either to persons or to things or to lawsuits). This division (persons, things, lawsuits) has traditionally entered the framework of large civil codifications from the 19th century, according to *Guy's* systematization.

The law must thus draw normative boundaries, which cannot go beyond the biological integrity of the body, but cannot descend below the boundary of the existence of the identity of the person residing in that body. In other words, a new artificial sapient creature cannot be created by replacing all body parts with things (*Frankenstein*). Between these extremes, there remains a large margin of evaluation and design of legal bases for the development of new legal rules in the field of bioethics, medical, civil and, especially, criminal law.

3. The concept of the body has become problematic today due to the development of medicine, bioethics, neuroscience and technological development in general, which has produced revolutionary advances in solving the problems

of various diseases and physical or mental disabilities of people. They made it possible not only to replace biological parts of the body (tissues and organs) through transplantation, but also to implant things that replace or supplement the functions of certain organs. Biohybrid artificial organs are of such nature, which include all devices that replace the function of organs or tissues and contain both synthetic materials and living cells (Colton,1995: 415). But in addition to biohybrid organs, medicine has developed a wide variety of organs made of different artificial materials (synthetic membranes, titanium and cobalt-chromium for prostheses, polymeric comonents etc.[1]). Possibilities of organ replacement, such as heart, liver, kidneys, etc. with the help of organ transplantation or artificial implants, open numerous, first of all, ethical dilemmas, such as the question of the "bionic man", a man whose many organs have been replaced by artificial ones, and the principle and ethical limitations inherent in this process. Ethical justification is found in the knowledge that man has always used objects from nature and technological progress to facilitate life without ethical concerns, so when technology and medical technique allowed these objects to replace parts of his body, medicine incorporated them into practice by adopting just the simple utilitarian principle of "help but do no harm." (Roumeliotis, 2021: 56).

The legal regulation of body and neuro implants is at the very beginning of the formation of legal standards and norms on various aspects of the use and protection of body and neuro implants. The reason for this is that the establishment of the relevant legal regime is faced with very rapid scientific and technological progress in this area, which is at a higher level in relation to certain artificial organs, while for others it is in a lower, early stage (eg neuro implants). Likewise, clinical trials with brain computer interfaces and advanced prosthetics are a particular problem, as well as a clear division of rules that would apply to treatment and enhancements with different types of body implants, in terms of rules to be followed and limitations to be set (Palmerini,2015: 226).

Human implants have numerous implications not only for bioethics and medical law, but also for other areas of law, especially criminal and civil law. The starting point for considering the legal consequences is the answer to the question: are implants part of the human body in the legal sense and to what extent do they

[1] Hench, Jones, (eds.) (2005)

affect the right to bodily integrity. And while in relation to biotech implants, which are functionally connected to other organs in the body by transplantation, there are no major problems, in the focus of the legal debate are other, non-living implants, nanotechnology implants and information carriers (Roosendaal,2012: 81). All implants are things, so if the point of view that they are part of the body is accepted, they should move to another legal regime of personal rights (*ius quod ad personas pertinet*). It is an indisputable fact that we use artifacts every day to expand our physical abilities or to overcome our physical deficiencies. For example, we use microscopes and telescopes to see things beyond the natural range of our visual system. Several twentieth-century philosophers have pointed out that when people use artifacts and technologies, they often tend to become extensions of their bodies: they become embedded in the user's body schema (Van den Berg, 2012: 159).

Today, that opinion is taking on very serious proportions, due to the rapid development of new technologies and achievements in creating "cyborg-assisted-life" and "cyborgization", terms that refer to the use of tomorrow's computer processors in a body embedded in today's relatively unchanged anatomy. The prediction that over time populations in developed countries will increasingly resort to implant technologies, not only for critical life-saving devices such as pacemakers, which are currently used for several dozen medical therapeutic interventions, has been confirmed. Unprecedented progress has been made in the development and use of internally integrated technologies such as nanobio-information-cogno and silicon-based platforms, platforms for nanotechnology materials (e.g. thin graphene (carbon) with MoS2 (molybdenum disulfide) and biotechnological platforms (eg synthetic DNA), communicating via telemetry within a framework of an interior intranet to an exterior Internet. In the next stage of advancement, the functions performed by these devices will be down-sized through progress in synthetic DNA, molecular computational devices, and nano-sized processors, deployed alongside, and within cells and organs as permanent non-organic, internal adjuncts to our anatomy. The important driver behind electrical control implantation is the development of the substrates, that is the material part of the computer, measured in nanometers, just a few atoms wide. We might anticipate that traditional medicine, even the ever-improving pharmacology, will be replaced or

augmented by implanted/telemetry bio sensors, organ stimulators and pumps, utilizing the materials, electronics, computer processors and inter/intra-body communication networks to enhance or replace failed human organs. The development of "cyborgization" is going so fast, that it is increasingly plausible to predict that homo sapiens born today, who carry genes and anatomical structures introduced 3.5 billion years ago, thanks to new technologies that overcome historical biological limitations, will be considered in less than a century inferior and unchanged (unmagnified) creature **(**Carvalko, 2013: 9).

The establishment of an appropriate framework for these changes, which open numerous ethical, cultural, identity and other issues, lags behind the increasingly massive application of artificial modifications of the human body, and thus of the human personality. It also has no answer in relation to the possibility of criminal abuse of their application, which can take different forms: violent changes in personality and its psychological characteristics, introduction of viruses, hacking through internal intranet telemetry, endangering health through intentional damage to implants, etc.

One of the categorical terms, around which a system of rules relevant to the basic human right to bodily integrity should be created, is "the body": whether and under what conditions artificial organs are considered parts of the body. The starting point for determining that term must be the general understanding of the human body, which is also adhered to by the humanities, as a functional system of organs that sustains human life. This system includes biological and non-biological implants, which replace or complement the functions of vital and other organs. The condition for considering a physical, chemical, hybrid or other non-biological implant as part of the body is that it is permanently connected to other organs and that it is in continuous functional connection with them. So, for example, a built-in pacemaker, but also an attached mechanical limb, an eye implant, etc. From the point of view of criminal law, any damage to such an implant or prosthesis should be considered a bodily injury. This is not the case with prostheses and other devices that help a person to function normally (crutches, wheelchairs, etc.), but are not permanently and functionally connected to other organs. Their destruction can be qualified as damage to other people's property.

This principle should also apply to implanted/telemetry biosensors, organ stimulators and pumps, which use computer processors and inter/intrabody communication networks to improve or replace damaged human organs. Processors and networks located outside the body cannot be considered part of it, but cases of their damage may fall under the legal definition of bodily injury, which in all criminal laws includes bodily harm as well as health impairment. It should be pointed out, however, that the complexity of the problems of new technologies requires many times more engaged legal minds in the search for an appropriate legal framework, harmonized with the absolute ideas and principles of law, faced with the increasing challenges of the future of humanity.

2. The right to bodily integrity

The right to the bodily integrity is important, because it determines the crossroads, where certain directions of the development of law branch off, especially the law on human rights, bioethics, medical, criminal and civil law. But, contrary to the frequent repetition that it is a pendant of the right to life and that it is a fundamental right, the determination of its content and scope is left to the very nebulous area of human rights and their protection. First of all, the right is not explicitly declared natural and inviolable in the basic international human rights documents, with the exception of the Convention on the Rights of Persons with Disabilities (Article 17: every person with disabilities has the right to respect for their physical and mental integrity on an equal basis with others (See: Lavazza, Giorgi, 2023: 6). Thus, the European Convention on Human Rights does not mention this right, determining its negative content through other provisions: prohibition of torture (Article 3), the freedom from slavery and forced labor (Article 4), right to freedom and security of person (Article 5), the right to respect for private and family life, home and correspondence (Article 9) and the freedom from discrimination (Article 15; s. Akandji-Kombe, 2007: 20). As all these articles cover in a very fragmentary way various aspects of rights that have a personal character, it remains unclear whether the right to bodily integrity is considered a separate right, whether it is synonymous with the right to personal integrity, which includes the integrity of the human being as a biological, psychological and social entity.

On the other hand, it is completely unclear which negative and positive obligations arise from the right to bodily integrity. While other provisions set numerous exceptions, which give them the character of derogable rights, as an absolute and non-derogable negative right, the Convention declares only the prohibition of torture and inhuman or degrading treatment or punishment (Article 3). Article 3 does not contain another paragraph that would determine the circumstances that allow the limitation of this right. Accordingly, it can be concluded that in terms of this provision there is no room for restrictions given by law (Simović, 2010: 36)**.** Is the prohibition of torture really absolute and non-derogable? Article 3 of the ECHR does not define torture, nor inhuman or degrading treatment or punishment. Accordingly, the European Court of Human Rights and, prior to November 1999, the European Commission of Human Rights have developed a complex and extensive body of jurisprudence to determine the constituent elements of these forms of abuse. In the case *Ireland v. UK* European Court of Human Rights drew a distinction between torture, inhuman treatment, and degrading treatment, holding that such a distinction was necessary because of the "special stigma" attached to torture. An act must cause "serious and cruel suffering" to constitute torture. In this instance, the Court held that 'the five techniques' caused "if not actual bodily injury, at least intense physical and mental suffering… and also led to psychiatric disturbances during the interrogation," and therefore constituted inhuman treatment, but did not "occasion suffering of the particular intensity and cruelty implied by the word torture." The Court thereby effectively replaced the distinction based on the purpose of the act with a subjective assessment of the severity of the pain and suffering caused by the act. According to such a distinction, degrading treatment that reaches a certain severity can be reclassified as inhumane treatment, which in turn, if severe enough, can be reclassified as torture.[2]

As the most explicit emanation of the right to bodily integrity, the prohibition of torture is an absolute and peremptory norm (*jus cogens*) of international law and can be enforced even against a state that has not ratified any of the relevant treaties. Despite this, the use of torture remains widespread and many governments, as well as insurgent groups that control territory (such as Boko Haram

[2] Association for the Prevention of Torture, (2008: 57).

in Nigeria, regimes in Sri Lanka, Iran, Afghanistan and other countries), continue to use torture to oppress and persecute people to this day. In addition, in the search for an adequate response to the spread of international terrorism, discussions on deviating from the prohibition of torture and its use as a last resort in the event of preventing a terrorist attack are revived.That view is linked to the rejection of the prohibition against self-incrimination and the question of the admissibility of the evidence obtained in an illegal manner (torture; See:.Thienel, 2006: 350).The rule of necessary defense is used as the main argument for that position. This rule is accepted in the European Convention on Human Rights as a permissible deviation from the absolute right to life: if it is permissible to take the life of another in the case of necessary defense, all the more ("argumentum a majore ad minus", "from the greater to the smaller"- if something is allowed for a more serious case, it should also be valid for a lighter one) torture or inhumane treatment should be allowed if there is an actual attack on the lives of others (planted bomb in a school with many children), so that the terrorist would be forced through self-incriminationto detect it and thus prevent it.

International conventions on the prevention and punishment of terrorism firmly stand on the international community's view on the absolute prohibition of terrorism and the inadmissibility of evidence obtained by coercion. Ihe spirit of international conventions is such that 'torture' and any form of cruel, inhuman or degrading treatment is an aberration of international human rights law. The right not to be tortured is absolute, unqualified and non-derogable. But some national anti-terrorist legislations do not always follow those *jus cogens* prohibitions of international law. In this case too, double standards are manifested in the attitude of those states towards international criminal law: that they accept and apply its norms and standards when they consider it to be in their interest. Consequently, traditional legal limits on the use of force had to make way for a new perception of national security in the war against terror. Most nations of the world have responded to domestic and international obligations following the 9/11 incident in the US by passing specific laws to prevent terrorism. After P.A.T.R.I.O.T. Act of October 26, 2001 USA, such laws have been adopted by the United Kingdom, Canada, New Zealand and Australia, while in other Western countries reforms of penal legislation have been carried out (Anwukah, 2016: 16). Emphasizing the reason for security in "the war against terror" above the interest

of protecting rights, the anti-terrorist legislation makes its way to the position that torture, albeit in a covert form, is a necessary strategy for obtaining direct intelligence about terrorist attacks or terrorist networks through confessions. Deviations from international law in national legislations take the form of various measures, such as indefinite detention without trial, trial of terrorists before a special court, abolition of the right to remain silent and legal representation, wiretapping of lawyer-client communications, use of torture and drugs to force confessions, or increased surveillance and reduced privacy protection. Finally, above the legislative level of prevention of torture as a criminal offense regulated in the main criminal laws, there always remains an open question - what if acts of torture are carried out by state authorities, and how to overcome the practice of their impunity.

If this (long) story about the prohibition of torture leads to the conclusion that the right to bodily integrity stands on very slippery foundations, we can agree that this right on the international and national level has not been established in a concise manner and with all the necessary guarantees of its inviolability. According to the possible restrictions, such as: compulsory vaccination, taking alcohol from the blood in the case of a misdemeanor, deprivation of liberty based on broad legal grounds, etc., it seems that it is a non-absolute, derogable right, and that the only absolute element that gives that right the character of natural rights, it is the individual's right to control and preserve one's body[3]

A step forward in clarifying the right to bodily integrity is made by the EU Charter of fundamental rights, which Chapter 1 on dignity contains the right to the integrity of the person (Article 3): 1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law; (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons; (c) the prohibition on making the human body and its parts as such a source of financial gain; (d) the prohibition of the reproductive cloning of human beings. In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* (2001), the

[3] Association for the Prevention of Torture, (2008: 57).

Court of Justice confirmed that a fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.

For the approach of the European Charter contained in this provision, it is significant that this right connects the physical and mental integrity of the person into a single subjective right that protects both inseparable components. In times of violence of all kinds, especially psychological, the right to personal integrity becomes more and more important. Man is exposed to terrible pressures, which cause individual and collective reactions - from extreme apathy to extreme anger and aggressiveness that can be attributed to the most brutal forms of violence, senseless killings "from sports", etc. Today, people are mercilessly exposed to hate speech that spreads on the Internet, mass manipulations, intimidation with war, mass diseases, etc. The connection between such traumatic effects on the personality and its not only psychological, but also mental health, has been confirmed by numerous scientific researches and the life experience of each of us. Medicine deals with the psychosomatic causes of numerous diseases. Psychological injuries or psychological torture can reach the level of severe physical injuries and even lead to death (Herring, Wall, 2017: 566). The right to the integrity of the person is a natural synthetic construct that combines the right to bodily integrity and the right to mental integrity. It protects man as a physical, psychological and moral being. The mental structure of the human personality is part of his bodily integrity. The body is not only the physical but also the mental substrate of human life

The integral approach to conceiving the right to the integrity of the person is based on the philosophical tradition, related to the teachings of *John Locke* and *J. S. Mill* about "our ownership of ourselves" - our rights to our own property. Property primarily includes the right over our body, which excludes any physical touching of others. However, our selves do not consist only of our bodies. Our minds are certainly also a part of ourselves, which implies ownership of the mind as well as of the body (*Mill*: "Over himself, over his own body and mind, the individual is sovereign." *Locke* even considered ownership of the mind to be primary, because he thought that we gain ownership of ourselves originally through the mental act of taking responsibility for our actions. Of course, there is great disagreement about the relationship between mind and body. On some views -

physicalist views - our minds are just a part of our bodies, or are reducible to our brains, or parts of our brains. But on other views, minds are not just parts of the body. For example, according to one widely held view in philosophy, our minds are distinct from, although completely determined by our brains, the same way that a statue differs from a lump of clay from which it is entirely determined. According to *Neal Levy*, our mind as a set of mechanisms and resources that are not limited to internal resources composed of neurons and neurotransmitters is not completely contained in the skull, but instead spills into the world (Douglas, 2020: 382). According to this thesis of the extended mind, if someone interferes with my smartphone or diary, it interferes with my mind, and thus with me, and thus violates my rights to self-property. Or, for example, violation of the right to the integrity of the person represents well-known forms of brainwashing, such as hypnosis and aversion therapy, which clearly interfere with the mind and impact on the body: they affect a person's brain states.

The nature of the right to personal integrity, in its complex meaningas a cluster of heterogenous constituent rights, enables the opening of an endless area of its operationalization through the development of international norms and standards, its constitutionalization in national constitutions and, especially, creative reforms of criminal legislation. The main reform direction, stimulated by recent conventions (on gender equality, bioetics, computer crime, environmental protection, etc.), is precisely the strengthened protection of the bodily and mental integrity of the individual. The result of that orientation, especially in criminal legislation, is the expansion of the zone of criminal protection against human trafficking, family violence, violence against children and women, discrimination on all grounds, hate speech, computer violence, harassment, stalking, psychological intimidation, sexual violence, illegal genetic, biopsychological and similar interventions in the human body.

3. The bodily authonomy

The concept of personal autonomy is an essential part of modern human rights. Man is an autonomous, conscious and responsible being, an independent and self-sustaining entity that develops individually in the open space of human rights. The European Court of Human Rights has defined personal autonomy as

"the ability of everyone to lead his life as he wishes", which includes "the possibility of engaging in activities that are considered physically and morally harmful or dangerous to his personality" (Hurpy, 2018: 38). Of course, we cannot underestimate the role of society, because an individual's life is not isolated and is always influenced by many external factors, so that his autonomous decision-making will often collide with the necessary limitations of the environment in which he lives, with the equal freedom of decision of other individuals, as well as the power the state and its coercion. Bodily integrity and autonomy refer to a human right that everyone should enjoy and consists in free decision-making about their body and their life. While bodily integrity and autonomy are themselves human rights, they are also central to the enjoyment of other human rights principles that fulfill the content of human dignity as the highest value.

Unlike the right to bodily integrity as the right that allows a person to have his body whole and undamaged and without physical interference and violent interference from others, bodily autonomy is defined as the right to make decisions about his own body and life without coercion or violence. Bodily integrity refers to the integration of the self and the rest of the objective world, so violating it is significantly different from interfering with decisions about one's body. An individual is free to decide whether to undertake physical work, go to the doctor, have sex, give birth to children, etc. From this basic difference arises the difference of possible justification for interference in the first or second right. The right to bodily integrity is basically a negative right, which creates prohibitions for violent interference with the body, as well as positive obligations for the state to take measures to preserve and protect bodily integrity (the right to health, to a healthy environment, protection of disabled persons, protection and providing conditions for children's development, etc.). The right to autonomy is basically a positive right, which includes obligations to respect autonomous decisions through the creation of legal, economic, social and other conditions for their adoption and implementation. Likewise, while every person has the right to bodily integrity, the realization of bodily autonomy is not equally accessible to all individuals, such as children, persons with physical or mental disabilities, but also persons whose decision-making autonomy is limited by legal restrictions (prisoners in prison, soldiers in barracks, persons limited by professional obligations, etc.). Bodily autonomy presupposes not only independent decision-making about

one's body, but also the ability to execute that decision, which again depends on bodily integrity.

There are different explanations about the content of the right to bodily autonomy, depending on how the meaning of the right to the body is explained by lawyers. There are those who claim that bodies should be viewed as property, which can be owned and transferred; those who reject access to property and instead argue that rights such as 'the right to bodily integrity', 'the right to privacy' or 'the right to autonomy' should be used to protect the special status of the body, and a third group who believe that there is something that can say for both views, and the ideal solution lies in finding the appropriate combination of property access and integrity/privacy. The significance of this dispute can be seen in the context of various legal issues: when considering the issue of living organ donation, should organs be treated as property that can be bought or sold like any other thing, or does the unique status of the human body mean that it should not be commercialized by treating it as property; or should confidential medical information about someone be considered proprietary or should it be protected through the right to privacy (Herring, Chau, 2007: 34).

Nevertheless, to a large extent, the discussion about the content of the right to bodily autonomy rests on the *Lockean* tradition of considering one's own body in terms of ownership: "My body, my property"! (Kall, Zeiler, 2014: 106). According to this thesis, the right of property over the body protects against all corporeal and non-corporeal forms of interference in the free decision-making of the subject of this right. A similar claim applies to other types of rights from autonomy ("rights to autonomy") and rights arising from privacy ("rights to privacy").

Contrary to such a narrowing of the freedom of autonomy towards a derivative of the right of ownership of the body, it should be considered that its content is more determined by the idea of individual freedom as a necessary condition for autonomy, emphasizing that freedom is always situated relationally and that it becomes meaningful only as freedom in relation to its factuality social and cultural dimension. Autonomous decisions are made in the midst of social relations, in interaction with others and in the context of the equal rights and freedoms of others.

As a fundamental right, guaranteeing bodily autonomy is a basic condition for equality of human rights, especially rights that affect the person and its physical and mental integrity (right to privacy, gender equality, right to health, etc.). It is of key importance for realizing the right to non-discrimination. Acts of violence, coercion, lack of respect for consent, denial of sexual and reproductive health information and service, all represent violations of this right and remain pervasive around the world. This right is about more than individual rights and requires more systemic change involving more fundamental legislative processes - at least, until structural systems of oppression are challenged and broken away with and new dynamics put in place. Respect for the integrity of the body and the integrity of the person and its autonomy implies a critical attitude towards the question - whether the state can dictate the choice of an individual about his body about things that do not harm others or offend the dignity of the human species. Consistent respect for this right imposes the attitude that state intervention of private bodily choices should only be permitted if based on *Mill*'s harm principle, or where the dignity of the human species as a whole suffices to justify public intervention.

10. The implications of bodily autonomy in the comprehensive meaning of free decision-making about one's physical and mental integrity are very broad and relate to several areas of human rights and their protection: from the right to procreation and the permissibility of abortion, sexual freedom, donation of human organs, etc., to suicide, self-harm and the right to die with dignity. A special problem is respecting the bodily autonomy of persons who have a limited ability to form their will and make decisions, such as children. The right of parents to make irrevocable non-therapeutic decisions on behalf of their children is particularly controversial, especially when it comes to irreversible decisions about surgical modifications of their children's bodies (Fox, Thomson, 2017: 501).

However, bodily autonomy is often prevented by legal, social, religious, and institutional norms that prevent personal decisions over own body. Examples of these norms include "marry your rapist" laws in some legislations that allow perpetrators to escape punishment if they marry their victims, denying autonomy experienced by survivors of rape. Some of these legal, social, religious, and institutional norms directly or indirectly threaten physical and mental health, or even life. As an emanation of individual freedom, respect for bodily autonomy as

a fundamental right in convergence with other rights, especially the right to privacy, inspires legal reforms in numerous legal fields. Today, the changes related to sexual freedom, protection of children, its facilitation for persons with disabilities, and especially the achievement of gender equality, are particularly topical. These are areas in which numerous studies point to the extremely worrying status of bodily autonomy. Thus, the 2021 *State of World Population* report, titled *My Body is My Own*, marks the first time a UN report focuses on the power and agency of individuals to make choices about their bodies without fear, violence or coercion.The report examines data on women's decision-making power and on laws supportive of sexual and reproductive health and rights. Tragically, only 55 per cent of women have bodily autonomy, according to measurements of their ablity to make their own decisions on issues relating to health care, contraception and whether to have sex.The innovations necessary to overcome such a situation are particularly related to the reforms of the criminal legislation, encouraged by the adoption of new international conventions that are on the line of strengthening the right to bodily autonomy (European Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), UN Convention on the rights of persons with disabilities, European Convention on action against trafficking in human beings, UN Basic Principles for the treatment of prisoners, and others international documents).

Starting from the position that there is no right to bodily autonomy without social justice and liberation, this right acquires the character of a permanent postulate for the overall transformation of today's society, in which the paradox of individual freedom still reigns (*Rousseau*: "man is born free and ewerywehre he is in shackles").

4. Conclusion

The rights to the body, bodily integrity and bodily autonomy are increasingly important rights, which confront the human personality with all its values with more and more challenges of the modern age. They are at the crossroads of existential rights, such as individual freedom, personal integrity, rights to privacy and other subjective rights, which presuppose respect for the human being and the elementary conditions of his existence, faced with the possibilities offered by

modern technologies and knowledge about human life.There is no doubt that these rights are natural and inalienable, because they are related to the right to life, but the determination of their content in international human rights documents, with some exceptions, such as the absolute prohibition of torture, is too fluid and leaves a number of ambiguities: what is the human body and what are its bounderies, in the light of the development of new technologies that enable the use of various implants and prostheses and other devices that help a person to function normally ("bionic man"); the understanding of bodily integrity as a symbiosis of the biological and mental components of the person and on that basis connecting of these rights with similar personal rights; and, finally, bodily autonomy and its transformation of its basis from the ownership right ("my body my property") to the freedom of choice ("my body my choice").

All these aspects of the right to the body are not consistently regulated in the international conventions on human rights, so it remains to be viewed as a fundamental right to be regulated by national legislation.The aim of this paper is to clarify theoretical positions that can serve as suggestions for determining a basic approach to respect and protection of the right to the body and related rights in criminal and other areas of law.

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LIFE: RIGHT OR DUTY? REFLECTIONS ON CERTAIN "END OF LIFE" ISSUES THAT HAVE ARISEN IN ITALY[***]

The Italian Constitutional Court declared the popular referendum request for the partial repeal of Article 579 of the penal code inadmissible, but the question was declared inadmissible because, as a result of the repeal, the constitutionally required minimum protection of human life, in general and with particular reference to weak and vulnerable people, would have been lost. The contribution, having made some critical premises on legal paternalism and outlined the liberal-solidaristic system that emerges from the Italian Constitution, deals with the possible normative options available to the legislator to make the holder of the good "life" make well-considered and informed choices and, thus, avoid any self-damaging "errors" in terms of "end of life" choices. The research, in particular, deals with the nudge strategies, useful to direct, in a soft way, the choices of the holder of the "life" good in the direction that the legislator believes desirable, but without prejudice to individual freedom of final option. It emerges that nudge strategies are consistent with anti-paternalistic legislative options and are, in some respects, imposed by a liberal-solidaristic system such as the one designed by the Italian Constitution. The work, therefore, investigates the most recent Italian constitutional jurisprudence on the subject of the "end of life" and the effects on the presumed obligations of penal protection of life, with an overlapping, if any, of the judgement on the "meritability" of punishment to that on the "necessity" of the same, which instead should be referred to the discretionary evaluation of

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the legislator and, a fortiori, to the will of the people in the event of a referendum. The protection of a constitutionally relevant legal asset, including life, is, in fact, a necessary condition, but not sufficient for criminal protection, which requires a further assessment, both of the merits and of the necessity of the penalty, in the same way as the general principle of extrema ratio. The conclusions are aimed at sustaining the lack, in Italy, of constitutional obligations of criminalisation, even to protect life, a fortiori in the matter of euthanasia, because behaviour, even if self-damaging, if not subject to coercion or undue pressure, if not vitiated by a cognitive vulnerability, if the result of a well-informed and well-considered choice, must be left to the autonomy of the individual without forced interference by the State through criminal sanction.

Keywords: *murder of the consenting, protection of human life, paternalism, "critical" function of the legal right, obligations of criminal protection, merits of punishment.*

1. Is life always good and death always bad? Premises and criticism of legal paternalism

Leonida Répaci, a brilliant Calabrian writer, wondered "whether life is a good and death an end" (Repaci, 1932: 340). Literature is capable, far better than law, of explaining in a few words the essence of a question and, often, of suggesting, in a shrewd and seductive manner, its most persuasive resolution. The issue we wish to address is that of the "end of life", of the freedom to choose when and how to die, particularly if those who wish to make such a choice are affected by serious, painful and, often, incurable pathologies. The solution to the many ethical and legal issues related to these situations, in our view, starts from the following question: do "one's own good" and "one's own evil" have an objective and absolute nature, or are they to be left to the subjective and relative assessment of the individual? Répaci, with a secular approach, suggested that what for some or for the majority may be something evil, for others may be seen as something good, and vice versa. If, on the other hand, such choices were objectively rational and absolute options, who should make them instead of the individual? The state? If so, by what legal means would it be legitimised to impose or induce the individual towards such choices? In these cases, in conclusion, can the State legitimately use criminal sanction?

The many questions we have posed find some theoretical answers, not uncontroversial, in the debate that has developed around legal paternalism, that idea according to which the State could use force, against the will of an adult individual, even if his choices are free and rational, in order to protect an interest qualified as the good of the individual himself (Alemany, 2006: 343; Dworkin, 1971: 20; Diciotti, 1986: 557; Kleinig, 1983: 3). The original foundation of this conception can be found in the influence that religious dogmas had on pre-Enlightenment criminal law, with an overlap between the idea of crime and the idea of sin (Schüneman, 2013: 312). In Christian doctrine, no different "truths" were allowed, but only the one dictated by the "creed", and any contrary opinion was denounced as erroneous, capable of giving rise not only to sin, but also to the most serious crime, that of lese majesty divine (Jacobucci, 2005: 179). Saint Augustine considered the "freedom to make mistakes" the worst death of the soul, affirming, instead, that one of the forms of Christian freedom was that from error,

that is, the freedom to be subject to the truth through the gift of faith (Trapè, 1990: 82).

The effort to overcome these theocratic ideas, towards the secularisation of the state, began with secular naturalism, for example Grotius' (Moccia, 1979: 61), and the concept of social harm as the basis of crime, an idea later reaffirmed by the Enlightenment, such as Beccaria and Helvétius, in their further modernising efforts (Beccaria, 1764: 46; Helvétius, 1758: 170). This reflects the teleological character of a certain utilitarian perspective, harm being considered the only justifying criterion for punishment, to the exclusion of the formalistic perspective based on mere disobedience, i.e. on the mere violation of a rule. These thinkers regarded the social contract and the autonomy of the individual as the deontological foundations of criminal law (Schüneman, 2013: 315). Man's freedom was considered the most precious good and included the possibility of disposing of oneself in the way that best suited one's own happiness, subject to respect for the rights of others (Radzinowicz, 1968: 6).

The principles of the Enlightenment constituted the manifesto of the liberal approach, which found development in Anglo-Saxon theorisations. Mill's is well known, according to which the only justification for limiting an individual's freedom of action is to avoid harm to others. The good, physical or moral, of the individual acting is not sufficient justification. One cannot compel him to do or not to do something because it is better for him, because it will make him happier, because, in the opinion of others, it is expedient or even right. [...] Coercion [...] is no longer admissible as a means of doing good to men, and is justifiable only for the safety of others.

In addition to the argument of theological origin, others have been devised in favour of paternalism (Diciotti, 1986: 76). For example, moral perfectionism, which can transcend into a true legal moralism, according to which the state has the task of guiding by persuasion or, if necessary, by force, towards an ideal moral excellence, thus prohibiting even actions deemed morally unacceptable even if they only cause harm to oneself, when this is incompatible with the cultivation of certain virtues (Stephen, 1874: 7; Devlin, 1959: 11; Häyry, 1991: 202; Danesi, 2004: 589). Again, the utilitarian argument has been used in its holistic version, according to which the individual is an inseparable part of society

and, once he or she creates relationships with other individuals, these relationships can no longer be legitimately severed, without causing harm, precisely to others, to the community (Mill, 1997: 92; Padovani, Stortoni, 2006: 51; Dahm, 1938: 225; Schaffstein, 1935: 108).

In the Anglo-American debate of the second half of the twentieth century, on the other hand, ideas against moralism and legal paternalism seem to have prevailed, embodied by the *harm principle* - in some respects comparable to the principle of offensiveness in continental Europe (Fiandaca, Francolini, 2008; Cadoppi, 2008: 83; Francolini, 2008: 282; Micheletti, 2011: 275) - focused on the possibility of sanctioning only as a consequence of harm to others and not also for harm to oneself (Donini, 2010: 41). Basic on this point is Feinberg's refined theoretical construction, which is based on self-determination as a fundamental right, as a value in itself, regardless of whether choices are advantageous, good or bad, according to parameters selected by others or by the community (Feinberg, 1984: 115). Hence the opposition to paternalism, both in its direct form, i.e. when the sanctioning claim is made to counteract actions that affect only oneself; and in its indirect form, i.e. when the situation involves two or more persons, in which one or more subjects perform the action towards the other, with his or her approval or desire, according to the maxim *volenti non fit iniuria* (Feinberg, 1984: 11).

True paternalism, on the other hand, is the one defined as *hard*, i.e. limiting the self-determination of an individual, who is adult, capable and adequately able to take decisions freely; *soft* paternalism, on the other hand, i.e. aimed at limiting self-damaging choices that are not fully or actually voluntary, is not true paternalism (Feinberg, 1984: 12). In the latter case, it is still an anti-paternalistic model, which can be defined as moderate (Feinberg, 1984: 15-16).

Without being able to fully analyse here the various requirements of voluntariness of choice outlined by Feinberg, it can, however, be said that moderate anti-paternalism does not allow the state to use force against the will of an adult and capable individual in order to prevent him or her from causing what is considered to be of harm to themselves, if their will has been formed rationally, is based on knowledge of the relevant facts, and is stable over time and is sufficiently free from compulsion or pressure (Feinberg, 1983: 104). If consent is not

flawed in these terms, the individual's self-determination cannot be restricted if it does not cause harm to others (Maniaci, 2011: 134).

By reasoning in this way, it emerges that even antipaternalism, the moderate kind, admits the possibility of syndicating certain choices with effects only on oneself, on the basis of an ideal paradigm of rationality, and allows, in cases of indirect paternalism, the possibility of sanctioning those who act to the detriment of others on the basis of irrational consent, of a fallacious will. The fundamental problem of moderate anti-paternalism is that of precisely circumscribing the hypotheses in which the state is legitimised to restrict the choices of apparently consenting, rational and competent adults; that of adequately describing an ideal-typical concept of rationality and competence (Arneson, 2005: 275). The considerable difficulties inherent in this, however, on the one hand, do not in themselves permit the denial of the possibility that apparently rational and competent adults have a "flawed" will; on the other, of admitting that any choice made by an allegedly incapable individual is an expression of his or her full, intimate, conscious, free will. The conditioning that each individual receives from the outside, such as cultural and social inductions, as well as his or her deliberative deficiencies due to cognitive limitations or lack of information, make it difficult to deny that there are situations in which individuals, adults and presumptively capable of intending and willing, make choices that, in the absence of these external influences or cognitive deficiencies, they would probably not have made (Hodson, 1983: 43; Micheletti: 2011: 284).

The issue, therefore, lies in the difficulty of discerning choices that are the result of an authentic and full will from those arising from a fallacious, inauthentic intention, since the actual reasons for human conduct remain largely inscrutable (Moccia, 1992: 87; Di Giovine, 2013: 626). On the other hand, in the face of this elusiveness, i.e. in the face of doubt as to whether the will reputed to be self-inflicted is truly genuine, legitimising the penal instrument, with absolute commands or prohibitions, in order to protect what the State considers to be the good of the individual or what should be his authentic rational will, would mean, on the one hand, forcibly imposing a behavioural model in defiance of the freedom of self-determination and, on the other, to assert an objective and universal idea of "good" that is incompatible with a pluralist and secular order.

This does not necessarily mean sharing the idea of classical liberalism, according to which the fundamental reason for individual autonomy is to be found in its instrumentality with respect to the full development and well-being of the person, because reasoning in this way would end up denying that some human behaviours - as will be better explained later - are not always rationally marked by the well-being of the individual who performs them, being instead conditioned by cognitive limitations or external factors (Ghini, 2010, 157). However, admitting the existence of such influences is not the same as denying the inescapable value of individual autonomy, which, instead, can find its justification in the "principle of reciprocity", i.e. in the respect and mutual recognition of the dignity of others as a presupposition of human relations, logically preceding and founding the democratic principle itself (Pulitanò, 2011: 499; Cadoppi, 2011: 228-229). If the ultimate reasons for choices remain unfathomable and if, as a consequence, it is often impossible to understand with certainty whether these choices are the fruit of an authentic will, the value of self-determination must nevertheless be reaffirmed as the ethical, even before the juridical, presupposition of civil coexistence, in the sense that freedom of will must be assumed in others so that others may recognise it in ourselves (Küng, 2010: 92, 227).

Moreover, this ethical need to recognise the freedom of choice, coupled with the acknowledgement of the conditioning that can "vitiate" the decisions of individuals, does not prevent the provision of regulatory instruments - as will be seen below - aimed at ensuring that the self-destructive will is as authentic as possible.

2. The liberal-solidaristic system designed by the Italian Constitution

Remaining within the framework of the classic anti-paternalist construction, which tends to be restrictive of punishability, it can be said that this belongs to the theoretical empyrean and is based on principles addressed to an "ideal" legislator (Feinberg, 1984: 4). In order to attempt to understand how much of this ideality is reflected in a legal system, it is necessary to analyse whether these principles are reflected in positive norms and, first and foremost, in constitutional norms representing the project of a state, the idea of a society of a country.

As far as the Italian Constitution is concerned, there are several norms that interest us. On the one hand, the primacy of the person and his fundamental rights, among which the moral freedom of self-determination stands out, combined with the inviolability of personal freedom enshrined in Article 13, with the right to health *under* Article 32, and the related prohibition of imposing health treatments except in cases provided for by law with respect for the human person emerges there. On the other hand, the typical principles of a secular and pluralist State are evident: the equal dignity of citizens regardless of their different conditions of sex, race, language, religion, political opinions and other personal or social nature (Art. 3, para. 1); religious freedoms (Arts. 7, 8, 18 and 19); freedom to manifest thought (Art. 21) (Romano, 1981: 477; Moccia, 1990: 863; Fiandaca, 1991: 165; Mantovani, 1994: 519; Dolcini, 2009: 1017; Canestrari, 2012: 8; Cavaliere, 2013: 424). Secularism, understood as the protection of pluralism, in Italy therefore represents an inspiring principle of constitutionally oriented criminal legislation, which imposes on the State a neutral position with respect to a certain morality or religion, even in reference to choices considered self-damaging (Rawls, 1994: 168; Canestrari, Cornacchia, 2007: 225).

In this perspective, the liberal and anti-dogmatic matrix of the Italian Constitution is clear, in which there is no room for a presumption of absolute truth typical of the totalitarian monopoly. In the words of Einaudi, an eminent Italian constitution-maker, it can be said that the method of freedom "recognises from the outset the power to pour into error" (Einaudi, 1959: 60). Pluralism, considered a meta-value (Zagrebelsky, 1992: 11), if it does not imply acquiescence to any assertion, it does, however, start from the idea that no one is the repository of the only truth. The pluralist "compass" in a personalist key, represented by the Italian Constitution, outlines an open system that, therefore, eschews a tyranny of someone's values over others (Zagrebelsky, 1988: 26). Pluralism, being a meta-value, does not in itself allow for a stable balance between contradictory principles, which instead interact. Their composition must be found by the legislator within, however, the limit of the Constitution, which from this point of view lays down "the inalienable points of any combination" (Zagrebelsky, 1992: 127).

In the Italian Constitution, therefore, the liberal principle must be harmonised with the solidaristic principle expressed in Articles 2 and 3, aimed at the fulfilment of duties of solidarity and the removal of obstacles of an economic and

social nature that effectively limit the freedom and equality of citizens (Barbera, 1975: 50). This is the combination of principles in the light of which one must assess whether the legislator is justified in enacting paternalistic criminal legislation. The axiological "cardinal points", therefore, are: person, liberty, solidarity and equality; references that are not classical liberal, but which are enriched with an egalitarian solidaristic component, compatible with the concept of moderate anti-paternalism, a component that, on the other hand, does not seem to offer the room for forms of true paternalism. Solidarity and the removal of obstacles mean recognising everyone's right to pursue "their own good", even through the help offered by the state, freely accepted, but do not represent an obligation to accept the "true good" according to others, through the imposition of supposed help (Cavaliere, 2013: 425, 426).

The liberal-solidaristic perspective assumed by the Italian Constitution is useful, as we have anticipated, to legitimise moderate anti-paternalism and, in particular, those norms aimed at regulating situations in which it appears consistent with constitutional principles to "contain", up to a certain point, choices considered self-damaging, even at the "end of life", of an adult and capable individual, when, for example, these choices may be the result of cognitive limitations or errors. The same perspective, then, can also be useful in assessing the legitimacy of rules that impose certain conduct on third parties who come into contact with individuals who have the will to take their own life, because, for example, they are seriously ill.

3. Are we really free to make rational choices? Possible options of the legislator to avoid the self-damaging"mistakes" of the individual

The philosophical ideal of autonomy underpinning anti-paternalism may come into friction with the actual workings of the human mind, according to the current knowledge of psychology and neuroscience in general. Without being able to go into the details of these theories, it is possible, however, to recall that, according to some studies in cognitive psychology, there are two systems of thought in every person: one, automatic and intuitive, which governs rapid or

unconscious reactions; the other, rational and reflexive, which superintends conscious, controlled, deductive behaviour (Kahneman, Tversky, 1979: 47). The competition between these two systems, in combination with heuristics ("mental shortcuts", i.e. simplified psychic elaborations aimed at achieving the goal in a short time and with minimal cognitive effort), lead to characteristic errors (*biases*), which prevent the best choices from being made in the individual's best interest. This tends to show that a model based on the notion of a rational agent is inadequate to describe real decision-making behaviour (Kahneman, Tversky, 1982: 3; Bonini, 2001: 391; Rossano, 2012: 85). If there are innate cognitive limits to the rationality of decisions, it can be assumed that those norms that tend to "influence" the choices of individuals towards conducts deemed not self-defeating are not paternalistic, or are only moderately so; always, however, preserving the ultimate freedom to choose, i.e. without coercion, but ensuring that, eventually, the individual himself is convinced, based on an *a posteriori* judgement, that this is indeed his good (Thaler, Sunstein, 2008: 5; Glaeser, 2006: 133). The moderation of this anti-paternalism lies in recognising the state, only, the possibility of influencing the individual. An attempt is made to steer his choice towards what is considered ideal, without, however, compromising his autonomy at the moment of the final decision, which will always be up to the individual, albeit after certain procedures have been carried out to warn him of the possible consequences of his conduct.

Cognitive psychology and neuroscience, therefore, have demonstrated the abstractness, if not the fictitiousness, of the perfect rationality of individuals and the tendency to maximise utility as the objective of every human choice. The recognition of factors, intrinsic or extrinsic to man, as sources of conditioning the "process" of free self-determination, therefore seems to constitutionally legitimise, in a solidaristic perspective, those norms aimed at removing the obstacles represented, for example, by those morbid or social factors, by those educational deficiencies, by those cognitive limits of rationality, which sometimes prevent the individual - although capable of understanding and willing - from making choices in his own interest; choices that can give rise to decisions that, without these "obstacles", would perhaps not be made. With reference to "end-of-life" choices made by individuals suffering from serious pathologies, it is evident, on the one hand, that only those who possess the appropriate mental faculties can

aspire to ask to be helped to die; on the other hand, it emerges that these cognitive faculties may in some cases be conditioned, weakened, if not actually compromised, by the disease itself or by the conditions of psychological prostration due to suffering, including moral suffering, borne perhaps for long years. Morbid factors, therefore, that could be detrimental to the presumed rationality of the decision and also to the "authenticity" of the freedom of the will, even though they affect a subject considered capable of understanding and wanting.

The discourse opens, therefore, towards the possible regulation options that the legislator can adopt in the presence of possible cognitive errors or choices that could be irrational (Rangone, 2012: 151; Rubaltelli, 2006: 57). A first option is that of "command-control", which prohibits certain activities, often through the use of criminal sanctions, also to avoid the possible errors of the individual, who makes a self-defeating choice. As a form of indirect paternalism (see § 1), think of Article 580 of the Italian criminal code which, as we shall see more fully below, punishes with imprisonment from five to twelve years anyone who facilitates the suicide of others in any way, even when the decision appears to be fully free and unconditional.

Leaving other regulatory options that are ill-suited to "end-of-life" choices aside - such as *empowerment* tools[1] - the other option is that of *nudge strategies*, aimed at avoiding mistakes by *softly* directing choices in the direction the legislator believes desirable, without prejudice to the final freedom of choice. These may be predefined choices, made by *fedault* by the public authorities, but admitting an express choice to the contrary by the individual (Thaler, Sunstein, 2008; Eidenmüller, 2011: 814). The problems associated with a regulation inspired by this moderate anti-paternalism or libertarian paternalism, such as the "gentle push", may be related, for instance, to the possibility that the legislator's choices, aimed at avoiding cognitive errors of individuals, are, in turn, the result of opposing cognitive errors, or are, in fact, the result of ideological, moral or

[1] These are instruments designed to educate recipients to cope with errors, along the lines of the warnings on cigarette packets or the calories in food products, or the prospectuses for financial products. To date, the results of these instruments are uncertain, both because this type of information often fails to overcome the character attitudes of individuals, and because one would have to get to the bottom of the accuracy of the information.

religious choices, camouflaged by the supposed "good" or interest of the individual. In the latter case - as could also occur with regard to end-of-life choices - the alleged "good" of the individual is instrumentalised, when the real reasons for the legislative choice are other, incompatible with a secular and pluralist state such as the one designed by the Italian Constitution (see § 2).

Moreover, the risk of excessive and unjustified regulations, which could constitute an exaggerated hindrance, e.g. procedural, to individuals making certain choices, should not be underestimated. If the legislator sets up a cumbersome bureaucratic apparatus to be overcome in order to arrive at the choice advised against by the State, this constitutes a less serious, but nevertheless perceptible, form of restriction of freedom. The proceduralisation of the choice, moreover, should be all the more serious, laborious and thorough, the more serious the potential damage and the more concrete the possibility of its realisation. It is obvious, therefore, that in the case of "end-of-life" choices, given what is at stake, complex and articulated procedures aimed at ascertaining the genuineness of the suicidal will are legitimate.

In recent decades - especially in civil law, consumer protection law, and economic and financial law - libertarian paternalism has received a number of endorsements and has repeatedly been suggested *de lege ferenda*. This seems, therefore, to be a line of evolution in law, which could also concern criminal law, while taking the greater moral implications and symbolism that criminal prohibition traditionally entails into account (Mill, 1993: 1227). An example, in some respects, might be the laws that in some countries, foremost among them Holland and Belgium, allow active euthanasia under certain procedural conditions aimed at guaranteeing the full autonomy, weighting and information of the individual, seeking to avert forms of "fallacious will" (Magro, 2001: 229; Canestrari, Ciambalo, Pappalardo, 2003: 133).

4. Procedural exculpatory measures as regulation of "end-of-life" choices

The example now given, from a penal point of view, leads the discourse towards the so-called procedural exculpatory measures, which generally consist of administrative *procedures* aimed at ascertaining in advance the certainty of certain assumptions of the lawfulness of the act (Donini, 2004: 28; Di Giovine, 2009: 178: Sessa, 2018: *passim*; Sessa, 2024: 168). These could also include the freedom of the self-inflicted choice, informed, conscious, considered in the light of a series of explanations. The procedural scapegoat, in itself, tends towards a neutrality of the state with respect to the ethical value of the choice, limiting itself to controlling the actual freedom of the choice itself (Donini, 2004: 29-30). It cannot be ruled out, moreover, that the administrative procedures underlying these exculpatory measures may also be used to guide the individual, with a "gentle push", towards a certain (non-self-damaging) choice deemed preferable by the legislator. On the other hand, if the objective is to overcome possible cognitive errors, the intentions of the State and the individual may in some ways eventually coincide, since the legislator will indeed have the task of directing the choice, but towards that (non-self-damaging) option which, downstream of the information procedure, may turn out to be the preferable one according to the individual's own *a posteriori* judgement. It is not, therefore, a matter of a purely "precautionary" paternalism (aimed, by means of absolute obligations or prohibitions, at preventing an event that, according to the state, the individual clearly has an interest in avoiding), but rather of a "tutelary" character, i.e. aimed at guaranteeing the effectiveness of the self-damaging will, where the "precautionary" matrix cannot go beyond the "gentle push" (Husak, 2008: 69). The model proposed here, therefore, may fall within the so-called libertarian paternalism in the "tutelary" sense, aimed at suggesting the adoption of conducts capable of reducing the self-exposure to certain risks or damages, such as death to the individual. Conducts that, if affected by cognitive errors, somehow fall outside the realm of authentic will, to fall rather into a kind of self-damaging culpable attitude (Capoppi, 2008: 107).

In a liberal-solidaristic system such as the one designed by the Italian Constitution, therefore, state intervention should be limited, even through proceduralisation, to *soft* influence practices that do not compromise the right to self-

determination, aimed, in particular, at overcoming possible cognitive determinant typical *biases* (Trout, 2005: 393). State interference by means of criminal sanction, on the other hand, should not be aimed at modifying individual preferences in conflict with supposedly higher values (moral, ideological, religious, etc.) or with a concept of "proper good" defined by others. Such strategies, of procedur-alised "soft push", are not only legitimate, but, if aimed at overcoming cognitive limitations deriving from morbid factors or psychological prostration in subjects in any case considered capable of understanding and willing, they are dutiful in a solidaristic system, insofar as they are aimed at removing obstacles that effectively limit the freedom and equality of citizens. Effective freedom to make decisions, in fact, cannot disregard the possibility of access to the best range of relevant information (Risicato, 2024: 139). With reference to end-of-life choices, therefore, it seems obvious that a prerequisite for an informed choice is a will fully informed by precise communication of the diagnosis and prognosis of the illness, as well as by the presentation of possible alternatives, such as palliative care and pain therapy.

5. The codictic discipline and Italian constitutional jurisprudence on "end of life" choices

So far we have reconstructed the theoretical framework within which a legitimate regulation of end-of-life choices should be inscribed in a liberal-solidarity system such as the one designed by the Italian Constitution of 1948. The Italian penal code, on the other hand, dates back to 1930, to the fascist era, with an ideological approach profoundly different from the one later adopted by the Constitution. This discrepancy is also clearly perceived with regard to "end of life" choices. Articles 579 (murder of the consenting person) and 580 (aiding suicide) of the Italian penal code, in fact, seem to show the unavailability of the good "life" on the part of its holder, even when the choice is the result of a fully free, unconditional and informed will.

We believe it is appropriate at this point to describe the two offences more fully. Consent killing, provided for in Article 579 of the Criminal Code, is nothing more than a "special" offence with respect to the general offence provided for in Article 575 of the Criminal Code on homicide, inserted into the legal

system to punish euthanasia as well. The provision states that "anyone who causes the death of a man, with his consent, shall be punished by imprisonment of from six to fifteen years. The aggravating circumstances indicated in Article 61 do not apply. The provisions relating to murder shall apply if the act is committed: 1. against a person under eighteen years of age; 2. against a person who is insane, or who is in a state of mental deficiency, due to another infirmity or due to the abuse of alcoholic or narcotic substances; 3. against a person whose consent has been extorted by the offender by violence, threat or suggestion, or who has been obtained by deception". The law considers murder of the consenting person as a separate offence, even though it is essentially a common murder, mitigated by the consent given by the victim. The specialising element with respect to common homicide, in fact, is precisely the victim's consent, which, on the one hand, diminishes the criminal disvalue of the conduct; on the other hand, it does not fall within the cause of justification of the consent of the person entitled under Article 50 of the Criminal Code, since its object is a right, life, considered absolutely inalienable by the 1930 legislature. It was precisely Article 579 of the criminal code that in 2021 was the subject of a referendum proposal, for its partial repeal, on the following question: "Do you want Article 579 of the criminal code (homicide of the consenting person) approved by Royal Decree No. 1398 of 19 October 1930, paragraph 1, limited to the following words 'imprisonment from six to fifteen years'"; paragraph 2 in its entirety; paragraph 3 limited to the following words "shall apply"?"[2]. The text of Article 579 of the Criminal Code, which, in the event of the question being admitted and the referendum being accepted, would have been as follows: "whoever causes the death of a man, with his consent, shall be punished in accordance with the provisions relating to murder if the act is committed: 1. against a person under eighteen years of age; 2. against a person who is insane, or who is in a state of mental deficiency, due to another

[2] The abrogative referendum is provided for in Article 75 of the Italian Constitution and states that 500,000 citizens or 5 regional councils can propose to the entire electoral body *"the total or partial abrogation of a law or an act having the force of law",* meaning a law in the formal sense, i.e. approved by parliament according to the ordinary procedure. After the referendum is proposed, the Constitutional Court decides on admissibility. All citizens voting for the election of parliament are entitled to participate in the referendum, and for the referendum to be valid, a *quorum* must be reached, i.e. the majority of those entitled to vote must take part in the vote; for the rule subject to the referendum to be repealed, a majority of the votes validly cast must be reached.

infirmity or due to the abuse of alcoholic or narcotic substances; 3. against a person whose consent has been extorted by the perpetrator by violence, threat or suggestion, or who has been obtained by deception". In the perspective of the promoters of the referendum, consent was to take on a new value: from an element that, by qualifying the conduct, mitigates the punitive treatment of [however subsisting] homicide, to a presupposition that excludes the conduct from the area of the criminally relevant, subject to exceptions built on the condition of the - residual - offended persons (Padovani, 2021: 7). That given by the Italian Constitutional Court on the referendum proposal, however, was a judgement of (in) admissibility, which we will discuss shortly.

The offence envisaged, on the other hand, by Article 580 of the Criminal Code (instigation or aiding and abetting suicide) provides that "whoever determines others to commit suicide or encourages others to commit suicide, or in any way facilitates their suicide, shall be punished, if suicide occurs, with imprisonment from five to twelve years. If the suicide does not take place, he shall be punished by imprisonment of from one to five years, provided that serious or very serious bodily harm results from the suicide attempt. The penalties shall be increased if the person instigated or aroused or aided is in one of the conditions indicated in numbers 1 and 2 of the previous Article. However, if the aforementioned person is under fourteen years of age or in any case lacks the capacity of understanding or will, the provisions relating to murder shall apply". Putting the analysis of the conduct of instigation aside and focusing on that of aiding suicide, we can say that the conduct consists in voluntarily facilitating the execution of another person's suicide, committed or at least attempted with serious or very serious bodily harm, through acts of aid rendered to the suicide, for example by providing the means to carry out the suicide, creating favourable situations, giving suitable instructions for the execution, and so on. There must be no direct cooperation in the execution, otherwise the conduct falls within the scope of the crime of murder of a consenting person.

Both norms under consideration protect the good of life, in the view of the historical legislator even against the will of its holder. In fact, in the ideological vision espoused by the 1930 code - imbued with authoritarianism mixed with Catholicism - life was almost a "duty" rather than a "right". Although attempted suicide is not punished in Italy, the reasons for this, reading the preparatory works

of the code, are to be found not in the freedom to take one's own life without risking criminal consequences should one fail, but in the - albeit correct - reason that the threat of punishment would have no deterrent effect on a subject distressed to the point of committing suicide. On the contrary, it was pointed out in the preparatory work that the threat of punishment would have the opposite effect, i.e. it would induce one to prepare well and execute suicide effectively, precisely to avoid the penalty in the event of failure. The "duty" to live is a postulate proper to an ethical and totalitarian state, such as the fascist state, because the individual in that ideological context was a "cog" of the state, he was useful to it in order to work, to produce, to fight, to procreate, etc. If living was a kind of "duty", life then could not be freely disposed of by its owner, because it "belonged" [also] to the state.

The perspective, of course, has profoundly changed with the entry into force of the Italian Constitution, marked by the aforementioned liberal and solidaristic principles that have placed the person at the centre and no longer the State and that have recognised a series of rights and freedoms that certainly militate towards a perspective that has challenged the full legitimacy of the previously mentioned cases (Articles 579 and 580 of the Criminal Code), especially with reference to the much debated issue of euthanasia practices. It is sufficient to bear Article 32 of the Constitution in mind, which, if, on the one hand, protects health as a fundamental right of the individual (even before being an interest of the community), on the other prevents anyone from being obliged to undergo a specific medical treatment (except by provision of law). In short, therefore, it can be said that health and even life, for the Italian Constitution, are a fundamental right, but not a duty, with all that may follow from this in terms of criminal law.

The Italian Constitutional Court (sent. no. 242 /2019, Cappato case), in fact, has declared the constitutional illegitimacy of Article 580 of the Criminal Code (aid to suicide), in the part in which it does not exclude the punishability of a person who, in the manner provided for by Articles 1 and 2 of Law no. 219/2017 (rules on informed consent and advance treatment dispositions), facilitates the execution of the suicide intention - autonomously and freely formed - of a person kept alive by life-support treatments and suffering from an irreversible pathology, source of physical or psychological suffering that he considers intolerable, but

fully capable of making free and conscious decisions, provided that these conditions and the modalities of execution have been verified by a public structure of the national health service, after obtaining the opinion of the territorially competent ethics committee.

Today, therefore, Law No. 219/2017 gives relevance to the expressed will of the patient to refuse health treatment necessary for his or her survival (Canestrari, 2023: 35). The hypothesis in which a person fully capable of self-determination expresses the refusal of a medical treatment, despite being informed by the doctor of the consequences, thus of the danger or certainty of death or serious damage to health, has generated a lively debate in doctrine and jurisprudence, through which, even before Law No. 219/2017, the right was affirmed at least to "not to treat oneself" and "to let oneself die", a concept, moreover, different from a true "right to die".

Italian constitutional jurisprudence has had the opportunity to express itself again, very recently, on the same issues, reinforcing, in substance, what had previously been affirmed, but specifying that ruling No. 242/2019 did not recognise a general right to end one's life but, in light of Law No. 219/2017, affirmed the right to refuse life-sustaining treatment, making even less invasive procedures included among such treatments (Cort. cost., 18 July 2024, No. 135). In the latter ruling, the Court reiterated that the right to life is the subject of express protection by all international human rights charters, which mention this right first over any other (Art. 2 of the ECHR; Art. 6 of the International Covenant on Civil and Political Rights), or immediately after the proclamation of human dignity (Art. 2 of the Charter of Fundamental Rights of the European Union). From these provisions, according to the Italian Court, flow, therefore, obligations that are also binding on the national system, through Article 117, para. 1, of the Constitution (as well as, with regard to the CFREU, Article 11 of the Constitution). From the recognition of the right to life "derives, finally, the corresponding duty of the legal system to ensure its protection through the law (as well as, more generally, through the action of all public powers). This duty - laid down in explicit terms by Article 2(1) of the ECHR and Article 6(1) of the ICCPR - has recently been affirmed by this Court, with particular clarity, precisely with reference to the issue of the end of life: [d]art. 2 of the Constitution. - no differently than Article 2

ECHR - descends the State's duty to protect the life of every individual" (Order No. 207 of 24 October 2018).

It was precisely the affirmation of the State's duty to protect human life that was at the basis of the aforementioned decision of inadmissibility of the referendum on the partial repeal of Article 579 of the Criminal Code (murder of the consenting person), since, by making it lawful to murder by giving valid consent, it would have deprived life of the minimum protection required by the Constitution (Sentence 2 March 2022, no. 50; Adamo, 2024: 21).

The Constitutional Court, indeed, should have answered the question "is the referendum admissible?", but it answered a different question, namely "is the legislation resulting from the referendum admissible?"; a question that - it is evident - helped to declare the question inadmissible (Penasa, 2022: 1). The last lines of the judgment state that the referendum is inadmissible "due to the constitutionally necessary nature of the legislation that is the subject of the question", thus considering that the *ratio of* Article 579 of the criminal code is the protection of the supreme value of life, endangered by an even partial abrogation of the code provision. However, the provision in question does not appear to have constitutionally binding content and this can be deduced from the position taken by the Constitutional Court itself in resolving the "Cappato case" referred to above. In that pronouncement it limited itself to stating that "the legislator cannot be deemed to be prevented" from incriminating "conduct that paves the way for suicidal choices" (Ord., 24 October 2018, no. 207) and to exclude that the crime of facilitating suicide "can be deemed per se to be in conflict with the Constitution" (Sent., 24 September 2019, no. 242). It follows that, according to the Italian Court, if, on the one hand, our Constitution does not prohibit the incrimination of the homicide of the consenting person, as well as that of aiding and abetting suicide, on the other hand, it does not even impose it, lacking precisely - as we shall see better in the next paragraph - constitutional obligations of criminalisation (Bricola, 1973: 7; Paonessa, 2009: 65).

In Judgment No. 50/2022, on the other hand, the Constitutional Court saw in Article 579 of the Criminal Code a kind of constitutionally necessary provision. If, however, the ways and forms of the implementation of constitutional protection are left to the discretion of the legislature, the laws "although consti-

tutionally necessary, are not of binding content" (Constitutional Court, Judgement No. 49 of 13 January 2000). The Constitutional Court, however, has held - we read again in Judgment no. 50/2022, § 4 - that "disciplines such as the one under consideration may be amended or replaced by the legislature itself with other disciplines, but they cannot be purely and simply repealed, because the minimum level of protection required by the constitutional references to which they are attached would not thereby be preserved". Also from this standpoint, however, the inadmissibility of the referendum question pronounced by the Constitutional Court does not seem to be well understood, because if a minimum level of protection of life is invoked, the partial abrogation requested with the referendum would not have affected those hypotheses in which the invalidity of consent requires the application of the general case of wilful homicide *pursuant to* Article 575 of the criminal code. The admission of the question and the popular approval of the referendum, therefore, would have left unaltered the criminal protection of life in those cases in which the consent is vitiated by certain "fragilities" of the holder of the property: minors under eighteen years of age, the mentally ill or persons in a condition of mental deficiency due to another infirmity or due to the abuse of alcoholic or narcotic substances, persons whose consent has been extorted with violence, threats or suggestion, or stolen with deception. The Constitutional Court's pronouncement, however, did not allow the Italians to express their opinion on an issue that is as delicate as it is ethically complex, that of aiding suicide by means of euthanasia practices, indirectly affirming the mandatory nature of the (penal) protection of life even in those cases in which the holder's consent to death appears to be unimpaired by psychic deficiency or other infirmity or frailty.

The referendum question was also "rejected" by the Constitutional Court because it would have pushed towards a "generalised licence to kill" (Luccioli, 2022: 5). The scenario foreshadowed by the Court was that of a "race to mass suicide at the hands of others", but it was a vision distorted "by the perspective chosen by the constitutional judges to look at Article 579 of the criminal code as an abstract provision atomised from the legal context" (Pugiotto, 2022: 87). According to the Court, the murder of the consenting person would have become possible "without any limiting reference" and, therefore, the approval of the referendum proposal would have made "the murder of those who validly consented

to it indiscriminately lawful", with the legitimisation of "self-destructive choices made by the holder of the right, which may turn out, however, not to have been adequately thought out". If, however, we make a reconnaissance of the jurisprudence on Article 579 of the Criminal Code, it emerges that the positive ascertainment of a valid consent has never found any confirmation in practice, since the provision of Article 579, para. 3 of the Criminal Code has been understood in a rigorous manner, postulating proof of absolute certainty, due to the peculiar relevance of the right to life with respect to the aggression of third parties (Padovani, 20220: 27). Then, the sphere in which the consent given for one's own death could have exculpated the homicidal action would have been exclusively the one within what is prescribed by the aforementioned Law No. 219/2017 on the subject of free and informed consent, since the expression "with his consent" would have been saved by the partial repeal of Article 579 of the Criminal Code.

Another argument for which the Constitutional Court, in its ruling no. 50/2022, deemed it necessary to reject the referendum proposal is to be found in the qualification of life as a "value that stands at the apex". A value defined by the Court as "the first of man's inviolable rights, as a prerequisite for the exercise of all others'. Those on the value of life and, in particular, on the "end of life", however, are all questions on which generalised agreement is indeed difficult. Can there be unanimity in answering the question of whether and how the quality of life is measured or to what extent it is worth living? Or, whether death is the end or the end of life? (Pugiotto, 2022: 89). Therefore, in a liberal democracy there should not be what in some cases seems to be a sort of imposition to live, leaving more room for individual free choice, around which, however, there must be adequate safeguards and procedures to verify the genuineness of the will. The referendum went in this direction: decriminalising in the sense of allowing and not forcing (Pugiotto, 2022: 89).

6. The legal asset "life" as a limit to the punitive power of a secular and pluralist State

From what we have written, what seems to emerge is that the Italian Court wanted to affirm, albeit implicitly, a sort of constitutional obligation on the part of the legislature to protect (criminal) life, even against those more modest forms of aggression, characteristic of the free choices to end one's existence prematurely in the event of serious pathologies that make, in the view of the holder of the asset, life itself no longer worthy of being continued.

Such a conclusion, however, in our opinion seems to stand in friction with the theory that legitimises the punitive intervention of the state, at least when this supposed obligation to protect is necessarily understood through criminal sanction. As is well known and as we have already anticipated, in fact, in order to distinguish crime from sin and, therefore, criminal law from morality, material behaviour is required - mere thought not being sufficient - that offends a graspable and well-determined legal good. Although in Italy the principle of offensiveness is not expressly constitutionalised, it can nevertheless be inferred from our Fundamental Charter, in particular in Article 13 (inviolability of personal liberty), Article 25(2) (principle of legality), Article 27(1) (personality of criminal responsibility) and Article 27(3) (re-educative function of punishment); read systematically, in connection with the principles of freedom of expression (Article 21), ideological tolerance and respect for the human person. Punishment limits and compromises the fundamental freedoms of the individual and, therefore, can only be legitimised if it is the consequence of a fact that is indeed material, but also offensive (Moccia, 1992: 109). The cornerstones of the principle of offensiveness are to be found in these constitutional norms because the *extrema ratio* character of criminal law is based on them, which reduces punitive intervention only to facts that are offensive to graspable legal goods (Caterini, 2004: *passim*; Manes, 2005: *passim*). Reasoning differently, criminal liability could be based on the mere violation of an obligation, on simple disobedience or transgression of a legislative command, as is the case in ethical and totalitarian states. A secular and pluralist State, such as the one configured by the Italian Constitution, on the other hand, as the basis of a crime can only demand an offence against a legal good. The very concept of a legal good, moreover, is not so easy to define, but if we

want to attempt to do so, we can say that it should be an interest, a well-defined entity, really graspable and consolidated in the collective conscience, so that it can be easily recognised by the addressees of the criminal law, who will also be able to realise its offence (Jäger, 1957: 13).

Another question is the degree of importance that the good must possess in order to become a legitimate object of criminal protection. The question is this: can the legislator freely choose any good and protect it through the criminal law, or is he limited in this choice, having to restrict his options only to those goods that are most important? On the basis of the aforementioned principle of *extrema ratio*, the answer can only be in the sense of an only partial freedom of the legislator in the choice of legal goods to be protected, because he is not completely free of limits. He must restrict the choice only to the most important interests, excluding the more negligible and modest ones. This is the "critical" function of the juridical good, which allows censure to be levelled at the legislator when he prepares rules to protect modest interests that do not deserve to generate the most serious sanctioning reaction, i.e. the criminal one.

If this is the case, what is the criterion for determining which goods are most relevant? The answer is always linked to the Italian Constitution. First of all, one must take Article 13 of the Constitution, which defines personal freedom as inviolable, prohibiting any form of detention and any other restriction, except in the cases and ways provided for by law into consideration. It is clear, therefore, that personal freedom is a "good" protected in a direct and very pregnant manner by our fundamental Charter; a good that, moreover, is offended by the criminal sanction that, par excellence, consists precisely in the limitation of criminal freedom. Even on the basis of the principle of equality (Article 3 of the Constitution), which also expresses the need for proportion between the offence to the good and the sanction, it would be an exaggerated reaction to impose the criminal sanction for facts that offend secondary legal goods. The same requirement of proportionality, therefore, logically implies that, since the good compromised by the penalty is personal liberty, which has constitutional importance, the same importance must be attached to the good that the legislator wishes to protect with the criminal penalty. If this were not the case, it would legitimise the offence - through punishment - to a good at the top of the hierarchy of constitutional values (personal liberty), in order to protect another that does not have as much importance, at

least as constitutional importance. Ultimately, following this approach, the legal goods that the legislator can legitimately protect through the imposition of criminal sanctions are only those that have constitutional importance, excluding instead those that are more marginal, precisely because they do not have such importance (Bricola, 1973: 42; Angioni, 1983: *passim*; Fiandaca, 2014: 70-71).

Returning to the "end-of-life" choices and the criminal cases set out in the Italian criminal code, there is no doubt that life is a legal asset at the apex of the Italian Constitution and, as such, legitimately protectable by the legislature. Although not explicitly protected, there is no doubt that the Constitution clearly protects human life. This protection is grounded in Article 2 of the Constitution, although no explicit reference is made to the good "life" in this provision. The guarantee that the Italian Republic recognises to the inviolable rights of man necessarily implies the protection of his life. This protection is reinforced, then, by the prohibition of the death penalty enshrined in Article 27(4) of the Constitution.

The Italian Constitution, thus, acquires the role of a limit to the State's punitive power also with reference to its function as a "catalogue" of goods that the legislature can legitimately protect with criminal sanctions. It is important to clarify, however, that this character of "limit" towards the legislature, which possesses the legal good, precludes the good itself from having a function that we could define as "propulsive" of criminal law, if one were to think that once the constitutional relevance of the good had been ascertained, the legislature would somehow be obliged to provide for its criminal protection. This is not the case, because the constitutional value of the good constitutes a necessary but not sufficient condition for the legislator to threaten the criminal sanction, since the legislator himself will also have to assess whether the penalty is indispensable or whether, conversely, the protection of that good can be guaranteed with different measures, precisely on the basis of the well-known principles of *extrema ratio*, fragmentary nature, subsidiarity and deservingness of punishment that should characterise the criminal system. This was, moreover, the constant orientation of the same constitutional jurisprudence: "the possible charge to the legislature of having omitted to penalise certain conducts, in hypothesis socially reprehensible or harmful, or even unlawful from another point of view, or of having defined the incriminating cases too restrictive, leaving out such conducts, cannot, in principle, result in a censure of the constitutional legitimacy of the law, and even less

so in a request for an "addition" to the same by a ruling of this Court" (judgments n. 447/21998, no. 226/1983; no. 49/1985, no. 411/1995; orders no. 288/1996, no. 355/1997).

7. Brief concluding remarks

On the basis of these arguments, therefore, the cited jurisprudence of the Italian Constitutional Court, which declared the referendum question on Article 579 of the criminal code inadmissible, is not convincing, since it uses the good "life" not as a limit to the State's punitive power, but as a criterion in itself legitimising the criminal sanction. The choice, on the other hand, should be referred to the legislator, or to the will of the people, even through a referendum, as further criteria of criminal policy. In essence, the extreme and safe constitutional relevance of the good of life in itself is not sufficient to legitimise criminal sanction, *a fortiori* when the offence to the same good - if this is the case - has been the result of a fully free and informed choice by the holder of the good. In our opinion, in such cases there is no sort of constitutional obligation to protect the good of life by criminal law, all the more so when the punishment comes into conflict with the individual's freedom of self-determination which, as we have seen above, admits of criminal protection - through procedural exemptions - only against self-destructive intentions formed in a non-genuine manner, the result of cognitive errors or, in the words of the Constitutional Court, of "self-destructive choices made by the holder of the right [...] not adequately thought out".

The aforementioned liberal-solidaristic perspective of the Italian Constitution, in fact, is useful, as we have anticipated, to legitimise those norms aimed at regulating situations in which it appears consistent to "contain", up to a certain point, the self-damaging choices of an adult and capable individual, when, for example, these choices may be the result of cognitive limitations or errors, or of poor or inadequate pondering. In our view, the state is not legitimised to behave like a "father", but more like a kind of elder "brother" whose task is to advise, to guide, to protect, without, however, imposing absolute prohibitions guarded by criminal sanction. The State, through criminal law, is therefore only legitimised to ensure that the choice considered self-damaging is adequately meditated, rea-

soned, reflected upon, on the basis of all the best available information. The criminal sanction, therefore, should only be imposed for conduct that facilitates the suicide of others or causes the death of the consenting person, when the choice of the holder of the good "life" is not the result of this necessary pondering according to standardised procedures which, if adopted, should be exculpatory.

In conclusion, returning to the question from which we started, we agree on the subjective and relative nature of what constitutes "one's own good" and "one's own evil", which cannot be ascribed to supposedly objectively rational and absolute visions. The conviction remains that behaviour believed to be self-damaging, if not subject to coercion or undue pressure, if not vitiated by cognitive vulnerability, if the result of a well-informed and well-considered choice, must be left to the autonomy of the individual without forced interference by the State, because everyone must be allowed, consciously, to make mistakes to their own detriment, if mistakes can really be spoken of (Waldron, 1981: 21).

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

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

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

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

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

Introductory notes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court's logic was as follows.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Final Considerations

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

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

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

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

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

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

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

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

[42] https://eapcnet.eu/

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

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

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

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

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

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

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

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THE ETHICAL BASIS OF THE RIGHT TO SELF-HARM

The text analyzes the possibility of ethical justification of legal protection of the self-harm. The introduction presents a problem of a rightful exercise of the Free Will. In the next parts, different aspects of Human nature are analyzed: biological, personal, social, moral and metaphysical. Special attention is given to the understanding of interrelations and compatibility between different aspects in an effort to explain inner purpose of the Human nature seen as a whole. Moral aspect of Human nature and capacities of the Free Will are specifically analyzed. In the final part, problem of Governmental influence on the exercise of the Free Will of citizens is explained and recommendation for the proper measures in accordance with the different aspects of Human nature seen as bearer of unique purpose is given.

***Keywords**: Free Will, Self-harm, Aspects of Human nature, Ethics*

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1. Introduction

This paper should try to give some answers to the present and growing questions - Are there or not boundaries to the exercise of the Human Free Will and to what extent political and institutional measures for support of this exercise should go. This is the multilevel problem, because human nature is complex and many different aspects should be taken into consideration. First of all we will try to define different aspects of human existence giving some arguments for or against unconditional use of the Free Will. After that we will try to find to what extent different aspects influence one another trying to establish proper understanding of the relations of aspects defining dimension of Human purposiveness. Problem of purpose will be directly connected to the explanation of the capacity of the use of the Free Will. In the conclusion an answer to the question "To what extent does moral obligation to legal support of self-harm exist?" will be given.

2. Different aspects of Human nature

Anyone trying to give the definition of Human nature will face the problem of its different aspects. Humans share biology and capacity to feel with many other beings (Schmidtz 1998: 62), but composition of the body, complex mind and capacity of use of the Free Will give them some social and moral dimensions incomparable to other creatures on the Earth. This uniqueness is well observed in the complexity and wideness of different human institutions established in the effort of obtaining complete and ultimate purpose for realization of Human nature. Religion, moral, customs, science and many other phenomena are directly connected to the realization of inner Human capacities existing in its nature (Stevanović, Grozdić 2021: 72). If we want to create preconditions for understanding of Human nature we have, at the beginning, to create proper criterion for differentiation of existing aspects of that nature. In this chart different aspects of Human nature are presented with special attention to their specific role.

Chart 1 List of different aspects of Human nature

Aspect of Human nature	The specific influence on Human existence	Providing quality
Biological	Physical bodily existence	Capacity to act in space and time
Personal	Development of personal capacities	Balance of Personal characteristics, personal motives
Social	Social interaction	Harmonious community
Moral	Moral development	Intrinsic values, Purpose beyond strictly personal interests
Metaphysical	Spiritual development	Eternal community

3. Biological aspect of Human nature

Biological aspect of Human nature is basic aspect in obtaining its physical and physiological characteristics. It is well documented that some characteristics of this aspect Humans share with other specimens on Earth (Nikolić, 1968:598). This basic aspect is fundamental in establishing all other aspects of Human nature because it makes inevitable precondition for their expression. Constitution of Human body directly influences physically obtainable aims he is capable to achieve. Birth, growth, aging, physical death are directly connected to the biological aspect of Human, creating unchangeable frame for its capacity to exist in space/time continuum.

Consisting of the ability to possess a body, this aspect provides the first elements of human individuality and uniqueness, creating the starting point for the development of the Personality in the later stages of growth. Only on the base of this aspect further actions of Personal development of Free Will, social integration and spiritual purpose could be established. That means that Biological aspect could not be seen as secondary, but most basic for any use of other Human

characteristic. That means that certain conditions as illness and bodily harm directly endangering biological aspect of existence could be seen as threatening for the Man itself. Without his biological aspect Man would be unable to physically exist and act.

It is obvious that biological aspect of Human nature consists of certain physical characteristic concerning nature of the body. At the first sight it is obvious that Human body is not inert and for the purpose of maintenance of existence it constantly functions in many processes which are subconscious (as heart beating, digestion, blood flow etc.) That means that without this processes functioning correctly all other aspects of Human nature would be endangered. It is obvious that without deliberate use of Human Free Will certain aspects of Human nature directly involve inner purpose consisting in the preservation of Life (Human existence) as such. This purpose of preservation of Life in the Biological aspect of Human nature creates fundamental precondition for all other purposes of other aspects.[1] That means that from the sub-consciousness level of Biological aspect Human nature shows some purpose understandable on the level of consciousness life. Observing different elements of Human body we can easily understand immanent purpose in their organic unity that creates the preconditions for its proper physiological existence. Based on the evidence of this objectively existing purpose, we can make an assumption - that Man as a whole is a purposeful being, understanding that other aspects of his nature have an immanent purpose just as his biological aspect has in processing of its elements. At the end we can conclude that Biological aspect of Human nature creates subconscious **Imperative of preservation of Life** (individual existence) through the constant effort in obtaining of proper functioning of physiological processes of the body. That can lead to the possible conclusion that conscious aspects of Human nature have some inner relation in the coexistence with the subconscious Biological aspect and maybe share imperative of Preservation of Life with him.

[1] I think it is not proper to say "Higher aspects" because we should understand Human nature in its aspects, more as the organic unity, and not hierarchy, even if other aspects involve consciousness and deliberate use of Free Will including social and metaphysical values.

4. Personal aspect of Human nature

Conscious aspect of the individuality directly leans on the imperative of the Biological aspect.[2] Human consciousness in its evolving from the time of the birth shows an innate desire to survive. This natural desire to preserve individual Life creates first fundamental purpose in the existence of Human being. It is obvious that healthy baby in all its actions demonstrates this inner desire to exist in the favorable circumstances as innate purpose (Ivić, 1987:148). This imperative of preservation of Life can be traced in all periods of human existence, even in the creating of certain metaphysical frame in his collision with inevitable fact of physical Death.

Most important element of the Personal aspect of Human nature is the individual exercise of the Free Will. Attributed to moral capacities, Free Will directly influences conscious use of deliberate choice. Free Will as Human inherent capacity to orient himself toward the chosen goals evolved from the inherent imperative of preservation of Life on the subconscious level through the development of higher cognitive capacities. Capacity to choose is directly connected with the capacity to understand. Moral aspect of Human life is based on the proper understanding of certain outcomes including individual responsibility for the consequences of moral decisions.

That means that Personal capacity to exercise Free Will is directly connected to the evolution of understanding through the development of Human Personality in time. Certain goals, as long time planning and decisions made on the basis of complex calculations, demands fully-developed mind.

That means that capacity to create self-proclaimed purpose leans on the capacity to understand what kind of purpose is that, and to accept this purpose as personal purpose.

It is important to emphasize that in Personal aspect of Human nature lies capacity to be responsible for certain deeds. From the early childhood till the end of the life Person understands itself as responsible for the deeds chosen by its Free Will based on its capacity to understand outcomes of its own choice. That

[2] "Survival reflexes, originating from the brainstem, are involuntary motor responses that are present at birth and facilitate the survival of the neonate" Hajrpal, Kovela, Qureshi 2023 10.7759/cureus.43757 (acc 23. 9. 2024)

aspect of Personal responsibility creates sui generis frame for understanding of individual moral worthiness as Personal purpose itself. That kind of purpose is self-created but in direct connection with the system of social values. Because this capacity to set a purpose and take responsibility for the outcomes of personal choice is directly and irrevocably connected to the Social aspect of Human nature we should try to understand what kind of influence on the moral use of the Free Will social circumstances have.

5. Social aspects of Human nature

Social aspect of Human nature was recognized as fundamental in the Antique period. Aristotle's definition of Man is "zoon politikon" (Aristotle 1991: 1253a19-125a39) meaning "being of the society". Without social interaction Man would be disabled in the development of moral and metaphysical aspect. But without social care and nurture he would not be able to survive biologically also.

From the moment of birth, a person relies on other people, first on members of his family, and later on the wider social community. What does an individual get from social interaction? First it gains capacity to communicate with others through the learning of language. This social interaction is fundamental for the Human well-being and social institutions allow him to create social life in accordance with the social customs and values. Complexity of social institutions (informal, educational, political, religious etc.) creates a net off achievable goals and capacities for development and self-promotion(Aristotle 1991: 1103b7-1103b26).

Language as means of communication becomes first element in obtaining knowledge about right and wrong as precondition for acquisition of knowledge of the fundamental moral categories of good and evil. On the later stages of personal development social interaction becomes essential for self-understanding, because through its social identity person becomes conscious about social customs, values and acceptable motives. Personal use of the Free Will is directly connected with the set of socially acceptable values creating frame for its further moral development.

Social customs and values create context of the morality allowing capacity of the Personal Free Will to participate in it. Moral values are induced as desirable, but capacity of Free will allows someone to reject them. But social context creates self-protective punitive measures (of moral condemnation or legal punishment) trying to establish predictable and harmonious social relations. Use of social values and informal and formal institutions supporting them in the effort of creating harmonious social relations remind us on the imperative of the biological aspect consisting in the preservation of Life as such. This analogy could be supported with the inner purpose of values - to form ideal context for development of the moral aspect of the Human nature.

6. Moral aspect

As it was mentioned before, moral aspect of Human nature begins to develop in the early stages of Human life. Even small child is capable to understand that certain acts are not acceptable and could entail punitive measures of some kind. That means that from the beginning of life Person develops awareness that certain motives and acts (even personally desired) would face social condemnation. In this discrepancy of personal motives and desires and socially acceptable and supported behavior exists substantial use of the Free Will. It is obvious that social authority defining acceptable behavior on the early stages of Human life with the development of higher cognitive capacities becomes internal "Voice of conscience" or "Voice of God" as Socrates liked to say (Platon, 2002:157).

This capacity to withstand our internal desires and wishes in obtaining negative feeling of Dignity of our own Personality as Immanuel Kant defined (Kant, 1981:82) makes essential difference between ordinary choice and moral decision. Ordinary choice depends on calculations of different perspectives for desired gains or unwanted losses, but moral decision lays on the capacity of the Person to sacrifice its desires or gains in the name of the greater good. That capacity to transcend personal wishes and perspectives in the name of grater good is fundamental for the moral aspect.

That inherent capacity to transcend direct influence of desires and other instrumental motives in the name of the respect for the moral law Immanuel Kant defined as positive freedom (Kant, 1990:25). Freedom allows us, however, to act

against moral law too. Acting against moral law is direct use of the Free Will in the way that diminish Dignity of our own Personality. Such moral stance puts the Human in the position of the usurper of the objective moral criterion in the name of its own Personal aims. That means that whenever someone acts in the name of its own selfish interests against the moral law inherent to its capacity of Free Will one directly acts as an agent of evil.

Our Reason, capable to think in the unconditional way creates capability to think of the action free of influence of other causes save our own objective moral law. Objectivity of the moral law, as Immanuel Kant claims, is in his capacity to be categorically imperative, internally motivated only by the moral Law created by capacity of our Reason to think unconditionally. That capacity to withstand external motives in the name of the pure moral law grounded in the capacity of the objective and unconditional thought of the Reason creates objective of the Free will in promoting of our capacity to act unconditionally free, excluding all external motives. Moral decision relying directly on the objective criterion of the moral law free of any external motive fundamentally differs from the choosing between two desirable (or undesirable) things motivating us externally demanding only use of prudence.

Evilness thus can be seen as direct and conscious neglecting of the moral law in the name of some external interest produced by our own selfish motives (Kant, 1990:30-31). Internal structure of Moral aspect of the Human nature allows freedom to violate objective moral law inherent to our Personality. But such act makes us directly responsible to the moral law itself. Demand of the moral law cannot be neglected because it lies in the very structure of our being and can be proved by our own Reason.

Thus, capacity of evilness creates substantially specific position of the Moral aspect of Human nature. Biological aspect defined by its Imperative of Preservation of Life is not capable to harm itself, and Social aspect (nominally) exists as a specific set of values and institutions with imperative effort to establish harmony and justice between members of the society. But Moral aspect and capacity of Free Will to set selfish motives (evilness) and diminish its own nature of obtaining moral goodness in transition from the Free Will to the Good Will looks like catastrophic anomaly of Human nature. That is fundamental point where capacities of Human nature are capable to destroy this same nature.

That means that capacity of the Free Will, through evil motives based on selfishness, is capable to destroy Human nature in all its aspects. That capacity to act evilly looks like an anomaly in the use of the Free Will. Instead of setting motives out of respect of the moral law given to us through our Reason and moral feeling, evil represents conscious breaking of morality for the fulfilling of selfish interests out of pleasure. That is transmission of the moral authority from the inherent moral law to the selfish interests out of satisfying personal desire for pleasure. Instrumentalization of the subjectivity out of selfish motives based on desired feeling of pleasure with conscious breaking of the boundaries of inherent moral law becomes a way to establish absolute criterion of personal moral authority.

On the contrary, our capacity to use our Free Will creating its maxims out of pure respect for moral law unaffected by any other motives represents Dignity of our Personality going beyond our own personal wishes and feelings and any possible external cause. That is the only way of doing morally through the capacities of the Moral aspect of Human nature that opens us a dimension which goes infinitely further than any gains obtainable by our own selfish interests, dimension of the Eternity, Metaphysical aspect of Human nature.

7. Metaphysical aspect

Eternity as such cannot be presented by our senses, but thinking of Eternity lies on unconditional capacities of our Reason capable to present Space or Time as infinite continuums (Kant 1970: 285-286).Metaphysical aspect of Human nature represents our capacity to understand our own and Personalities of other H uman as inherent eternal values going beyond any utilization. That means that we are capable to admit existence of higher causes then our selfish interests and desires.

Religion itself represents system of values capable to give capacities for infinite perfecting of our morality by creating metaphysical aspect of our nature. Religion and morality create spiritual dimension of action of twofold manner. Morality thorough the authority of moral law establishes Dignity of Human Personality as the timeless category and Religion facilitates Eternal frame of further moral perfection through the Will and the authority of God. That specific and unique metaphysical relation between God and Man resembles in some manner

to the relation of the parent and a child. Relying on Personality of God as authority of final purpose that is presented in him through his capacity to fulfill unconditional obligations of the moral law, Person creates specific context of communion with other Humans.

Religion represents willful cession from the capacity of selfish establishing of Personal Subject as an ultimate moral authority and accepting of the God`s authority as fundamental source of eternal and unchangeable values. That cession from the selfish interests and acceptation of the God as ultimate moral authority allow us to establish eternal communion with other people as God`s creatures capable for Goodness itself. Metaphysical aspect of Human nature relies on our capacity to communion with others on the base of our own will to use Free Will as an instrument of God`s Will itself. That means that Moral aspect of Human nature would lose any purpose without Eternal perspective established through the Metaphysical aspect. On the other side, inherent Dignity of our Personality capable to fulfill Will of God allows us to introduce ourselves as members of the Eternal community of the Good people under the rule of God. That is the reason why many philosophers understood inherent dignity of the moral law as the "Voice of God" within us (Kant,1979:105).

That kind of communion creates specific responsibility of one Human for another, not just as a mean for some utilitarian purpose, but as a final end. Other version of categorical imperative of Immanuel Kant underlines that (Kant, 1981:73-74). That means that metaphysical aspect of Human nature provides context for justification of higher purpose for Human personality and creates specific responsibility not toward selfish interests of our needs but toward eternal and final aims. In that context our responsibility for other Humans goes beyond fulfilling certain mutual interests and agreements toward unconditional care for Human Personality as final aim. Moral aspect of Higher purpose of our own Personality directly relies on Metaphysical aspect of the Eternal purpose established by the authority of God creating unconditional responsibility for other Humans as bearers of that Eternal purpose even for all beings as God`s creatures too.

8. Responsible Government and moral capacities for establishing of legal frame for self-harm

After analyses of different aspects of Human nature we are now able to conclude on certain regularity existing in its wholeness. Implicit Imperative of the Preservation of Life in Biological aspect correspond to the compatibility of different capacities of Personal aspect (emotions, intellect and will) and harmonious relations of Social aspect correspond to the proper use of the Free Will in moral aspect. All of these aspects have justification and fulfillment in the eternal perspective of the metaphysical aspect of Human nature. Understood in such manner Human nature can be seen as functionally united and purposive in all of its aspects. That mutual connection of all aspects can be proved in the way that violation of one of them certainly violate all of the others.

What is most interesting is that conscious and deliberate violation (not induced by inevitable Death, disease or some natural cause) is possible only through the misuse of the Free Will in the Moral aspect of Human nature. That abuse of Free Will, as explained earlier, is the negation of the inherent Dignity of our own Personality, by placing our motivation to satisfy all personal desires as the ultimate moral authority instead of fulfilling inherent demands of the moral law presented in our innate capacities.

Now we can establish certain recommendation for proper use of the Human nature in all it aspects: **May the proper use of biological aspect allow us to the create compatibility of Personal capacities which will through the proper use of the Free Will in Moral aspect create harmonious relations of Social aspects in accordance to the eternal values of the Metaphysical aspect of our Nature as our Final aim.**

On the other side, making our own interests of satisfying personal desires ultimate aim and supreme moral authority directly and irrevocably endanger all other aspects of our Nature. Such stance would inevitably harm biological integrity through unrestrained pursue for satisfaction, harm harmonious social relations through persistence on selfish interests and totally disable Moral aspect by diminishing Dignity of Personality reducing it on the mechanism of constant pleasure destroying thus eternal capacities of the Metaphysical aspect.

One of the most interesting questions in contemporary Philosophy of justice is - what is the purpose and where do the boundaries lie for intervention of the State and responsible Government toward the exercise of the Free Will of its citizens (Dworkin, 1978:255)? Understanding role of the State not only toward fully developed adults but toward education and pedagogy of undeveloped children and young people too, we cannot deny important role of the social and governmental institutions in preparation of the proper use of different aspects of Human nature. That means that Government should not encourage any use of different aspects of Human nature that would lead to harm or inability of the Persons on their underdeveloped age, and would protect them and sanction their violation on the stage where Person could be understood as fully responsible for its deeds.

Considering that Human nature should be understood as the wholeness based on the mutual influence of its different aspects, at the end, we can give certain recommendations for responsible attitude toward developing of Human Personality as such:

Chart 2: List of Governmental measures for proper development and preservation of Human nature

Aspect of Human nature	**Preservation of the**	**Governmental measures and restrictions**
Biological	Biological life	Protection of bodily integrity Restriction of bodily harm including self-harm
Personal	Compatibility of different personal characteristic	Improving care for developing of different capacities of the Person
Social	Capability of the Person to interact and develop in the society	Social care, fair distribution of wealth and the possibility of social mobility
Moral	Proper use of the Free Will	Development of virtues and capacities for benevolence; suppression of selfishness and insensitivity to others
Metaphysical	Orientation toward ultimate purpose	Protection of the Religion

Through this chart certain recommendation are given for taking measures by the Government. It is obvious that certain contemporary (sometimes legally supported) acts as abortion or euthanasia should be suppressed because they directly violate essential processes of the biological aspect. In the same way social phenomena as body implants or tattooing can be perceived as barbaric and unnecessary because they change the integrity of our body compromising our physical health to some extent and should not be encouraged or promoted. In the same way, education based on the prospect of pure utilization of the Person (professional life) should be replaced by the education that would develop all capacities of the Person. In the social aspect, inclusion, acceptance and care for socially suppressed (poor, disabled etc.) should be present. In moral aspect, culture of the use of the Free Will consisting of developing of virtues, benevolence and responsibility toward self and others should be promoted allowing us to, at the end, reach the final perspective of Unconditional and Eternal in our Nature. Complexity of Human nature should be developed in compatibility of the wholeness to obtain complete and final reason of its existence. [3]

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RIGHT TO BODILY INTEGRITY AND CRIMINAL JUSTICE[**]

The discussion surrounding the right to bodily integrity has become a prominent and contentious issues within moral, political and legal spheres. The right is often considered one of the most fundamental rights that individuals possess, alongside the right to life. The right to bodily integrity encompasses the principle that individuals have the autonomy to control what happens to their own bodies and to be free from unwanted physical intrusion. Government-imposed bodily intrusion infringes upon this right and can have serious implications on individuals' rights.

Recent scholarly discourse has delved deeply into the content, scope, and significance of this right, recognizing that a nuanced understanding of it is crucial for determining the permissibility or impassibility of various activities, especially in the criminal justice, including rehabilitation of offenders through medical interventions. The scholarly debate has prompted exploration into the nature of the right to bodily integrity and its implications for a wider range of issues. While rehabilitation through medical interventions may be considered in certain contexts, it must be approved with caution and in accordance with ethical principles and human rights standards. Upholding individuals' right to bodily integrity and autonomy is paramount, and any interventions must be justified, proportionate, and respectful of individual's rights.

The aim of the article is to contribute to the ethical and legal dimensions of the right to bodily integrity, by examining theoretical frameworks and practical implications.

Keywords: *bodily integrity, criminal justice, human rights, government-imposed bodily intrusion, rehabilitation.*

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1. Introduction

The right to bodily integrity is a fundamental human right that encompasses the principle that every individual has the autonomy and sovereignty over their own body (Wall, Herring, 2017: 566). It guarantees that individuals have the right to make decisions regarding their own bodies without interference or coercion from others, including the government. The concept of bodily integrity has strong roots in classical liberalism, which emphasizes the autonomy and sovereignty of the individual. This philosophical tradition emerged as a response to monarchical rule, where rulers often exerted control over the bodies of their subjects through coercion and punishment, including public displays of torture (Patella-Rey, 2018: 787). John Stuart Mill, in his work "On Liberty" articulated the principle of bodily integrity in his work as the individual's sovereignty and autonomy over their own bodies and minds (Mill, 1859: 22).

The right to bodily integrity is enshrined in various international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR). It is also recognized in many national legal systems around the world. The ICCPR does not explicitly mention a right to physical or bodily integrity. However, the UN Human Rights Committee has recognized that certain provisions of the Covenant implicitly protect bodily integrity and autonomy. Specifically, the rights to privacy (Article 17) and security of the person (Article 9) in the ICCPR have been interpreted to encompass bodily integrity and autonomy (Frommer, et al. 2021: 27).[1]

Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, in Article 17 explicitly recognizes the right of persons with disabilities to respect for physical and mental integrity on an equal basis with others, which includes protecting them from exploitation or abuse that may compromise their bodily integrity. Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT), adopted by the UN General Assembly in 1984, specifically addresses the prohibition of torture and other forms of ill-

[1] Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), 112th Sess, UN Doc CCPR/C/GC/35 (16 December 2014); Human Rights Committee, General Comment No 28: Article 3 (The Equality of Rights between Man and Women) 68th Sess, UN Doc CCPR/C/21/Rev. 1/Add.10 para 20.

treatment. It defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes such as obtaining information or punishing. The CAT emphasises the importance of respecting bodily integrity. Convention on the Rights of the Child adopted in 1989 recognizes the right of every child to the enjoyment of the highest attainable standard of health and to facilitate for the treatment of illness and rehabilitation of health. This includes the protection of children's bodily integrity from harm or exploitation. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979, does not explicitly mention the right to bodily integrity, it addresses issues such as violence against women, including rape and other forms of sexual violence, which can violate women's bodily integrity.

In Serbia the right to bodily integrity is protected under various legal instruments, including the Constitution of the Republic of Serbia and international human rights treaties ratified by Serbia. Article 25 of the Constitution guarantees the inviolability of physical and mental integrity, stating that "*No one shall be subject to torture, inhuman or degrading treatment of punishment, medical or scientific experimentation without his or her free consent*". Serbia is a party to several international human rights treaties that protect the right to bodily integrity. For example, the European Convention on Human Rights and the International Covenant on Civil and Political Rights both contain provisions safeguarding individuals against torture, inhuman or degrading treatment, and arbitrary interference with their physical integrity (Dimitrijevic, et. al., 2005: 29). In addition to constitutional provisions, Serbian laws and regulations provide further protection for bodily integrity in specific contexts, such as healthcare, medical treatment, and criminal justice (Criminal Code, Chapter XIII, crimes against life and body, Chapter XXIV crimes against environment, Chapter XXV crimes against security, Chapter XXVI crimes against safety of public transport, etc.).[2]

Abovementioned legal instruments uphold the rights of individuals to have the freedom to make decisions about their own body, including health care,

[2] Criminal Code, Official Gazette No. 85/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

reproductive choices, and bodily modifications. It also protects individual from any acts against their body which they did not consent to.

Violation of right to bodily integrity can occur in various contexts, including medical settings, prisons, and during armed conflict. Governments and other entities have a duty to respect, protect, and fulfil this right for all individuals within their jurisdiction. Any infringement on this right should be subject to legal accountability and redress.

The scholarly debate has prompted exploration into the nature of the right to bodily integrity and its implications for a wide range of issues, especially in the criminal justice. The author tackles topics such as scope of the right to bodily integrity, government-imposed bodily intrusions, and controversial of rehabilitation of offenders and use of medical interventions to prevent reoffending. By examining theoretical frameworks and practical implications, the article provides valuable insights into the complexities surrounding this fundament rights and intersection with various aspects of ethics.

2. Scope of the right to bodily integrity

There is debate over the precise scope of protection afforded by the right to bodily integrity. Some argue that it should be narrowly constructed to protect against physical harm and invasive medical procedures without consent, while other advocate for a broader interpretation that includes protections for reproductive autonomy,[3] and bodily privacy.[4]

[3] The topics of reproductive autonomy pose challenging questions due to the presence of multiple human entities involved. Proponents of reproductive rights argue that individuals have the fundamental right to make decisions about their own bodies, including whether to terminate a pregnancy. They emphasize the importance of protecting the autonomy of pregnant individuals, as well as their physical and mental well-being. On the other hand, opponents of abortion often argue that the developing fetus has inherent moral worth and a right to life that must be protected. More information in Thomson, J. J. (2016). A defense of abortion, pp.133.

[4] This is because medial information is considered highly sensitive and falls within the scope of the right to privacy protected by Article 8 of the European Convention on Human Rights. The disclosure of medical records without patient's consent or in circumstances where it is not necessary or proportionate can constitute an interference with their right to privacy. More information in Marshall, J. (2016) p. 7.

The right to bodily integrity is closely related to the prohibition of torture.[5] These human rights often intersect in cases where individuals' physical autonomy and well-being are violated through acts of coercion, violence, or forced interventions (Marshall, 2016: 9).

Different legal and ethical frameworks may influence interpretations of the right to bodily integrity, leading to divergent views on its content and application. Debates may arise over whether the right is absolute or subject to limitations, how conflicts between individual rights and public interests should be resolved, and the role of government in protecting or restricting bodily autonomy (Wall, Herring, 2017: 568).

One area of controversy is the extent to which the right to bodily integrity should protect individuals from government-imposed or medically necessary interventions. For example, debates may arise over the legality and ethics of forced medical treatment, compulsory vaccination, or involuntary psychiatric interventions, balancing public health interests with individual autonomy.[6] According to the jurisprudence of the European Court of Human Rights the protection of the individuals' bodily integrity is not absolute.[7] Interference can be justified if it is in accordance with the law, pursue a legitimate and proportionate aim. In cases involving vaccinations or treatments aimed at controlling the spread of pandemic disease, a legitimate aim is present. The European Court of Human Rights has previously accepted non-consensual blood tests, vaccinations, and screening programs as justified measures aimed at protecting public health, public safety, and the rights and freedoms of others (Douglas, Frosberg, Pugh, 2021: 1).[8] However,

[5] In this regard the right to bodily integrity is overlapping with international prohibitions of torture which are absolute (Article 3 of the European Convention on Human Rights).

[6] More on bodily integrity and right to health in Vujovic, R. (2022) Mandatory Immunization of Children and Protection of the Right to Life, Health and Bodily Integrity. In: Pavlovic, Z. (ed.) *Yearbook Human Rights Protection - Right to Life*, Belgrade: Institute of Criminological and Sociological Research, pp. 567-584.

[7] The European Court of Human Rights for the first time indicated that the concept of private life (article 8) covered the physical and moral integrity of the person in the case of X and Y v. the Netherlands, Application no. 8978/80. More information available in the Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, home and correspondence (2022) European Court of Human Rights.

[8] Case *X v. Austria*, Application no. 8278/78; case *Acmanne v Belgium*, Application no. 10435/83.

non-consensual interventions that interfere with bodily integrity may fail the proportionality test if other equally effective and less restrictive alternative measures are available.[9]

Arguments often arise concerning reproductive rights and the right to bodily integrity, particularly regarding issues such as abortion, contraception, assisted reproductive technologies, and sterilization. Debates may center on the extent to which individuals have the right to make decisions about their own bodies and reproductive health free from state interference or moral judgement (Thomson, 2016:133).

The intersectionality of the right of bodily integrity with other human rights, such as the right to health, non-discrimination, and privacy, can give rise to complex controversies. For example, debates may occur regarding access to healthcare services, the impact of systemic inequalities on bodily autonomy, and the disproportionate effects of certain policies or practices on marginalized communities (Shaman, 2008: 246).

Advances in biotechnology, genetics, and medical research raise new ethical and legal questions about the scope of the right to bodily integrity. Controversies may arise regarding issues such as genetic testing, organ transplantation, human enhancement technologies, and bioengineering, prompting debates about individual consent, privacy, and equity (Kovacevic, 2020: 1571).

Controversies surrounding the content of the right to bodily integrity reflects broader tensions between individual freedoms, societal values, and ethical principles, highlighting the need for ongoing dialogue, debate, and engagement to navigate complex moral and legal issues related to bodily autonomy and human rights.

[9] The spread of COVID-19 pandemic in 2020 raised debate on possibility of compulsory vaccination due to the lack of evidence on benefits of vaccine to violate bodily integrity and fail the proportionality test.

3. Government-imposed bodily intrusion and right to bodily integrity

Government-imposed bodily intrusion refers to situations where governmental authorities, typically through law enforcement or correctional authorities, imposes physical interventions on individuals' bodies as part of criminal investigation, prosecution, punishment, or rehabilitation efforts (Borgmann, 2014: 1059). The government-imposed bodily intrusion in the context of criminal justice raises complex legal, ethical, and human rights issues, requiring careful consideration of individual rights, public interest, and the rule of law. Balancing the need for effective law enforcement and public safety with respect for fundamental rights and human dignity remains a central challenge in navigating disputes surrounding bodily autonomy within the criminal justice system.

Law enforcement agencies often conduct searches and seizures of individuals' bodies as part of criminal investigations, such as through par-downs, strip searches, or bodily fluid testing. Controversies arise over the scope and legality of these intrusions, with debates about privacy rights, probable cause, requirements, and the use of invasive search techniques.

Government authorities may perform various forensic procedures on individuals' bodies to gather evidence in criminal cases, such as DNA sampling, fingerprinting, or medical examinations. Debates arise over issues of consent, bodily integrity, and the potential for abuse or misuse of forensic evidence, particularly in cases involving vulnerable populations or marginalized communities (Matic Boskovic, 2019: 338).

In some jurisdictions, courts may order forced medical interventions on individuals as part of criminal sentencing or treatment programs, such as medication that replace drug addiction, chemical castration for sex offenders or psychiatric medication for individuals with mental health issues. In other jurisdictions, courts or parole boards may impose medical interventions on individuals' release from custody, such as mandatory drug treatment, HIV testing, or medical monitoring. Polemics arise over the balance between public safety concerns and individuals' rights to privacy, autonomy, and dignity, with questions about the necessity and proportionality of such conditions. Controversies surround the ethics and legality of such interventions, raising questions about bodily autonomy,

medical ethics, and the potential for coercion or harm (Douglas, 2014: 105). Some authors compare forced medical interventions with the imposition of medical correctives as a condition of parole or early release.[10] One common critique is centered around the notion of consent. Critics argue that when the only alternative for an offender is to remain incarcerated, their decision to undergo a medical corrective is not truly voluntary but rather coerced (Ryberg, Petersen, 2013: 79). In this context, the offender may feel compelled to consent to the intervention in order to secure their release from custody.

Correctional institutions may employ various punitive measures that involve bodily intrusion, such as solitary confinement, physical restraint, or forced feeding. Polemics arise over the use of these measures as punishment, rehabilitation, or security measures, with concerns about their impact on mental and physical health, human dignity, and prisoners' rights (Pavlovic, 2020: 45).

Law enforcement agencies may use coercive interrogation techniques that involve bodily intrusions, such as stress positions, sleep deprivation, or sensory deprivation (Matic Boskovic, 2020, 64). Disagreements surround the legality and morality of these techniques, with debates about their effectiveness, reliability of evidence obtained, and compliance with human rights standards (Guiora, 2008: 85). The European Court of Human Rights has established through its caselaw that the cumulative use of certain interrogation techniques over an extended period can lead to physical and psychological suffering, which may amount to inhuman and degrading treatment. Such practices would violate Article 3 of the European Convention on Human Rights. The jurisprudence underscores the importance of considering the overall context and consequences of interrogation techniques employed by authorities.[11]

[10] More on alternative sanctions and conditional release see: Matic Boskovic, M. (2022) Krivično procesno pravo EU, p. 83.

[11] Case *Ireland v United Kingdom*, application no. 5310/71.

4. Controversies on rehabilitation of offenders and use of medical interventions

The use of medical interventions for the rehabilitation of offenders is a highly controversial topic (Douglas, 2014: 109). Mandating medical interventions as part of criminal rehabilitation programs can be seen as a violation of the right to bodily integrity, particularly if the interventions involve invasive procedures or alter individuals' bodily functions without their consent. The use of medical interventions for the rehabilitation of offenders raises questions about the ethical obligations of healthcare provider, particularly if the interventions involve potentially harmful or controversial practices (Ryberg, 2012: 231).

There is debate about the effectiveness of medical interventions in rehabilitating offenders and reducing recidivism rates. The potential effectiveness of hormonal anti-libidinal agents in reducing sexual recidivism among certain groups of sexual offenders is supported by some research findings. However, the reliability of these conclusions is limited by several factors, including the methodological challenges and ethical considerations inherent in conducting research with this population.[12] Additionally, the use of hormonal anti-libidinal agents is associated with medically significant side effects, further complicating the assessment of their effectiveness and the ethical considerations surrounding their use (Chew, Douglas, Faber, 2018: 1). These side effects may include hormonal imbalances, metabolic changes, and other adverse reactions, which can impact the overall health and well-being of individuals receiving this treatment. Given these limitations and complexities, it is crucial to approach the use of hormonal

[12] One of the primary methodological challenges is the ethical dilemma of conducting randomized control trials involving high-risk sexual offenders. There are debates about whether it is ethical to leave certain individual untreated, as would be required in a control group, given the potential risk of reoffending. Additionally, ensuring that participation in research projects is fully voluntary and non-exploitive, particularly in the prison setting where power dynamics may be twisted, is crucial but challenging. Practical constraints within the prison system also present challenges for researchers. Disruption from factors such as early release or transfers can affect the continuity of treatment and research protocols. Furthermore, controlling for environmental conditions and demographics, which are important factors in understanding treatment outcomes, can be difficult in such setting. More in Chew, C., Douglas, T.,. Faber, N. S. (2018) Biological Interventions for Crime Prevention. In. Birks, D., Douglas, T. (eds), Treatment for Crime: Philosophical Essays on Neurointerventions in Criminal Justice, Oxford University Press, pp. 11-43.

anti-libidinal agents with caution (Ryberg, 2015: 619). While there may be potential benefits in reducing sexual recidivism, it is essential to weight these against the potential risks and ethical considerations involved in administrating such treatments to individuals with a history of sexual offending.

While some studies suggest that certain interventions, such as medication-assisted treatment for substances use disorder, can be effective in promoting rehabilitation, others question the long-term outcomes and unintended consequences of medical interventions (Bahr, Masters, Taylor, 2012: 155). Critics argue that focusing solely on medical solutions may overlook underlying social, economic, and environmental factors that contribute to criminal behaviour. Mandating medical interventions as part of criminal rehabilitation programs can lead to decrease the negative impact of stigmatization and discrimination against individuals with a history of criminal involvement (Moore, et al, 2023: 3). Recent study conducted by Moore showed that treatment improved family perception and reduced negative attitudes towards offenders and help regain trust that was harm during active addition. Furthermore, participants in the study reported improvement in the self-perception due to the engagement in the treatment. There was a general sense that treatment helped participants begin to heal from previous trauma and problems.

Over the last decades there is discussion on use of neurointerventions in criminal justice with the aim to assess, treat, or modify the brains of individuals involved in the criminal justice system. These interventions are designed to address issues related to criminal behaviour, such as assessing culpability, reducing recidivism, or altering behaviour (Douglas, 2014: 101). Some interventions are already enforcing in some European countries and USA for rehabilitation purposes within the criminal justice system, such as pharmacotherapy to address issues like aggression or impulsivity (Kastelic, Pont, Stoever, 2009: 68). Examples include chemical castration, which reduces testosterone activity of sex offenders in Denmark, Germany, Norway, Finland, Estonia, Iceland, Latvia, Sweden (Peters: 1992: 307). In addition, there are brain simulations like transcranial direct current stimulation and pharmacotherapy, which have been reported to reduce aggression (Birks, Buyx, 2018:133). There is a belief that there are practical reasons for employing neurorehabilitation, primarily because it can help protect the public from future crimes. In other words, the use of these interventions is seen

as a means to achieve the end goal of reducing recidivism and enhancing public safety (Dore-Horgan, 2022: 430).

The permissibility of using neurorehabilitation hinges on whether its implementation unjustifiably infringes upon the rights of offenders. This includes considerations of bodily integrity, autonomy, dignity, and freedom of thought. Critics argue that mandatory, coercive, and non-consensual use of neurointerventions may violate the rights of individuals (Bennett, 2018: 257), while proponents argue that the potential benefits to society may justify certain infringements on individua rights (McMahan, 2018: 117).

Neurointerventions can take various forms, including pharmacological and neurostimulation (transcranial stimulation), or neurosurgical interventions (deep brain stimulation) (Tesnik, Douglas, Frosberg, Ligthart, Maynen, 2023: 26). Each of these interventions carries different implication for bodily integrity.

Furthermore, there is discussion of classification of neurointerventions as treatment or punishment. Different authors have different views and arguments depending on various factors, including the purpose, context and effects of the intervention. Neurointerventions can be considered as a form of treatment when their primary aim is to address a medical condition or mental health issue and are perceived as a right of the offender to rehabilitation (Dore-Horgan, 2022: 432). In this context, neurointerventions might be used to alleviate symptoms, improve cognitive function, or enhance overall well-being. For example, neurointerventions such as medication or therapy may be employed to manage conditions like depression or anxiety, with the goal of improving the individual's quality of life.

On the other hand, neurointerventions may be viewed as a form of punishment when they are imposed as a consequence of criminal behaviour or as part of a legal sanction (Ryberg, 2019: 95). In this context, neurointerventions might be used to modify behaviour, reduce the risk of recidivism, or incapacitate individuals perceived as posing a threat to public safety. For example, chemical castration, a form of neurointerventions, has been used in some jurisdiction as a condition of parole for certain sex offenders, with the aim of reducing the likelihood of future sexual offenses.

The severity of the infringement of the right to bodily integrity varies across different forms of neurointervention. Pharmacological interventions, such as the administration of psychotropic medications, may be less invasive and thus

potentially less severe in their infringement of bodily integrity compared to neurosurgical procedures.

Although the legal principles and jurisprudence recognize offenders right to rehabilitation,[13] neurointerventions are not included in the list, except in the context of treating recognized mental health disorders and diseases.[14]

5. Conclusions

The development of neurointerventions as a method for preventing recidivism raises important ethical and practical questions about their use in the criminal justice system and its implication on bodily integrity. Traditional concept of bodily integrity often focusses on physical intrusions or interventions that involve direct manipulation with body. However, neurointerventions present a unique challenge because they involve interventions at the neural level. Neurointervnetions, such as brain stimulation or pharmacotherapy targeting neurological processes, raises questions about the boundaries of bodily integrity and the extent to which individuals have a right to control their neural processes. These interventions may not involve physical intrusion in the same way as traditional medical procedures, but they still have potential to affect individuals' cognitive and emotional functioning.

The scope of protection provided by the right to bodily integrity against neurointerventions are still uncertain and subject to ongoing debate. Some argue that the right to bodily integrity should encompass protection against any form of interference with bodily autonomy, including interventions at the neural level. Other contend that the unique nature of neurointervnetions requires a re-evaluation of traditional conceptions of bodily integrity and the development of new ethical frameworks to address these issues.

One of the key issues related to neurointerventions is whether it should be considered a form of treatment or punishment. From a treatment perspective,

[13] *Murray v. the Netherlands*, application no. 10511/10, para 104; *Harakchiev and Tolumov v. Bulgaria*, application no. 15018/11, para 264.

[14] United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 1958. Standard minimum rules for the treatment of prisoners and related recommendations. New York: United Nations, Deptartment of Economic and Social Affairs, rule 62.

neurointervenetions may be seen as medical interventions aimed at addressing underlying neurobiological factors that contribute to criminal behaviour. Proponents argue that intervening at the neural level could help prevent future offending addressing issues such as impulsivity, aggression, or other psychological factors. From a punishment perspective, neurointerventions may be viewed as a form of state-sanctioned coercion or control over individual's bodies. Critics argue that using medical interventions as a condition of parole or early release could infringe on individuals' autonomy and bodily integrity, particularly if they are not provided with genuine choices or alternatives. A crucial ethical consideration is whether individuals are provided with informed consent and genuine choice regarding participation in neurointerventions.

Various treatments are already offered to offenders serving prison sanctions, such as anger management or cognitive behavioural therapy. It is essential to ensure that individual's rights are respected, and that any interventions are voluntary and informed. It is crucial to determine whether participation in neurointeventions is truly voluntary or whether individuals may feel coerced to undergo treatment in exchange for leniency in their sentences. Coercion would undermine the ethical validity of any consent obtained.

The effectiveness and safety of neurointerventions must be rigorously evaluated. If these interventions are not proven to be effective or if they pose significant risks to individuals' health, their use in the criminal justice system would be ethically questionable. There are concerns about fairness and equity in offering different sentencing outcome based on whether individuals agree to undergo neurointerventions. This approach could disproportionately impact vulnerable or marginalized population.

It has to be stressed that any use of neurointerventions in the criminal justice system must adhere to existing legal and regulatory frameworks governing medical treatment, research ethics, and human rights. These frameworks should provide safeguards to protect individuals' rights and ensure ethical standards are upheld. The ethical evaluation of neurointerventions also depends on considerations of their effectiveness and potential risks. Finally, decisions about the use of neurointervetions should involve a careful balancing of competing interests, including the rights and well-being of individuals, public safety concerns, and principle of justice and fairness.

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THE RIGHT TO BODILY INTEGRITY AND HELATH AND THE RIGHT TO LIFE IN THE LIGHT OF THE ECHR CASE-LAW AGAINST ROMANIA

Guaranteeing the right to health, bodily integrity and the right to life is not only achieved at the legislative level by prohibiting intentional or culpable conduct under criminal sanctions, but also effectively by streamlining the functioning of institutions, bodies and procedures whose dysfunctions, although are not directly related to these rights, may significantly affect them.

In this article, we propose an incursion into the case-law of the European Court of Human Rights with regard to the Romanian State, analyzing those decisions pronounced against Romania through which the Court found violations of the rights provided for by the Convention which also affected the bodily integrity, health or life of a person.

Keywords: *right to bodily integrity and health, right to life, ECHR practice, related rights, subsequent injuries.*

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1. Introductory thoughts

The constellation of fundamental rights and freedoms has, as its main characteristic, the fact that each of these rights cannot be looked at and analyzed in isolation, but intertwines with other rights, the violation of some of them possibly having a transitive effect and affect others, with serious consequences for one person. As shown in some official analysis (Council of Europe 1, 2015, p. 4) it has become very difficult"to define precise and clear boundaries between the fundamental rights and freedoms enshrined in the Convention and socio-economic rights (...). The Court is thus inevitably called upon to consider cases having a socio-economic dimension, including health, where they raise an issue under one or more fundamental civil and political rights guaranteed under the Convention. Consequently, health issues have arisen before the Court in a wide variety of circumstances".

The system of fundamental rights and freedoms, as drawn up and conceived by international documents and especially by the European Convention on Human Rights, represents the modern stage of the evolution of human civilization, each state being obliged to design its legislative, executive and judicial systems in such a way that the fundamental rights and freedoms of individuals be protected and guaranteed.

2. Is there a right to health and bodily integrity enshrined by ECHR?

According to a doctrinal opinion, the right to bodily integrity as "the most important of the civil rights", this right being viewed as a complex with quite ambiguous boundaries, not being reduced to the principle of bodily autonomy. (Herring,Wall, 2017: 567)

If the right to life is considered the "king of rights", this being a precondition for the existence and exercise of other fundamental rights and freedoms, the right to bodily integrity and health of the person is more difficult to detect as such, especially with regard to the provisions of the European Convention on Human Rights. As a matter of fact the European Convention on Human Rights

does not guarantee a right to health-care or a right to be healthy (Council of Europe 1, 2015:.4), nor a right to physical integrity.

Thus, usually, the right to bodily integrity and health is considered as a logical extension or revitalization of the right to life, however, in ECtHR practice, it is analyzed either by reference to art. 3, or, more unusually, to art. 8 of the ECHR.

According to art. 3 of ECHR - Prohibition of torture - " No one shall be subjected to torture or to inhuman or degrading treatment or punishment. It is obvious that this prohibition aims to protect the right to physical integrity and health of one persone buy banning conducts that could expose that person to serios suffering and pain. According to art. 8 of ECHR - 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." Even if the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity, still its absolute character leads to the protection of other related values such as health and physical integrity, aspect revealed by the case-law of the Strasbourg Court (Council of Europe 2, 2023: 6).

In the case of art. 8 of ECHR, the concept of health and body integrity are included in the concept of private life, the creative case-law of ECtHR contributing to this extension of the concept. As regards art. 8, the first time that the concept of private life was indicated by the Court to cover the physical and moral integrity of the person was in the case of *X and Y v. the Netherlands* (1985)[1], the

[1] *Case of X and Y v. The Netherlands*, Application no. 8978/80, Judgment of 26 March 1985, par. 22: "There was no dispute as to the applicability of Art. 8 the facts underlying the application to the Commission concern a matter of "private life", a concept which covers the physical and moral integrity of the person, including his or her sexual life." See https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57603%22]} accessed on 10.09.2024.

Court stating in case *Y.F. v. Turkey*, 2003 that "a person's body concerns the most intimate aspect of private life"[2]

Guaranteeing the right to health, bodily integrity and the right to life is not only achieved at the legislative level by prohibiting intentional or culpable conduct under criminal sanctions, but also effectively by streamlining the functioning of institutions, bodies and procedures whose dysfunctions, although are not directly related to these rights, may significantly affect them.

ECHR Case-law against Romania tackling the issue of health and bodily integrity[3]

In the case of Romania, the violation of the right to bodily integrity and health of the person was carried out either through the direct action of natural or legal persons, under public or private law, or as a consequence of the dysfunction recorded in the conduct of legal procedures or as a consequence of the violation of other fundamental rights.

Romania's casuistry before the European Court of Human Rights could be divided into two groups of cases: on the one hand, the cases in which the Court found a violation of art. 3 of the convention, and on the other hand, the cases in which the Court found a violation of art. 8.

In the following we are going to present the most interesting judgments against Romania regarding the violation of the right to health and bodily integrity as a consequence of of violations of other rights enshrined by ECHR.

[2] *Case of Y.F. v. Turkey*, Application no. 24209/94, Judgment of 22 October 2003, par. 33.

[3] The selection of the cases regarding art. 8 of ECHR was based, among others, on the Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence drafted by Council of Europe and the Registry of European Court of Human Rights, 2024, available at https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng, accessed on 24.09.2024.

3.1. Cases against Romania in which the Court has tackled the violation of art. 3 and/or art. 8 of ECHR

3.1.1. Case Nicolae Virgiliu Tănase v. Romania [GC], 2019[4]

In 2004 the applicant N. V. T. had road accident which occurred at night on a public road, involved two other drivers and left him with a serious physical disability. The applicant's car was shunted by a moving vehicle into a parked vehicle. The authorities initiated a criminal investigation against the applicant and the other two drivers involved. However, that investigation, and in particular the inquiries into the responsibility of one of the other two drivers, was ultimately dropped by the prosecution in 2012 on the ground that not all the constituent elements of an offence were present. The prosecutor's decision was upheld by a District Court, which dismissed the applicant's appeal as statute-barred.In his application to the European Court, the applicant complained under Article 3 of the Convention that the domestic authorities had not examined the case on the merits or shed light on the circumstances of the accident, and had applied a special time-bar for the driver who had allegedly caused the accident.

As regards the breach of art. 3 of ECHR, the applicant's health problems were directly, or at the very least indirectly, related to his accident. The damage to his health had resulted either from chance events or from negligent conduct. The investigation launched by the authorities into the circumstances of the accident concerned an unintentional offence. However, physical injuries and physical or mental suffering sustained by a person as a result of an accident caused by chance or negligent conduct could not be considered as the result of "treatment" to which someone had been "subjected", within the meaning of Article 3. Such treatment is primarily, though not exclusively, characterised by an intention to injure, humiliate or debase the individual by undermining or diminishing his or her human dignity, or attempting to arouse feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. Thus the Court has found art. 3 not applicable to the case

Also the Court analysed the case through the obligation to investigate imposed for the national authorities.(Stoyanova, 2023:1). In addition, in this case,

[4] Case *Nicolae Virgiliu Tănase v. Romania,* Application no. 41720/13, Judgment of 25 June 2019.

the Court found Art. 8 not applicable to a road-traffic accident which did not occur as the result of an act of violence intended to cause harm to the applicant's physical and psychological integrity[5].

The reasoning of the Court in this case was found peculiar in the doctrine, because the Court found that the investigations into a serious traffic accident were compatible with art. 2, 8 and 6 ECHR and that art. 3 ECHR was not applicable, marking a change of jurisprudence as the Court stated that art. 3 (procedural limb) ECHR is only applicable to non-state ill-treatment if inflicted intentionally. (Burli, 2019)

3.1.2. Case Buturugă v. Romania, 2020[6]

In *Buturugă v. Romania*, the applicant reported her former husband's violent behaviour to the authorities, relying on a forensic medical certificate. She requested an electronic search of the family computer to be used in evidence for the criminal proceedings, alleging that her former husband had improperly consulted her electronic accounts, including her Facebook account, and that he had made copies of her private conversations, documents and photographs. That request was dismissed on the grounds that any evidence likely to be gathered in this way would be unconnected with the alleged threats and violent acts committed by her former husband. Subsequently the applicant lodged another complaint against her former husband for violation of the confidentiality of her correspondence, which was dismissed as out of time. The public prosecutor's office imposed an administrative fine on her former husband and discontinued the case, relying on the provisions of the Penal Code governing violence between private individuals and not on those concerning domestic violence. The court upheld the conclusions of the prosecutor's office to the effect that the threats to the applicant had been insufficiently serious to qualify as criminal offences, and that no direct evidence had been produced to show that the injuries sustained by the applicant had been caused by her former husband. As regards the alleged violation of the

[5] Par. 129-132.

[6] Case *Buturugă v. Romania*, 2020, Application 56867/15, Judgment of 11 February 2020.

confidentiality of her correspondence, the court ruled that that matter was unrelated to the subject matter of the case, and that data published on the social networks were public.

The Court emphasised the need to comprehensively address the phenomenon of domestic violence in all its forms. In examining the applicant's' allegations of cyberbullying and her request to have the family computer searched, it found that the national authorities had been overly formalistic in dismissing any connection with the domestic violence which she had already reported to them. The applicant had been obliged to submit a new complaint alleging a breach of the confidentiality of her correspondence. In dealing with it separately, the authorities had failed to take into consideration the various forms that domestic violence could take. In particular, under Article 8 the States have a duty to protect the physical and moral integrity of an individual from other persons, including cyberbullying by a person's intimate partner.[7]

Regarding serious acts the Court stated it falls to the Member States to ensure that efficient criminal law provisions are in place. [8]

As regards art. 3, in this case - *The investigation into the ill-treatment* - the Court observed the Romanian authorities did not address the impugned facts from the angle of domestic violence. Indeed, the investigation did not take account of the specific features of domestic violence. Furthermore, while none of the domestic authorities had contested the reality and severity of the injuries sustained by the applicant, no evidence had emerged from the investigation capable of identifying the person responsible. The investigating authorities had thus confined themselves to questioning the applicant's relatives as witnesses, failing to gather any other type of evidence to ascertain the origin of the applicant's injuries and, possibly, those responsible for inflicting them. In a case concerning alleged acts of domestic violence, the investigating authorities ought to have taken the requisite action to elucidate the circumstances of the case. Accordingly, even though the legal framework put in place by the respondent State had provided the applicant with some form of protection, the latter had taken effect subsequently

[7] Par. 74.

[8] Par. 74, 78, 79.

to the impugned acts of violence and had failed to remedy the shortcomings in the investigation.

As regards art. 8 in this case, - t*he investigation into the violation of the confidentiality of the applicant's correspondence* - the Court noted that in both domestic and international law, the phenomenon of domestic violence is regarded not as being confined to physical violence but as also including psychological violence or harassment. Furthermore, cyberbullying is currently recognised as an aspect of violence against women and girls and can take on various forms, including cyber violations of privacy, hacking the victim's computer and the stealing, sharing and manipulation of data and images, including intimate details. In the context of domestic violence, cybersurveillance is often traceable to the person's partner. The Court therefore accepted that such acts as improperly monitoring, accessing and saving the spouse's or partner's correspondence could be taken into account by the domestic authorities when investigating cases of domestic violence. Such allegations of breach of confidentiality of correspondence required the authorities to conduct an examination on the merits in order to gain a comprehensive grasp of the phenomenon of all the possible forms of domestic violence.

3.1.3. C.A.S. and C.S. v. Romania, 2012[9]

In January 1998, the first applicant - CAS -, a seven-year-old boy, was followed home from school by a man who forced his way into the family home and subjected him to a violent sexual assault before warning him at knife-point that he would be killed if he told anyone what had happened. Over the following months the abuse continued several times a week. In April 1998, after finally being told by his son what was happening, the boy's father (the second applicant) alerted the police, who started an investigation. The first applicant identified his aggressor in a line-up and several witnesses stated that they had seen the man either entering, or in the vicinity of, the boy's flat during the period in question. Two medical examinations of the boy indicated injuries consistent with repeated sexual abuse. After the investigation had been discontinued three times, the suspect eventually stood trial in 2004, when he was acquitted of rape and unlawful

[9] Case *C.A.S. and C.S. v. Romania,* Application no. 26692/05, Judgment of 24 September 2012.

entry of the boy's home. The domestic courts found that the parties and witnesses had given contradictory statements and were particularly concerned by the fact that the parents had waited a long time before going to the police. They further noted that the first applicant had not given an accurate description of the facts and was prone to fantasizing.

In this case, the Court takled the issue of respect of children, who are particularly vulnerable and the obligation of Member States to ensure that efficient criminal law provisions are in place to prevent breaches in the rights of children. In the Courts reasoning, the measures applied by the State to protect children against acts of violence falling within the scope of Article 8, must be effective. This should include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity [10]. The obligation imposed for the states should also provide adequate protection for dangerous situations reffering to the fact that the State should have known of a particular danger.

Despite the gravity of the allegations and the particular vulnerability of the victim, the investigation had been neither prompt nor effective. The authorities had waited three weeks before ordering a medical examination of the victim and two months before interviewing the main suspect. Overall, the investigation had lasted five years. Furthermore, seven years after the incident, the main suspect had been exonerated without the authorities even trying to find out if there was any other suspect. Of even further concern in such a case of violent sexual abuse of a minor was that the authorities had not tried to weigh up the conflicting evidence and establish the facts or carry out a rigorous and child-sensitive investigation. In fact, while the courts had paid no attention to the length of the investigation, they had attached significant importance to the fact that the family had not reported the crimes immediately to the police and, to a certain extent, that the victim had not reacted sooner. The Court failed to see how the parents' alleged negligence could have any impact on the diligence of the police in their response to the rape of a seven-year-old boy. Nor could it understand why the authorities had not been more aware of the particular vulnerability of the victim and the special psychological factors involved, which could have explained his hesitation in

[10] Par. 82.

reporting the abuse and describing what had happened to him. The States had an obligation under Articles 3 and 8 to ensure the effective criminal investigation of cases involving violence against children, with respect for their best interests being paramount. It was particularly regrettable that the first applicant had never been given counselling or been accompanied by a qualified psychologist either during the rape proceedings or afterwards. The failure to adequately respond to allegations of child abuse in this case cast doubt over the effectiveness of the system Romania had put in place to comply with its international obligations to protect children from all forms of violence and to help the recovery and social reintegration of victims. Indeed, it had left the criminal proceedings devoid of any meaning. In sum, the authorities had failed to carry out an effective investigation into the allegations of violent sexual abuse of the first applicant and to ensure adequate protection of his private and family life.

Thus the Court found both art. 3 and art. 8 violated.

3.1.4. Case of Georgel and Georgeta Stoicescu v. Romania, 2011[11]

On 24 October 2000 the applicant, aged 71 at the time, was attacked, bitten and knocked to the ground by a pack of around seven stray dogs in front of her home in a residential area in Bucharest. As a result of the fall, the applicant suffered a head injury and fractured her left thigh bone which required four days' hospitalisation. After being discharged from hospital she was prescribed medical treatment which proved to be too expensive for her. Following the incident, the applicant started suffering from amnesia and shoulder and thigh pains and had difficulty walking. In addition, she lived in a constant state of anxiety and never left the house for fear of another attack. By the year 2003 she had become totally immobile. The applicant's state of health continued deteriorating with the result that two and a half years after the incident, on 4 June 2003, she was declared disabled by a medical panel of the Bucharest Local Council.

The applicant argued that her injuries were due to a lack of action on the part of the Romanian authorities to solve the problem of stray dogs and ensure the safety and health of the population. As a consequence, the applicant argued

[11] Case *Georgel and Georgeta Stoicescu v. Romania*, Application no. 9718/03, Judgment of 26 October 2011.

Romania had failed in its positive obligations under article 8 to protect the applicant's physical and moral integrity and prevent intrusion into her private life. The Court identified that the concept of private life includes a person's physical and psychological integrity, and article 8 gave rise to a positive obligation on States to ensure effective respect for the rights protected by the article, including prevention of breaches of the physical and moral integrity of an individual by other persons when the authorities knew or ought to have known of those breaches.

In this case the Court found a violation of art. 8 when a woman was attacked by stray dogs in an area where such animals were a common problem. The Court stated that the lack of sufficient measures taken by the authorities in addressing the issue of stray dogs in the particular circumstances of the case, combined with their failure to provide appropriate redress to the applicant as a result of the injuries sustained, amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life.[12]

3.1.5. Case I.V.Ț. v. Romania, 2022[13]

In this case the applicant, aged eleven at the material time, was interviewed without prior parental consent about the accidental death of a schoolmate during a school trip, and the interview was broadcast on television. The higher domestic courts dismissed the civil proceedings that she brought against the private broadcasting company, finding that the journalists had not acted wrongly in so far as they had been covering a subject of public interest, and that the adverse attitude of the school teachers and schoolmates towards the applicant following the broadcast of her interview was not imputable to the journalists.

The Court stated that the disclosure of information concerning the identity of a minor could jeopardise the child's dignity and well-being even more severely than in the case of adult persons, given their greater vulnerability, which attracts special legal safeguards[14].

[12] Par. 62.

[13] Case *I.V.Ț. v. Romania*, 2022, Application no. 35582/15, Judgment of 1 June 2022.

[14] Par. 59.

3.1.6. Case C v. Romania, 2022[15]

In this case the Court elaborated on the State's positive obligations in the context of sexual harassment[16] and stated that the State has an affirmative responsibility to protect individuals from violence by third parties[17]. The Court has also emphasized the need for protection from secondary victimisation in the course of the proceedings/investigation and from stigmatisation due to, insensitive/irreverent statements that are extensively reproduced in the prosecutor's decision or a lack of explanation by the prosecutor as to the need for a confrontation in a case concerning allegations of sexual harassment[18]. In general, the Court has emphasized the need to take measures to protect the rights and interests of victims[19]. Thus the Court found that the investigation of the applicant's case had such significant flaws as to amount to a breach of the States' positive obligations under Art. 8 of the Convention.

3.1.7. Case Bursuc v. Romania, 2004[20]

On January 27, 1997, the applicant, a legal advisor by profession, was stopped by two police officers, while he was in a bar in the headquarters of the Democratic Party in Piatra-Neamţ. The police officers addressed the applicant, rudely asking him to present his identity card and he answered them in the same tone. In response, the two police officers punched and kicked the applicant, handcuffed him and dragged him into a police car parked 30 meters from the party headquarters. In the car, the applicant was again hit with fists and sticks, so that he fell into a state of semi-consciousness. Brought to the police headquarters, the applicant was taken to a room where he was brutally beaten by approximately 8 policemen. They threw the applicant to the ground, kicked him, hit him with a stick, threw water on him and urinated on him. Mistreated for more than 6 hours, the applicant fainted several times. Since his condition was getting worse, the police agreed to transport him to the Psychiatric Hospital in Piatra-Neamţ, where

[15] Case *C. v. Romania*, Application no. 47358/20, Judgment of 30 November 2022.

[16] Par. 61-88.

[17] Par. 62-66.

[18] Par. 82-85.

[19] Par. 85.

[20] Case Bursuc v. Romania, Application no. 42066/98, Judgment of 12 October 2004.

he arrived around 4 in the morning. After he was given sedatives, considering his serious health condition, a team of doctors decided to transport the applicant to the Neurosurgery Hospital in Iasi.

The Court considered that, in this case, the injuries found on the applicant's body were produced as a result of a treatment for which the Romanian Government was responsible. Regarding the assessment of the severity of ill-treatment, the Court recalled that this was relative in nature; it depends on a set of circumstances specific to the case, such as the duration of the treatment or its mental or psychological effects and, in some cases, on the victim's sex, age and state of health. When a person is deprived of freedom, the use of physical force when it was not determined by the person's behavior, affects human dignity and constitutes, in principle, a violation of the right guaranteed by art. 3 of the Convention.[21] In this case, the Court particularly emphasized the intensity of the hits inflicted on the applicant, which produced multiple bruises on the head and, above all, a cranio-cerebral trauma by violence, with diffuse cerebral edema, having lasting effects.[22]

The duration of the ill-treatment inflicted on the applicant for several hours, starting with his detention at the bar in the evening, continuing during the transport by police car and then to the police station, before being taken to the hospital in a serious condition until 4.20 am were emphasized by the court in its reasoning. Furthermore, the Court noted that the applicant was particularly vulnerable, being alone under the supervision of at least 5 policemen who took him to the police headquarters during the night following a minor incident in a bar. Therefore, the Court considered that the violence to which the applicant was subjected presents a particularly serious character, likely to lead to acute pain and suffering, so that they must be considered acts of torture within the meaning of art. 3 of the Convention.

[21] Par. 89.

[22] Par. 91.

3.2. Cases tackling the right to health and bodily integrity in relation to other rights provided for by ECHR

3.2.1. Case Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania, 2014[23]

The application was lodged by a non-governmental organisation, the Centre for Legal Resources (CLR), on behalf of a young Roma man Mr Câmpeanu, who died in 2004 at the age of 18. Mr Câmpeanu had been placed in an orphanage at birth after being abandoned by his mother. When still a young child he was diagnosed as being HIV-positive and as suffering from severe mental disability. On reaching adulthood he had to leave the centre for disabled children where he had been staying and underwent a series of assessments with a view to being placed in a specialised institution. After a number of institutions had refused to accept him because of his condition, he was eventually admitted to a medical and social care centre, which found him to be in an advanced state of psychiatric and physical degradation, without any antiretroviral medication and suffering from malnutrition. A few days later, he was admitted to a psychiatric hospital after displaying hyper-aggressive behaviour. The hospital concerned had previously said that it did not have the facilities for patients with HIV. There he was seen by a team of monitors from the CLR who reported finding him alone in an unheated room, with a bed but no bedding and dressed only in a pyjama top. Although he could not eat or use the toilet without assistance, the hospital staff refused to help him for fear of contracting HIV. He was refusing food and medication and so was only receiving glucose through a drip. The CLR monitors concluded that the hospital had failed to provide him with the most basic treatment and care. Mr Câmpeanu died that same evening.

The Court noted that the case concerned a highly vulnerable young Roma man suffering from severe mental disabilities and HIV infection who had spent his entire life in State care and died in hospital through alleged neglect. In view of his extreme vulnerability, he had been incapable of initiating proceedings in the domestic courts without proper legal support and advice. At the time of his death Mr Câmpeanu had no known next-of-kin. Following his death, the CLR

[23] Case Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania, Application no. 47848/08, Judgment of 17 July 2014.

had brought domestic proceedings with a view to elucidating the circumstances of his death. It was of considerable significance that neither its capacity to act nor its representations on Mr Câmpeanu's behalf before the domestic medical and judicial authorities were questioned or challenged in any way. The State had not appointed a competent person or guardian to take care of his interests despite being under a statutory obligation to do so. The CLR had become involved only shortly before his death - at a time when he was manifestly incapable of expressing any wishes or views regarding his own needs and interests, let alone on whether to pursue any remedies. Finding that the CLR could not represent Mr Câmpeanu in these circumstances carried the risk that the respondent State would be allowed to escape accountability through its own failure to comply with its statutory obligation to appoint a legal representative. Moreover, granting CLR standing to act as Mr Câmpeanu's representative was consonant with the Court's approach in cases concerning the right to judicial review under Article 5 § 4 of the Convention in the case of "persons of unsound mind" (Article 5 § 1 (e)). In such cases, it was essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. The CLR thus had standing as Mr Câmpeanu's *de facto* representative.

The Court underlined that for his entire life Mr Câmpeanu had been in the hands of the authorities, which were therefore under an obligation to account for his treatment. They had been aware of the appalling conditions in the psychiatric hospital, where a lack of heating and proper food and a shortage of medical staff and medication had led to an increase in the number of deaths in the winter of 2003. Their response had, however, been inadequate. By deciding to place Mr Câmpeanu in that hospital, notwithstanding his already heightened state of vulnerability, the authorities had unreasonably put his life in danger, while the continuous failure of the medical staff to provide him with appropriate care and treatment was yet another decisive factor leading to his untimely death. In sum, the authorities had failed to provide the requisite standard of protection for Mr Câmpeanu's life. Thus a violation of art. 2 occured. Also, the Court observed the failure of Romanian authorities to carry out an effective investigation into the circumstances surrounding the death of Mr Câmpeanu and a violation of Article 13 in conjunction with Article 2 on account of the failure to secure and implement

an appropriate legal framework that would have enabled Mr Câmpeanu's allegations relating to breaches of his right to life to have been examined by an independent authority.

Conclusions regarding the case-law against Romania

It was stated in the Romanian doctrine that we can already talk about a "typology" of the cases against Romania starting from the facts and the findings of the Court. (Selejan-Guțan, 2023: 143)

Thus, there are cases in which the rights to health and bodily integrity are violated due to ill-treatment caused by police officers. Among these, in case *Bursuc v. Romania* (2004), the Court considered that the ill-treatment rose to the level of gravity of torture. There were also cases of police violence or treatment of detainees that do not rise to the level of severity of torture, but were considered inhumane treatment (Case *Pantea v. Romania*[24], Case *Cobzaru v. Romania*[25]) or "degrading treatments" (Case *Barbu Anghelescu v. Romania*[26]). Part of the violations found by the Court in the charge of the Romanian authorities were due to their violation of the positive procedural obligation to carry out an effective investigation regarding alleged violations of the physical integrity of the person, either by the authorities or by individuals.

In other cases Romanian authorities failed to fulfill their obligations to ensure safety of the citizens leading eventually to the injuries and damaging bodily integrity and health of persons (Case *Georgel and Georgeta Stoicescu v. Romania, 2011*).

Another set of cases are related to sexual abuses committed by persons in different situations (work environment, abuse on minors).

Still, there are plenty of cases against Romania in which the Court of Strasbourg has analyzed the concept of health and bodily integrity in connection with rights guaranteed by ECHR.

[24] Case *Pantea v. Romania*, Application no. 33343/1996, Judgment of 3 June 2003

[25] Case *Cobzaru v. Romania*, Application no. *48254/99)*, Judgment of 26 July 2007

[26] Case *Barbu Anghelescu v. Romania*, Application no. 46430/99, Judgment of 5 October 2004.

One thing is clear: the right to bodily integrity and health cannot be analyzed in isolation, but accepting the fact that fundamental rights represent a unitary whole in which there are interconnected and mutually determined relationships.

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CRIMINAL LAW PROTECTION OF THE RIGHT TO LIFE IN THE LEGISLATION OF THE REPUBLIC OF SRPSKA

Constitutional provisions of all modern states ensure a dominant place for the right to life within the system of fundamental human rights and freedoms. As such, it enjoys the status of an absolutely protected right, which states cannot abolish or limit under any conditions.

The criminal law protection of the right to life, which is independent, comprehensive, and primary, is realized through incriminations that can be divided into two groups. The first group consists of those criminal acts where the right to life is the primary object of protection, while the second group consists of criminal acts where the primary protection is of other goods or values, with the violation or endangerment of the right to life being a qualifying circumstance of the act. In Bosnia and Herzegovina, due to the system of parallel and divided jurisdiction in criminal legislation, the criminal law protection of the right to life belongs to the entities and the Brčko District of Bosnia and Herzegovina. The authors analyze the criminal law protection of this right in the legislation of the Republic of Srpska, pointing out the differences that exist in this area within the criminal laws of Bosnia and Herzegovina.

Keywords: *right to life, criminal law protection of the right to life, murder, privileged murder, qualified murder.*

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1. Introductory remarks

The right to life is an absolute, natural human right that belongs equally to all people and represents the fundamental basis of human civilization. As such, this right has the status of a universal civilizational value in modern society, and its criminal law protection is not only a matter of domestic law but also has legitimacy within the frameworks of international law. Respect and acknowledgment of this right are the basic postulates of our civilization, and its criminal law protection becomes an imperative of every modern and democratic criminal law. The universal character of the right to life in the system of fundamental human rights is ensured in the most significant international documents[1], which emphasize that every human being has the right to life, which must be protected by law, and that no one can be arbitrarily deprived of life, thus imposing an obligation on signatory states to protect this right by law. The extent and content of this protection are not determined by the mentioned acts, but states are left to do so according to their assessments and possibilities, so a violation of this duty exists only when a state's law provides no or insufficient protection of the right to life in situations where there is a serious threat. The right to life is above every other human right; the basis and meaning of all other human values are in the closest connection with the human right to life. Because of its significance, this right is established as a special constitutional value, and its inviolability and sanctity are provided as a constitutional principle ("Human life is inviolable" - Article 11 of the Constitution of RS; in Article II/3a of the Constitution of BiH, the right to life is first in the catalogue of human rights). All other human rights and values would remain meaningless if the right to life were not adequately protected. Therefore, all countries strive to ensure effective protection of this right by the legal order, with criminal law protection being the most significant and efficient form of legal protection in general.

It can be said that the criminal law of each country is the best proof of how effectively the declaratively established human right to life in the constitu-

[1] Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; European Convention on Human Rights, 1950; American Convention on Human Rights, 1969; African Charter on Human and Peoples' Rights, 1981.

tion of a country (almost always as an inviolable and/or inalienable right) is actually and effectively protected (Babić, Marković, 1998:1). The criminal law protection of this right is the basis for the protection of all other human rights, making any discussion about any other human right and freedom irrelevant if the legal order does not ensure effective protection of this right. Due to the importance and position of this right in national and international law, the protection of this right has been prioritized in the Republic of Srpska since the Criminal Code of 2000, which was not the case in earlier criminal legislation. The question of the subjectivity of the right to life, the relationship between the right to life and the right to death, and the establishment of adequate boundaries for criminal law protection of human life and bodily integrity in different stages of existence have not yet received their final and generally accepted solutions. However, regardless of these dilemmas concerning the criminal law protection of human life, it is generally accepted that criminal law protects human life from its beginning to its end, i.e., from the moment of conception to the moment of death. However, the extent and intensity of criminal law protection of this right are not the same in all developmental stages of human life. The literature raises the question of whether an unborn child can independently enjoy legal protection, i.e., the right to life (Pavlović, 2022:259)? This issue is discussed from various aspects, not just legal ones, but from the perspective of criminal law protection of fundamental human rights, including the constitutionally guaranteed right to parenthood, it is considered that full protection of the right to life is provided to a human being as a living entity, starting from the moment of birth, i.e., when that life is autonomous and self-sustaining or self-regulating. Therefore, absolute protection of the right to life begins from the moment of birth. Criminal law protection of the right to life from conception to birth, for understandable and legitimate reasons, is set more restrictively, so future life or life in the making is not absolutely protected, as there are legal interruptions of pregnancy, nor is it protected in cases of negligent injuries or endangerments (Babić, Marković, 2018:37).

In addition to dilemmas regarding the moment from which the criminal law protection of the right to life begins, the question arises of until what moment it lasts. Since human death does not occur in a single moment and the cessation of functions of individual organs does not occur simultaneously (each tissue and organ dies its own particular death, except in the case of destructive means where

death occurs instantly for the whole organism), determining the moment of death or, more precisely, the moment in which the criminal law protection of human life ceases is extremely complicated. If we add the issue of transplantation of certain human organs, especially the heart, lungs, liver, etc., which is allowed only from a deceased person because otherwise such a procedure constitutes murder, it is clear what problem the legislator faces in determining the boundaries of criminal law protection of this good. However, respecting the achievements of medical sciences, modern criminal law accepts brain death, i.e., irreversible brain damage and the cessation of all brain functions, as the moment of death. Determining this moment is done by applying the so-called Harvard criteria, according to which the electroencephalogram (EEG) must show a cessation of brain electrical activity for at least ten minutes, provided there are no other reactions during that time (Babić, Marković, 2018:38). Vitality, or the ability to live, is not a condition for criminal law protection of human life, so criminal law protects the right to life of every being born of a woman that has a human-like form, regardless of whether it possesses the ability for independent life or not, whether it suffers from an incurable disease or is perhaps in a coma, etc. Thus, a person's ability or inability for independent life does not affect the scope and quality of criminal law protection of the right to life. Medical achievements have enabled the extension of life expectancy, and consequently, an increasing number of people require assistance for daily activities. In this regard, the concept of long-term care, defined by the World Health Organization (WHO) as "activities undertaken by others to ensure that people with significant loss of intrinsic capacity can maintain a level of functional ability in accordance with their basic rights, basic freedoms, and human dignity" (WHO, 2015, according to Chen, 2023:645), should be mentioned. These activities enable the enjoyment of basic human rights, primarily the right to life, which raises the question of what the right to life encompasses. In other words, does a person, as the holder of the right to life, have the right to unlimited disposal of their life as they have the right to unlimited disposal of their property? An analysis of the legal norms regulating the criminal law protection of the right to life in the criminal legislation of the Republic of Srpska reveals that the concept still prevails in our legal system that the right to life is a personal right belonging exclusively to its holder and cannot be transferred to others. This

follows from the fact that suicide is not criminalized, but aiding suicide is criminalized, and euthanasia is not accepted as a basis for excluding the unlawfulness of the act of murder in our legal system. Therefore, the consent or request of the passive subject for taking life, according to our legislation, does not exclude the unlawfulness of the criminal act, meaning that a person cannot freely dispose of this right as they can with some other rights, such as property rights. This leads to the conclusion that human life is protected even when a person renounces such protection, as well as when the right to its violation is transferred to another (here, the old Roman rule: volenti non fit iniuria - no injury is done to a willing

The right to life also encompasses the right to the inviolability of physical integrity, and the criminal law protection of this right is achieved through incriminations classified into the group of crimes against life and body, which can be divided into two main groups. The first and most important group consists of those incriminations where the life and body of a person are the primary and exclusive object of protection, while the second group includes those incriminations found in various chapters of criminal codes where the primary object of protection is other individual or social values, and the violation or endangerment of the right to life constitutes an aggravating circumstance establishing a more serious form of the offense.

In this sense, this protection is also established by the Criminal Code of the Republic of Srpska, which in Chapter XII, titled Crimes Against Life and Body, prescribes only those crimes directed exclusively against life and bodily integrity. These are classical and standard criminal acts that, according to criminological typology, belong to the so-called natural crimes (delicta mala in se), meaning those acts that have always been inherently criminal and will continue to provoke the most severe societal reaction (Babić, Marković, 2018:36,37). Simultaneously, the protection of these values is also achieved through incriminations in other groups of crimes where the primary object of protection is other values, and the violation or endangerment of the right to life constitutes an aggravating circumstance establishing a more serious form of the offense. Such cases can be found, for example, in the group of crimes against sexual integrity, against public health, against the constitutional order and security, against public traffic safety, etc.

2. Murder

The fundamental function of criminal legislation is to protect the basic rights and freedoms of individuals and other fundamental individual and general values established by the constitution and international law (Article 1, Criminal Code of the Republic of Srpska). The realization of the protective function is achieved by prescribing certain criminal offenses and providing sanctions for the perpetrators of these offenses. Given that the right to life is the supreme, fundamental right of an individual, it is clear that the legislator must establish such a system of penal policy that will enable effective protection of this right from all forms of infringement and endangerment. Establishing such a protection system is possible not only through the definitions of the elements of individual criminal offenses, i.e., by introducing new incriminations, but also through the system of criminal sanctions and rules on sentencing.

In this sense, the Criminal Code of the Republic of Srpska has made certain changes compared to the previously existing system, as well as compared to the Criminal Code of the Federation of Bosnia and Herzegovina (hereinafter: CC FBiH) and the Criminal Code of the Brčko District of Bosnia and Herzegovina (hereinafter: CC BD BiH). These changes are reflected in the introduction of new privileged and qualified forms of murder, as well as the provision of life imprisonment for the most serious forms of aggravated murder.

The basic criminal offense that protects the right to life, i.e., the life of an individual in all criminal law systems, including the criminal legislation of the Republic of Srpska, is murder. By its nature, it represents an absolute negation of an individual's right to life as a natural right of every person, i.e., an absolute negation of a person as a living human being. From a legal perspective, it is the unlawful deprivation of another person's life, which is commonly referred to in criminal law as: "whoever deprives another of life." The CC RS does not deviate from the usual formulation of the crime of murder and prescribes in Article 124, paragraph 1: "Whoever deprives another of life shall be punished by imprisonment for 5 to 20 years." This formulation defines the so-called ordinary murder, i.e., murder that is not accompanied by additional circumstances, whether privileged or qualifying, that establish a lesser or greater form of this offense. The basic form of the offense is the murder defined in Article 124, paragraph 1, and

it can be said that this criminal offense has the character of a general criminal offense and is subsidiary to its privileged and qualifying forms. Therefore, the characteristics of this basic form of murder are contained in all special forms of murder.

Given the fact that the act of execution is not defined through the precise setting of activities leading to death but is defined through the consequence - deprivation of life, it can be said that murder falls into the category of so-called "open offenses" where the act of execution represents any act that can cause the death of another person (so-called consequential acts). This legislative solution is conditioned by the possibility of finding new forms and methods of causing the death of another person, and defining the act of execution by law, according to the principle of nullum crimen sine lege, would prevent the application of this incrimination to cases not provided for by law (Babić, Marković, 2018:40). These are mainly active actions (commission), but murder can also be committed by omission (non-commission) by a guarantor, i.e., a person who is obliged to take actions to prevent the occurrence of the fatal consequence - so-called improper omission or guarantee criminal offenses of omission (e.g., not feeding a child by the parents or failing to take actions to protect the life of another person in all cases where such an obligation exists). The act of execution can consist of physical actions on the victim's body (strangling, administering poison, using cold or firearms, etc.), but the death of another person can also be caused by psychological actions on them (e.g., causing a state of shock by sending a telegram with false content, etc.) or by causing a situation that will lead to the death of a person (e.g., causing a brake system failure on a car, infecting with a severe infectious disease that can lead to death, such as the HIV virus, etc.). The consequence of the act is the death of another person. For the existence of the offense, it is irrelevant whether the death occurred immediately after the act of execution or later, and sometimes the time distance between the act and the consequence can be relatively long, when murder appears as a distanced criminal offense. In such cases, it is important to establish a causal link between the undertaken act and the fatal consequence. In a ruling by the Supreme Court of Serbia, it was held that there is a causal link, i.e., a criminal offense of murder, even when the death occurred ten months after the act of execution (SCS, Kž. 834/91, see Lazarević, 341.).

The object of protection in all forms of murder is the life of a person, but not one's own life, rather the life of another person (thus, suicide is not foreseen as a criminal offense). According to the prevailing understanding, the object of murder is a person from the moment of the initiation of childbirth, regardless of whether it is a natural childbirth or performed surgically (so-called "cesarean section") until the moment of death. As an argument in favor of this stance, the definition of the criminal offense of infanticide during childbirth (Article 127, CC RS) is cited, according to which this offense is committed by a mother who deprives her child of life during or immediately after childbirth, under the influence of a state caused by childbirth. Unlawful actions that cause harm to human life up to this moment cannot be considered as acts of committing the crime of murder but rather the crime of unlawful abortion. In criminal law terms, a person's life ends with the onset of brain death, i.e., the cessation of brain function as the center of all physical and psychological functions of an individual, and after that moment, taking certain actions on the body of a person, e.g., taking vital organs for transplantation purposes, cannot be considered as acts of committing this criminal offense (Babić, Marković, 2018:40).

The subjective aspect of the offense consists of intent, whether direct or eventual, which is a factual question assessed by the court in each specific case. It is very important to consider all the circumstances of the specific case, primarily those of an objective nature, but also the personal characteristics, as all these in their entirety will provide the possibility to properly determine the perpetrator's mental attitude towards the act.

As mentioned earlier, the legislative competence for protecting basic human rights and freedoms in Bosnia and Herzegovina belongs to the entities and the Brčko District of BiH, so entity legislators independently regulate this issue. Therefore, in terms of criminal law protection of the right to life, there are certain differences reflected not only in different forms of aggravated murder but also in the provision of certain lighter forms of murder. Namely, the legislator of the Republic of Srpska, unlike other legislators in BiH, has foreseen a special, lighter form of the criminal offense of murder, i.e., murder under particularly mitigating circumstances, which exists when the criminal offense of murder from paragraph 1 of Article 124 is committed under particularly mitigating circumstances.

The criminal policy reason for introducing this incrimination is to find a compromise solution between the public interest in preserving human life, on the one hand, and the right to death as an integral part of the right to life that belongs to every individual, on the other hand (Babić, Marković, 1997: 88-106). Namely, advances in medical technology and science have made it possible to maintain human life even when life itself has lost its real meaning and has become an unbearable burden for both the dying person and their family. Therefore, the question arises as to whether the state's interest in protecting human life as a public good outweighs an individual's right to freely dispose of their right to life as a personal right, or what objective and moral interest the state has in protecting life against the will of the individual, especially when that life represents mere existence without any prospects. It is clear that the task of the state is to protect the natural rights of its citizens, and the right to life is the fundamental natural right of every person. However, if this protection contradicts the will of the individual, it turns into a specific form of violence that opposes the concept of human rights protection. In this context, the so-called right to death is propagated as the right of every person to request the cessation of life-saving, life-maintaining, and life-prolonging measures when it is clear that there is no possibility of recovery. In this regard, many modern legal systems have legally evaluated the request or plea of a passive subject addressed to another person to end their life as a mitigating circumstance in the criminal act of murder, leading to the incrimination of murder upon request or plea, or with consent, as a privileged form of murder in the legislation of a significant number of European countries. Considering the fact that there are other circumstances, apart from those mentioned, which are not covered by the existing incriminations of privileged murder, but which, for reasons of humanity and justice, must also be treated as mitigating circumstances, the Criminal Code of the Republika Srpska has provided for a broader incrimination, which can be designated as murder under particularly mitigating circumstances (Babić, Marković, 2005:23). It could be said that the legislator attempted to resolve the old dilemma related to euthanasia, assisted suicide, murder upon request, at the plea of the passive subject, and similar situations, by allowing real-life situations, similar to the aforementioned, even though they essentially represent intentional deprivation of another person's life, to be treated as a privileged,

lesser form of this criminal act. The penalty for this form of the act is imprisonment ranging from 1 to 8 years.

The particularly mitigating circumstances, which are at the core of this form of murder, represent a legal standard that is realized through interpretation and application by judicial practice. We can say that this element of the criminal act is impossible to define in advance because its content depends on numerous factors that the court must take into account. This primarily refers to the state of the passive subject, their psychological and physical characteristics, state of mind, social environment, age, etc., as well as the objective circumstances surrounding the case, the psychological and physical traits of the perpetrator, and especially the motives or reasons behind the intentional deprivation of the passive subject's life. All of this leads to the conclusion that this is a very complex criminal act, which in some way determines both the act of committing the crime and its subjective element.

One of the reasons for establishing this privileged form of murder is the fact that the perpetrator acts out of compassion for the passive subject, who often suffers great pain without any real prospect of recovery or finds themselves in an exceptionally difficult life situation with no hope of improvement. Such behavior by the perpetrator, motivated by altruism and the desire to shorten the suffering of the passive subject, generally does not meet with public condemnation; on the contrary, it often elicits sympathy and approval, which was the legislator's motivation for providing for this form of murder.

Based on the above, we believe that this incrimination can be applied to cases of intentional murder carried out at the request, plea, or consent of the passive subject, to murder committed out of compassion or mercy towards the passive subject, and to assisting in dying by intentionally shortening life. However, in analyzing judicial practice in cases of taking another person's life, we did not come across any example of the application of this incrimination. This does not mean that there were no situations to which this incrimination could and should have been applied, but, in our opinion, it indicates a certain caution on the part of the judiciary when it comes to interpreting and applying it. This is understandable to some extent, as it involves the intentional deprivation of another person's life, a conscious and deliberate act to take another person's life, often initiated by the victim, who requests the shortening of their suffering or pain, and accompanied

by feelings of pity or compassion from the perpetrator. Thus, the subjective elements that underlie particularly mitigating circumstances dominate, and these are often very difficult to determine with certainty.

Additionally, we believe that this form of murder could be applied to some cases of intentional deprivation of life where the victim's long-term life and behavior significantly influenced the perpetrator's decision and the execution of the act. These are life situations in which a victim of violence becomes the perpetrator of violence, where a person who has endured violence for an extended period, especially a victim of domestic violence, takes the life of the abuser.

It is interesting to note that the Criminal Code of North Macedonia (https://jorm-.gov.mk/wp-content/uploads/2016/03/законик-пречистен-текст.pdf accessed on 23.07.2024) provides for a specific criminal offense of Murder out of Noble Motives (Убиство од благородни побуди, Art. 124), which essentially corresponds to the criminal offense of murder committed under particularly mitigating circumstances. Additionally, the definition of the criminal offense of sudden murder includes cases of life deprivation carried out suddenly by a person who, without their fault, was brought into a state of severe agitation by attack or severe insult, or as a result of domestic violence, gender-based violence against a woman by the killed person (Убиство на миг, Art. 125). We believe that this part of the incrimination of sudden murder, which relates to cases of gender-based violence and domestic violence, can be subsumed under the incrimination of murder committed under particularly mitigating circumstances as provided by the Criminal Code of the Republic of Srpska.

3. Aggravated Murder

The fact is that every murder results in the death of a person, and in this sense, we cannot differentiate between individual cases. However, it is also true that not every murder is committed in the same manner, under the same circumstances, or for the same motives. This is why legal systems distinguish between the basic criminal offense of murder and its aggravated (qualified) and mitigated (privileged) forms.

From a criminal law perspective, aggravated (qualified) murder is an intentional taking of life accompanied by qualifying circumstances, i.e., an intentional taking of life of another person committed under particularly aggravating circumstances which increase the danger posed by the act and the perpetrator. Consequently, the legislature prescribes the harshest punishment or the maximum prison sentence for this form of murder. Therefore, aside from the basic characteristics of the criminal offense of murder such as the form of guilt, the object of protection, and the act of execution aggravated murder also has other specific features that qualify it as a more serious form of murder. These are the so-called qualifying circumstances, which pertain to the manner of execution, the motives behind the act, the status of the victim, the circumstances under which the act was committed, etc.

Since aggravated murder is an intentional taking of life accompanied by special circumstances, it is necessary to establish that the perpetrator was aware of all elements of the crime, i.e., that the qualifying circumstances were encompassed by their intent. If multiple qualifying circumstances are present in a specific case, such as a murder for gain committed in an exceptionally cunning manner, there will be a concurrence of qualifying circumstances but not a concurrence of criminal offenses. This is because it concerns only special forms of the same criminal offense for which the same penalty is prescribed, thus creating an apparent concurrence of criminal offenses based on alternativeness (Babić, Marković, 2005:24).

The legislative technique for regulating aggravated murder in the criminal law of Bosnia and Herzegovina varies. In the Criminal Code of Republika Srpska (CC RS), it is regulated as a separate offense in Article 125, which encompasses cases of intentional taking of life that were previously part of other criminal offenses, such as robbery. Article 125 states:

"(1) A minimum of ten years imprisonment or life imprisonment shall be imposed on:

1) Whoever takes another person's life in a cruel or treacherous manner,
2) Whoever takes another person's life for gain, to commit or conceal another criminal offense, out of ruthless revenge, hatred, or other particularly base motives,

3) Whoever takes the life of a family member previously abused by the perpetrator,
4) Whoever takes another person's life during reckless violent behavior,
5) Whoever takes another person's life and intentionally endangers the life of another person,
6) Whoever intentionally takes the lives of two or more people, excluding manslaughter, infanticide during childbirth, or murder committed under particularly mitigating circumstances (Article 124, paragraph 2),
7) Whoever takes the life of a child or a woman known to be pregnant,
8) Whoever takes the life of a judge or prosecutor in connection with their judicial or prosecutorial duties, or an official or military person performing security duties or duties of maintaining public order, capturing a criminal offender, or guarding a person deprived of liberty,
9) Whoever takes another person's life during the commission of a robbery or a violent theft.

(2) The penalty from paragraph 1 of this Article shall also apply when the taking of life is committed in an organized manner or on order. Since the general maximum prison sentence is 30 years, the special maximum sentence for aggravated murder is 30 years."

In contrast, the Criminal Code of the Federation of Bosnia and Herzegovina (CC FBiH) and the Criminal Code of the Brčko District of Bosnia and Herzegovina (CC BD BiH) do not prescribe aggravated murder as a separate offense. Instead, they include it within the article on murder, where a second paragraph essentially covers cases of aggravated murder. There are differences in the qualifying circumstances prescribed, reflecting differences in the scope and intensity of criminal protection of the right to life in Bosnia and Herzegovina, which are assessed according to the essence of the criminal offenses that protect the object of protection and the type and severity of the prescribed criminal sanctions.

The Criminal Code of the Federation of Bosnia and Herzegovina, in Article 166, Paragraph 2, provides for the existence of a more severe form of the

criminal offense of murder in cases where the murder is committed in a cruel or treacherous manner; in the course of reckless violent behavior; out of hatred; for profit, for the purpose of committing or concealing another criminal offense; out of reckless revenge or other base motives; as well as in the case of the murder of a judge or prosecutor in connection with the performance of their judicial or prosecutorial duties, or of an official or military person while performing security tasks, duties of maintaining public order, apprehending a criminal offender, or guarding a person deprived of liberty.

Similarly, Article 163, paragraph 2, of the CC BD BiH, which regulates the crime of murder, stipulates the existence of a more serious form of this offense if committed in a cruel or treacherous manner; during reckless violent behavior; out of hatred; for gain, to commit or conceal another criminal offense, out of ruthless revenge, or other base motives; and if the life of an official or military person performing security duties or duties of maintaining public order, capturing a criminal offender, or guarding a person deprived of liberty, or the life of a child or a woman known to be pregnant, is taken. For this form of murder, both laws prescribe a minimum of ten years imprisonment or a long-term imprisonment.

Given that the general maximum prison sentence in these laws is 20 years and that long-term imprisonment can range from 21 to 45 years, there are significant differences in the penalties prescribed for this offense in the CC RS. Differences also exist in the qualifying circumstances of the crime, i.e., in the prescribed forms of aggravated murder, with some forms of aggravated murder specified in Article 125, paragraphs 4 and 9 of the CC RS, also found in the CC FBiH and CC BD BiH as more serious forms of other offenses, such as robbery and violent theft, or domestic violence. However, these two laws do not provide for the existence of aggravated murder if committed in an organized manner or on order, or if the life of one person is taken while intentionally endangering the life of another person, or if the lives of two or more persons are intentionally taken, excluding privileged forms of murder.

Although every murder represents the destruction of human life and is therefore a very serious criminal offense, the legislature has nonetheless distinguished between them based on various circumstances that serve as characteristics of the crime, differentiating them by their degree of danger or severity.

3.1. Murder in a Cruel or Treacherous Manner

The qualifying circumstance for this form of the offense is the specific manner of execution, which the legislature has designated as cruel or treacherous, without providing criteria for their interpretation. This leaves it to judicial practice and doctrine to find appropriate interpretations of these circumstances and thus the true meaning of this form of aggravated murder. Changes in the legal definition of the criminal offense have also influenced the interpretation and application of this incrimination over time. In the previous legal solution, this form of the offense was more restrictive; murder in an especially cruel or extremely treacherous manner. Accordingly, this form of aggravated murder could be applied to specific cases where the court found the presence of cruelty or treachery of such intensity.

Every murder, regardless of the manner of execution or the weapon used, involves a certain degree of cruelty or treachery. Therefore, the essence of this form of murder is a cruel manner of execution that manifests greater cruelty than usual in any deprivation of life. The assessment of cruelty in the crime of murder cannot be based solely on objective facts but also on the subjective stance of the perpetrator. Thus, the qualification of a specific manner of murder as cruel cannot be based solely on an objective assessment of the method used, i.e., the pain and suffering endured by the victim, but it is necessary for the perpetrator to be aware that they are causing severe or prolonged pain to the victim (Babić, 1995: 77; Commentary on the Criminal Code of Serbia, the SAP of Kosovo and the SAP of Vojvodina p. 111.). The objective component of cruelty represents the severity of the pain and suffering caused to the victim, while the subjective component encompasses the perpetrator's attitude towards the victim's suffering, i.e., the insensitivity of the perpetrator towards the victim's agony or their enjoyment in the victim's suffering. Under this interpretation of the qualifying element, the basis for applying this incrimination is not exclusively the manner of execution but also the psychological attitude of the perpetrator manifested by such a manner of execution. Nevertheless, it should be emphasized that the pain or suffering inflicted by the perpetrator must, by their intensity or duration, exceed the measure of pain and suffering that occurs in any murder. It is sufficient for the suffering to be either prolonged or intense (Babić, Marković, 2005:25). Physical pain and suf-

fering that are not particularly intense by themselves can constitute cruelty if prolonged through repeated acts. This view is also reflected in older case law, as evidenced by the Supreme Court of Serbia case Kž I 914/72, where the first-instance court's verdict convicting the defendant of murder in a cruel manner was upheld because he had beaten his wife with his hands and a short stick for an extended period, causing multiple serious and minor external and internal injuries that led to severe bleeding and, after a short time, her death (Jakovljević, 1975:371). Murder committed in a cruel manner exists even in cases where the suffering or pain is of short duration but of particular intensity, as was the case with a murder where the victim was doused with a large quantity of boiling water mixed with a strong solution of caustic soda. Despite the fact that the victim's pain lasted only a short time, it is certain that such a method of execution causes intense pain (Čejović, 1986: 290).

The qualifying circumstance that makes this form of murder specific is the treachery that characterizes the manner in which the crime is committed. The answer to what this qualifying circumstance encompasses, or what is considered a treacherous method of committing murder, should be sought in existing judicial practice and doctrine. In this regard, two concepts can be distinguished: the objective and the objective-subjective. According to the objective concept, treachery as a method of committing murder involves actions by the perpetrator that the victim could not notice or detect, or methods that make it difficult or impossible to uncover the crime, such as murder from an ambush, while the victim is asleep, or using means that obstruct the detection of the crime (Tahović, 1955:74). The objective-subjective concept of treachery assumes that the objective component of this term is reflected in the covert and secretive actions of the perpetrator, while the subjective component is characterized by deceitful, insincere, and malicious exploitation of the trust the victim had in the perpetrator, or of the victim's helplessness or hopelessness[2] (Babić, Marković, 1997: 29).

In literature, typical examples of this type of murder are often cited as sudden murder, murder while the victim is asleep, and murder by poisoning. However, although these cases involve a victim who is innocent or helpless, un-

[2] See: Commentary on the Criminal Code of the Republic of Serbia, p. 112.

able to anticipate the attack and thus unable to defend themselves (objective component of treachery), it cannot be accepted a priori that the murder was committed in an extremely treacherous manner without also establishing the subjective elements of treachery. For example, in the case of an ambush, to apply this incrimination, it is necessary to establish that the victim was lured into that situation through deceit or by abusing a relationship of trust that existed between the perpetrator and the victim (e.g., inviting the victim to a certain location under the pretext of delivering an important message, repaying a debt, or having an important conversation). Similarly, murder committed while the victim is asleep would be considered extremely treacherous only if the perpetrator specifically exploited that situation to commit the crime, or if the victim was deceitfully put into that state, for example, by being given a sedative. When it comes to murder by poisoning, this form of murder would only exist if the perpetrator acted cunningly and slyly, using an existing or newly established relationship of trust, such as inviting the victim to dinner and then putting poison in their food (Babić, Marković, 2005:27).

3.2. Murder for Profit, to Commit or Conceal Another Crime, Out of Reckless Revenge, Hatred, or Other Particularly Base Motives

Murder for profit, to commit or conceal another crime, out of reckless revenge, hatred, or other particularly base motives represents a special form of aggravated murder where the underlying factor is the perpetrator's motive an internal, psychological element that is often very difficult to prove. Therefore, the essence of this form of aggravated murder lies in the subjective element of the crime, for which there are no exact methods of determination, but its existence is usually inferred from objective indicators. For instance, in a murder for profit, it is essential to establish that the perpetrator was motivated by a reckless, egotistical drive to gain benefit, even at the cost of another's life. In this context, it is irrelevant whether the benefit is material or non-material and whether it is of an illegal nature or not.

In cases where the murder is committed to execute or conceal another crime, the primary motive of the perpetrator is to eliminate the passive subject in order to facilitate the commission of the other crime or to cover it up. The nature and severity of the other crime are irrelevant for the application of this form of

aggravated murder. Reckless revenge as an aggravating circumstance in murder is a factual issue determined by the court in each specific case, considering all the objective and subjective circumstances involved. Thus, for revenge, which is generally defined as the infliction of harm in retaliation for a perceived wrong, to qualify as an aggravating circumstance in murder, it must be reckless. As with most other aggravating circumstances, there are no precise criteria for determining such a character of revenge. The evaluation usually begins with the moral norms of the given society and legal norms, while customary norms that conflict with current legal solutions and ethical principles are irrelevant. This approach was also accepted in earlier case law.

In one verdict, it was emphasized that the defense's appeal to customary law in the case of a defendant who killed a member of his extramarital partner's family out of revenge after she had left him four years earlier to live with another man, with whom she had a child, was unfounded, given that such outdated, invalid norms, contrary to positive law and morality, cannot be used to assess the actions of either the defendant or the victims in relation to the question of the reckless nature of the revenge[3] (Čejović, 1986: 307).

Hatred, as an aggravating circumstance in murder, is interpreted in accordance with the definition of hate crimes as prescribed by Article 123, Paragraph 1, Item 21 of the Criminal Code of the Republic of Srpska (RS), which states: "A hate crime is a crime committed entirely or partly due to the racial, national, or ethnic affiliation, language, religious belief, color of skin, gender or sexual orientation, health status, or gender identity of the victim." From this, it is evident that establishing hatred as an aggravating circumstance, which is of an explicitly subjective nature, requires additional objective criteria that will clearly indicate that the murder was committed, for example, due to religious belief or because of gender or sexual orientation.

In addition to the aforementioned motives that qualify as aggravating circumstances, the legislator also mentions "other particularly base motives." Base motives are those that are in stark opposition to prevailing and generally accepted moral norms and attitudes, and which are condemned by the majority of society. They are characterized by a particularly high degree of moral reprehensibility,

[3] Supreme Court of Yugoslavia, Case No. Kž 32/72

social and ethical blameworthiness, and contempt. These are extremely negative motives that make the perpetrator's behavior inhumane, dishonorable, and unworthy of a human being, rendering them a person of no character or scruples (Babić, Marković, 1997: 32). In line with the previous statements, we could say that murder driven by other particularly base motives represents a form of murder where the perpetrator is motivated by such motives that cannot, by the strictest standards, be considered worthy of a human being motives that indicate the perpetrator's moral baseness and provoke severe moral condemnation from society (Babić, Marković, 2005: 33). In our opinion, examples of such murders include the killing of a former or current spouse, extramarital, or romantic partner who has left or decided to leave the perpetrator, a woman killed out of misogyny, and similar cases.

3.3. Killing a previously abused family member

The murder of a family member who was previously abused is a form of serious murder that is specific not only because of the special relationship between the perpetrator and the victim, but also because of the fact that the deliberate deprivation of life was preceded by abuse of the victim. Therefore, the perpetrator of the murder and the victim are members of the same family, and the passive subject of the murder is the victim of domestic violence perpetrated against him by the perpetrator of the murder. In our opinion, for the application of this criminal case, it is sufficient to establish the existence of a special relationship between the perpetrator and the victim and the fact that the perpetrator committed violence against the victim, and it is irrelevant whether the victim reported it to the competent authorities and how long it lasted. Therefore, it is enough to establish that, for example, the passive subject reported or reported the perpetrator to the competent authorities for any form of violence, i.e. it is sufficient for there to be witnesses or other evidence confirming the fact that the passive subject was abused by the perpetrator before the murder. This does not mean the period immediately before the act of murder, because the abuse could have lasted for years, months, and the act of murder itself was carried out without any action that preceded it, which could be classified as abuse. E.g. the perpetrator took the life of his wife with a gunshot, against whom he committed domestic violence, when she was leaving the shared apartment, after she told him that she was leaving him.

This form of aggravated murder is also known in many other legislations, and the special reason for its introduction into the criminal legislation stems from the fact that the number of murders of family members or family members, who were victims of domestic violence, is constantly increasing (Babić, Marković, 2018:53).

3.4. Murder During Reckless Violent Behavior

As a specific form of severe murder, the legislator has foreseen murder during reckless violent behavior. The main characteristic of this form of murder is the violent behavior of the perpetrator during its commission, i.e., the specific attitude towards the act and the victim in terms of objective elements hooligan behavior and, from the perspective of motive and the perpetrator's subjective relation to the victim and the act premeditated murder without a cause or for a trivial reason. Some authors consider that murder during reckless violent behavior is the taking of someone's life done out of spite, not motivated by any special motive, but rather as a way for the perpetrator to express their arrogance, recklessness, and disregard for the value of human life (Lazarević, 1991: 84).

3.5. Murder by Intentionally Endangering the Life of Another Person

Murder by intentionally endangering the life of another person is a specific form of severe murder, where the core issue is the degree of injury or endangerment of the protected good. The perpetrator, in addition to intentionally taking one person's life, also intentionally endangers the life of another person, thus increasing the degree of threat to the protected good, i.e., the right to life. The danger to another person's life must be concrete, meaning there was an objective possibility that, as a result of the taking of one person's life, another person's life could also be taken. It can involve one or more people, and the source of danger can be the method of committing the act, the means used for the murder, or some other circumstance (Lazarević, 2006:351). Such a situation exists if, for example, automatic weapons, bombs, plastic mines, or timing mechanisms are used in a place where there is an objective possibility of harming other people, such as at a workplace, in a restaurant, in official vehicles, in a train, or in a room where a gathering is to be held, etc. (Babić, Marković, 2018:36).

3.6. Murder of Two or More Persons

The essence of the qualifying circumstance of this form of severe murder, like the previous one, is the degree of injury to the protected good, as it involves a greater extent of violating the right to life compared to other forms of murder; it involves the intentional taking of the lives of at least two people. The legislator has limited the application of this criminal offense by excluding its application in cases of murder in the heat of passion, the murder of a child during childbirth, or murder committed under particularly mitigating circumstances, as these are also considered intentional murders but treated by the legislator as privileged. Therefore, it would not be criminologically justified to treat multiple privileged murders as severe murders. In legal terms, this involves the concurrence of the crime of murder, whether ideal or real, which the legislator has classified as severe due to the gravity of the resulting consequence. Furthermore, this fact indicates the exceptional danger posed by the perpetrator, manifested as a tendency to commit murders. This is the essence of this form of severe murder.

3.7. Murder of a Child or a Pregnant Woman

The tendency for enhanced legal protection of children from all forms of violent crime, which is present in all modern European legislations, has influenced the creation of legal protection for the right to life. Although the right to life enjoys absolute protection from the moment of birth until death, this has led the legislator to ensure enhanced protection of this right for children through the criminalization of severe murder. It should be noted that the legislator has defined a child, when a victim of a crime, as a person under 18 years of age. Therefore, for the application of this form of severe murder, it is sufficient to prove that the victim was a child and that the perpetrator was aware of this fact. The other alternative qualifying circumstance also refers to the specific nature of the victim, i.e., a pregnant woman. As in the previous case, for the application of this incrimination, it is necessary to establish that the perpetrator was aware that they were taking the life of a pregnant woman. This qualifying circumstance of murder, in our view, indirectly provides legal protection to the so-called future life. Before the existence of this form of severe murder, cases of killing a pregnant woman were categorized as ordinary murder (of course, if there were no other qualifying circumstances), thus neglecting the fact that taking the life of a pregnant woman

essentially meant destroying two lives: the current life of the pregnant woman and the future life of the fetus.

3.8. Murder of a Judge or Public Prosecutor, Official, or Military Person

According to the legal formulation of the act, this form of severe murder exists when the life of a judge or public prosecutor is taken in connection with the performance of their judicial or prosecutorial duties, or when the life of an official or military person is taken while performing security duties or duties related to maintaining public order, apprehending a criminal, or guarding a person deprived of liberty. Unlike the previous form of severe murder, for the application of this incrimination, it is necessary to establish that the taking of life was related to the performance of their duties or functions. Otherwise, this form of the act will not exist. The rationale for this solution is found in the need for enhanced legal protection of the right to life for those categories of people who, while performing their duties and responsibilities, are exposed to increased risks to their lives.

3.9. Murder Committed Organically or on Commission

This form of severe murder represents a specific reaction by legislative bodies to the problem of organized crime, which has recently been expanding in our region. Murder committed in an organized manner, or better said, organized murder, is a type of severe murder that differs from other forms by the manner of its execution. The very concept of organized murder is difficult to define precisely, but a logical interpretation would suggest that it involves a murder committed after certain preparations, agreements, and plans for its execution. It is, therefore, a form of murder for which the involvement of multiple individuals is necessary, or which, by its definition, presupposes the participation and contribution of multiple people for the crime to be carried out. Along with this qualifying circumstance, the legislator has also alternatively provided for another possibility, namely that the murder was committed on commission, or based on an agreement between the person commissioning the murder and the perpetrator. Cold-blooded taking of another person's life on commission, by someone who has no personal relation to the victim, with full awareness and determination to take that person's life, indicates that the perpetrator is devoid of all moral and human feelings and is extremely dangerous to the community (Babić, Marković, 2018:59).

4. Privileged Murders

Murder, as the intentional taking of another person's life, is considered a severe criminal offense in all criminal law systems, for which there is no justification, as it involves the conscious and deliberate taking of another human life. However, there are certain life situations and circumstances that reduce the degree of danger posed by the act and the perpetrator and provide a basis for treating such murders as privileged, i.e., for prescribing a lesser penalty for the perpetrators. In the Criminal Code of the Republic of Srpska, privileged (less severe) forms of murder are Murder in the Heat of Passion and Murder of a Child During Childbirth. Some literature occasionally includes Negligent Killing in this category of murders. We believe that it is not a privileged murder because it differs from the criminal offense of Murder and all other privileged forms by the nature of culpability rather than by other circumstances that mitigate the degree of danger of intentional taking of another person's life.

One might question whether the legislator, by prescribing privileged forms of murder with a lesser prison sentence compared to other criminal offenses, such as property crimes, has diminished the significance of the right to life as an object of protection. This is because the offense involves the intentional taking of life by a perpetrator who consciously and willingly performs an act that deprives another person of life. However, analyzing the elements of these criminal offenses, it can be concluded that the legislator has taken into account the real-life situations that have determined the behavior of the perpetrator, or that are fundamental to their actions. In the case of Murder in the Heat of Passion, it is the provocation of the victim, and in the case of Murder of a Child During Childbirth, it is certain circumstances related to pregnancy and childbirth that significantly influenced the decision to take the newborn's life. In both cases, there are circumstances that, from a socio-ethical and moral standpoint, cannot lead to the exclusion of the unlawfulness of the act, but according to the legislator's view, they significantly affect the act by altering its severity and nature.

4.1. Murder in the Heat of Passion

According to the legal definition in Article 126 of the Criminal Code of the Republic of Srpska, this form of murder is committed by someone who takes another's life in the heat of passion provoked by severe abuse, harassment, or insults from the victim. The prescribed punishment is imprisonment from two to twelve years.

The criminal nature of this type of murder is determined by the relationship between the perpetrator and the victim. This relationship is actually the central element of this criminal offense because it leads to the state of intense agitation in the perpetrator, which forms the basis for the privilege of this form of murder. The victim, through their behavior namely, through attack, severe abuse, or severe insults provokes the crime and significantly contributes to their own victimization. We can say that the victim, in a certain way, participates in the creation of the crime by taking actions that are such in their nature that they bring the perpetrator into a special psychological state of agitation in which they react violently and make a sudden decision to kill the provoker. Thus, it involves an intense emotional state characterized by the suddenness of onset and lack of self-control. Besides the state of intense agitation brought about by the victim's provocation, which, as previously mentioned, forms the basis for this form of murder, a significant feature of this type of murder is that it is committed in the heat of passion. There are differences in the doctrine and jurisprudence regarding this element that might not seem significant at first glance but can lead to substantial differences in how perpetrators are treated. Generally, a temporal continuity between the provocation by the victim and the commission of the murder is required, with the possibility of a shorter or longer time gap between these two moments. Two interpretations are differentiated: one, which imposes a highly restrictive temporal gap and limits this qualification to reactions of the perpetrator that are virtually instantaneous and follow immediately after the victim's provocation (regardless of whether the state of intense agitation lasted longer than what is covered by the term "in the heat of passion"), and the other, more expansive interpretation, which considers that the temporal continuity between these two moments exists as long as the state of intense agitation caused by the victim's provocation persists (Babić, Marković, 2018:62). Thus, the regular discussion in-

volves the correlational relationship between the victim's behavior and the murder, and in this sense, interprets the concept of acting "in the heat of passion." However, it seems that the problems in interpreting and applying this element stem from this correlational approach. The state of intense agitation is a fundamental characteristic of this incrimination, and in our view, it is the *ratio legis* and represents the basis for the privilege in this case of taking a life. Therefore, the question of temporal continuity should be considered in relation to the state of intense agitation and the perpetrator's reaction, rather than the relationship between the provocation and the perpetrator's reaction (Babić, Marković, 1997:54).

4.2. Murder of a Child During Childbirth

According to the legal definition in Article 127 of the Criminal Code of the Republic of Srpska, the crime of Murder of a Child During Childbirth involves the intentional taking of the life of a newborn by the mother, during childbirth or immediately after childbirth, under the influence of a state induced by childbirth. At first glance, it is evident that this involves the intentional killing of a child during or immediately after childbirth. From a victimological perspective, this is a completely innocent victim who has contributed nothing to their own victimization. Therefore, it would be a logical conclusion that such intentional murder of a powerless victim should not be criminally justified as privileged. However, the basis for the privilege found by the legislator lies in the fact that the mother takes the life of her child during or immediately after childbirth under the influence of a state caused by childbirth. Thus, the essential element of the crime is the state induced by childbirth, which replaced the earlier formulation of "disorder caused by childbirth," which was inadequate as it did not reflect the essence of the psychological state of the mother during the commission of the crime, provided that the mother is a psychologically healthy person[4]. This does not mean that pathological psychological states underlying the mother's behavior should be disregarded, but they should not be classified under the term "state caused by childbirth" but should be interpreted within the framework of criminal responsibility.

[4] For more details, see Babić, Marković, 1997: 67-70.

The new formulation of the crime, i.e., the phrase "state caused by childbirth," clearly indicates that the privilege of this incrimination is not based solely on a psychological disorder caused by childbirth, but rather on a special psychological state of the mother under the dominant influence of exogenous factors related to pregnancy and childbirth, rather than childbirth itself, although their correlational connection with the mother's individual personality traits cannot be excluded. This legislative stance has certain implications for the application of this incrimination because the "state caused by childbirth" must be established in each specific case, regardless of whether the killing of the child occurred during or immediately after childbirth (Babić, Marković, 2018:66).

A crucial element of this crime is the timing of its commission, as the crime can only be committed during childbirth or immediately after childbirth. The destruction of the fetus before the onset of labor, that is, before the first labor pains, if there are no legal conditions for it, would have to be legally qualified as an unlawful abortion. Considering that the passive subject is, in victimological terms, a completely innocent victim, one who has contributed nothing to their own victimization, and that the penalty for this crime is imprisonment from 1 to 5 years, we believe that, in order to achieve adequate criminal protection of the right to life of the newborn, the phrase "immediately after childbirth" should be interpreted restrictively and limited to a very short period.

5. Negligent Homicide

With the reform of criminal legislation in the Republic of Srpska in 2000, the term "Negligent Homicide" replaced the previous term "Involuntary Manslaughter." We believe that this terminological change is more appropriate. The previous legal term was a contradictory and inconsistent combination of two concepts: "homicide," which implies intentional deprivation of another person's life, and "negligence," which is associated with involuntary offenses.

Article 128 of the Criminal Code of the Republic of Srpska prescribes a prison sentence of two to eight years for anyone who negligently causes the death of another person. Therefore, the offense exists when the perpetrator was aware that their actions or inactions could cause another person's death but recklessly believed that the consequence would not occur or that they could prevent it. It

also applies when the perpetrator was unaware of the potential for a fatal outcome, but given the circumstances of the act and their personal attributes, they were obliged and able to foresee such an outcome. The death of another person is the result of the perpetrator's carelessness or reckless behavior. This is a commission-omission offense, meaning that the classification of the act applies both to situations where the death of another person occurred as an unintended consequence of an action taken and when the death occurred due to a failure to take action to prevent it. In this sense, the Military Court in Banja Luka found a person guilty for failing to engage the safety mechanism while removing a pistol from its holster, knowing that a bullet was in the chamber, and that its discharge could injure those present. This occurred when the person slipped on a wet floor.[5] The justification for this criminal offense lies in the nature and importance of the protected interest, namely the right to life, which, as a natural human right, must enjoy absolute protection from all forms of harm and endangerment.

6. Incitement to Suicide and Assistance in Suicide

The criminal protection of the right to life is not directed toward the holder of this right; every individual has the complete freedom and unrestricted authority over their life, up to the point of its complete destruction. This reflects the modern legislative stance that the right to life is a personal and inalienable right of every individual that cannot be restricted, even when exercising that right means its total negation. Accordingly, suicide is not considered a criminal offense, which is logical since the same person would be both the perpetrator and the victim. However, aiding or encouraging suicide constitutes, in the legislature's view, actions that endanger the right to life, and as such, they are criminalized as independent offenses under the theory of limited accessory liability (Article 129 of the Criminal Code of the Republic of Srpska). This allows criminal law to protect the right to life from any actions by others, even when such actions merely assist the holder of the right to life in realizing their decision to self-destruct. When drafting this offense, the legislature considered the characteristics

[5] Unpublished verdict, no. IK 121/93, according to Babić, Marković, 2005:49.

of the passive subject, the manner in which the act was carried out, the circumstances under which it was committed, and based on these factors, provided for several forms of the offense. If aiding or inciting suicide is directed toward an adult, it constitutes the basic form of the offense, punishable by six months to five years in prison. However, if the actions of aiding or inciting are directed toward a person whose ability to understand the significance of their actions or control their behavior was significantly diminished or non-existent, or toward a child, more severe forms of the offense exist. This approach by the legislature is justified because children, as well as persons whose mental capacity is excluded or significantly reduced, often do not fully grasp the meaning of such a decision at the moment of deciding to commit suicide, as the decision is made impulsively under the influence of overwhelming life experiences. Incitement of a child or an incapable person to commit suicide, or assisting such a person in doing so, is equated with murder from the perspective of criminal sanctions. The criminal protection of the right to life against endangerment is also manifested through a special form of this offense, which provides for punishment of those who cruelly or inhumanely treat a person who is dependent on them, leading to that person's suicide, which can be attributed to the perpetrator's negligence. It is interesting to note that aiding in suicide under particularly mitigating circumstances is prescribed as a lesser form of the offense. In our opinion, the rationale for this provision is the same as for prescribing a lesser form of murder, that is, murder committed under particularly mitigating circumstances.

7. Unlawful Termination of Pregnancy

The right to life as an object of criminal law protection enjoys absolute protection from the moment of a person's birth, which is realized through specific criminal offenses that protect this right from unlawful harm or endangerment. However, this does not mean that human life is not protected before birth, as the legislature provides for the criminal offense of Unlawful Termination of Pregnancy, which enforces the criminal law protection of the human fetus, or future life, or life in the making. This criminal offense only criminalizes cases of illegal termination of pregnancy, meaning only those cases that contradict the legal conditions for performing an abortion. Therefore, the legislature does not criminalize

every termination of pregnancy or the destruction of a human fetus as a bearer of future life, which is a direct consequence of affirming a person's right to free parenthood and elevating this right to the level of a constitutional principle (Article 36 of the Constitution of the Republic of Srpska). The essence of this right, that is, the right to free parenthood as a fundamental human right, consists on one side of the freedom to have children and on the other side, the freedom not to have children, or the right of a woman to freely and independently decide on the termination of pregnancy. The realization of this negative aspect of the right to free parenthood, specifically the right of a woman to independently and freely decide on the termination of pregnancy, was enacted by the Law on Conditions and Procedure for Termination of Pregnancy, which prescribes the conditions for a legal abortion (Babić, Marković, 2005:55).

Unlawful termination of pregnancy is criminalized under Article 130 in several forms. The basic form of the offense is the unlawful termination of pregnancy with the consent of the pregnant woman, which includes not only performing the abortion but also aiding the pregnant woman in having an abortion. More serious forms of the offense exist if the perpetrator regularly performs unlawful abortions with the consent of the pregnant woman, if the abortion is performed without the pregnant woman's consent, or if she is under 16 years old and it is done without the consent of her parent, guardian, or adoptive parent. The most serious form of the offense occurs if death, serious bodily injury, or severe health impairment of the woman upon whom the abortion was performed results from the mentioned forms.

Self-induced abortion is not punishable. Therefore, the human fetus enjoys limited criminal law protection against third parties, but not against the pregnant woman, as she is not criminally liable for the destruction of her own fetus.

Conclusion

The right to life, as a fundamental human right, enjoys absolute criminal law protection in the legislation of the Republic of Srpska from the moment of birth until death from all actions that could harm or endanger it, except when such actions are taken by the right holder themselves.

Although criminal legislation has undergone reform over the past two decades, the concept of this protection has not significantly changed. In addition to amendments that corrected certain criminal offenses, the most significant change is reflected in the tightening of penal policies through the introduction of harsher sentences or life imprisonment for the most serious criminal offenses. This legislative activity followed increasing public pressure demanding stricter penalties for perpetrators of murders or other crimes resulting in the death of the victim, such as rape. However, it is important to note that even before the introduction of life imprisonment, there was an option to impose long-term imprisonment ranging from 25 to 45 years, which was rarely used in judicial practice. Therefore, it remains an open question as to how and to what extent these changes will impact the criminal law protection of the right to life.

Finally, it should not be forgotten that the right to life, besides the right to the inviolability of life or bodily integrity, also includes the right to a dignified life. This requires adequate criminal law protection of all other human rights and freedoms, as well as certain general values such as health, the environment, and the like. We believe that the latest reform of criminal legislation in the Republic of Srpska has set this protection at a satisfactory level.

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MULTIPLE HOMOCIDE AND THE PUBLIC'S PERCEPTION

In this paper, the author discusses the crime of multiple homocide and public's perception by analyzing mass murder as one of the most serious crimes against life and body. The issue of prevention is not only a matter of criminal law, but also applies to the media that report on crimes. Mass killings are not a new crime, and as such they are criminalized in the Criminal Code, but in relation to reporting on them, new, preventive forms of work should be undertaken. In reporting on mass killings, written and electronic social media should respect a code of ethics that would oblige them to inform the general public about the injured and endangered right to life of individuals. By avoiding the incitement of Amok violence or Werther's syndrome, and by supporting positive examples as prevention, the possibility of further mass murder and violence would be minimized. Only through reporting in accordance with professional standards and ethical rules can adverse effects be avoided.

Keywords: *mass killings, copying crimes, prevention, professional reporting.*

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Instead of an introduction

Mass murder is considered one of the most serious crimes against life and bodily integrity today, not only because of the number of people killed and injured, but also because of the message to the public that everyone can be a target, to how we try to prevent it. The murder of multiple persons does not qualify as a "new" crime because it has been recognized as such for several decades. In criminal law, it is defined as a criminal offense of aggravated murder. But the fact is that since the 1960s, the media have dealt with this crime much more intensively, reporting on all the details that the victims suffered.

The crime of murder of several persons (aggravated murder), which can also be referred to as mass murder, is a complex and destructive act that occurs as a result of many factors. In cases of mass killings, it seems that the media is largely responsible for learning about models for copying the manner in which a crime is committed. One element that is relevant to the spread of mass murder and other "contagious" behaviors is imitation. Developing different strategies with the idea that they work in such a way as to change the probability of mass killings is the obligation of the competent institutions, but the professional attitude of the media in reporting is certainly the basis for the full implementation of these strategies, in order to prevent the imitation of these crimes, and to minimize the imitation of these crimes. When it comes to crimes against life and limb, copying behaviour fuelled by media coverage is not only related to the murder of multiple persons. The media effect has also been shown in suicides, including mass killings, and may also play a role in other extreme events such as domestic terrorism or racially motivated crimes with lethal consequences.[1]

However, we should not read what is not written: the media are not responsible for the crimes that are committed, but with their writings they can influence everyone who is informed through their content. That is why it is important in court proceedings (and not only with the competent regulatory authorities) that professionals recognize the phenomenological forms of Werther's syndrome or the Papageno effect, and although criminal law comes ultima ratio only after crimes have occurred, court decisions also have a role in general prevention.

[1] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5296697/

Knowledge of the phenomenology of the murder of several persons is therefore especially important for state authorities that monitor the development of the state of crime in society and prosecute perpetrators of criminal offenses ex officio. From Werther's syndrome, to the Papageno effect, to the Amok attacks today, we conclude that modern criminal law must accompany both media coverage, including social media postings, and the way in which the public is informed.

The Sorrows of Young Werther (Die Leiden des jungen Werthers, 1774) by J.W. von Goethe depicts the torments of the protagonist who, as an adolescent, has to balance his expectations and social conventions, but also his frustration with the unrequited love of the girl Lota, which is why he eventually commits suicide. After the publication of the novel, chroniclers wrote that the novel was occasionally banned, due to literary imitations of behavior and frequent suicides. In this way, the question is formulated as to how literature (art), and today media writing, affects public opinion. In Goethe's time, Werther syndrome was a hypothesis for a correlation between frequent suicides and sensationalist reporting. Imitations are more common if information is given about age, appearance, education, but also motivation.

In contrast to Goethe, The Magic Flute (Die Zauberflote, 1791) the great Mozart, through the character of Papageno and three boys who advise him to call the lost person with music, offered solutions to such difficult situations when we are in crisis, through giving constructive solutions. Prevention is possible through the Papageno effect and responsible reporting. In reality, things are not so simple and require individual analyses that would point to possible directions out of the spiral where once violence has begun, it always gives rise to new violence. Media coverage of mass killings mostly speculates about the possible motives of the perpetrators of the crime, but also about other details of the crime that may affect potential new perpetrators. These details include descriptions of the weapons used, the order in which the perpetrator killed the victims, as well as the number of deaths and injuries (Lankford, 2016). According to published data, many mass murderers knew about their predecessors, which they learn about through articles in the media, including online research (Langman, 2018). According to Duwe, multiple murders are crimes where the perpetrators have the most influence on each other, where media reports can inform the perpetrators about the motives and the way they are used in committing aggravated murders (Duwe, 2005).

Posing problems in this way can open a conversation between professionals at all levels, in order to seek solutions in order to minimize the mentioned dangers, with questions about what mass killings are, how to position the media in relation to reporting, whether it is possible to spot and perceive future dangers and ways to get out of them, and more. A similar problem is observed in crimes against sexual freedoms, where the media play a similar role as in mass killings (Pavlović, Paunović, 2020). In search of answers, we have analyzed the reporting of a part of the media on a specific serious murder of several persons, with certain conclusions and suggestions. But, let's start in order.

Determination of the crime of aggravated (mass) murder of more than one person

The right to life, threatened by murder, is considered the most socially dangerous crime in the field of so-called classical crime, and is present in all social structures and various conditions of interpersonal relationships. Given the consequence of endangering the right to life, the criminal legislation has also criminalized the criminal offense of murder, with its manifestations. Regardless of the different legal systems, they all recognize this crime, albeit with different incriminations in the protection of this right. The right to life and its protection applies to those who are born, but we believe that in connection with certain professions, we can also talk about the murder of several persons when it comes to unborn children, as subjects of law (Pavlović, 2022).

The definition of aggravated murder of more than one person in the context of the topic could be defined as an event of targeted gun violence in one or more locations over a 24-hour period with two or more people killed. Incidents such as gang violence or domestic murder do not qualify as mass killings according to most authors (Krouse & Richardsson, 2015). Mass shootings are defined as incidents that result in four or more deaths, while "active" shootings have no minimum (Lankford & Silver 2019; FBI 2008). Some authors, especially in the United States, have dilemmas about how many people must be killed and injured for a crime to qualify as aggravated homicide, out of two or three killed with at least five injured during the attack (Huff-Corzine, McCutcheon & Corzine, et al.

2014).[2] Terrorists commit serious murders for political gain, and mass murderers have no such motives. A lone wolf terrorist is an individual who commits the murder of multiple people because of a radical ideology that justifies violence (Borum, Fein & Vossekuil, 2012). In the case of aggravated (mass) murders of several persons in schools, we have not encountered a dilemma in the relevant literature that there is a certain number of killed and wounded victims that would be the limit of whether it is an ordinary or aggravated murder (two or more).

Regardless of the number of people killed (multiple persons) or the place where the crime of murder of multiple persons was committed, each of these situations can be determined as a mass murder (Duwe, 2019), without analyzing the individual motives of the perpetrator. For the purposes of this paper, we did not go into the individual motive of the perpetrator. The aim was to analyze the link between media coverage of mass shootings and the contagion effect it can cause to contribute to any future mass shootings. It is clear that the subject of our research and further analysis is neither multiple murders nor serial murders, but exclusively mass murders. Mass murderers commit crimes in a single act, which does not have to be simultaneous, and can last from a few moments to several hours. Mass killings include aggravated killings of multiple persons committed by shooting or using other firearms or cold weapons in an open or enclosed space. These murders take place through the so-called Amok attacks, as a complex social phenomenon of endangering security that requires early recognition as the only possible form of prevention of such violence (Vulević, 2019).

In some countries, such as the U.S. and Canada, the most talked about are mass shootings in schools where one student kills other students, teachers and support staff. But mass killings are also carried out in other places, such as parks, train stations, streets, and more, by other perpetrators. According to some authors, this type of perpetrator and form of aggravated murder is not so prevalent in theoretical work and research, because the perpetrators are generally found at or near the scene of the crime, dead or alive and ready to surrender, while this is generally not the case with multiple or serial killers (Dietz, 1996).[3]

[2] https://www.euronews.rs/svet/fokus/78997/rast-broja-masovnih-ubistava-jedan-od-najalarmantnijih-trendova-u-sad-svi-povezani-s-desnicarskim-ekstremizmom/vest

[3] https://pubmed.ncbi.nlm.nih.gov/9004327/

According to the Criminal Code in Serbia,[4] such a detailed elaboration of aggravated murder is not carried out, but in Chapter 13 - Criminal Offenses Against Life and Body, the criminal offense of murder and aggravated murder is criminalized. Unlawful, conscious and intentional deprivation of life of another person, as an unlawful act, is defined in the Criminal Code in Article 113 with a penalty of imprisonment from five to fifteen years. Article 114 (1) of the Criminal Code defines aggravated murder in several forms. In this article, the legislator separately, separately from the so-called ordinary murder, prescribes more serious, qualified forms of murder, which it calls aggravated murders. All forms of aggravated murder have basic features, common to every murder, i.e. unlawful deprivation of the life of another person, but more serious forms are accompanied by a special, qualifying circumstance that makes it more serious and socially dangerous than ordinary murder. The penalty for the perpetrator of the crime is aggravated murder, imprisonment of at least ten years or life imprisonment.[5]

It is clear that the consequences of the criminal offense of aggravated murder (murder of a higher person) are of such a nature that they require really increased attention in reporting, and in this context, more attention should be paid to this phenomenon in the time ahead, through the elaboration of existing laws and the creation of procedures for the future.

[4] "Službeni glasnik RS", br. 85 od 6. oktobra 2005, 88 od 14. oktobra 2005 - ispravka, 107 od 2. decembra 2005 - ispravka, 72 od 3. septembra 2009, 111 od 29. decembra 2009, 121 od 24. decembra 2012, 104 od 27. novembra 2013, 108 od 10. oktobra 2014, 94 od 24. novembra 2016, 35 od 21. maja 2019.

[5] "Službeni glasnik RS", br. 85 od 6. oktobra 2005, 88 od 14. oktobra 2005 - ispravka, 107 od 2. decembra 2005 - ispravka, 72 od 3. septembra 2009, 111 od 29. decembra 2009, 121 od 24. decembra 2012, 104 od 27. novembra 2013, 108 od 10. oktobra 2014, 94 od 24. novembra 2016, 35 od 21. maja 2019.

Here are a few examples and a few questions about it

Although in this paper we deal with the topic of reporting on mass killings, due to the way of detecting the perpetrators of crimes and the event itself, we will give an example of post festum writing. In 2003, Polish writer Christian Bala described the murder of a Polish businessman (2000) whose body was found in Wroclaw in the Oder River, Poland. Bala was sentenced to 25 years in prison for the crime of murder. In his defense before the court, he said that in his book he only described the murder that was reported in the Polish press, and that it was about literary freedom. However, the details in the book were known only to the police and the perpetrator of the murder, so during the court proceedings according to the court decision, Bala was held accountable for this crime.

The book itself could not be used as evidence, but a convicting decision could be made through the evidence gathered. Although more than five years passed from the murder to the trial, the question is how much the analysis of the content could have led to this trial even before it was actually revealed. During the trial itself, the media very carefully reported on the event itself, with full professionalism and without sensationalism. In Poland itself, after this trial, the content of the book and the media reports, there was no similarly committed crime of murder. The effect of the imitation in this case was not even noticed.

In another case, which does not resemble the one described in the novel Amok, but is about the (mass) murder of several people committed in May 2023 in our country (Republic of Serbia), the media reported in accordance with their editorial policies. This is a court proceeding that has not yet been completed, so we will not write about the process itself, but we would define the problem that may exist in such situations.

According to Meindl and Ivy, the media can play a significant role in promoting what is called the copying effect, whereby individuals can be inspired by media coverage to carry out their own attacks. This especially, if detailed descriptions of events and perpetrators are given, images and videos that can be understood as sensationalist reporting. (Meindl & Ivy, 2017). Even the framework of writing about the murder of multiple faces can be described as a sensation. To reduce the effect of contagion, Meindl and Ivy (2017) suggest that the media should avoid over-reporting mass shootings, and instead focus on reporting

the facts of the event without sensationalizing the violence or the perpetrator. Taking a proactive role in promoting the right to life and bodily integrity, emphasizing the social and environmental factors that contribute to mass shootings, and expressing views that can reduce the risk of future events, we come to professional reporting.

How successful we were in this, and the media were invited to such reporting by the highest state and political leadership in the very days when this crime was committed, but also how much we will encounter professional reports in the future, will be shown by the prevention of such and similar crimes, so that they will never happen again.

Analysis of media coverage of mass murder in early May 2023 in Serbia (event of May 5 - research)

We followed the printed editions of the daily newspapers Politika, Večernje novosti, Dnevnik and Kurir from 06.05.2023 to 14.06.2023, which is a period of 40 days. The questions of how sensationalist the newspaper reports (because we did not follow other media, from the internet portals onwards) were or were not sensational, and whether journalists could have done their job better, are rhetorical in nature. Namely, the task of the media is to report on violence and crime, in this case on an event with incalculable consequences for us as a society, because it is really rare for such serious murders to happen. The defendant for this crime, U.B., was charged with killing nine people, two of whom were minors, on May 4, 2023, in the villages of Malo Orašje near Smederevo and Dubon near Mladenovac, by firing an automatic rifle and a pistol, and attempting to take the lives of another 20 people, of whom he wounded 12 of them.[6]

Reporting on such a crime is fraught with challenges not to cross the line that separates the socially acceptable and the socially unacceptable. In some previous works, we mostly encountered situations where the victims' rights to reverence for them were violated, or the presumption of innocence of the defendants, in this case it was a completely different topic. Namely, it was necessary to strike a balance between objective reporting and fighting possible panic. At the same

[6] https://www.bbc.com/serbian/lat/srbija-68903381

time, it was necessary to take into account whether we could show an image that would not create the effect of infection or possible copying by some new, potential perpetrators.

The unit of quantitative analysis of the research was the texts in the hard copy editions of the daily press, which had as their theme the reporting on the mass murder in the villages of Malo Orašje and Dubona, whether it was written about the suspect or the victims. During the analysis of the content, we paid special attention to the number of articles, places or sections where they were published, the number of days, published photographs, the identity of the victims and perpetrators, authorized texts or unsigned, state measures, titles of articles.

All analysed data were accompanied by qualitative analysis.

Table No 1

	Daily news							
	Politika		Dnevnik		Večernje novosti		Kurir	
40 days 104 articles	No	%	No	%	No	%	No	%
Total number of articles	17	16	13	13	32	31	42	40
Number of days in which articles were published	13	32	10	25	21	52	25	62
Number of days with title on the front page	3	23	5	50	10	48	13	52
Number of days with articles accompanied by a photo	9	69	7	70	19	90	25	100

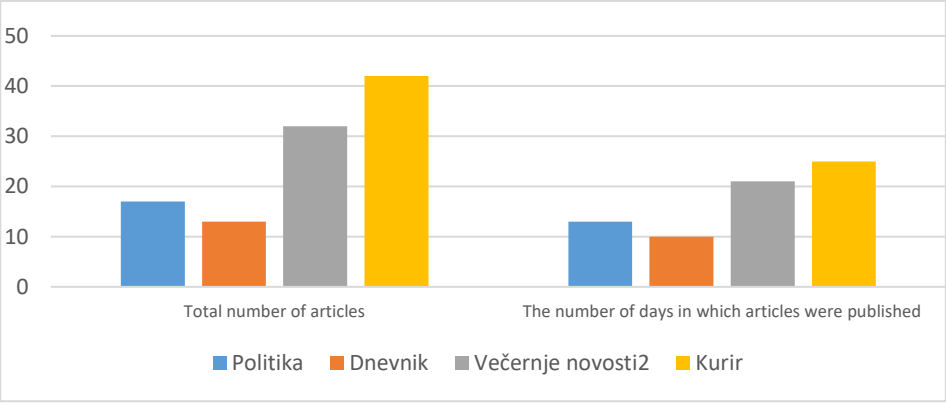
A total of 104 articles related to this event were published in all four daily newspapers during this period. The largest number, as many as 42, was published in Kurir (40%), 32 in Večernje novosti (31%), 17 in Politika (16%), and only 13 articles in Dnevnik (13%).

In Politika, articles were published in editions in 13 days out of 40 days (32%), in Dnevnik in 10 days (25%), while Večernje novosti and Kurir published articles related to this topic in 21 days out of 40 days (52%), and in 25 days (62%), respectively.

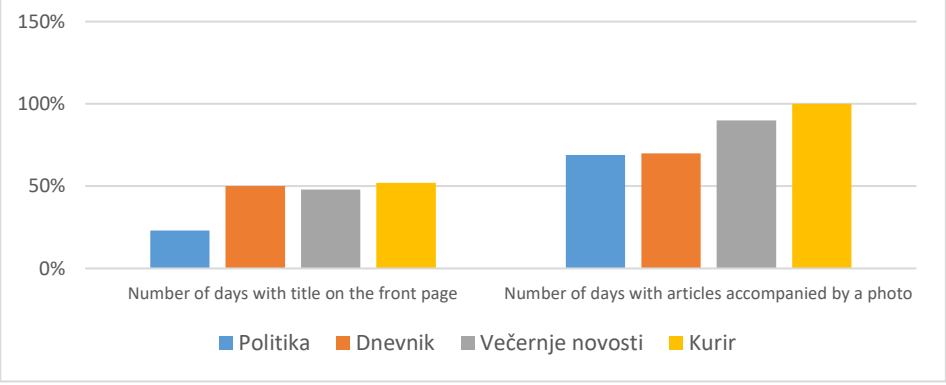
In Dnevnik, in 5 out of those 10 days, the articles were accompanied by the headline on the front page, in Večernje novosti in 10 out of 21 days, and in Kurir in 13 out of 25 days, which is about half of the day when the articles were published. Only in Politika did they follow the text parts with highlighting on the front page of their written editions in much fewer cases - 3 times out of 13 days (23%).

Photographs accompanied articles in all four daily newspapers, of which, in Kurir, all articles were illustrated with photographs - 100%, and in Večernje novosti almost all - only in 2 days there were no photos with the text - 90%. In Politika, a slightly smaller number of days was with a photo - 69%, and in Dnevnik this number was similar and amounts to 70%.

Grafics No 1



Grafics No 2



Reports about this event have been published in various sections. The largest number of articles in all newspapers were published in the main columns, especially in the first 10 days after the event. Later, the articles, according to their content, were arranged in standard rubrics for the analysis of similar events.

In Politika, the largest number of articles, 9, were published in the Chronicle section. In the sections Events of the day and Society, 6 and 2 articles were published.

In Dnevnik, the largest number of articles was also published in the section Current - 6, in Politika and Judicial 3 and 4 articles each. Vecernje Novosti has formed a column Massacres in Serbia and 16 articles have been published in it, and 9 articles in the Chronicle section. In the sections Actual, Events and Society there are a smaller number of articles, 5, 1 and 1.

In Kurir, the largest number of articles was published in the Topic of the Day section - 25, and in the Chronicle 14 articles.

Table No 2

	Daily news							
	Politika		Dnevnik		Večernje novosti		Kurir	
Categories	No of articles	%		%		%		%
Events of the day	6	35						
Current			6	46				
Massacres in Serbia					16	50		
Topic of the day							28	67
Society	2	12			1	3		
Chronicle	9	53			9	28	14	33
Policy			3	23				
Court			4	31				
News					5	16		
Events					1	3		
Total number of articles	*17*		*13*		*32*		*42*	

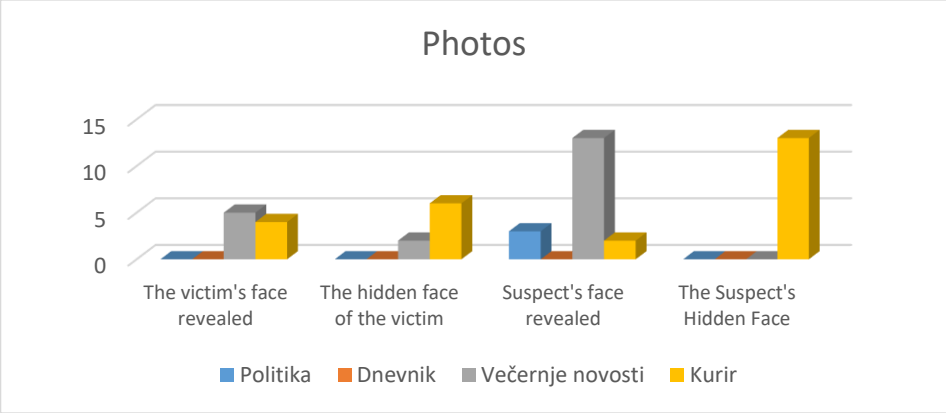
Appreciating the writings through the principle of privacy and protection of the integrity of the subjects about whom it was written, there was not a single article with a photo of the victim in any form in the monitored newspapers Politika and Dnevnik. On the other hand, the photographs of the killer were published in Politika three times with his face uncovered, while in Dnevnik it was not published even once.

On the other hand, in the Evening News, a photo of the killer was given 13 times, always with his face uncovered. Photographs of the victims were published 7 times, 5 times with blurred faces of underage victims and 2 times with uncovered faces. In 10 of its daily editions, Kurir published photographs of the victims, 6 times with their faces hidden, and in the remaining 4 cases, the photos of adult victims or wounded persons were fully uncovered. Photographs of the killer were published in almost all articles (23 out of 25 published), but almost always (21 out of 23) in a blurred edition.

Table No 3

	Daily news			
	Politika	Dnevnik	Večernje novosti	Kurir
Number of articles with a photo of the victim	0	0	7	10
Number of articles with the victim's face revealed	0	0	5	4
Number of articles with the victim's face hidden	0	0	2	6
Number of articles with a photo of the killer	3	0	13	23
Number of articles with the face of the killer revealed	3	0	13	2
The Hidden Face of the Killer	0	0	0	21

Grafics No 3



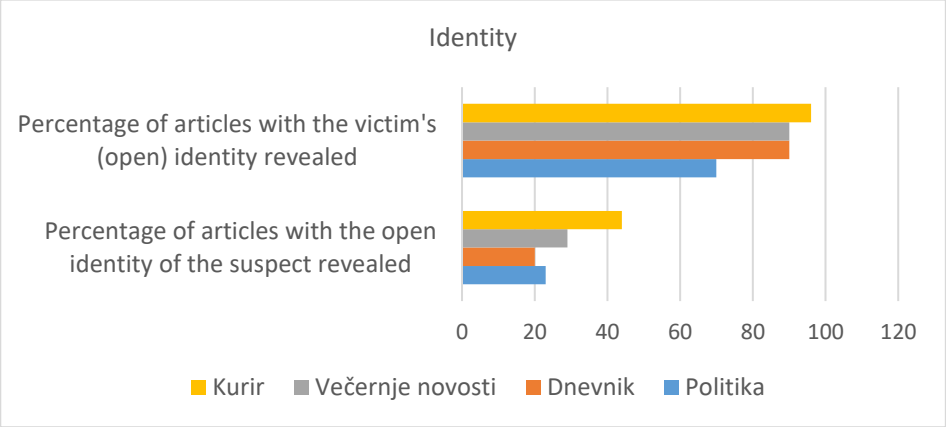
In relation to the data on victims, in the monitored period, the most publications with the identity of the victim, either in the form of initials or full name and surname, were in Kurir 44%, followed by Večernje novosti (29%), in Politika (23%), and the least in Dnevnik (20%).

Information about the identity of the killer was not revealed with his full name and surname, only in the daily newspaper Kurir, but the initials "U.B." were always used. On the other hand, in the Evening News, the full name and surname of the killer are always listed. The full identity of the killer (either through his initials or full name and surname) was revealed 24 times in Kurir, 19 times in Vecernje Novosti, and 9 times in Politika and Dnevnik.

Table No 4

	Daily news							
	Politika		Dnevnik		Večernje novosti		Kurir	
Number of days with articles:	Broj	%	Broj	%	Broj	%	Broj	%
With the victim's initials	3	23	1	10	0	0	11	44
With the victim's identity revealed	0	0	1	10	6	29	0	0
With the initials of the murderer.	1	8	8	80	0	0	24	96
With the identity of the killer revealed.	8	62	1	10	19	90	0	0

Grafics No 4



The texts that were published were mostly original, author's texts, directly related to the event itself. Quotes from statements of various personalities, information from officials, testimonies were published.

Most of the articles are signed with the journalist's initials or full name. In Večernje novosti (19) and Kurir (22) there was approximately the same number of signed texts (either with the full name or initials or descriptively - Ekipa Kurira), which represented the majority in both newspapers. There was not a single article in Politika without some of the characteristics of a journalist. On the other hand, most of the articles were published in the Diary with no indication of who wrote them.

Table No 5

Number of days with articles where it is given:	Daily news			
	Politika	Dnevnik	Večernje novosti	Kurir
Identity of the journalist by full name / surname	6	1	18	10
identity of the journalist with initials / descriptive	7	5	1	12
The identity of the journalist has not been disclosed	0	4	2	3

From the titles of all the analyzed texts, it is obvious that most of them were with the connotation of conveying post-festum information about the event in question - Table 6, while the other part of the texts was followed by titles that pointed to the tragedy and shocking nature of the event itself - Table 7.

A number of articles present the measures of the state as a reaction to the event in question, and so are the titles that accompany them - Table 8.

Table No 6

	Titles of articles with the transmission of information
POLITIKA	"He killed 8 people and wounded 14 with an automatic rifle." "Injured in the crime near Mladenovac taken care of in three hospitals" "Uroš Blažić confessed to the murders in Dubona and Mali Orašje" "The last farewell of the victims in Belgrade and Mali Orašje" "Arrest of the father of an eight-time murderer" "A man from Mladenovac was taken to a prison hospital." "The suspect's uncle has been arrested." "A mass murderer from Mladenovac has been detained extended" "A taxi driver who was a hostage to Uroš Blažić was interrogated"
DNEVNIK	"He killed eight people, wounded 14." "The father of the suspect in the massacre" has been arrested. "The uncle of a mass murderer from Mladenovac has also been arrested." "She lied that she was pregnant", "Detention of the brother of a mass murderer from Mladenovac"
VEČERNJE NOVOSTI	"He shot them all while they were lying down", "The monster has no regrets" "The victim was first searched for in the center of Mali Orašje" "There is still no rifle with which Uroš killed one by one" "Arsenal hid in the attic", "Detention of the father of the murderer from Dubona" "The monster was not drunk or drugged", "The mass murderer had no help" "Pregnant woman and taxi driver about the night of hell", "We will hear as many as 50 witnesses" "She lied to the killer that she was pregnant and threatened them with bombs." "Fathers testified about the tragic night", "And the relative of the killer had a weapon"

KURIR	"I confessed to the crime, I fired a Kalashnikov because I wanted to scare the locals!" "Three funerals, brother and sister will rest together, and a mutual friend by their side." "The background of the crime, I was not inspired by a 13-year-old boy from Vračar" "A young man is going to be watching." "The father of the mass murderer from Dubona has denied his guilt." "Miraculously, she survived, you need 50,000 euros for an artificial arm!" "A few minutes before the massacre, we enjoyed hanging out by the fire!" "In remembrance, the locals plan to erect a memorial plaque to the murdered at the site of the massacre." "A mass murderer has been taken to the U.S. for observation." "The killer's uncle has been arrested, witnesses of the massacre are being questioned." "A mass murderer from Mladenovac and the father of a boy killer from Vračar under the same roof" "Wise and brave, the confession of a woman who was kidnapped by a monster from Mladenovac"

Table No 7

	Titles of articles emphasizing the tragedy of the event
POLITIKA	"Shock after yet another mass shooting." "Dad, he's coming, I'm dying", "Fear and silence rule the villages"
DNEVNIK	"Serbia Mourns: Ten Funerals in a Day", "The Only Real Punishment Is the Most Severe" "I'm praying for their lives and a speedy recovery."
VEČERNJE NOVOSTI	"The face of evil", "I lost both eyes, I'm no longer a mother" "We Will Not Prepare Dalibor Wedding", "Black Banners Instead of St. George's Wreaths" "Prayer for our living wounds", "No one wakes us up from this death" "The only real punishment is the one that is the most severe", "Taxi driver still in fear" "Litija has never been more painful, prayer has never been sadder" "And we were killed, our children"
KURIR	"Bloody March", "Heroic Death", "Shrouded in Black" "It was terrible, four young people died instantly" "Gruesome testimony", "And the killer from Mladenovac tortured animals" "He got into a taxi and held a bomb next to my head." "A Parent's Confession, He Killed Us Alive"

Table No 8

	Titles of articles on state measures
POLITIKA	"We will disarm Serbia to save our children"
DNEVNIK	"Moratorium on the issuance of firearms licenses" "We will completely disarm Serbia"
VEČERNJE NOVOSTI	"Moratorium on Gun Licenses"
KURIR	"More than 3,000 long and short pipes handed over"

Based on the analysis of the published articles, we can conclude that the media's interest in reporting on this event has declined sharply after a little more than 5 weeks from the event itself. The newspaper articles themselves were of the usual form and content that belongs to each of the monitored daily newspapers, which viewed this event in the light of not only the criminal offense of murder, but also the activities that almost immediately began to be carried out by the state apparatus as one of the prevention measures. Time ahead will show how well the media have actually done their job, but at the same time it gives them the opportunity to make positive strides in the next round of writing about this event, following the trial of the accused for this aggravated murder. Finally, when the final verdict comes, the media should speak out again, and all those who published articles about the event itself, for the sake of justice and truth according to the principle of respect for the right to life (Pavlović et Paunović, 2021).

Conclusion

Media coverage of the crime of killing more than one person (mass murder) can positively or negatively affect the behavior of the public and individuals. Therefore, responsible reporting on this issue is something that involves publishing only verified information necessary to clarify the broader context of the circumstances in which the mass murder took place. The demonstrated negative effects of contagion or imitation may pose a danger if the reporting encourages hopelessness, violence, and imitation.

The contagious effect that occurs after a mass murder can trigger a whole avalanche of events that have the idea of imitating that first event. That is why the role of the public, the role of the media in dealing with the consequences of the tragedy, is immeasurable, and requires exceptional professionalism, and not a sensationalist approach. In this way, the media can motivate to another, new criminal offense with a similar way of execution, through arming and provoking conflicts. On the other hand, responsible and professional reporting can mitigate harm, increase immunity in the community to dire consequences, and work on the feeling that other members of society are safe and secure. Thus, proper reporting can not only prevent the occurrence of what we will conditionally call imitations of mass murder (Werther syndrome), but it can also obtain a positive result in the prevention of such crimes against life and body (the Papageno effect).

A review of the relevant literature concludes that there is no universal answer to what it is that would be correct reporting on the cause of mass killings. Namely, it is difficult to say which approach would be good, but the fact is that several of them should be built, and this means that not only the reaction of state authorities is written, but also that the media themselves encourage changes in thinking. In difficult situations, journalists can help by sending serious messages, messages of positive examples. General formulations can help to understand the mass murder itself, without constantly holding a specific event. Legal professionals themselves should not comment on a specific event.

The sources of information should be as original and statistically correct as possible, without photos of the victims, but also of the defendant. News about

such a serious crime should not be published on the front pages, without unnecessary details, with an emphasis on information on forms of assistance and contacts of the competent institutions for this.

To conclude, that the observed dailies mostly reported in the way they usually do in cases of murders, but that we really very rarely encounter this number of victims, and that of mass murder. Reporting in accordance with the rules of the profession also implies a step for the better, i.e. media reporting that would lead to better prevention, without too violent details about the committed act, citing affirmative examples, from sports to culture. Only in this way can the influence of the public have its full meaning in a positive sense. At the same time, this paper aims to invite the professional and general public, in order to open a discussion on the existing incrimination and the reaction of criminal law to mass killings, respecting the principle of legality in its entirety.

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Original Scientific Paper
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OBLIGATIONS OF INSTITUTIONS REGARDING THE PROTECTION OF THE RIGHT TO LIFE[*]

The right to life is a basic human rigt. It`s contained both in international documents and in legal acts adopted at the national level. In each state, the abovementioned right is proclaimed by the Constitution, while the mechanisms for its protection and sanctions for its infringement are prescribed by various laws. The absence of protection of life can be the basis for different types of liability. Certain categories are particularly sensitive when it comes to the threat of that right. These are children, the elderly, the sick, etc. Every institution has an obligation to implement a series of measures in order to protect the persons residing there for various reasons from negative influences that threaten their life and physical integrity.

In this paper, we start from the assumptiom that at the level of various institutions there is no awareness of the need to establish mechanisms for the protection of life, as well as the potential responsibility for not establishing them and violating the aforementioned values. That is why we tried to point out the need to improve the responsibility of institutions regarding the protection of llife, the importance of the existence of mechanisms for the protection of the right to life at the level of institutions, as well as the possible consequences of failing to establish them.

Keywords: *institutions, responsibility, protection, right to life.*

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1. Introduction

The right to life is the most important human right and together with the right to human dignity, personal integrity, the prohibition of torture and inhuman treatment or punishment, the prohibition of slavery and forced labor belongs to the corpus of so-called personal rights. The right to life is an absolute human right that must be respected uncoditionally and without any restrictions (Krstić, Marinković, 2016: 50).

Bearing in mind that the right to life is inviolable and is guaranteed by all international documents, states have the obligation to take all available measures to protect this right on their territory. The authors emphasize the extraterritorial nature of the obligation to protect the right to life by states. Therefore, the state is obliged to protect all individuals from explusion or extradition to a country where their life is in serious danger (*Ibid,* 116).

Obligation to protect the life of a person, i.e. the direct obligation of immediate positive action exists in a situation where the state knew or could have known that there was a real and immediate danger to the life of a certain person, and failed to take adequate measures within its jurisdiction to avoid that risk (*Ibidem*). However, some circumstances can still lead to the death of individuals. Therefore, it`s sufficient for the state to take all reasonable measures to prevent the occurence of risks that may contribute to the occurence of such consequences. Such an attitude is contained in the practice of the European Court of Human Rights, which decided on the violation of the state`s obligation to take all necessary measures in order to protect the right to life of individuals.

In the first part of this paper, the subject of analysis are the provisions of international documents that guarantee the right to life, and then the attitudes of the Human Rights Committee contained in Generall Comment No. 36, which are of great importance for the interpretation of Article 6 of the International Convenant on Civil and political rights that guarantee the right to life.[1]

As the practice of the European Court of Human Rights are of great importance for the actions of national authorities, not only judicial ones, but also

[1] United Nations, Human Rights Committe, *General comment No. 36 on article 6: right to life,* 3 September 2019, https://documents.un.org/doc/undoc/gen/g19/261/15/pdf/g1926115.pdf, 7.9.2024.

other state institutions, in the following part of the paper the subject of analysis is the jurisprudence of the aforementioned court. In this research, we start from the assumption that at national level it`s necessary to improve awareness of the importance of the role of various institutions in terms of protecting the right to life. Therefore, by applying content analysis methods, we tried to indicate when state institutions are obliged to react in a timely manner in order to prevent the occurrence of harmful consequences that may threaten the right to life, as well as when they cannot be considered to have violated their duty to undertake reasonable measures in order to prevent risks to people`s lives and health. If the institutions of a state don`t react in a timely manner in situations where they are obliged to take adequate measures in order to prevent the occurrence of the aforementioned risk, this can contribute not only to the criminal liability of the responsible persons, but also to the occurence of material damage to the state due to the obligation to compensate the person`s relatives whose right to life was violated by the untimely reaction of state institutions.

2. The right to protection of life and bodily integrity in international documents

The International Convenant on Civil and Political Rights stipulates that the right to life is inseparable from a person`s personality and that it must be protected by law (Article 6).[2] Therefore, it seems that it`s inextricably linked with other rights that can be considered so-called corupus of personal rights: the right to dignity, personal integrity, the prohibition of torture and inhuman treatment and punishment, the prohibition of slavery and forced labor. Bearing in mind that so-called are also important for personality devlompment, social and economic rights, the right to life is closely related to them.

According to the authors, the state's obligation to protect the right to life is negative in the sense of refraining from taking life, but also positive in the sense of the obligation to take all reasonable measures to protect the right to life of an individual within the jurisdiction of the state, and not only by the state and its

[2] International Convenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. https://www.ohchr.org/sites/default/files/ccpr.pdf, 7.9.2024.

officials, but also from private individuals (Zdravković, 2019: 341). The positive obligation of the state is contained in Article 2, paragraph 1 of the European Convention on Human Rights. Therefore, the obligation of the state, and therefore of its institutions, is not only to refrain from intentional and illegal taking of life, but also to fulfill the obligation that consists in taking adequate measures to protect the lives of persons under its jurisdiction.[3]

The provision of some legal acts at the international level also guarantee the right to bodily integrity, although this right is not defined directly. Thus, Article 3 of the European Charter of Fundnamental Rights and Freedoms stipulates that everyone has the right to respect for physical and psychological integirty. [4] Accordingly, in the field of medicine and biology, the free consent of the person to treatment or research must be respected, and the preson must be informed of their content in accordance with the provisions of the relevant regulations. In addition to the aforementioned charter, Article 17 of the Convention on the Rights of Persons with Disabilities stipulates the obligation to respect physical and mental integrity (Bublitz, 2022: 2).[5]

In an immediate way, other international documents also guarantee the right to the protection of bodily integrity. For example, in the Universal Declaration of Human Rights, it`s included in Article 3, which guarantees every peson the right to life, liberty and personal security.[6] The aforementioned Declaration guarantees the equality of all before the law without any dinstinction and protection against any discrimination (Article 7). Article 9 of the International Convention on Human and Political Rights guarantees the right of every person to freedom and personal security (Bublitz, 2022: 6).

[3] Text of the European Convention on Human Rights in english is available at: https://www.echr.coe.int/documents/d/echr/convention_eng, 7.9.2024.

[4] Charter of Fundamental Rights of the European Union, 2012/C 326/02, *Official Journal of the European Union*, C 326/391.

[5] Convention on the Rights of Persons with Disabilites, adopted 12 December 2006 by Sixty-first session of the General Assembly by resolution A/RES/61/106. Entry into force 3 May 2008, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities, 7.9.2024.

[6] Universal Declaration on Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly Resolution 217A) as a common standard of achievements for all peoples and all nations. It sets out, for the firsst time, fundamental human rights to be universally protected.

Bearing in mind that the state is oblliged to take reasonable measures in order to prevent the risk to life, and therefore the physical integrity of the individual, we beleive that the obligation to protect this right is also related to the right to life. Therefore, in this paper, the subject of consideration is the obligations of the state and its institutions to protect both of the aforementioned rights. In addition to the right to take preventive meassures that reduce the possibility of the occurrence of a risk that can produce harmful consequences for life, as well as the physical integrity of people, the state`s obligation, in accordance with the interpretation of the Human Rights Committee, is also to conduct an efficient and effective investigation, in order to invesstigate a certain event and applied sanctions against persons who violated the right to life and bodily integrity (Zdravković, 2029: 341).

3. The views of the Human Rights Committee expressed in General Comment No. 36 regarding Article 6 of the International Convenant on Civil and Political Rights

The state`s obligations regarding the protection of the right to life, can be seen by analyzing the views of the Human Rights Committee expressed in General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights. According to them, the right to life is the supreme right, which represents the basis for the realization of all human rights and it must not be derogated from even during a state of emergency. The basic obligation for the contracting states with regard to the protection of the said right implies not only the adoption of laws, but also the undertaking of other measures that enable the protection of the right of life. These measures include reducing the risk of threats that may come from both physical and legal entities. This implies an adequate level of organization of state bodies and administration through which public powers are exercised in order to protect the right to life. Therefore, this doesn`t mean only the establishment of new institutions, but also the prescription of different procedures (United Nations, Human Rights Committee, 2029: paragraphs 18-21). The obligation to protect the right to life by law implies that every material basis for depriving life is prescribed by law and defined in such a way as to

avoid an overly broad or arbitrary interpretation (*Ibid*, paragraph 19). The definition of the right to life, which is contained in various international documents, doesn`t contain an explicitly prescribed obligation to protect life. Such an obligation was considered before the European Court of Human Rights, which gave an answer to the question of the limits of such a duty (Šurlan, 2021: 20).

Some authors believe that the right to physical integrity actually combines several other rights: the right to life, the right to health protection, the right to bodily integrity, the right to psychological integrity, the right to sexual integrity, the right to freedom, the right to (human) dignity and the right to a healthy environment (Jotanović, 2017: 107). The above-mentioned rights are interconnected. Thus, for example, endangering the right to life simultaneously endangers the right to health, but also the right to bodily and mental integrity, Similarly, jeopardizing the right to a healthy enviroment simultaneously threatens the right to life. Therefore, the fact that the protection of the right to life protects all the aforementioned rights at the same time, but also that the right to life is also protected by their protection, should be taken into account. At the national level, the aforementioned rights are guarenteed by the highest legal acts. According to the Constitution of Serbia (*Official Gazette of the Republic of Serbia*, no. 98/2006 i 115/2021), the right to life is inviolable (Article 24), and it also guarantees the inviolability of physical and psychological integrity. Accordingly, no one may be subjected to torture, inhuman or degrading tretment of punishment, or subjected to medical or scientific experiments without heir freely given consent (Article 25).

The obligation of the state to protect the right to life requires the member states to take special protection measures towards presons who are in vulnerable situations, i.e. whose lives are at particular risk due to specific threats or existing patterns of violence. In General Comment on Article 6 of the International Convenant on Civil and Political Rights, under persons who may be exposed to risk or threats, the following are stated: human rights defenders, officials who fight against corruption and organized crime, humanitarian workers, journalist, prominent public figures, witnesses to the crime, victims of domestic violence, victims of gender-based violence, victims of human trafficking, children, especially street children, unaccompanied migrant children and children in situations of armed conflict and members of ethnic and religious minorities, etc. (paragraph 23)

However, not a single international documen pays special attention to the elderly and the protection of their right to life. Such an approach should be changed in the coming period, bearing in mind both the rapid aging of the population and the difficult living conditions of members of the elderly population, which are primarily reflected in both poor health and the lack of financial resources to provide adequate medical care and help (Kostić, 2023a: 339 and 340).

Special protection measures are enjoyed by persons with disabilities, including persons with psychosocial or intellectual disabilities, in order to ensure their effective enjoyment of the right to life on an equal level, as it`s guaranteed to other persons. Those measures must include adaptation to the specific needs of persons with disabilities, such as, for example, enabling persons with disabilities to access basic facilities and services and preventing the unjustified use of force by law enforcement authorities against them. (paragraph 24)

Under particularly sensitive groups, the Committee for Human Rights includes persons who have been deprived of their liberty by the state. Therefore, the state also has a responsibility to take care of their lives and physical integrity and must not rely on lack of financial resources or other problems to diminish this responsibility. This obligation includes: provision of necessary medical care and appropriate regular health monitoring, protection from violence among prioners; preventing suicides: providing reasonable accommodation for persons with disabilities. (paragraph 25)

According to the position of the Human Rights Committee, the increased duty of the state is also reflected in the obligation to protect persons who are in state institutions that limit freedom, such as: mental health facilities, military camps, refugee camps, camps for internally displaced persons and institutions for minors and orphanages. (*Ibidem*)

In connection with the above, in addition to the protection of the right to life, health and physical integrity, special attention should also be paid to the right to human diginity in order to ensure that accommodation in such institutions doesn`t constitute a violation of the said right. Therefore, each state should provide an adequate level of financial resources (the source can be donations of humanitarian aid) in order to enable the realization of such rights. A stay in these institutions also implies the provision of adequate health care and assistance,

while children, in accordance with special regulations guaranteeing children`s rights, should be allowed to develop and receive education.

It should be borne in mind that all the mentioned measures imply not only the adoption of general legal acts, but also the adoption of internal rules and procedures at the level of institutions that are obliged to take certain measures to protect children from peer violence and discrimination in order to enable adequate developent and education of children, which is one of the essential prerequisites for realizing the right to life of every child. Failure to take adequate measures is a simultaneous violation of the state`s obligations undertaken in accordance with international documents. In the event of a violation of the right to life or the right to bodily integrity, as well as failure to take appropriate protective measures, the state bears responsibility, and therefore pays material damages to persons whose rights have been violated or to applicants on behalf of a victim who lost their life in certain circumstances.

According to the position of the Human Rights Committee expressed in General Comment no. 36, the duty to protect life implies that member states should take adequate measures to address general conditions in society that may lead to direct threats to life or prevent individuals from enjoying their right to life with dignity. Uner these conditions, the Committee cites crime, environmetal destruction, the spread of life-threatening diseased, extreme poverty and homelessness. The measures that the state should take are those activities that enable individuals to access basic goods and services, such as: food, water, shelter, health care, electricity, sewage and other measures necessary for adequate general conditions. One of the important measures is the strengthening of effective health sevices for emergency cases, operations, activities carried out in emergency situation (firemen, ambulance and police forces), as well as social housing programs (Human Rights Committe, 2029: paragraph 26; Kostić, 2021: 254, 257 and 266).

It can be concluded from the above that the right to life doesn`t exclusively include the right to be alive or the right to complete physical integrity. It also includes the right to a dignified life, which would provide every individual with the basic conditgions for preserving the dignity of the person. Certainly, in order to protect the dignity of the person, it`s necessary to take other measures.

The postition of the Human Rights Committee regarding the protection of the right to life is that states are obliged to undertake adequate activities related

to the protection of both health and personal dignity. These measures are primarily of a preventive nature, because when consequences occur, it can be considered that the state, i.e. its institutions didn`t take reasonable measures to prevent the occurrence of risks that could endanger the lives of individuals. These measures relate to the prevention of stigmatization that may be associated with disabilities and various diseases, with the mandatory development of plans and programs that promote the prevention of violence, as well as a campaign to raise awareness about the harmfulness of gender-based violence, improving knowledge about the possibility of access to medical examinations and treatments in order to reduce the mortality of mothers and newborns. In order to protect life, the state also has obligation to develop sepecial plans for emergency situations and disaster management plans (Human Rights Committee, 2019: paragraph 26).

Protection of the right to life, according to the position of the Human Rights Committee, includes investigation in the case of illegal deprivation of life, as well as prosecution of the perpetrators of such incidents, including those in which force was used unnecessarily, resulting in death. This obligation implies providing an effective legal remedy to victims of huuman rights violations, as well as to their relatives (*Ibid,* paragraphs 28-30).

3.1. Special rights of the child according to General Comment No. 36 regarding Article 6 of the International Convenant on Civil and Political Rights

In General Comment No. 36, the Human rights Committee pays special attention to the rights of the child. According to the position of the said body, in accordance with Article 24(1) of the International Covenant on Civil and Political Rights, every child has the right to protection measures required by his or her status as a minor, by his or her family, society and the state. These measures mean the adoption of special regulations and the undertaking of special activities of the child and the need to ensure the survival, development and well-being of every child (Human Rights Committee, 2019: paragraph 60).[7] This means that the institutions where children are educated must take adequate protection measures,

[7] According to Article 3 of the Convention on the Rights of the Child, in all activities concerning children, regardless of whether they are undertaken by public or private social welfare institutions, courts, administrative bodies or legislative bodies, the best interests of the child shall be of primary importance.

especially measures against abuse and neglect, which also insludes measures related to the protection of children from any type of violence, which also includes establishment of special procedures and activities to suppress cases of peer violence in schools (Kostić, 2022: 391).

Therefore, every state has the obligation to provide children with the right to an adequate standard of living and education as an essential prerequisite for the protection of the right to life in accordance with the Convention on the Rights of the Child. In the General Comment, as a measure of special importance for the protection of the right to life of the child, the Human Rights Committee highlights the obligation of states to enable shildren to enjoy the highest standard of health, as well as making available the necessary capacities for treatment and health rehabilitation. In addition, the obligation consists in ensuring that no child is deprived of access to such health care services. Special attention should be paid to the reduction of infant mortality, the fight against disease and malnutrition, but also to ensuring the supply of nutritious food and clean drinking water. Special activities should be aimed and informing both parents and children that they have access to education (Article 24 of the Convention on the Rights of the Child, Vaghri, 2022: 32 and 33). Therefore, in order to enable the realization of the best interests of the child at the natiobal level, an environment should be created in which human dignity is respected and the development of each child is ensured. During its assessment and determination, the state must ensure the right to life, survival and developmnet (UN Committee on the Rights of the Child, 2013: paragraph 42, cited according to Ruggiero, 2022: 23).

At the level of each state, it`s necessary to enable the realization of the right of every child to a standard of living that corresponds to the child`s physical, mental, spiritual, moral and social development (Article 26 of the Convention on the Rigts of the Child). For the life and proper development of a child, it`s ncesseary to give children the right to education, so it`s important that at least primary education be complusory and free for all. Special attention must be paid to maintaining discipline in a manner appropriate to the human dignity of the child (Arrticle 28 of the Convention on the Rights of the Child). In order to protect the right to life, children`s education should be focused on the development of the child`s personality, talents, and mental and physical abilities (Article 29). Therefore the realization of the child`s right to life depends first of all on the taking of measures

by a state, i.e. its insutitions should undertake to enable the right to its survival and development (Committee on the Rights of the Child, 2013: paragraph 10).

3.2. Environmental protection and the right to life according to General Comment No. 36 regarding Article 6 of the International Convenant on Civil and Political Rights

The Committee for Human Rights paid special attention to considering the relationship between envrionmental protection and the realiyation of the right to life. According to the position expressed in General Comment no. 36, environmental degradation, climate change and unsustainable development represent a threat to the enjoyment of the right to life of both current and future generations. Therefore, in order to protect the right to life, it`s necessary to take adequate measures at the level of each state in order to ensure the protection of the environment from damage, pollution and climate changes caused by both public and private entities. Therefore, sustainable use od natural resources should be ensured, basic standards for the environment should be developed and applied, impact assessments should be developed and applied, impact assessments should be carried out, and relevant countries should be consulted on activities that will have a significant impact on the environment. Providing access to information on environmental hazards and paying due attention to preventive measures is stated as a special obligation in this regard (Human Rights Committee, 2016: paragraph 62).

Exactly the same position is contained in the judgments of the European Court of Human Rights. They provide protection for the right to a healthy environment, which is still not guaranteed as a special right in international documents, through the protection of the right to life and freedom of information, and through which the right to receive information is realized (*Öneryildiz v. Turkey*, *Budayeva and others v. Russia*, stated according to Kostić, 2023b: 1376 and 1377).

4. Obligations of the state and its institutions regarding the protection of the right to life in the practice of the European Court of Human Rights

The practice of the European Court of Human Rights doesn`t differ from the positions of the Human Rights Committee expressed in General Comment no. 36 regarding the protection of the right to life, although the petitions addressed to the said court refer to the violation of Article 2 of the European Convention on Human rights. There are many areas in which the state is expected to protect the life and health of individuals, as well as to take a large number of preventive measures in order to protect them. According to Article 2, paragraph 1 of the European Convention on Human RIghts, the state has the obligation to refrain from intentional and illegal taking of life, as well as to take appropriate steps to protect the lives of people within its jurisdiction. In this regard, that obligation includes two aspects. The first is reflected in the obligation to ensure an adequate regulatory framework, and the second is the obligation to undertake preventive operational measures (Council of Europe/European Court of Human Rights, 2023: 6).

4.1. Treatening the right to life of persons deprived of liberty

In the case of *Renolde v. France*, the applicant appealed to the European Court of Human Rights, because her brother, who was in custody pending trial, althoough the medical report stated that he suffered from psychiatric disorders, was transferred to another prison, while the prison file didn`t state to suffer from any disease. Two days after the transfer, the detainee tried to commit sucide. The emergency psychiatric team diagonosed him with an acute episode of delirium and prescribed appropriate treatment. However, no attempt was made to ensure that the detainee actually took the medication. Therefore, he was placed in an independent cell where he was under special supervision in the form of more frequent patrols. He then assaulted a guard and was ordered to serve 45 days in the penalty cell. The day after that, he wrote a letter to his sister in which he said he couldn`t do it anymore. After his lawyer saw his letter, he asked for an evaluation of his mental capacity to be held in a penal cell. However, he was found

hanged in his cell before he could be examined. Three days before that, he received a supply of medicinies, but even then there was no verification that he had actually taken the prescribed therapy (European Court of Human Rights, Information Note on the Court`s Case-law, no. 112, October 2008, *Renolde v. France*, Application no. 5608/05, Judgment from 16.10.2008).[8]

In the case *Renolde v. France*, the Court determined that Article 2, paragraph 1 of the European Charter on Human Rights was violated. Namely, it was proven that the competent insitutions knew from the moment when the detainee first tried to commit suicide that he was suffering from acute psychotic disorders that could lead to self-harm. According to the position of the court in the specific case, although the detainee`s condition was changeable and there wasn`t necessarily an immediate risk of a further suicide attempt, that risk was still real and it was necessary to carefully monitor whether the condition could worsen. Therefore, it could be expected that the competent authorities take adequate measures to determine whether it is good for the detainee to remain in detention. However, regardless of the previous suicide attempt and the diagnosis of the detainee`s mental state, his admission to a psychiatric hospital was never discussed. Therefore, in the specific case, the competent institutions failed to order the placement of the detainee in a psychiatric hospital. However, what they should have done at the very least was to provide medical treatment according to his condition (*Ibidem).*

In addition, the Court expressed doubt regarding the decision to leave a detainee who was known to suffer from psychotic disorders to drink unsupervised and take prescribed daily therapy. Therefore, the Court held that although the motive for the sucide wasn`t known, the failure to ensure that he took his daily medication contributed to his death. In addition, considering the sentence of 45 days in the penal cell imposed on him by the disciplinary commission, it seems that his mental state wasn`t taken into account. Those circumstances, and above all the deprivation of visits and other activities, increased the risk of suicide. Therefore, in the specific example, it was about the failure of the institutions to

[8] Text in English is available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-1876%22]}, 7.9.2024.

apply all reasonable measures in order to reduce the risk of suicide of an individual (*Ibidem).* This position of the European Court of Human Rights is exactly the same as the position of the International Committee for Human Rights expressed in General Comment No. 36, which concerns the treatment of the prison population in order to protect the right to life.

4.2. Violation of the child`s right to life

In the case of *İlbeí Kemaloğlu and Meríye Kemaloğlu v. Turkey* (Application no. 19986/06, Judgment of the European Court of Human Rights from 10th of April 2012) applicants were the parents of a boy who died at the age of seven in 2004 when Istambul was hit by a heavy snowstorm. That day, the boy went to his elementary school by the municipal shuttle that ran between his house and school. However, due to the snowstorm, classes were dismissed at the beginning of the afternoon, before the regular end of the school day in accordance with the schedule. According to information from the case file, the boy wasn`t on the list for a paid school bus, but used a free municipal shuttle. On that day, the municipality wasn`t informed about the early end of classes, so the shuttle didn`t arive when the school was closed. The boy tried o return home by himself, which was 4 klometres away from his school. Late in the afternoon, when he didn`t return home, his parents called the police, and his body was only found a day later, frozen near the river. The Presidency of Elementary Scool Inspectors of the Istanbul Directorate of Education launched an investigation during which the inspectors took the statement of the municipal shuttle driver who said that he wasn`t informed that day that the school would be closed earlier and that everyone had already gone home when he went to school after the boy. In the same year, the inspectors compiled a report in which they determined that the deputy director of the school was guilty of non informing the municipality about the temporary closure of schools, while the Presidency also concluded that the deputy director of the school was guilty of failing to notify the municipal service of the early dismissal of classes transportation. However, he was reprimanded as a disciplinary punishment (paragraphs 4-7).

After that, the boy’s parents, who are also petitioners to the European Court of Human Rights, filed two separate lawsuits in the Istanbul Administrative Court against the Ministry of Education, the Municipality of Yenidogan and the

Municipality of Istanbul, in which they stated that their child lost his life due to the negligence of the local authorities and demanded compensation for damages. They requested legal aid for court fees and later submitted all relevant documents on which they based their request for legal aid which was rejected by the Istanbul Administrative Court without giving specific reasons for the rejection (paragraphs 8-11).

In 2004, the applicants filed a criminal complaint with the competent public prosecutor against the school principal, deputy principal and class teacher of the deceased boy. The prosecutor submitted files to the district governor's office with a request to authorize the public prosecutor to initiate criminal proceedings, but the prosecutor rejected his request stating that no guilt can be attributed to the persons against whom the criminal charges were filed. After that, the applicants filed an objection to the Regional Administrative Court against the decision of the governor's office, which was annulled by the aforementioned court, stating that there is sufficient evidence in the case files to initiate criminal proceedings (paragraphs 14-17).

During 2010, the Court of Cassation quashed the judgement of the Criminal Court, without examining the merits of the case for procedural reasons, because the court clerk's signature was missing from the minutes of the hearing, so the file was returned to the Criminal Court, which once again exonerated the accused persons (paragraph 21).

In their application, the applicants complained that Article 2 of the European Convention on Human Rights was violated because the state did not fulfill its positive obligation to protect the life of their son and did not conduct an effective investigation into the circumstances of his death. Therefore, in the specific application, the applicants claimed that the defendant state did not protect the right to life of their child, because they let the seven-year-old child walk alone through the snowstorm. They considered that the effectiveness of domestic legal remedies was insufficient, because there was no effective legal remedy that could hold accountable the persons who contributed to the death of their seven-year-old child through their negligence. The Court pointed out that Article 2, paragraph 1 orders the state not only to refrain from intentional and illegal taking of life, but also to take adequate measures to protect persons under its jurisdiction. In this case, the Court took the position that the state's obligation to protect the right to

life also applies to the school administration, which has the obligation to protect the health and well-being of students, especially children who are particularly vulnerable and must be under the control of competent authorities. However, this positive obligation should be interpreted in such a way as not to impose an excessive burden on the competent authorities, given the unpredictability of human behavior and the operational choices that must be made regarding priorities and resources (paragraphs 32-36).

Bearing in mind the above, according to the Court's opinion, not every risk to life can be considered an obligation from the Convention to take operational measures to prevent the materialization of the risk. To determine the existence of a real and immediate risk to the life of a certain person and to take measures within the authority of the competent authorities if reasonably assessed and if such risk can be expected to be avoided. The choice of means that will enable the fulfillment of positive obligations in accordance with Article 2, according to the opinion of the Court, depends on the free assessment of a particular state, and therefore its institutions and bodies (paragraphs 36-39).

In the circumstances of the particular case where the primary school was closed extremely early due to bad weather conditions, the Court cannot find it unreasonable to expect the school authorities to take basic measures to minimize any potential risk. In addition, the Cort considered that by neglecting to inform the municipal shuttle service about the early closing of the school, local authorities didn`t take measures that could have been avoided by failing to inform the municipal shuttle service about the early closing of the school, in order to take measures to avoid the risk to the right to life of the applicant's son. According to the opinion of the Court the question of state responsibility in accordance with Article 2 of the Convention could be considered to exist in the event of the inability of the domestic legal system to ensure responsibility for negligent conduct that endangers or doesn`t lose human rights (paragraphs 41, 42, 46, 47 and 48).

The positive features of the state therefore include the establishment of an efficient legal system. In the specific case, the Court concluded that the domestic authorities did not undertake the obligation to protect the right to life of the petitioners' seven-year-old son, and even the competent judicial authorities did not enable the petitioners to effectively determine any responsibility for the death of their child and to receive adequate compensation (paragraphs 42 and 49).

Therefore, the Court took the position that there is a violation of Article 2, paragraph 1 of the Convention, as well as that it is a violation of the right to a fair trial guaranteed by Article 6, paragraph 1 of the Convention (paragraph 49).[9]

4.3. The position of the judicial practice regarding the guarantee of absolute securtiy of the right of life

In order to determine the existence of a violation of Article 2, paragraph 1 of the European Convention on Human Rights, it is necessary to determine all the circumstances of the specific case. According to the position of judicial practice, the mentioned article cannot be interpreted in such a way that every individual can be guaranteed the absolute security of the right to life, especially when a person assumes responsibility by exposing himself to unjustified danger.

In the *Gokdemir v. Turkey* judgment, the applicant appealed to the court because her husband drowned in 2005 after falling into the sea while fishing (Application no. 66309/09, European Court of Human Rights Judgement from the 11th of June, 2015).[10] On the same day, two eyewitnesses were questioned by the competent authorities. According to their statements, he fell into the sea because he jumped onto a platform that was slippery while fishing. In 2005, the wife of the deceased filed a criminal complaint with the Public Prosecutor's Office in Bulacak against the City Council of Bulacak for manslaughter, and in her complaint she claimed that the death occurred due to the lack of a rescue vehicle, rope or any similar equipment. In addition, she claimed that no warning sign was posted on the stairs or landing. The public prosecutor decided not to prosecute anyone in connection with her husband's death, as he concluded that her husband died due to his own negligence and recklessness. On the decision of the public prosecutor, the applicant lodged an objection with the competent court, which the court rejected and concluded that the decision not to conduct criminal proceedings was in accordance with the law and procedure (paragraphs 1-11).

[9] According to Article 6, paragraph 1 of the European Convention on Human Rights, everyone has the right to a fair and public hearing within a reasonable time before an independent and impartial court, establlished on the basis of law, in the course of deciding on his civil rights and obligations, or on criminal charges against him.

[10] Text of the Judgement in english is available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155477%22]}, 7.9.2024.

Bearing in mind the above, the applicant complained that her right to a fair trial was violated because her allegations were neither examined nor investigated by the judicial authorities who, in her opinion, behaved protectively towards the city council. The Court considered that the applicant's complaints related to the effectiveness of the investigation into the death of her person and that they should be examined in the light of Article 2 of the European Convention, according to which states are obliged to take appropriate measures to protect the lives of those under their jurisdiction. In addition, the court stated that the risk of drowning after falling into the sea was an obvious risk that an average person, such as the applicant's husband who was not a vulnerable person, would be expected to appreciate and avoid. Therefore, in the specific case, Article 2 of the Convention cannot be interpreted in such a way as to guarantee every individual an absolute level of safety in any activity in which the right to life may be threatened, and especially in situations where a person bears a certain degree of responsibility for an accident when he is alone exposed herself to unjustified danger. In the specific case, the absence of safety equipment at the exact place where the accident occurred or the failure to place a warning sign can hardly be considered a basis for state responsibility in accordance with Article 2 of the Convention, as it would represent an excessive burden on the authorities. The court found that a tragic incident led to the death of the husband, and the court opined that the authorities had undertaken a series of investigative actions to determine the circumstances of the death without delay. The investigation was carried out on time, and a report was made about it. The police also questioned witnesses who confirmed that the petitioner's husband drowned after accidentally falling, and an autopsy was performed the next day. The public prosecutor decided not to press charges and concluded that the petitioner's husband died due to his own negligence, and the investigation was up-to-date according to the court's opinion. For the above reasons, the court considered that the petitioner's application was inadmissible. (paragraphs 12-21)

5. Conclusion

The right to life is an absolute right guaranteed by various international documents. In order to protect the said right, according to Article 6 of the International Convention on Civil and Political Rights and Article 2 of the European Convention on Human Rights, each state has a negative obligation to refrain from any activity that threatens the said right, and to undertake a series of legislative and operational measures to protect it.

However, as institutions and bodies established by the state act on its behalf, the obligation to implement those measures is their obligation. Failure to undertake adequate activities is a basis for both criminal and tort liability. When it comes to the protection of the right to life, it implies the existence of effective executive and judicial authorities that are obliged to conduct a timely and effective investigation and impose sanctions on individuals who have violated someone's right to life. Failure to undertake such activities can be one basis for state responsibility. However, it should be borne in mind that the state's obligation to protect the right to life is not absolute. It is reflected exclusively in the obligation to take reasonable measures and that when the institution or body acting on behalf of the state knew or could have known that as a result of not undertaking its activities, a risk would occur that could have harmful consequences for the life of a certain person. If in a specific case it is established that a person contributed to the occurrence of harmful consequences by his actions, even though he could and had to know that he was endangering his own life, there will be no responsibility of the state, and therefore of its institutions, for the violation of the right to life.

The right to life is connected with some other rights, so their protection can be viewed through the prism of the protection of the right to life. Under those rights are understood primarily those rights that fall under the so-called personal rights: the right to physical and mental integrity, the right to a healthy environment, etc. By jeopardizing them, in a large number of cases, the right to life is also threatened (eg the right to a healthy environment), while by jeopardizing the right to life, physical and mental integrity is simultaneously threatened.

However, the right to life is also connected with some other rights that developed later, such as social and economic rights. Therefore, the right to life should not be understood exclusively as mere survival, but every individual

should be provided with basic living conditions. According to the position of the Human Rights Committee, sensitive groups should enjoy special protection, such as persons deprived of their liberty, bearing in mind that in relation to them, adequate standards are often not applied that enable them to enjoy basic human rights, as well as persons with disabilities and persons who are located in medical institutions. A special category that needs to be paid attention to is children, who, in order to enable the enjoyment of the right to life, have the need for education and development. Therefore, special protection should be provided to children in primary schools through special procedures and protocols for dealing with cases of violence and abuse, but adequate measures should also be implemented in practice to protect children from harmful actions.

It seems that none of the international documents recognizes the need for special protection of the elderly, especially considering that in many cases the right to life of these persons (due to low pensions, illness and inability to pay for nursing homes and special care and help) questioned. Therefore, in the coming period, special attention should be paid in international documents to this, in our opinion, also sensitive group.

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THE RIGHT TO LIFE: HUMAN RIGHTS APPROACH IN CRIMINAL LAW[**]

In this paper, the author considers the right to life within the relationship between criminal law and human rights paradigm, especially the role and importance of human rights doctrine in criminal law. The penetration of human rights into criminal law contributed to the strengthening of the criminal law protection of the right to life, both directly and indirectly. In the first case, certain norms and criminal law institutes that primarily protect the right to life have been redacted in terms of providing more comprehensive protection. Hence, when it comes to the protection of the life within criminal justice system it should be stated that criminal law becomes first instead of last resort. Mirroring the fact that life is a kind of "good" that is necessary condition for the enjoyment of all the other goods and rights, many criminal law norms that primarily protect other rights also need to be viewed in that sense. In general, there is a tendency to protect right to life not just in pure physical (bodily) sense but with the certain quality. However, based on the fact that human rights have both a defensive and an offensive role within criminal law it could be easily stated that the making criminal law norms and creating criminal justice system is in a certain way the art of balancing between an effective protection of the fundamental values which are endangered by criminal acts and protection of the fundamental values which can be endangered while that goal is being achieved.

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In order to confirm the hypothesis regarding the influence of the human rights on criminal law when it comes to the protection of the right to life, the paper will provide the relevant and prominent jurisprudence as well as the analysis of the certain changes regarding the criminal law institutes on a comparative level.

***Keywords**: life, right to life, criminal law, human rights.*

1. Introductory remarks

The law as a social category with dynamic character, has changed over the centuries. Not to mention that the criminal law has evolved significantly over the past millennials. Most of those changes are related to enhancing the position of the citizen in front of the state power. It is often said in the relevant literature that today the role of human rights concept in criminal law is to ensure criminal accountability for those individuals who have violated international human rights or humanitarian law (Engle, 2014: 1070). However, in the earlier stages of the development of the criminal law, the application of the human rights paradigm within the criminal law system was related to the promotion and guarantee of the protection of basic human rights against state coercion. Having that in mind, it is safe to claim that human rights element in the criminal justice system has evolved in terms of expanding its scope and reach which process is still ongoing with more or less success depending on current socio-political pattern.

So far, human rights become a matter of common agreement and are shaping the way in which we relate to each other and to state and local authorities (Amatrudo, Blake, 2015:1). Since the achieved level of human rights in a legal system indicates the civilizational level of development of one society and is a frequently used criterion for certain diplomatic activities towards countries that ignore the achieved standards of human rights, today, almost no one denies the importance of human rights, both the state representatives, and citizens.[1] Despite this, we are witnessing massive human rights violations all around the world, there are many cases in which authorities are abusing their power and seriously violating human rights or ignoring the necessity to fulfill its positive obligation and ensure the protection of basic human rights within their jurisdiction.

When it comes to the human rights discussion in terms of impact on criminal law and criminal justice system, the fact is that the *revolving door* phenomenon is particularly present. In other words, the more massive the violation of human rights is, the stronger is the need to implement effective ways and mechanisms to protect human rights. For instance, after the Second World War which

[1] Statement that human rights ideal "unites left and right, the pulpit and the state, the Minister and the rebel, the developing world and the liberals of Hampstead and Manhattan" is illustrative example of this. See: (Douzinas, 2002:445).

is remembered as among the most brutal period of violation of the basic human rights, the biggest step towards protection of human rights was made regarding the adoption of human rights codifications at the international and regional level and establishment of the international/regional bodies for monitoring the implementation of adopted standards and their further development.

There can be no doubt that human rights approach in criminal law played a dominant role in making what we today call modern criminal law. The core of contemporary criminal law principles are made of human rights paradigm since the most of the modern criminal codes proclaim that protection of a human being and other fundamental social values constitute the main *raison d'exister* of criminal law. While striving to protect the basic human beings and social values, criminal law mechanisms are often in such position to endanger the same values in order to be more effective. Therefore, it could be argued that human rights have both a defensive and an offensive role within criminal law (Tulkens, 2011). For that reason, it could be easily stated that the making criminal law norms and creating criminal justice system is in a certain way *the art of balancing* between an effective protection of the fundamental values which are endangered by criminal acts and protection of the fundamental values which can be endangered while that goal is being achieved. Having that in mind, it could be claimed that the sole nature of criminal law is based around human rights idea. Their symbiotic relationship is starting point when thinking about the essence of both criminal law and human rights concept. In general, conceptualization and systematization of the human rights idea should be the place where the criminal law must look for the answers on the at least two basic questions: *What are the values (human rights) that need to be protect within criminal law*? *To what extent the chosen values should be protected?* On the other hand, taking into account the fact that the criminal law mechanism are at the highest level of the state coercion, there can be no better system to promote and protect chosen values and rights than the criminal law is.

Among the many rights and values, right to life is the most important one since it is a prerequsite for realizing all the other rights and freedoms. Furthermore, law is a social creation that aims to enable life, i.e. common life at the certain space and time. It can be said that the sole notion of the right to life has changed its meaning and scope from epoch to epoch. Those changes went towards

spreading the term, from protecting life in a pure physical (bodily) sense to protecting life with a certain quality, such as dignity for instance.

2. General remarks on the right to life and its legal nature

The idea about the necessity to protect a life of every single human being on equal level and way was born in the doctrine of natural law (*lex naturalis*). In contrast to Ancient Greece legal thought where the state was understood as an absolute powerful entity, the legal heritage of Ancient Rome gave rise to the idea of the state as the embodiment of benefits for its citizens (Sredojević, 2014:474). Not everything in terms of the protection of the right to life has always been indisputable, i.e. at the level of understanding that is at least declaratively present in public discourse today. Not to mention entire categories of people whose lives were considered an object in the hands of the powerful in relation to the prevailing and generally accepted understanding of human life as a fundamental human right (Đ. Đorđević, M. Đorđević, 2021:76). Additionally, during the reign of King *Milutin* at the beginning of the 14th century, there was the possibility to impose a fine for the murder according to the Serbian medieval law (Vuković, 2022:10), what is unimaginable today, considering the importance of life on the hierarchical scale of goods protected by the criminal law.

In the development of the normative aspect of human rights three phases are noticeable, with the first referring to *institutionalization*, the second to *constitutionalization*, and the third one to the *internationalization* of development (Sredojević, 2014). The first phase was embodied in the *Magnum Carta Libertatum* from 1215. while the process of constitutionalization was spawned in the framework of the American and French revolutions at the end of the 18th century. From that point in history of legal and political life, most of the states around the world explicitly set out in their constitutions the protection of the right to life as a fundamental principle.[2] Finally, the process of internationalization began after the end of the Second World War, with adoption of the Universal Declaration of

[2]There are a few constitutions in which the protection of the right to life is not prescribed explicitly, but the existence of that protection is indisputably concluded on the basis of other rights and prohibitions. See for example the Constitution of the Republic of Montenegro.

Human Rights (UDHR)[3] and consequently other international legal acts adopted at international and regional level.

Further development of the right to life legal protection was around the deepening the meaning of the term what leads to the more comprehensive protection. Since the very beginning of the legal, particularly constitutional and conventional protection of the right to life, the main goal was to protect life in physical sense and to ensure that no one can be deprived of his life intentionally without rules governing when life may be taken based on a sentence of the court. Interdisciplinary scholastic thought developed the notion all the way to the extent that judicial bodies both at the national and international/regional level, need to address the issue of right to life of unborn child[4], euthanasia, abortion etc. in the context of right to life when interpreting this fundamental right. When considering violation of Article 2. of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRF)[5] European Court of Human Rights (ECHR) expanded the meaning of the term, so in the context of the right to life the Court has addressed issues such as forced disappearances, extradition of foreigners to countries where their lives are in danger, compulsory measures to prevent suicide, the right to die, social protection etc. [6]

As we explained above, a new tendency regarding theoretical and practical approach to the right to life is to ensure more comprehensive and purposeful protection what means that life without certain quality is not what it must be. Today, it is a common place that right to life must be followed with and is closely related to some other protected rights and freedoms, at the first place right to

[3] Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948).

[4] The question of when the right to life protection begins was deeply addressed by the ECHR. The Court in general left the issue to be solved on the national level according to the principle of margin of appreciation. There is a different normative position in the American Convention on Human Rights which in Art. 4. states that every person has the right to have his life respected from the moment of conception.

[5] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 04 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; entered into force 03 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998).

[6] Interrights, *Manual For Lawyers: The Right to Life under the European Convention on Human Rights (Article 2)*, Interrights, London, 2011, p. 1.

liberty and security, right to respect for private and family law, prohibition of torture, prohibition of slavery and forced labour. It could be said that such an approach is also recognized in UDHR since the same provision (Art. 3) guarantees protection of the right to life, liberty and security of person. In the American Convention on Human Rights (ACHR)[7] the interesting and arguably correct legal position was taken in terms that the right to *juridical personality* as a precondition for the enjoyment the right to life was mentioned before the right to life. Some scholars went even further and analyze the right to life in the context of the right to work and the right to a healthy environment. In the first case, the fact is that the right to life is the most important human right, however, it can be only completely enjoyed if there is a proclaimed right that protects against hunger, which in most cases is the right to (dignified) work (Stevanović, 2022: 418). In the ECHR practice, the question arose whether the right to life includes in its scope the right to social protection and security (Beširević, et. al, 2017: 36). [8] When it comes to the right to life in the light of the healthy environment, it is the result of the tendency to protect the life with the certain quality - in an appropriate environment (Kambovski, 2021; Orlović, 2014). In some prominent decisions of the ECHR (For example Öneryıldız v. Turkey - *Application no. 48939/99*) such approach was uphold when the Court stated that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. Furthermore, the Court underlined that this positive obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives and that they must govern the licensing, setting up, operation, security

[7] American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673 (1970)

[8] Such a legal approach is not just a a matter of vision for the future since there are few constitutional courts which already affirmed it (Beširević, et. al, 2017: 36).

and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.[9]

Finally, the right to life is closely related not only in theory, but also in constitutional practice and normative framework to the issues of bio-medicine and bio-ethics. For instance, Constitution of the Republic of Serbia[10] in the provision guaranteeing the inviolability of the right to life, prescribes the prohibition of cloning a human being.

It should be mentioned that new technologies come with the further necessity of rethinking right to life with taking into account the new technologies. At first place, we should think about virtual cyber space and the digital normative framework which was developed in order to protect human rights while dealing with the internet and "online world" (Stănilă, 2021).

When it comes to the legal nature of the right to life protection, there is still ongoing academic debate on the issue whether the right to life is an absolute or relative human right. In the light of this legal dilemma, the right to life should be consider as a crucial and fundamental right since no other rights and freedoms cannot exist when there is no right to life. This statement is a distinctive feature of the right to life which must be take into consideration when it comes to the legal interpretation. Nevertheless, it still does not mean that the right to life has an absolute character since even the most impactful international/regional conventions proscribe the possibilities and circumstances in which life can be taken.[11] On the other hand, it could be claimed that right *not to be subjected to the arbitrary deprivation of life*[12] (*prohibition of arbitrary deprivation of life)* is so called *ius cogens* norm and belongs to the legal category of absolute rights. When it comes to the jurisdictions of member states of the Council of Europe, that statement arises from the ECHRF and its Art. 2. where it is stated that "…no one shall be deprived of his life intentionally save in the execution of a sentence of a court

[9] See Öneryıldız v. Turkey para. 89-90.

[10] "Official Herald of the Republic of Serbia", Nos. 98/2006 and 115/2021.

[11] See also: (Beširević, et. al, 2017: 36; Paunović, et. al, 2014: 142).

[12] The United Nations has defined the deprivation of life as involving a "deliberate or foreseeable and preventable life-terminating harm or injury, caused by an act or omission. See: Human Rights Committee General Comment No. 36, 2017, para. 13.2).

following his conviction of a crime for which this penalty is provided by law."[13] Other prescribed exceptions to the "absolute protection of the right to life" from the same article are also contrary to the possibility of arbitrary deprivation of life.

There is the difference between *abstract* and *concrete* protection of the right to life (Orlović, 2014: 163). The first one is provided by the international and regional conventions as well as by the national constitutions. Further concretization of that protection belongs above all to the criminal law and criminal justice system. However, the dynamic interpretations of the right to life, at first place within the jurisprudence of the ECHR "showed the way" for the national legislations regarding the protection of the right to life in terms that it provided certain obligations of the state in this regard, which are classified as a *negative*, *positive* and *procedural* obligations. In the first case, it is an obligation with an absolute legal nature and refers to the prohibition of arbitrary deprivation of life. The obligation to take the necessary measures to protect the life of a person who is at risk is marked as positive obligation, while the state's obligation to conduct an effective investigation when arbitrary deprivation of life occurs, especially if there is an appropriate degree of suspicion that an unlawful deprivation of life has happened, is procedural state obligation. In this regard, it has to mentioned that the ECHR took the legal position that for the violation of Art. 2. of the ECHRF it is necessary to prove that the state and its organs were aware of the potential risk for an individual's life or they had to be, without undertaking all the necessary actions to prevent it.[14] However, the vast majority of addressed issue regarding the right to life and state violation of this right in front of the ECHR and also

[13] Protocol No. 6 on ECHRF which was adopted in 1983, abolished the death penalty in peacetime, what practically in certain way changed Article 2 of the ECHRF which allows the death penalty if it is based on the law and a court ruling. Furthermore the ECHR in the case Öcalan v. Turkey (*Application no. 46221/99*) stated that on the territory of the member states of the Council of Europe, the death penalty is not legally acceptable, regardless of Article 2 of the ECHRF. However, the death penalty exists and is legally acceptable in wartime but only as a consequence of lawful war activities.

[14] See Gongadze v. Ukraine (*Application no. 34056/02).* In the mentioned case, a well-known journalist even informed the prosecutor's office about threats to his life that he received for criticizing the government and asked for the protection. The practice of the ECHR went even further in terms that violation of the state positive obligation regarding protection of the right to life are violated if the persons at risk for his life did not ask for a protection (Beširević, 2017:59).

ACHR related to the state failure to undertake an effective investigation according to the law when there is grounded suspicion on arbitrary deprivation of life.

3. Human rights doctrine in criminal law

Human rights doctrine has had a major influence on the development and conceptualization of criminal law. That influence can be recognized on at least four levels: *conceptualization of crime, principles of criminal law, institutes of substantive criminal law,* as well as *criminal procedure*.[15]

3.1. Human rights approach in defining the notion of crime

The relationship between human rights and criminal law is prominent and gives the meaningful structure to the both legal concepts. Dissatisfied with the legalistic approach to defining crime as a pillar of criminal law, the concept according to which a crime is explained not as a violation of the norms of the criminal code, but as a violation of the human rights of the victim has entered the scholar discourse and has gained considerable attention (See: Milovanovic, 2005: 82; Henry, Milovanovic, 2000: 273). According to that constitutive approach in defining crime (harm) two basic forms of crime (harm) can be identified: *harms of reduction* and *harms of repression.* The first refers to the situation "when an offended party experiences a loss of some quality relative to their present standing" and the second one "occurs when an offended party experiences a limit or restriction preventing them from achieving a desired position or standing" (Milovanovic, 2005:83). Scholars who advocate such approach are defining crime as a denial of the others humanity (Milovanovic, 2005:83) or it could be said that victims of crime are rendered a non-person or less complete being (Henry, Milovanovic, 2000:274).

Regardless of the many scholars statements that such human rights oriented approach in crime defining is ineffective in practice, it is undeniable fact that this approach influenced the modern criminal law a lot through the redesigning of the existing institutes and the implementation of the new crimes. Nevertheless, human rights doctrine affected theoretical considerations on crime and

[15] See also (Tulkens, van de Kerchove, 2013) who analysed that influence on three levels: classification of offences, sentences and procedure.

criminal law and due process (procedural) rights as well as international/regional jurisprudence of the judicial bodies which are controlling the normative framework of human rights. This symbiotic relationship between human rights doctrine and criminal law is deeply rooted in the idea of the rule of law which principle is inherent to the all modern legal systems. Regardless of the fact that the scope of human rights is flexible and unframed, life as a value is indispensable issue of all considerations on human rights and all the other human rights are attached to the right to life as a fundamental right and connective tissue.

3.2. Human rights and criminal law principles

Although all the principles of criminal law limit the power of the state in the use of force within criminal justice system, *the principle of humanity* is the most obvious product of the relationship between human rights and criminal law, particularly international criminal law. The scope of the principle influence can be viewed in two aspects (Stojanović, 2017:27). The first one is focused on the issue of the basic values protected by the criminal law. According to the principle of humanity, one criminal law system can be recognized as a humane only if it protects the human being and other fundamental social values (Stojanović, 2017:27). The second aspect refers to the criminal sanctions and their execution (Stojanović, 2017:27; Jovašević, Stevanović, 2011:41). In general, the principle is implemeted in the criminal law and procedure when during the execution of the prison sentence the convict person is treated humanely without inflicting physical and psychological suffering, pain and discomfort, and when his dignity is not injured by the authorities responsible for the execution of criminal sanction (Jovašević, Stevanović, 2011:41). In that sense, regarding the violation of right to life, the ECHR stated in the case of Tomašić and others v. Croatia (*Application number 46598/06*) that inadequate psychiatric treatment of a person convicted for repeatedly threatening of using a bomb and state failure to examine the risk i.e. in order to assess whether he had posed a risk of carrying out his death threats against others immediately before his release from prison, is violation of right to life. Undoubtly, the most prominent product of human rights doctrine when it comes to the criminal sanctions is cancellation of the death penalty. Based on

political tendency the ECHR stated in the case of Öcalan v. Turkey that the Council of Europe is zone without death penalty despite the Art. 2. of the ECHRF which affirms death penalty if it is provided by the law.

Principles based on fairness and humanity, which is based on the protection of the right to life, were used for example by the German courts in the trials against the officers of the Third Reich, when the courts did not recognize as a basis of justification and ground for excluding criminal responsibility the authority of every soldier to freely kill a deserter (Vuković, 2022:120).

3.3 Human rights and substantive criminal law

When it comes to the institutes of substantive criminal law in terms of how much they are influenced by idea and human rights doctrine, such influence is present both in the general and special part of criminal law regulation. Within the most of the contemporary criminal codes the human being and other fundamental social values are protected as the only value that deserves that kind of protection, and as such constitute the basis and scope for defining of criminal acts, imposing of criminal sanctions and their enforcement to a degree necessary for suppression of these offences.

Crimes that primarily provide protection for life can be considered traditional *mala in se* crimes that are common place regarding the criminal law protection all over the world when it comes to the contemporary period and from the comparative point of view. Today, it is typical for criminal codes to contain special chapter of criminal offenses where the main object of protection is life and bodily integrity. It is not a rare situation regarding modern criminal laws, that the so-called special part where the list of criminal offenses is given, begins with that criminal offenses. Such a nomotechnical approach indicates the importance of this group of criminal acts which provides *direct protection* of the life and bodily integrity within criminal law mechanisms since the criminal offenses contained in that group primarily and exclusively protect life and bodily integrity in the physical-biological sense regardless of the desired quality of life and regardless of the context (work environment, traffic accidents, medical procedures etc.). It derives from that fact that such kind of protection provided by the most of the criminal offences from that group has a primary character when it comes to the protection of life and bodily integrity and criminal offences from that group such

as *Murder, Aggravated Murder, Manslaughter in a Heat of Passion, Infanticide, Negligent Homicide, Serious Bodily Harm* are the common place for a prototype of the modern criminal code.

The importance of criminal law protection of life can also be reflected when it comes to the institution of *release on parole* in the way that the many criminal codes prohibit the possibility for the court to release on parole a convicted person for some specific crimes against life. For instance, in the Criminal Code of the Republic of Serbia, the court may not release on parole a person convicted for the aggravated murder (Article 114, paragraph 1, item 9 - caused death of a child or pregnant woman) what also indicates particular importance of the specific crimes against life.

The institute of *self-defence* and extreme *necessity* are grounds for excluding criminal responsibility i.e justification or excuses depending on the basic conception of the crime given in the general part of the criminal code. Those institutes are mentioned in the literature as the reason why the protection of the right to life is not of an absolute character, however it can be argued that they are actually one of the main barriers to arbitrary and intentional deprivation of life and in that sense strong guarantee of protection of the right to life. Basically similar grounds for excluding criminal responsibility (i.e justification or excuses) exist not only in almost all criminal codes, but also in the important regional human rights documents.[16] To say, ECHRF in Art.2 paragraph 2 stipulates that deprivation of life shall not be regarded as inflicted in contravention of mentioned Article when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained and in action lawfully taken for the purpose of quelling a riot or insurrection. Under the war circumstances the scope of goods that are under protection are wider when it comes to the application of the grounds for excluding criminal responsibility. Therefore, according to the Rome Statute of the International Criminal Court[17] the perpetrator shall not

[16] According to some authors, the origin of the institute of necessary self-defense should not be sought in laws created by humans, but in natural law, since it is the purest of all laws, and therefore it could not be created by lawyers (Sangero, 2006:6).

[17] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010*)*, UN General Assembly, 17 July 1998.

be criminally responsible if among the others grounds, he acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this ground; or his conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

Mirroring the fact that the purpose of human rights is to regulate behavior of the state i.e. to ensure position of the citizen in front of the state power, mentioned grounds for excluding criminal responsibility (i.e justification or excuses) given in ECHRF were designed and adopted to the situation when state agents is/are about to use the force which is no more than absolutely necessary and likely to lead to the deprivation of life. On the other hand, when it comes to the self-defence and extreme necessity on the national level within criminal codes, those institutes as a grounds for excluding criminal responsibility i.e justification or excuses are made in order to govern the behavior of private individuals[18] when they are in the situation to defend their own goods and at first place their lives. When it comes to the scope of goods that are under protection of self-defence and extreme necessity institutes, one path is about narrower position according to which self -defence is such defence as necessary for the perpetrator to repel a concurrent unlawful attack on himself or on someone else and extreme necessity exists when an act is committed by the perpetrator to repel from himself or someone else a concurrent unprovoked danger that could not be otherwise repelled, and the damage inflicted does not exceed the damage threatened.[19] The solution

[18] For instance, there are such solutions (likewise in the Criminal Code of the Republic of Serbia) according to which there is no extreme necessity if the offender was under obligation to expose himself to imminent danger.

[19] For example, such narrower solution was applied in the Croatian Crimianl Code.

that allows wider scope of goods that are under protection of self-defence and extreme necessity institutes is based on defending/protecting personal goods or another persons goods.[20] However the principle of *necessary defence* and *proportionality of goods* are applied in order to prevent the perpetrator to take a life in order to defend his insignificant property right.

The fact is that the above mentioned institutes of self-defence and extreme necessity are contained in criminal codes to be the last resort action of private individuals when the state is not in the position to protect their lives due to the imminent danger or failed to act in accordance with the positive obligation to ensure right to life and undertake necessary actions. Therefore, it could be argued that those institutes are step forward in the protection of right to life although a big abuses are enabled by them.

The criminal law protection of life is equally provided for all human beings. However, numerous criminal codes provide in certain circumstances and for certain categories of people the stronger criminal law protection of their lives. This fact is not the result of the desire to privilege and protect only those categories, but on the contrary, it is an expression of the desire to ensure the protection of their lives in an adequate way. That stronger protection refers to the certain categories of people who are under specific circumstances or in a specific psychophysical condition or perform certain jobs or duties that involve exposure to higher risk of life and as a result are far more vulnerable compared to the average situations. Hence, the criminal codes contain criminal offences which consequence is causing death of a child, a pregnant woman, an official while performing duty, a family member, etc. or they are contained in the criminal offence aggravated murder as its specific forms. For such offences severe sanctions are proscribed than it is the case with the murder as a typical offence of causing death what should be additional deterrent factor for potential perpetrators. However, it has to be mentioned that the structure of categories of people under the stronger criminal law protection of their lives varies according to socio-political changes. Thus, the campaign with the outline of moral panic led to the appearance of a new criminal offense of Femicide in numerous criminal codes, based on gender as a criterion for distinguishing.

[20] This is the position taken in the Criminal Code of the Republic of Serbia. See Art. 19-20.

Negligence is punishable when it comes to the causing death of another, so in order to cover socially unacceptable commission or omission that caused death of another, in most of the contemporary criminal codes proscribe negligent homicide as a criminal offence.

There is no doubt that the implementation of human rights standards at the national level is largely influenced by historical, cultural and political determinants. Therefore, it should not be surprising that there is a range of crimes whose main object of protection is life, and on which there is no consensus at the level of the international community. The most illustrative example of this thesis is the different normative practices at the national level regarding the criminalization of mercy killing. There is also a different comparative approach regarding the issue whether the mercy killing has to be a privileged form of murder what would leads to the lenient sanctions.[21] The so called privileged forms of murder are showing the strict legislator position when it comes to the situations in which murder occurs under some mitigating circumstances, such as provoked attack by the victim, disorders caused by childbirth etc. In other words, protection of life is positioned so high at the scale of protected values that mentioned ways of taking lives are still prohibited and criminalized. However, mirroring the mitigating circumstances, proscribed sanctions are milder.

The set of criminal offences that in general criminalize a failure to rescue someone in immediate danger if one can do it without any risk to oneself is another issue that is not regulated in the same way on comparative level, in terms of criminal law life protection. In general, national jurisdiction under Anglo-Saxon law tradition have refused to impose such liability while on the other hand criminal codes that have developed under continental legal tradition mostly imposed it. In the Criminal Code of the Republic of Serbia criminal offences such as *Endangerment, Abandonment of a Helpless Person, Failure to Render Aid and Failure to Render Aid to Person Injured in Traffic Accident* are the result of *principle od solidarity* that prevailed and by criminal law mechanism force people to act in order to save the lives of other people who are at risk without any risk to oneself.

[21] When it comes to the criminal offence of Incitement to Suicide and Aiding in Suicide, it should be mentioned that many important legal system do not proscribe it as a criminal offence.

International criminal law is a traditional meeting place of criminal law and human rights doctrine. Every modern criminal code contains the special chapter within crimes against humanity and other rights guaranteed by the international law are proscribed. The main protective object of those crimes are life and so it belong to a category of direct protection of life in criminal law. The main characteristic of crimes from that group is that through them lives are endangered and destroyed in a massive (collective) way due to strategic intent and use of military weapons under the war circumstances.

Direct protection of life in above mentioned sense could be found in other crimes out of the group of criminal offences that protects life and bodily integrity. For instance, Constitution of the Republic of Serbia within the same provision (Art. 24) in which guarantees that the life is inviolable, stated that cloning of human beings shall be prohibited. Indeed, cloning of human beings is criminalized but was put in the group of criminal offences against human health.

On the other hand, indirect life protection within criminal law is quite wider and could be seen as contribution to a life with a certain quality principle when it comes to the criminal law life protection. In general, indirect life protection in criminal law is placed on two ways. The first one refers to a situation when some criminalized act (commission or omisson) caused death, but due to the principle of specialty that act is defined as a criminal offence other than murder. In that situation causing death is a graver consequence of the criminal offence. Such offences that contain that graver consequence of causing death are numerous and placed in almost every single group of crimes classified according to the main protective object. When that graver consequence is completed sanctions are severe or a part of the range that gravitates towards the maximum must be applied. This is for example the case with the criminal offences such as *Unlawful Depriving of Liberty, Abduction, Coercion, Rape, Domestic Violence, Violation of Family Duty, Transmitting HIV Infection, Failure to Provide Medical Assistance, Failure to Render Aid to Person Injured in Traffic Accident* etc.

Secondly, there are numerous criminal offences through which the life protection is provided but without explicitly mentioning causing death as a consequence. Take for example basic criminal offences from labor relations, ecology and road traffic safety. Although the criminalization of acts against labor relations is a legitimate aspiration of the legislator to provide protection to work as a socio-

economic category of vital importance for the functioning of every state (Stevanović, 2021: 167), only certain situations that deserve criminal protection have been selected and proscribed as a criminal offences. When it comes to the all of those selected situations of violating labor rights it is noticeable that criminal law protection is provided only when the worker's life is threatened. Non-payment of solidarity aid or jubilee award will certainly not lead to this, but non-payment of salaries or performing work without prescribed rest can potentially endanger an individual's life. Hence, it is justified that many criminal codes contain criminal offences that cover deliberately violation of "first level" labor and social security rights. In general, the same could be say for the crimes against ecology and road traffic safety. Violating of the rules governing that fields are the object of interest for the criminal law when an important value such as life, is endangered. The principle that the protection of a human being and other fundamental social values constitute the main *raison d'exister* of criminal law is well presented through those crimes. Not every nature endangered is the matter of criminal law protection of the environment, but when it comes to the violating the regulations on protection, preservation and improvement of the environment pollutes air, water or soil to larger extent or over a wider area, than the criminal law protection is required, in order to protect eco-system and also to protect humans lives since such unlawful actions inherently endanger human lives. It could be argued that when it comes to that hybrid group of crimes, endangering human lives at least does not seem like an impossible and remote consequence, although as such it is not set forth as an element of the criminal offence. However, the distinction between the *direct* and *indirect* life protection within the criminal law is not of a great particular usage although it could be useful while interpreting a certain offence, when it comes to the sentencing, or could be useful as a legislative motive to go for reconceptualization of some offences, group of criminal offences or to implement a new offences.

3.4. Human rights and criminal procedure

It could be said that today dominant concept (in the member states of the Council of Europe) of criminal procedure is aimed at protecting the human rights of the person against whom the proceedings are being conducted rather than at protecting the same rights when it comes to the victim regardless of the fact that

in the 1960s, the movement for the protection of victims' rights began, what was supposed to shed more light on the protection of victims in criminal procedure (Ilić, 2010:138). This primarily refers to those codes which as a subject matter define the aim to establish the rules to prevent the conviction of any innocent person before enabling a perpetrator of a criminal offense to be sanctioned in accordance with conditions envisaged by the criminal law, based on lawfully and fairly conducted proceedings.

Due to above mentioned position of the person charged with a criminal offence under the criminal procedure, the concept of a *fair trial* was developed and is still developing, which includes specific rights such as right to be presumed innocent until proved guilty according to law and *in dubio pro reo* concept without which the right to life of a person charged with a criminal offence in the context of criminal procedure is unthinkable.

However, when it comes to the protection of the right to life of a person charged with a criminal offence, the most prominent guarantee is reflected in the *prohibition of torture or cruel, inhuman or degrading treatment or punishment* (Art. 5. of the UDHR; Art. 3. of the ECHRF etc.). It is not just a kind of natural law legal product since the confession of the defendant was considered a *regina probandi* over a long period in the history of criminal procedure which was routinely extorted by the state agents (Škulić, 2022).[22] However, the same aim was the leading motive to implement *exlusionary rule* or the concept of *unlawful evidence* when it comes to the European legal tradition, in the criminal procedure.

There are also some limitations of the process of obtaining evidence related to the protection of the right to life, since for example in Criminal Procedure Code of the Republic of Serbia the obtaining of samples of biological origin and performance of other medical actions which are under the rules of the medical profession required for the purpose of analysing and establishing facts in proceedings may be conducted even without the consent of the defendant, *except if*

[22] That is why Criminal Procedure Code of the Republic of Serbia proscribes that when a defendant confesses to having committed a criminal offence, the authority conducting proceedings shall be required to continue collecting evidence about the perpetrator and the criminal offence only where grounded suspicion exists about the veracity of the confession or if the confession is incomplete, contradictory or unclear and contrary to other evidence. Such solution relativizes centuries-old supremacy of the confession of the defendant as a *regina probandi*.

it would cause harm to his /her health in some way. The same could be said when it comes to the strict reasons for ordering detention (although numerous abuses occur in practice) or the right of detainee to be visited by the doctor etc.

4. Conclusion

There is no doubt that the contemporary criminal law is centered around the human right doctrine although there is a lot of room for further improvement of the current state of affairs. In light of this, further effort is necessary to answer some open questions regarding right to life such as the very moment when this right needs to be applied for the first time in humans life (right to life of unborn child), mercy killings, right to death within right to life etc. Additionally, there are many issue related to right to life that must be take into consideration in the time to come. This at first place refers to the issue of artificial intelligence and other similar technologies regarding the life protection. The process of developing the human rights concept has changed from the right to life in a physical (bodily) sense towards the concept of the right to life with a certain quality. In this regard, many issues are open and "are waiting" to be considered as a potential part of the right to life. This is for example the case when it comes to the right to work and social security, the right to a healthy environment etc.

However, it seems that most of the problems regarding the protection of the life within criminal law arise when it comes to the selective implementation of the human rights idea in criminal law and calling upon human rights protection when they are most brutally violated. Therefore, although we are living in a time of principled supremacy of the idea of human rights, unimaginable violations of human rights, both on a collective and individual level, routinely occur every day. Regardless of this, symbiotic relationship between human rights doctrine and criminal law is deeply rooted and have a huge impact on the development of both, human rights law, and criminal law. Human rights doctrine has had a major influence on the development and conceptualization of criminal law. That influence can be recognized on at least four levels: *conceptualization of crime*, *principles of criminal law*, *institutes of substantive criminal law*, as well as *criminal procedure.* On the other hand, criminal law is the best and the most suitable "platform" for promoting human right idea and for effective protection of the selected rights

and freedoms. Finally, based on the fact that human rights have both a defensive and an offensive role within criminal law it could be easily stated that the making criminal law norms and creating criminal justice system is in a certain way the art of balancing between an effective protection of the fundamental values which are endangered by criminal acts and protection of the fundamental values which can be endangered while that goal is being achieved.

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СИНТЕЗ КРИМИНОЛОГО-ИСТОРИЧЕСКОГО ЗНАНИЯ КАК ПЕРСПЕКТИВА РАЗВИТИЯ НАУКИ О ПРЕСТУПНОСТИ

Связь криминологии с иными науками всегда мыслилась важным компонентом приращения научного знания о преступности и развития методологии криминологических исследований. Одним из направлений такой связи выступает взаимодействие криминологии и истории. Обе науки в этой части движутся навстречу друг другу. Принцип историзма, как неотъемлемый элемент методологии отечественной криминологии, стимулировал изучение криминологами истории преступности и ее отдельных видов, истории профилактической и правоохранительной деятельности, истории развития криминологических теорий. Диверсификация методологических основ исторической науки и развитие социальной истории, в свою очередь, также обусловило внимание историков к проблемам преступности и ее предупреждения. Между тем, применение исторического метода в криминологии и включение преступности в предмет исторических исследований остаются относительно самостоятельными и не связанными друг с другом процессами. А теоретическое осмысление междисциплинарных связей криминологии с историей неоправданно остается «белым пятном». Такая ситуация не является специфически российской проблемой и в последние годы привлекает активное внимание специалистов по всеми миру. В англоязычной науке отсутствие взаимодействия между криминологией и историей объясняется, прежде всего, целями и организацией исследований. Если историки изучают прошлое ради раскрытия самого прошлого, без акцентированной его связи с настоящим, то криминологи, напротив,

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сосредоточены на изучении настоящего и обращаются к прошлому лишь в той мере, в какой оно способно объяснить происходящие в настоящем процессы. Однако эта автономность, порожденная во многом искусственными границами, справедливо оспаривается. Наука делает уверенные шаги в направлении преодоления отраслевой замкнутости криминологии и истории. Результатом этой работы стало развитие исторической криминологии как особого подхода к изучению преступности и связанных с ней проблем. Специальные монографические исследования, совместные коллективные обсуждения, организация тематических выпусков авторитетных журналов, разработка специализированных программ обучения направлены на то, чтобы обеспечить полномасштабное включение исторического компонента в криминологическую науку через стимулирование исторического мышления и пересмотр отживших историософских представлений о взаимосвязи прошлого, настоящего и будущего.

Ключевые слова: *методология криминологии; принцип историзма; междисциплинарные исследования; криминологические теории; истори-ческая криминология; история криминологии; история преступности; история криминологической профилактики.*

1. Введение

Криминология, как и любая наука, изучающая социальные явления, по природе своей обречена иметь тесные содержательные связи с иными, прежде всего, общественными науками. Этот тезис, на первый взгляд, тяготеющий к разряду прописных истин и констатируемый во вводных главах всех учебников по криминологии, при его надлежащем развертывании и обосновании способен существенным образом обогатить содержание криминологической науки, ее методологический аппарат, гносеологические установки, как следствие, повысить качество, результативность криминологических исследований и социальную значимость их результатов.

Наука делает серьезные шаги в осмыслении связи криминологии с математикой, биологией, психологией и т.д. Между тем, ни глубина исследования характера такой связи, ни, что особенно важно, спектр научных областей, с которыми криминология может и должна взаимодействовать, не могут быть признаны достаточными.

В связи с этим вопрос о «пограничных» для криминологии науках требует отдельного внимания. В учебной литературе стандартным является утверждение о связи криминологии с юридическими (уголовное право, уголовный процесс, криминалистика и др.) и неюридическими отраслями знания. Среди последних, как правило, называется экономика, статистика, социология, деликтология, психология, психиатрия, педагогика. Иногда упоминаются иные отрасли знаний. Но в большинстве учебников в ряду адресатов научного взаимообмена криминологии не была упомянута история. Возможно, указание на нее скрывалось под многозначительным «и т.д.», которым завершалось изложение перечня наук, взаимодействующих с криминологией, но вполне возможно, что взаимодействие криминологии и истории не мыслилось в качестве темы, достойной специального упоминания. Только в учебнике Ю.М. Антоняна сделано краткое замечание о пересечении криминологии с историей при проведении научных

изысканий в области развития преступности в разные исторические периоды[1].

В рамках настоящей работы мы поставим своей целью, по мере возможностей, восполнить этот пробел и концептуализировать методологические и содержательные связи криминологической и исторической наук.

2. Историзм как принцип советской криминологии

Поскольку сама постановка вопроса о междисциплинарных связях науки требует определенного уровня ее зрелости, при рассмотрении взаимосвязи истории и криминологии представляется возможным, учитывая исторический опыт становления и развития криминологической науки в России, ограничиться анализом научной литературы, изданной начиная со второй половины прошлого столетия.

Советская криминология - совершенно особый пласт знания, причем как в российской, так и в мировой науке о преступности. Ее принципиальная особенность - вполне определенный методологический фундамент, в качестве которого выступала материалистическая диалектика, и методологический унитаризм, обеспечивающий единые гносеологические установки не только для всех криминологов, но и для представителей всех иных общественных наук в целом. В силу этого можно утверждать, что представители советской криминологической науки имели единый подход к решению вопроса о связи истории и криминологии. Причем, что крайне важно в разрезе нашей темы, содержание этой связи было имманентно заложено в сам методологический фундамент обществоведения.

Речь идет о принципе историзма - одном из основных принципов диалектического изучения общества. Историзм, вне сомнений, требовал анализа криминологических явлений в их возникновении, становлении и развитии, с учетом социального и временного контекста. Однако представляется, что в советской криминологии он оставался в большей степени гносеологической установкой, нежели развернутой методической

[1] Антонян, Ю.М. (2004). *Криминология. Избранные лекции.* Москва: Логос. С. 28.

программой. В прикладном, организационно-методическом аспекте исторический метод не был полностью реализован.

Пафос историзма во многом оставался подчеркнуто идеологическим, обосновывающим историософское различие советской и буржуазной криминологии. «Буржуазным криминологическим теориям, - утверждал официальный учебник, - присущ внеисторический подход, а отсюда признание преступности как вечной, присущей человечеству категории». В то время как «советская криминология вскрывает историческую неизбежность преступности в условиях капитализма, показывает изменение характера преступности на различных этапах развития социалистического общества, перспективу ее ликвидации в нашем обществе»[2].

За пределами этой идеологической максимы, в прикладном, исследовательском отношении применение исторического метода было ограниченным. Общая направленность криминологических исследований на разработку фундаментальных, базовых понятий криминологии и нацеленность исторической науки на изучение политической истории страны, делали взаимодействие данных наук и проведение историко-криминологических исследований практически неосуществимым.

3. История в криминологической науке

Следуя принципу историзма и признавая ценность исторического метода, российская криминология закономерно включила его в своей арсенал. Значение данного метода усматривалось в том, чтобы на основании изучения преступности за более или менее длительный период времени вскрывать устойчивые характеристики, закономерности и тенденции, прежде всего, самой преступности[3]. К этом добавлялась необходимость с учетом исторических данных выявлять реальные закономерности и тенденции ее причинной базы, устойчивые характери-

[2] Звирбуль, В.К., Кузнецова, Н.Ф., Миньковский, Г.М. (ред., 1979). *Криминология.* Москва: Юридическая литература. С. 8, 9.

[3] Долгова, А.И. (ред., 1997). *Криминология*. Москва: Инфра-М, Норма, 1997. С. 47.

стики личности преступников, проверять надежность мер предупреждения и контроля преступности, строить долговременные криминологические прогнозы, а также развенчивать сомнительные теории и предположения[4].

По мере укрепления научного статуса и расширения исследовательского поля, отечественная криминология существенно продвинулась в направлении проведения исторических исследований и реализации принципа историзма. Без претензий на исчерпывающий анализ, можно представить несколько тематических блоков, в которых исторический метод проявил себя с достаточной полнотой, и которые охватывают собой практически все компоненты предмета криминологической науки.

1) Криминология приступила к осмыслению собственной истории, причем как в целом к эволюции содержания и формы организации криминологических знаний, так и к изучению истории отдельных криминологических учений и вклада конкретных исследователей в развитие криминологической теории.
2) С позиций историзма криминология исследовала детерминанты преступности, механизм преступного поведения - «генезис преступления» и процесс формирования личности преступника.
3) Появился ряд исследований, посвященных истории организации профилактики и предупреждения преступлений.
4) Криминологи приступили к исследованию истории собственно самой преступности.
5) Был признан в качестве отдельного предмета криминологических исследований феномен изменения преступности.

Признавая несомненную ценность накопленного опыта проведения исторических исследований в криминологии, позволим себе высказать несколько замечаний, призванных показать специфику организации исторического анализа в криминологических сочинениях.

Заметим, прежде всего, что криминологи воспринимают историю почти исключительно как метод познания современных криминологи-

[4] Лунеев, В.В. (2015). *Курс мировой и российской криминологии*. В 2 т. Т. I. Общая часть. Москва: Юрайт. С. 296.

ческих проблем, причем метод не основной, вспомогательный. Криминологи не склонны, по общему правилу, рассматривать историю преступности в качестве самостоятельного предмета исследования. В силу этого исторические экскурсы в криминологических сочинениях:

а) имеют место лишь как текстуально обособленная часть криминологического анализа, занимая в крупных монографических работах лишь место отдельного параграфа или главы;
б) присутствуют далеко не всегда, в отличие, например, от работ, посвященных уголовному праву, где наличие историко-правовой компоненты стало устойчивой и хорошей традицией;
в) ограничиваются неглубоким по протяженности периодом исторического наблюдения, весьма близким к современности, в течение которого сложились и продолжаются в настоящем те или иные криминологические тенденции;
г) посвящены дискретно описанию отдельных криминологических явлений и не позволяют создать целостной картины генезиса и развития комплекса отношений, определяющих связь детерминант, состояния и профилактики преступности;
д) нацелены на то, чтобы на основе некоторых исторических данных продемонстрировать истоки текущего состояния преступности и мер борьбы с ней, сравнить ее актуальный уровень с прошлым временем, то есть, иными словами, чтобы лучше понять и объяснить именно современную преступность. История в данном случае выступает лишь как фон криминологических рассуждений или как нечто, что, детерминировав современное состояние преступности, само по себе безвозвратно ушло в прошлое.

4. Преступность в исторической науке

Тема преступности не представляла интереса для российских историков вплоть до рубежа XX - XXI веков. Лишь с 80-х годов прошлого столетия, по мере падения сдерживающих исследовательский интерес оков диалектического материализма и свершения «методологической революции», наблюдается растущее внимание к проблематике социальной

истории, исторической антропологии, культурной истории, истории повседневности. «Распространение постмодернистских идей оказало воздействие на российских исследователей, которые все более применяли социологический и антропологический подходы к истории. Постсоветская историография активно использовала наследие французской школы «Анналов», американской «новой социальной истории» и других направлений и школ западной науки. ... Социальная история, история ментальностей, историческая антропология изменили предмет исторических исследований, в центре которого оказались не история государства и его институтов, а изучение социальных отношений, картины мира, сферы повседневности, области воображаемого и т.д. Историки активно заимствовали проблематику, подходы, методы и язык социологии и антропологии, пересматривали требования к историческим сочинениям, внедряли новую терминологию»[5].

На этом фоне тема преступности уверенно вошла в круг интересов профессиональных историков, вначале как часть общего проекта исследования социальной истории страны, а затем - и как самостоятельный предмет научного анализа. К настоящему моменту историки уделили немало внимания изучению общего состояния преступности и борьбы с ней на различных этапах развития страны; исследованию исторического опыта борьбы с отдельными видами преступности; внушителен объем литературы, посвященной истории региональной преступности и опыту противодействия ей.

Не претендуя на оценку достоинств имеющихся сочинений для развития исторической науки, но принимая во внимание, что в них анализируется преступность - основной компонент предмета криминологии, обратим внимание на некоторые их особенности, препятствующие широкой агрегации исторического знания к криминологии:

а) признание истории преступности предметом анализа, для изучения которого применяются сугубо исторические методы («историоизация преступности»);

[5] Чернобаев, А.А. (ред., 2014). *Историография истории России*. Москва: Юрайт. С. 474.

б) нестрогое отношение к криминологическим категориям и понятиям, слабо связанное с криминологической и правовой теорией обоснование территориальных и хронологических границ исследования;
в) невнимание к криминологическим теориям объяснения преступности, ее детерминации и профилактики, сосредоточенность на описательной, а не аналитической парадигме;
г) отсутствие связи исторического опыта с современными актуальными проблемами объяснения и предупреждения преступности.

5. Характеристика, оценка и результат сближения криминологии и истории

Проникновение исторического метода в криминологические исследования и включение преступности в предмет исторического анализа - взаимонаправленные тенденции, отражающие развитие общественных наук. Однако их оценка не только не является однозначной, но и в должной мере не сформулирована. Нам неизвестен опыт серьезного науковедческого анализа данного феномена. Отдельные публикации тем не менее позволяют вывить весьма противоречивые суждения.

С одной стороны, в исторической науке имеет место некоторое пренебрежение вкладом профессиональных юристов в разработку проблем истории преступности и противодействия ей. Это заметно уже при обращении к описанию историографических разделов исторических сочинений, где имена криминологов упоминаются крайне редко. Не иначе как отраслевой предвзятостью можно объяснить, например, пренебрежительные высказывания историка права В.А. Рогова о том, что монография М.Н. Гернета о смертной казни «наименее ценная», работы М.П. Чубинского по уголовной политике имеют лишь «некоторое значение», а труды Г. Тальберга и Н. Евреинова «ничего не прибавляют» к познанию истории телесных наказаний, в то время как лишь исторические сочинения С.И. Штамм отличаются «скрупулезностью исследования применения

различных наказаний по конкретным видам преступлений»[6]. В этой же тональности (и даже резче) звучит обратная критика со стороны М.П. и И.М. Клейменовых - профессиональных криминологов - в адрес историков, разрабатывающих проблемы преступности. Они обвиняют их в дискредитации криминологии как науки, высокомерном к ней отношении, в «изъятии объекта (предмета) науки с целью его аннигиляции (уничтожения)», посягательстве на методологию науки, в непонимании сложных криминологических связей между явлениями, формулировании банальных и юридически безграмотных рекомендаций[7].

С другой стороны, отчетливо, настойчиво и последовательно звучат голоса и криминологов, и историков, ратующих за методологическое обновление науки, расширение спектра исследовательских интересов, междисциплинарность и т.д.

В целом же создается ситуация запутанного взаимоотношения истории и криминологии, сочетающая в себе признание и отрицание, восторг и отторжение, уважение и неприязнь.

Важно подчеркнуть, что ситуация эта не является специфически российской. В той или иной степени ее переживают научные сообщества по всему миру.

В то время как популярный интерес к отъявленным преступникам и их деяниям, можно сказать, вечен, история преступности и история уголовного правосудия в 1970-х годах были едва изученными предметами, - признает Р. Кателло[8]. По свидетельству П. Лоуренса, вплоть до конца двадцатого века, за некоторыми исключениями, криминологи, прошедшие социологическую подготовку, редко ссылались на исторические данные или включали их в свои исследования в какой-либо значительной степени[9].

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[6] Рогов, В.А. (1995). История уголовного права, террора и репрессий в Русском государстве XV - XVII в.в. Москва: Юристъ. С. 25, 27, 33, 34.

[7] Клейменов, М.П., Клейменов, И.М. (2010). «Профанация криминологии». Криминологический журнал Байкальского государственного университета экономики и права. №. 2. С. 13 - 20.

[8] Catello, R. (2023). «Who gave historical criminology a name? A history of 20th-century historical criminology». *Journal of Criminal Justice.* Vol. 85 (preprint, 101954).

[9] Lawrence, P. (2019). «Historical criminology and the explanatory power of the past». *Criminology and Criminal Justice*. Vol. 19, № 4. P. 496.

Это позволило Д. Пратту назвать криминологию «субъектом без прошлого», а исторические исследований в ней - «эзотерической роскошью»[10].

Объяснение такой ситуации, предлагаемое в англоязычной литературе, с известными оговорками, может оказаться приемлемым и для понимания ситуации в российской науке.

Р. Кателло, утверждает: «Поскольку криминология является областью исследований, принципиально ориентированной на настоящее, и поскольку историческое исследование по сути касается знания о прошлом, всегда имели место фундаментальные методологические и мировоззренческие расхождения между таким дисциплинам, как история и криминология. Взаимосвязь между историей и криминологией долгое время считалась, в лучшем случае, непростой, а в худшем - ненужной»[11].

М. Дефлем объясняет отсутствие взаимодействия между криминологией и историей спецификой организации исследований в этих науках. Относительное пренебрежение сравнительно-историческим анализом в криминологии было результатом ее склонности к технически завершенным и, как правило, количественным эмпирическим исследованиям условий современности. В то время как сравнительно-историческое изучение общества в значительной степени было присвоено антропологией и историей[12].

В этом же ключе видит основную причину отсутствия диалога историков и криминологов П. Лоуренс. Среди криминологов, интересующихся прошлым, - отмечает он, - существует тенденция использовать исторические данные для проблематизации криминологических предположений о настоящем, а не для фактического объяснения генезиса современного поведения, политики или институтов. Ключевой характеристикой криминологии является желание понять настоящее *с*

[10] Pratt, J. (1997). «History and Criminology: Understanding the Present». *Current Issues in Criminal Justice*. Vol. 8, № 1. P. 60, 62.

[11] Catello, R. (2023). «Who gave historical criminology a name? A history of 20th-century historical criminology». *Journal of Criminal Justice.* Vol. 85 (preprint, 101954).

[12] Deflem, M. (2015). «Comparative Historical Analysis in Criminology and Criminal Justice». *The Routledge Handbook of Qualitative Criminology* / ed. H. Copes, M. Miller. London: Routledge. P. 63 - 73.

целью повлиять на будущее. Этот тип дискурса (по крайней мере до 70-80-х годов прошлого века) был в значительной степени чуждым многим историкам, которые обычно искали закономерности прогресса от более примитивного прошлого к более сложному или просвещенному будущему, делая *четкие заявления о будущем на основе прошлого*[13].

Со временем отсутствие диалога между историей и криминологией стало оцениваться критически. Полвека назад Д. Маца отмечал, что «главный недостаток социологии и криминологии заключается в том, что они не являются историческими»[14]. Между тем, уровень взаимоотношений и взаимопонимания историков и социологов долгое время оставался низким.

Историки неоднократно нападали на социологов за игнорирование или неправильное использование прошлого, в то время как социологи критиковали тенденцию историков избегать заявлений об общей значимости их исследований для настоящего и будущего[15]. «Историки склонны изучать криминологические тексты, не полностью охватывая или не понимая более глубоких теоретических основ идей или исследований, которые они используют», - резюмировал П. Кинг, - Тогда как «криминологи часто лишь на мгновение склоняют колени перед историческими исследованиями и, таким образом, не в состоянии должным образом контекстуализировать структуры и недавние закономерности изменений, которые они анализируют»[16]. Такая ситуация позволила П. Берку в 1992 году охарактеризовать взаимоотношения истории с иными социальными науками как «диалог глухих»[17].

Между тем, «ползучее сближение» двух областей научного знания привело к тому, что уровень взаимодействия между криминологией и

[13] Lawrence, P. (2012). «History, criminology and the «use» of the past». *Theoretical Criminology*. Vol. 16, № 3. P. 319 - 323.

[14] Weis, J.G. (1971). «Dialogue with David Matza». *Issues in Criminology.* Vol. 6, № 1. P. 53.

[15] Yeomans, H., Churchill, D., Channing, I. (2020). «Conversations in a Crowded Room: An Assessment of the Contribution of Historical Research to Criminology». *The Howard Journal.* Vol. 59, № 3. P. 244.

[16] King, P. (1999). «Locating histories of crime: a bibliographical study». *British Journal of Criminology.* Vol. 39. P. 161 - 162.

[17] Burke, P. (1992). *History and Social Theory.* Cambridge: Polity.

историей стал гораздо выше, чем это было еще десять лет назад. Если в 1999 году П. Кинг пришел к выводу, что хотя взаимодействие истории и криминологии и перестало быть «диалогом глухих», но все еще представляет собой беседу, ведущуюся «сдержанным шепотом»[18], то в 2020 году специалисты для описания этого взаимодействия использовали образ «рандеву в переполненной комнате», в которой многочисленные группы людей шумно беседуют, перебивая и не слыша друг друга: «несколько отчетливых, членораздельных голосов разносятся по залу, но большинство теряется в шуме»[19].

Определенным итогом междисциплинарного сближения криминологии и истории стала историческая криминология – исследовательское направление, получившее к настоящему времени серьезное методологическое и интеллектуальное обоснование, а также организационное оформление.

В англоязычной криминологии это нашло отражение в нескольких формах:

- во-первых, в возрастающем числе научных сочинений, посвященных обобщенному анализу связи истории и криминологии, а также конкретных исследований, раскрывающих эту связь на примере отдельных видов преступлений, регионов, исторических периодов и т.д.;
- во-вторых, в учреждении в 1978 году Международной ассоциации истории преступности и уголовного правосудия[20] и выпуске ею, начиная с 1997 года, специализированного двуязычного (английский / французский) журнала «Преступность, история и общество» (Crime, History and Societies)[21];

[18] King, P. (1999). «Locating histories of crime: a bibliographical study». *British Journal of Criminology*. Vol. 39. P. 163.

[19] Yeomans, H., Churchill, D., Channing, I. (2020). «Conversations in a Crowded Room: An Assessment of the Contribution of Historical Research to Criminology». *The Howard Journal*. Vol. 59, № 3. P. 245, 253.

[20] См.: https://www.h-net.org/~iahccj/index.html

[21] См.: https://journals.openedition.org/chs/

- в-третьих, в организованном коллективном обсуждении проблем исторической криминологии на площадке ведущих криминологических журналов. Менее чем за десятилетие три специальных выпуска крупнейших академических журналов были посвящены исключительно или почти исключительно исторической криминологии: 1) Специальный выпуск «Историческая криминология» в *Европейском криминологическом журнале* (том 11, выпуск 2, март 2014); 2) Специальный выпуск «Может ли история что-то изменить? Взаимосвязь между историей преступности и политикой правосудия» в Журнале преступности и правосудия Говарда (том 59, выпуск 3, сентябрь 2020); 3) Специальный выпуск «Прошлое как наше будущее: исторические уроки, которые следует извлечь из теории, практики и политики допроса» в *Журнале уголовного правосудия* (2022);
- в-четвертых, в организации специальных отделений исторической криминологии в криминологических обществах и развитии сетевых сообществ историков преступности (*Британское криминологическое общество, Австралийское и Новозеландское криминологическое общество* имеют сеть исторической криминологии[22], *Американское криминологическое общество* имеет подразделение исторической криминологии[23], *Европейское криминологическое общество* имеет рабочую группу по исторической криминологии[24]);
- в-пятых, в организации специальных программ обучения в бакалавриате «История и преступность»[25].

В целом сегодня в науке можно констатировать отчетливое стремление синтезировать криминологическое и историческое знание о преступности. Поскольку, - пишет С.Р. Эмах, - историк и криминолог

[22] См.: https://www.historicalcriminology.com/; https://anzsoc.org/about/thematic-groups/historical-criminology-network-thematic/

[23] См.: https://dhistorical.com/

[24] См.: https://www.esc-eurocrim.org/index.php/activities/working-groups/74-european-historical-criminology-working-group

[25] См., например: https://www.essex.ac.uk/courses/ug00190/1/ba-history-and-criminology?utm_source=studyqa.com&utm_medium=program-page&utm_campaign=default

озабочены пониманием настоящего, чтобы формировать будущее, первый - через изучение прошлого, а второй - через изучение самого настоящего, то их сотрудничество невозможно переоценить[26].

6. Заключение

Длительный период автономного существования истории и криминологии, молчаливого и бессодержательного признания взаимных достоинств и ценности кооперации, по-видимому, прошел. Междисциплинарные и трансдициплинарные исследования преступности и средств противодействия ей уверенно вышли на передний край криминологического знания. В этом отношении сближение криминологии и истории и формирование на этой основе особой исследовательской области - исторической криминологии следует рассматривать как одно из закономерных и давно ожидаемых следствий развития наук об обществе. Историческая криминология с ее требованиями исторического мышления при проведении криминологических исследований с учетом категории исторического времени, уверенно заявляет свое веское слово в методологическом обновлении криминологии, создавая перспективы для совершенствования наших знаний о преступности, ее лучшем понимании и объяснении.

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THE THREE STRIKES PENALTY AND THE RIGHT TO LIFE IN HUNGARIAN LAW

According to the original' provision of the Criminal Code, if at least three of the offences in the group of offences are completed offences of violence against a person committed at different times, the maximum penalty for the group of offences is doubled. If the maximum sentence thus increased would exceed twenty years or if any of the offences in the group of offences is punishable by life imprisonment, the offender shall be sentenced to life imprisonment. In a pending case, the Metropolitan Court of Appeal turned to the Constitutional Court with a judicial initiative, in which it sought a declaration that this provision of the Criminal Code was unconstitutional and a prohibition of its application in the pending case. The Constitutional Court then examined whether the mandatory application of life imprisonment in the Criminal Code meets the constitutional criteria for a system of punishment under the rule of law derived from Fundamental Law. A key element of the constitutional limits on criminal law is the protection of the individual against arbitrary use of criminal law by the state. The extreme values of the constitutional framework of the applicability of criminal sanctions are the right to human dignity, the right to liberty and security of person on the one hand, and the prohibition of torture, cruel, inhuman or degrading treatment or punishment on the other.

Keywords: *punishment, human dignity, three strike punishment.*

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1. The purpose of punishment

The purpose of punishment is to prevent either the offender or others from committing a crime, in order to protect society.[1] The Criminal Code defines the purpose of punishment as the prevention of the perpetrator or another person from committing a crime, in line with the previous Criminal Code. The aim of punishment is thus to protect society, one aspect of which is individual crime prevention and the other general crime prevention. However, it reflects a change of approach from the previous Criminal Code in that the purpose of punishment has been placed at the beginning of the chapter on sentencing rather than in the chapter on penal theory, thus reflecting the fact that punishment is not an end in itself but a means to an end. The Penal Code refers to the punishment that can be imposed for each offence by the word "punishable", which means the potential harm to be suffered. For this very reason, it does not declare that "the punishment is the legal disadvantage caused by the commission of the offence". (Gál, 2003: 8.)

Punishment is only one of the means of prevention as an end. In a narrower sense, the threat of punishment, law enforcement, the effective functioning of the judiciary, the system of penal enforcement can also be included, but in a broader sense, the proper functioning of society, education, training, social institutions, adequate public lighting, etc. also serve the purpose of crime prevention.

Individual and social prevention are interlinked, since punishment and other legal disadvantages imposed on individuals have a general preventive effect, but effective social prevention also has an impact on the individual. Individual prevention can be achieved not only through education, but also through the imposition of proportionate punishment that complies with substantive law and the overwhelming majority of society's sense of justice. Individual prevention means that the punishment must be capable of deterring the offender from committing a new offence. In theory, individual prevention achieves its true purpose when the punishment changes the essence of the offender's personality so that he becomes a law-abiding citizen. Individual deterrence is also achieved if the offender does not commit a new offence for fear of punishment. By imposing a

[1] Hungarian Criminal Code (Act I of 2012) § 79

proportionate punishment, the objectives of punishment must also include retribution and deterrence, because punishment necessarily has a retributive character, but the Criminal Code makes it clear that the most important role is that of prevention. The aim should be to ensure that the punishment achieves its objective in such a way that the retributive effect is felt as little as possible outside the offender. The criminal power of the State is intended to protect the security of the individual. On the one hand, by retaliating against an assault or an insult, by inducing the offender to change his or her attitude, on the other hand, by deterring others from committing similar offences, and finally, by eliminating or minimising situations in which the life and dignity of a person may be threatened."[2] It should be noted that the right to life is a prominent issue in the academic literature of Central and Eastern European countries. (Stevanovic, Grozdic, 2021; Jovanovic, 2021; Boskovic, Gál, 2021.)

Punishment must also serve the purpose of deterring others from committing crimes. Punishment can be used to influence members of society in a particular direction. The effectiveness of the influence and the impact of the measure or punishment in society depend on the individual perception of the offence and the sanction imposed. Punishment serves the purpose of general prevention adequately if it contributes to the consolidation of positive values in the members of society, but in its absence it can also be achieved by the fear of a similar degree of punishment.

2. Principles for imposing the penalty

Within the limits set by this Act, the penalty shall be imposed in a manner commensurate with the gravity of the offence, the degree of culpability, the offender's danger to society and other mitigating and aggravating circumstances, bearing in mind the purpose of the offence. Where a custodial sentence of a definite duration is imposed, the average sentence shall be applicable. The average shall be half the sum of the upper and lower sentences.[3]

[2] Concurrent opinion expressed by Dr. János Zilinszky, Judge of the Constitutional Court on the unconstitutionality of the death penalty, in his decision 23/1990 (X.31.)

[3] Hungarian Criminal Code (Act I of 2012) § 79

The system of penalties in the Penal Code is relatively specific. Within the limits of the law, the court imposes a proportionate punishment or measure based on the principle of individualisation. Only the court is entitled to consider what punishment is proportionate to the gravity of the offence within the statutory range of penalties, and what punishment is in accordance with the principles of sentencing. The general principles of criminal law and the constitutional requirements arising from the Fundamental Law must also be taken into account when imposing sentences."[4] The limitation of rights by means of punishment must comply with the principles of proportionality, necessity and ultima ratio".[5] Proportionality of the penalty also means that the law imposes different penalties for different types of offence, which may be combined in proportion to each other. The punishment of the perpetrators of similar acts must be similar in relation to the act committed and the degree of culpability, but the proportionality test also requires the harm, the damage, the degree of culpability and the gravity of the offences to be taken into account. "The principle of proportionate punishment is the only possible constitutional punishment under the rule of law because it is the only one compatible with the ideal of equality of rights."[6]

Proportionality means proportionality of the offence, and in the case of multiple offenders, the internal proportionality of the sentence cannot be ignored, but the punishment must also be adapted to the personality of the offender. Individualisation must not, however, undermine the principle of the unity of judicial practice, which is fundamental to legal certainty and equality before the law. Accordingly, offences of similar gravity and offenders with similar personal circumstances should not be subject to substantially different penalties. (Bencze, 2011: 111.)

Where the law also allows for the application of a non-custodial measure or penalty, or alternatively a fine, community service or imprisonment, the court should choose the non-custodial measure or penalty if it is sufficient to achieve the purpose of the sentence. This follows from the fact that "criminal law is the

[4] 1214/B/1990 Constitutional Court decision

[5] 1214/B/1990 Constitutional Court decision

[6] 23/1990 (X.21.) Decision of the Constitutional Court on the unconstitutionality of the death penalty, concurrent opinion of András Szabó, Constitutional Judge

ultima ratio in the system of legal liability, its social function being to act as a sanctioning clause in the legal system as a whole. The role and function of criminal sanction, of punishment, is to maintain the integrity of legal and moral norms when the sanctions of other branches of law no longer help."[7]

The principles of sentencing set out the general criteria that the court must take into account when determining the type and level of punishment to be imposed as a legal consequence of the offence. As pointed out by the Constitutional Court in its Decision No 13/2002 (III.20.) AB, "the right to determine the penalty in the penal system of the Criminal Code is shared between the legislator and the law enforcer."

The starting point for the court is the range of penalties laid down in the special part of the Code, which is increased in the rules of the General Part of the Criminal Code on a mandatory basis from case to case, or, at the discretion of the judge, allows the lower limit to be exceeded. Pursuant to Article 81(3) of the Criminal Code, for offences punishable by at least two fixed terms of imprisonment, the maximum sentence is increased by half of the maximum sentence. By force of law, the penalty for an offence is increased by half in the case of imprisonment pursuant to Article 89(1) of the Criminal Code in proceedings against special and multiple offenders, where, in the absence of rules to the contrary, the maximum penalty for a new offence is increased by half in the case of imprisonment. A mandatory ring-fencing rule is provided for in Article 90(2) of the Criminal Code for violent multiple offenders, where the maximum penalty for a more serious offence of violence against a person is doubled. In the case of an offence committed by a criminal organisation, the maximum penalty for intentional offences committed by a criminal organisation is increased by two times the maximum penalty under Article 91(1) of the Criminal Code. The possibility of exceeding the lower limit is provided for in Article 82 of the Penal Code by applying the rules on reduction of sentence.

From the very beginning, jurisprudence has held that punishments must be economical, which means that "the punishment must be such that its execution does not cause the state or society more harm than the punishable act itself",

[7] Decision 30/1992 (V.26.) of the Constitutional Court, Decision 13/2000 (V.12.) of the Constitutional Court

(Angyal, 1909:147.) "i.e. it must be proportionate to the harm or danger caused by the punishment and must not inflict a greater injury on society than the punishable act itself." (Finkey, 1902: 377.)

According to Article 28 of the Fundamental Law, the courts, in the application of the law, shall interpret the wording of the law primarily in accordance with its purpose and in conformity with the Fundamental Law. "In interpreting the Fundamental Law and the legislation, it must be presumed that they serve a moral, economic purpose that is in accordance with common sense and the common good." The moral and economic framework for the imposition of sentences is also set out for the courts in the Criminal Code in accordance with the Fundamental Law. In general, therefore, it is not a matter of discretion what burden the execution of the expected punishment imposes on society, because the limits are set by the legislator. However, it cannot be ruled out that the Fundamental Law will ultimately incorporate these aspects into the reasons for the court's judgment.

As in the previous Criminal Code, the Btk. emphasises the degree of culpability of the offender, the offender's danger to society and other mitigating and aggravating circumstances as the main criteria for imposing punishment, and, in line with consistent judicial practice, also mentions the specific material gravity of the offence.

3. Material gravity of the offence

When determining the range of penalties, the legislator assesses the social risk and negative consequences of the offence it has defined and decides on the material gravity of each offence. The Penal Code does not define the material gravity of an offence as the abstract material gravity of the offence as already assessed by the legislator and defined by law, but as the concrete gravity of the offence committed. The substantive gravity of the offence corresponds essentially to the degree of danger of the act to society. The degree of danger to society, i.e. the gravity of the offence, is an objective category, and the perpetrator's knowledge and intentions are to be disregarded. The state of consciousness of the offender is a circumstance related to the guilt of the offence and can be assessed in the context of the guilt. The objective gravity of the offence (like the regularity of the offence) may be influenced by circumstances of which the offender was

unaware at the time of the commission of the offence or which occurred afterwards, so that the consequence of the offence outside the scope of the offence may be assessed in the imposition of the sentence even if the offender's knowledge did not extend to it.

The offence of damaging an object of law is obviously more serious than the offence of endangering an object of law. Within both the offence of criminal damage and the offence of endangering an object of law, there are numerous degrees of difference in the degree to which the offence is dangerous to society.

The substantive gravity of the act is lower if, for example, in the case of a crime against property, the damage is compensated independently of the perpetrator, but higher if the act has further serious consequences, even if the perpetrator is not guilty of the crime, for example if the victim of sexual violence commits suicide. (Földvári, 1998:280.)

The danger of the act to society is also affected by circumstances such as the manner, place, time and means of commission, but certain circumstances relating to the victim may also be assessed in this context, for example if the victim of the fraud is a young, immature child.

In the case of the offence of infringement of personal liberty, the duration of the restriction of liberty may be assessed as the concrete material gravity of the act for the purposes of imposing the sentence.[8]

The material gravity of the offence is largely determined by its consequences, so that in the case of assault the nature of the injury and the duration of the treatment may also differ greatly. In imposing a sentence, it must be assessed whether, for example, in the case of assault, the permanent disability is a minor, almost imperceptible loss of mobility of a finger of the hand, or whether the victim may become disabled and without aids may not even be able to walk for the rest of his life. An injury or danger that is significantly above the average is usually an aggravating circumstance, while a significantly less than average injury is a mitigating circumstance. Animals have been added to the list of protected subjects of law, where care must be taken not to disturb the proportions which should reflect the value of the punishment.

[8] Curia published Court Decision BH1998.258.

If the qualification depends on the threshold, a mitigating circumstance if the damage, value or material damage is at the lower limit, aggravating if it is close to the upper limit. The legislator also penalises, within a penalty range, the offender who commits an offence for a value just above the higher threshold, or the offender who actually commits the offence for the highest amount within the threshold.

The offender is considered to be liable if the offence is a basic offence but is close to a qualifying offence, such as homicide, which is considered to be particularly cruel.

4. The guilt of the offender as a sentencing factor

The penalty to be applied must also reflect the degree of culpability of the offender. Guilt can be interpreted as the psychological relationship between the offender and the acts that are dangerous to society. (Nagy, 2001: 419.)

Guilt is a component of the definition of the offence, but also a criterion for determining the level of punishment. It follows that the criminal liability and punishment of the perpetrator can only be established if the socially dangerous act punishable under the Criminal Code was committed culpably, i.e. intentionally, or, if the law also punishes negligence, recklessly.

The degree of culpability must be assessed in terms of the form of intentionality and negligence, recklessness and reckless disregard, and direct and reasonable intent. Negligent recklessness and reasonable intent always give rise to an inference of a lesser degree of culpability. A lesser or greater degree of intent or negligence may be inferred from material circumstances. The degree of culpability is also linked to the motive and purpose of the offence, the means and method of commission, which must also be taken into account when determining the level of punishment. The degree of culpability is usually lower in cases where the offence is occasional and the motive is excusable. A greater intensity of intent may be inferred from the persistent and consistent pursuit of the offence. A significantly higher degree of conscious recklessness than average, where there was a high degree of recklessness in relying on the lack of a result, indicates a higher degree of culpability. In the case of negligence, an aggravating circumstance may

be if the possibility of a serious consequence could have been foreseen even with the attention that could reasonably have been expected.

5. The offender's danger to society

The offender's danger to society must also be taken into account in the sentencing process, where the personality of the offender must also be taken into account, given that each offence has something of the offender's personality. The degree to which the imposition of a sentence is likely to achieve the aims of the punishment, and the kind of punishment that can have a positive influence on the behaviour of the offender after the crime has been committed, can be inferred from the offender's social dangerousness.

The social dangerousness of the offender can be inferred primarily from the nature of the offence itself. The way in which the offence is committed may also determine the material gravity of the offence, but may also characterise the personality of the offender. In this case, it is not really a question of assessing the same circumstances twice. It is ultimately the circumstances of the offender's personality which determine whether he is dangerous to society, and it is at most these circumstances which can be inferred from the act itself. The offender's danger to society as a person can also be inferred from his behaviour before and after the offence, and the different degrees of re-offending can be assessed in this context. The court also assesses the offender's criminal history and his behaviour after the offence. In assessing the personality of the offender, the law enforcement officer also examines his personal circumstances, including his lifestyle. The personal circumstances of the offender are favourable, for example, if he has no criminal record and has led an honest life in the past. The offender's danger to society can be inferred from his repetition of the offence and his behaviour, which shows signs of remorse.

The Penal Code mentions guilt and the offender's danger to society as separate elements in the principles of sentencing. The attributable psychological relationship to a specific act is not to be assessed in the context of the offender's danger to society, but as a degree of culpability. The guilt is a partial expression of the offender's personality, whereas the punishment affects the whole personality, so that the expected impact of the punishment must also take account of the

offender's danger to society within the framework of the offence committed. (Györgyi, 1983: 3)

By the offender's danger to society, the legislator refers to the offender's danger to personal society, but in doing so, the punishment must be determined in accordance with the principles governing the imposition of other penalties. The social danger inherent in the offender's person may be outstanding if the offence committed by him is of lesser gravity. The penalty must be determined in accordance with all the general principles governing the imposition of penalties, and no hierarchy can be established in the circumstances listed in the Criminal Code. The circumstances of the offence must be assessed in conjunction with each other and in their context. It is not their number, but their effect in a given case that is decisive in determining the penalty, which must be imposed in an appropriately individualised manner. Nor is it consistent with the purpose of the penalty and the requirement of proportionality if, in addition to the considerable material gravity of the offence, the court overestimates the relatively minor mitigating circumstances on the part of the offender.[9]

If the offender commits the offence while criminal proceedings are pending against him, with knowledge of the fact, and from this it can be inferred that he is a person of increased danger, irrespective of the outcome of the previous proceedings, the fact that he committed the offence while the criminal proceedings were pending is an aggravating circumstance. It is also an aggravating circumstance if the offender committed the offence during the probation period of a suspended prison sentence in another case, during the period of conditional release or before the pardon became final, since the fact that the threat of additional penalties did not deter him from committing the offence is an indication of the increased danger to his person. This does not constitute a double assessment, since the possible imposition of a suspended prison sentence, the termination of parole, the expiry of the pardon are not a legal consequence of the offence itself, but of the sentence imposed by the judgment.

[9] Curia published Court Decision BH1999.1, 1982.174

6. Other aggravating and mitigating circumstances

The sentence must also take account of other aggravating and mitigating circumstances. The material gravity of the offence, the degree of culpability and the personality of the offender are factors which themselves aggravate or mitigate the penalty. However, case-law has developed a number of other aggravating and mitigating circumstances, which it is impossible to list in the law because they are too numerous. It is not possible to provide a complete list of the factors that may be taken into account in imposing a sentence, and their specific importance and gravity vary from one offence to another. The correct procedure is for the judge to first take into account the mitigating and aggravating factors, to assess them carefully according to their weight, and then to impose the sentence accordingly, rather than to add up the other aggravating and mitigating factors after the sentence has been determined. The Penal Code imposes an obligation on the courts to identify all the material and non-material facts to be taken into account when imposing a sentence and to assess them when applying the legal consequences. The Supreme Court has pointed out that the factors for the imposition of sentences cannot be determined once and for all, but that the principle of equality before the law requires uniformity of sentencing, including the absence of striking and unjustified disparities in the assessment of the circumstances affecting the sentence. The circumstances influencing the penalty must therefore be assessed not in abstract general terms, not mechanically, but in relation to the facts of the specific case, and must be explained in the decision. A factor which is generally regarded as an aggravating or mitigating circumstance can be assessed as such in a specific case if the reason for which it has an aggravating or mitigating effect can be established in the case in question. The same fact may be indifferent or have the opposite effect in relation to another act or another offender. A given circumstance can be both an aggravating and a mitigating factor depending on the offence committed. Family status, care of minor children is usually a mitigating factor, but if the offence is committed to the detriment of the family, it is disregarded, possibly even an aggravating factor. It should also be noted that caring for minor children implies a greater presumption of abstinence from committing offences.

The prohibition of double counting also applies to the assessment of the circumstances that affect the sentence. A circumstance which is regulated by the legislator as an element of the offence or which gives rise to a more serious or less serious classification cannot be assessed separately as a mitigating or aggravating circumstance, but where the gravity of the specific circumstance is significantly greater than the degree of gravity required for classification, there is no obstacle to assessing it as an aggravating or mitigating circumstance in addition to the more serious or privileged classification.

A circumstance that is regulated as a more serious or less serious case for a particular offence may be aggravating or mitigating for the assessment of other offences that do not contain such a qualifying case.

Subjective factors affecting the punishment include the offender's criminal history, age, lifestyle, whether he has a job or is a job seeker, whether he leads a vagabond lifestyle, his education, his education, his activities for the public good, his alcohol abuse, his leadership role, his influence by others, the excusable or particularly reprehensible perpetrator of the offence, his state of health,

Juvenile age is not a mitigating circumstance, but may be considered as such if the offender was not much over the age of criminal responsibility or was a young adult when he committed the offence. The primary objective of the disqualification of juveniles is specific prevention, and the impact of the sanction imposed on the juvenile offender is therefore decisive in its choice, in addition to the material gravity of the offence. The imposition of a custodial sentence on a juvenile may, in the light of the more serious nature of the offence, be less likely to infringe the proportionality requirement, but, contrary to the special requirement for the imposition of a sentence on juveniles, it may also lead to a situation which adversely affects the development of the offender's personality, which is contrary to the rules of the Criminal Code.

Self-reporting by the offender is a mitigating circumstance. It is of particular importance if it made it possible or significantly facilitated the detection of the offence. It is also a mitigating circumstance if the offender cooperated in the investigation of the offence and played a role in the success of the investigation. A confession of guilt is an important mitigating circumstance, as is a partial confession. It has greater force if it is of an investigative nature; in such a case, a confession covering the whole of the offence has a mitigating effect even if it is

accompanied by a partial denial of guilt.[10] The effort to obtain a confession has lost much of its importance for the authorities, but it should be valued more highly by the offender. In the case of an offence committed in the act, only an admission of guilt and remorse are relevant.

Among the material circumstances (mitigating and aggravating) that influence the punishment, the practice of the Supreme Court emphasises in particular the fact that the act remains an attempt, the method of commission, the characteristics of the means of commission, the dangerousness, the endangerment of public safety, the permanent or serious disturbance of public peace, the commission in front of a wider public, the direct or indirect causal link, the role of proximate causes, the personal characteristics of the victim (sick, elderly, in need of protection, etc.), the victim's possible defiant behaviour, forgiveness, continuity, occasionality, the passage of time, the multiplicity of the offence.[11]

The role of the accomplice in the offence is usually less important than that of the offender, and therefore complicity is usually a mitigating circumstance, but the accomplice's culpability may exceed that of the offender, for example in the case of budget fraud, where the accomplice is the "account holder" for a fictitious tax deduction, enabling a large number of offenders to commit the offence. Similarly, the imposition of criminal liability which, by reason of the gravity and nature of the activity, results in the imposition of a penalty even more severe than that imposed on the perpetrator, is justified where the instigator, by virtue of his training and his managerial role, induces the perpetrators to abuse the victim, ultimately resulting in his death.[12]

7. The mean average penalty

Paragraph (2) of Article 80 of the Criminal Code provides for a comparison with the mean value of the given range of sentences as the starting point for the imposition of sentences. The question of the imposition of a median sentence can also be traced back to the Csemegi Code and its Ministerial Explanatory

[10] Curia published Court Decision BH1993. 480, BH1992. 291

[11] Curia Criminal Division opinion Bkv. 56

[12] Curia published Court Decision BH1994. 296

Memorandum, according to which, if neither aggravating nor mitigating circumstances are present or if they counterbalance each other, "the average between the maximum and the minimum shall constitute the period to be fixed as the term of the sentence". This was also confirmed by Full Court Decision No XLIX of 1885 of the Curia (Supreme Court), although the sentencing practice of the courts was generally below the mean. (Nagy, 2001: 419.)

If the legislator wishes to avoid a direct quantitative tightening, it can choose a solution that seeks to orient and guide judicial practice and the approach of the judiciary, and provide criteria for this. (Kónya, 2011: 129.) This is achieved by the imposition of average sentences, originally introduced by Act LXXXVII of 1998.

It should be noted that the requirement of an ideal starting point for the imposition of a fixed term of imprisonment had already been well established in judicial practice in judicial decisions published before 1999.[13]

The provision aims to ensure uniformity in judicial practice. In examining the provision, the Constitutional Court stated that "neither the value of the right of judicial discretion is called into question, nor does it follow from the constitutionally recognised aims of punishment that the law may not lay down rules of an indicative or even mandatory nature for the imposition of punishment. There is therefore no limitation derivable from the Constitution on the legislature's discretion to lay down, by means of legislation, criteria consistent with the constitutional principles of criminal law, either in order to standardise the practice of imposing sentences or to make it more stringent or less severe." [14] Constitutional Judge László Sólyom said that "the imposition of a sentence may be considered arbitrary if it leaves too much room for the judge's subjective decision." [15]

A simpler rule than in the previous Criminal Code is used to determine the average. The median is half the sum of the upper and lower limits of the pen-

[13] Curia published Court Decision BH.1978.420., BH.1980.157., BH.1987.66., BH.1987.67., BH.1989.48., BH.1996.350.

[14] Decision 13/2002 (III.20.) of the Constitutional Court

[15] Decision 23/1990 (X.21.) of the Constitutional Court on the unconstitutionality of the death penalty, concurrent opinion of Constitutional Judge László Sólyom

alty. For the offence of robbery (§ 365 of the Penal Code), which carries a sentence of 2-8 years, the mean is calculated by adding the upper limit of 8 years to the lower limit of 2 years, which totals 10 years, and dividing this by 2, and the result is 5 years. The median for a given qualification will be the range between three and seven years.

The reference to a median does not imply a narrowing of the possibilities offered by the range of sentences, does not make the sentencing regime absolutely definitive, and does not create a sentencing constraint. Nothing precludes the court from weighing and assessing the individual circumstances at its own discretion. The Criminal Code does not limit the court's discretion to assess the weight of the circumstances relevant to the imposition of the sentence within the statutory range of penalties, but it does draw attention to the fact that, in the interests of the unity of judicial practice, the average of the range of penalties should be taken as the benchmark, i.e. the sentence to be imposed should be set against it. (Elek, 2012: 20.)

The rule that the range of the sentence is to be regarded as the average does not affect the fact that the court must impose the proportionate sentence within the limits of the punishment prescribed by law, based on the requirement of individualisation. If the court does not impose a custodial sentence for a fixed term within the range of the average but deviates substantially from it, it must state the criteria on which it has based its decision.[16]

The law also reflects the legislator's expectation that the court should give exhaustive reasons for the use of the possibility of the range. In the reasons for the sentence, the sentence imposed must always be justified (Art. 258(3)(e) of the Criminal Code), but the imposition of a sentence different from the mean must be justified in detail if the difference is significant. The court is entitled to consider whether the penalty is proportionate to the gravity of the offence and other mitigating and aggravating factors within the statutory range of punishment.[17]

[16] Curia published Court Decision BH2001.354.

[17] Decision 13/2002 (III.20.) of the Constitutional Court

8. The cumulative penalty

A cumulative sentence shall be imposed for a set of offences. The cumulative sentence shall be imposed on the basis of the most serious of the offences or the most serious of the offences in the set. If two or more of the offences in the group of offences are punishable by a fixed term of imprisonment, the maximum sentence shall be increased by half of the maximum sentence, but shall not exceed the combined maximum of the sentences for each of the offences.[18]

Aggregation of offences is when one or more acts of the offender constitute several offences and are tried in one proceeding (Criminal Code. Article 6(1)), the court shall impose a cumulative sentence. The Criminal Code basically retained the previous provisions on cumulative sentencing. The cumulative sentence is a single sentence, regardless of the number of acts in the cumulative offence, and is a single sentence in form and content.

In the imposition of a cumulative sentence, it is of no doctrinal significance whether the offender has committed the statutory elements of several offences by a single act (formal cumulation) or whether he has committed acts that are materially cumulative, i.e. acts that are separate in space and time. There is a procedural barrier to the adjudication of formally cumulative offences in several separate criminal proceedings. A cumulative sentence is a single sentence, which also means that it is a single conviction, so that one date counts for the purposes of criminal record discharge, recidivism, specific recidivism, (violent) multiple recidivism.

One of the rules for imposing a cumulative sentence is the principle of absorption, which means that the cumulative sentence is imposed on the basis of the most serious of the offences in the offence category or the penalty range for the offences in the offence category. The penalty for the specific part of the offence is more severe if the maximum penalty range is higher or if, when several offences are taken together, imprisonment is obviously more severe than imprisonment. If the offence of aggravated homicide, which is punishable with imprisonment for a term of ten to twenty years or life imprisonment, is combined with

[18] Article 81(1) of the Criminal Code

any of the offences of theft, the applicable penalty will also be the one applicable to aggravated homicide.

The principle of asperation allows the upper limit of the applicable sentence to be broken if it is insufficient to deal properly with the offences in the group of offences. Under the grouping rule, the upper limit of the most serious statutory sentence is increased by half if the law imposes a sentence of imprisonment for a fixed term only for at least two of the offences in the group of offences. The Criminal Code retains the "increase" phrase of the previous Penal Code, making it clear that the sentence range is set by the legislator and that it is not for the legislator to increase it.

The increased ceiling may not be higher than the total duration of the ceiling for each offence, which means that it must be at least one day lower. For two offences, the maximum penalty for the more serious offence may be increased by half if it is less than the maximum penalty for the other offence. Otherwise, the maximum penalty for the most serious offence is increased only by one day less than the maximum penalty for the less serious offence. If the two offences of robbery as defined in Article 365(1) of the Criminal Code are committed together, both offences shall be punishable by imprisonment for a term of two to eight years. In such a case, the maximum sentence that can be imposed is twelve years, because the eight-year maximum is increased by half. (Two identical offences are obviously not more serious than one of them, so the maximum for the offence of robbery should be increased by half.) The maximum for the two offences combined would be sixteen years, which is more serious than the twelve years determined by increasing the maximum by half, so the lesser of the two would be the maximum sentence in the case.

However, in the case where the offence of aggravated robbery is matched by an offence carrying a penalty of up to three years imprisonment, increasing the aggravated robbery offence by half of the maximum would also result in a maximum of twelve years. The combined maximum for the two offences is eight plus three years, or eleven years, which is less than twelve years. The cumulative sentence cannot exceed the combined total of eleven years and must therefore be reduced by the minimum possible duration, which is one day. In this case, the maximum custodial sentence will therefore be eleven years minus one day. It

should be noted, however, that years and days are not the norm for cumulative sentences.

The cumulative sentence may not, however, exceed the general maximum of twenty-five years of imprisonment for a fixed term as laid down in the Penal Code.

The cumulative nature of the offence has the effect of raising the maximum sentence and cannot therefore be taken into account as an aggravating circumstance, because of the prohibition of double counting. Where more than two offences which were punishable by a custodial sentence of a fixed amount are grouped together, the offence committed in excess of two must be assessed as an aggravating circumstance, irrespective of whether the court uses the increased sentence limit under the rules of asperation when imposing the sentence or whether it imposes the cumulative sentence taking into account the sentence for the most serious offence.

9. The three strikes in Hungarian law

According to the original provision of the Criminal Code, if at least three of the offences in the group of offences are completed offences of violence against a person committed at different times, the maximum penalty for the group of offences is doubled. (Kónya, 2010: 513.)

If the maximum sentence thus increased would exceed twenty years or if any of the offences in the group of offences is punishable by life imprisonment, the offender shall be sentenced to life imprisonment. [19]However, if the General Part of this Act so permits, the sentence may be reduced without limit.

This original rule of the Penal Code, unlike the general cumulative rules, sentenced repeat offenders of violent crimes against the person with particular severity. It increases the maximum penalty for the most serious offence in the group of offences to twice the maximum penalty if at least three of them are crimes of violence against the person. The Criminal Code only provides for this in relation to completed offences committed at different times. A further tightening is that if the maximum sentence thus increased exceeds twenty years or if one

[19] Paragraph 81(4) of the Penal Code when it entered into force

of the offences in the aggregate is punishable by law with life imprisonment, the offender will be sentenced to life imprisonment.

The scope of violent crimes against the person is defined in the Criminal Code.[20] For offences of violence against the person, if the maximum sentence would exceed 20 years with a twofold increase, or if any of the offences in the offence group is punishable by life imprisonment, the Criminal Code shall be amended accordingly. Under Article 81(4) of the Criminal Code, life imprisonment was to be imposed. The judge had the discretion whether to exclude the possibility of parole from life imprisonment or to set it at between 25 and 40 years.

This rule had to be taken into account at the time of indictment and when cases were joined or separated. If several proceedings are opened, the cases must be joined or the offences of violence against the person in the same proceedings cannot be separated, because the strictness of the law would not have been as the legislator intended. In this respect, however, even before the adoption of the law, the Constitutional Court pointed out that "Decisions to merge and separate cases may have not only procedural but also substantive criminal law consequences (cumulative, cumulative punishment). The justification and arbitrariness of these decisions may be one of the elements in assessing whether or not the enforcement of a criminal claim can be considered fair."[21] The procedure is not fair if the decision as to which accused persons are to be joined by the authority in several pending criminal cases is made in an unpredictable and arbitrary manner. If cases of violence against the person were not merged during the investigation or at the latest at the trial stage, the legislative will to impose a more severe penalty would not be enforced. It is possible that in a particular case the court would apply a suspended prison sentence.

[20] Paragraph 459 (1) 26 of the Criminal Code

[21] Decision166/2011 (XII.20.) of the Constitutional Court, dissenting opinion of Miklós Lévai

10. Constitutional review of "three strikes" sentencing

In a pending case, the Metropolitan Court of Appeal turned to the Constitutional Court with a judicial initiative, in which it sought a declaration that this provision of the Criminal Code was unconstitutional and a prohibition of its application in the pending case.

In the opinion of the Budapest Court of Appeal, as the petitioning court, the contested provision is incompatible with the Fundamental Law in several respects.[22] If the acts of the accused are separated in time and space, the facts of the criminal proceedings may make it unpredictable and unforeseeable whether Paragraph 81(4) of the Criminal Code applies to the offender.

The referring court argued that the imposition of a mandatory life sentence does not allow for the examination and enforcement of the sentencing criteria, which is also contrary to the requirement of legal certainty that the criminal law as a whole, including the sentencing system, should not be contrary to itself. In the view of the referring court, the principle of equal treatment under Article XV of the Fundamental Law and the prohibition of discrimination against the accused are infringed by the fact that some persons who have committed the same acts are favoured and others disadvantaged by the fact that their acts are judged in one or more proceedings, depending solely on their procedural situation.

On the basis of Article I(3) and Article II of the Fundamental Law, the Court held that the imposition of a mandatory life sentence on first-time offenders who have committed offences which do not carry a life sentence does not satisfy the requirement of proportionality required by constitutional criminal law. In this connection, the petition also refers to the fact that, in the context of the current legislation, there is a real risk that, as the underlying criminal proceedings show, a defendant with no criminal record will not have the opportunity in criminal proceedings to have a cumulative sentence imposed on him by the court, taking into account aggravating and mitigating circumstances, in proportion to the actual material gravity of the offences committed. This circumstance infringes the requirement of a necessary and proportionate restriction of

[22] Fundamental Law of Hungary (Constitution)

fundamental rights to such an extent that it also infringes the prohibition of the inviolability of human dignity.

The Judicial Council also considered that it was incompatible with the provisions of the Fundamental Law which lay down the basis for the functioning of the courts, Articles 25(2)(a), 26 and 28 of the Fundamental Law, because it restricts the constitutional functioning of the courts in the area of criminal law by removing judicial discretion and thus preventing the individualisation of the judiciary. The mandatory imposition of the most severe penalty would empty the courts of their sentencing function, which would seriously infringe the principle of judicial independence.

The Constitutional Court has taken the following legal provisions into account in its proceedings:

11. The provisions of the Fundamental Law which are the subject of the petition:

"Article B (1) Hungary is an independent, democratic state governed by the rule of law."

"Article I (1) The inviolable and inalienable fundamental rights of the PEOPLE shall be respected. Their protection shall be the primary duty of the State. Article I (2) Hungary recognizes the fundamental individual and community rights of man. Article I (3) The rules relating to fundamental rights and obligations shall be laid down by law. A fundamental right may be restricted to the extent strictly necessary for the fulfilment of another fundamental right or for the protection of a constitutional value, in proportion to the aim pursued and with due regard for the essential content of the fundamental right."

"Article II Human dignity is inviolable. Everyone has the right to life and dignity, and the life of the unborn child shall be protected from the moment of conception."

"Article XV (1) Everyone is equal before the law. All persons have the capacity to have rights.

"Article 28 In the application of the law, the courts shall interpret the text of the law primarily in accordance with its purpose and in conformity with the Fundamental Law. In interpreting the Fundamental Law and legislation, it shall

be presumed that they serve a moral and economic purpose in accordance with common sense and the common good."

For the first time, the Constitutional Court reviewed provisions similar to the Hungarian legislation introduced in the United States of America and Slovakia to improve public safety.

The so-called "Three Strikes" law for recidivist, lifestyle offenders was first adopted in Washington State in 1993. The law provides for a mandatory life sentence for a third offence, with the possibility of parole after twenty-five years. By 2004, twenty-six of the fifty states had adopted "Three Strikes" laws for repeat offenders. A common feature of US law is that there are no time limits on the commission of offences, the rule applies only to multiple convictions if the new offence occurred after the previous conviction, and a third conviction for a minor offence can be punishable by life imprisonment. The US Supreme Court has examined the constitutionality of the "Three Strikes Law" in two cases, and in both cases concluded that it does not violate the Eighth Amendment and therefore does not constitute "cruel and unusual" punishment or treatment.[23]

In Slovakia, in 2004, it was introduced that if a defendant is convicted of one of the offences specifically enumerated in the statute and has been previously sentenced to imprisonment twice for such an offence and has served at least part of his sentence, he shall be sentenced to life imprisonment. The general condition for the application of a mandatory life sentence was that the degree of danger of the offence was very high, having regard to the particularly heinous nature of the offence, the motive or the particularly serious consequences. The law was later tightened up, whereby the general conditions no longer had to be met. Following the amendment of 1 January 2010, life imprisonment may be imposed only for offences that are punishable by this penalty in the specific part of the Penal Code. The imposition of life imprisonment is further conditional on the effective protection of society and on the offender's no longer being likely to be rehabilitated. It is important to stress, however, that the application of the stricter rules is conditional on multiple convictions, and that the "three strikes" rule cannot be applied in the case of cumulative sentences. The "three strikes" provision described in the US and Slovak legislation can be matched in Hungarian law by the rule for

[23] Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003).

violent multiple repeat offenders. According to this rule, anyone who commits a third violent crime against a person (constituting a repeat offence) - i.e. who has already been convicted twice - is subject to a maximum penalty of twice the maximum penalty. If it exceeds twenty years or if the offence is otherwise punishable by life imprisonment, life imprisonment shall be imposed.[24]

The subject of this case was not the "three strikes" for violent multiple offenders, but the constitutionality of the legal provisions relating to the aggravation of the cumulative sentence. Under the stricter cumulative rules challenged in the judges' motions, if a person commits at least three violent offences against a person and they are tried in the same proceedings, the maximum penalty for the most serious of these offences is doubled. If this would exceed twenty years, or if one of the cumulative offences is otherwise punishable by life imprisonment, then life imprisonment will be imposed.

The fundamental difference between the cumulative rules and the rules for violent multiple offenders is that the cumulative rules can apply to an offender who has committed three violent offences against a person for the first time at the same time or within a short period of time, but who has never been convicted before. However, multiple violent offenders have a criminal record and have been convicted twice before. The Under Article 81(4) of the Criminal Code, the violent offences against at least three persons had to be committed at different times and the rule applied only to completed offences, so that attempts and preparation did not justify the application of stricter rules.

It can therefore be concluded that for offenders who commit a violent crime against three or more persons, it is not foreseeable when the stricter cumulative rules, including the mandatory life imprisonment, may be applied. The possible different procedural status of these offenders creates the possibility that they will not face the same criminal threat, which makes the application of the contested provision of the Criminal Code unpredictable and unforeseeable for the addressees . Nor can the inconsistency of the legislation be adequately remedied by judicial interpretation, since it allows for conflicting interpretations which are not consistent with the legislative purpose.

[24] Section 90(2) of the Criminal Code

The infringement of fundamental law consists in the legislature's failure to create in full the substantive and procedural conditions of criminal law which would make it possible to impose the same conditions of sentencing, irrespective of the procedural position of the accused, that is to say, irrespective of whether their acts are the subject of one or more proceedings. In the light of the above, the Constitutional Court held that the Article 81(4) of the Criminal Code did not comply with the requirement of legal certainty arising from the rule of law under Article B(1) of the Fundamental Law.

The Constitutional Court then examined whether the mandatory application of life imprisonment under Article 81(4) of the Criminal Code meets the constitutional criteria for a system of punishment under the rule of law derived from Article B(1) of the Fundamental Law.

A key element of the constitutional limits on criminal law is the protection of the individual against arbitrary use of criminal law by the state. The extreme values of the constitutional framework of the applicability of criminal sanctions are the right to human dignity (Article II of the Fundamental Law), the right to liberty and security of person (Article IV of the Fundamental Law) on the one hand, and the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article III of the Fundamental Law) on the other. Article IV(2) of the Constitution has clarified the content of the right to personal liberty compared to the previous Constitution by not explicitly excluding the possibility of permanent deprivation of liberty, but only for the commission of a violent and intentional crime, on the basis of a final court judgment, with due regard to the criteria of necessity and proportionality.

The extent to which the State may interfere in the life of the individual and restrict his fundamental rights and freedoms through the application of penalties and measures is derived from the rule of law and the constitutional prohibition on restricting the essential content of fundamental rights. The Constitutional Court does not have the power in that regard to overrule the legislature's discretionary criteria, so long as it does not find that the coherence of the system of penalties, and thus legal certainty, has been infringed. The constitutional objective of coherent regulation is to exclude arbitrariness on the part of the State. The Constitutional Court has held that the threat of a more severe penalty for multiple offences is based on constitutional grounds. Legislative assessment of

multiple offences is necessary because it attaches particular importance to the maintenance of criminal law standards. Moreover, a more severe assessment may also be justified because it gives weight to the functioning of the criminal justice system.

A more severe assessment of multiple offences in the current criminal law system meets the requirements of constitutional criminal law, the legislator has the constitutional freedom to punish multiple offences more severely, but the limitation of the right to punish must also meet the constitutional requirements of criminal law.

It does not follow from the constitutionally recognised aims of punishment that the law may not lay down rules of an orientative or even mandatory nature for the imposition of punishment. There is, however, a single limit: it must be for a constitutionally justifiable purpose, respecting the criminal law guarantees expressly provided for in the Fundamental Law, as well as the other principles governing criminal law and fundamental rights.

The contested provisions of the Criminal Code treat all offences falling within the category of crimes of violence against the person in the same way as regards the mandatory application of the penalty, even though they are criminal offences with different substantive gravity. According to the Constitutional Court, the mandatory application of life imprisonment in certain cases, even in the case of multiple offences, cannot be constitutionally justified, even in the case of such a limited range of offences, which have different degrees of seriousness. The legislation at issue does not allow the court to assess the actual gravity of each offence committed, so that when imposing the sentence the court cannot properly assess the gravity of the offence and the danger to society of the offender, the degree of culpability, the other aggravating and mitigating circumstances, while taking into account the gravity of the offence, and thus disrupting the coherence of the system of penalties under the rules in force.

In the case of these special cumulative rules, differentiated sentencing in line with the gravity of the offences committed and in accordance with the fundamental criteria of the penal system would have been served if the legislator had created a discretionary power for the courts to decide between the applicability of a fixed-term sentence and life imprisonment, which would have allowed for the imposition of individualised sentences.

The Constitutional Court accepted the petition as well-founded and held that Article 81(4) of the Criminal Code was contrary to the Constitution and annulled it with retroactive effect to its entry into force on 1 July 2013, and also ordered a review of the criminal proceedings concluded by final decision.

12. Concluding thoughts

This case illustrates the need for judges to be constantly mindful of constitutional requirements in addition to written law. If they have concerns about the constitutionality of an applicable law because they consider it incompatible with the Fundamental Law, they must exercise their right to refer the matter to the Constitutional Court for review, in order to avoid arbitrary and unjust judgments.

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Original Scientific Paper
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VIOLATION OF THE BODILY INTEGRITY AS A VIOLATION OF THE FUNDAMENTAL HUMAN RIGHT

When discussing the right of ownership of our body, there is no need for elaboration since our instant answer will be that we are the sole owners of our bodies and nobody can tell us what to do with it, while we are alive and when we die. Therefore, every human being should have the right to protect and have a saying in regards to their own body.

But in regards of the process of removing or donating an organ the question appears whether there is a breach of the bodily integrity? In regards to this question there is the physical and moral view of this issue which stands on the answer whether in this process there is a violation of the bodily integrity which if there is a violation then there is a violation of a fundamental human right.

***Keywords**: bodily integrity, human rights, violation, donation and transplantation of organs.*

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1. Introduction to the concepts of integrity and bodily integrity

First let's begin by explaining the concepts of integrity and bodily integrity. The Charter of Fundamental Rights of the European Union states that all human beings have the right to respect towards their physical and mental integrity. If the physical and mental integrity are respected then there is protection of the human dignity. In the Charter, the integrity in the biological and medical spheres is discussed as the fundamental good, which needs to be maintained and protected. Also, bodily integrity is not only linked to the physical integrity, there is the psychological integrity, and personal integrity. The concept of integrity is very fragile and it can easily be violated which is shown in the United Nations Population Fund report from 2021 stating that many people especially women experience losses of bodily integrity and autonomy during their life spam (Ott, Dabrock, 2023).

To continue with, we need to ask the question of what does the body represent in legal terms. The definition for the body in legal terms, is that it is the biological matter constructed from blood, bones, and flesh. Therefore, the human body is a term that is protected by human rights and legal regulations. These regulations protect the body from physical harm as well as giving approval about applying medical procedures. There are also some international norms that directly refer to the body, like the European Charter of Fundamental Rights and Freedoms and the Convention on Rights of Persons with Disabilities presenting respect for the physical and mental integrity of the body. But the body has been, and still is, a subject of controversy and argument, by politicians, civil rights representatives, as well as legislations and regulations (Bublitz, 2022).

Therefore, if we combine the two terms body and integrity, we end up with the word bodily integrity, a term which refers to the fundamental right of every individual to have autonomy and sovereignty over their own body. This means that every human being has the authority to make decisions regarding their

own body in regards to the moral, ethical but also the physical and personal autonomy.[1] The concept of bodily integrity has been established in legal doctrines and has been elaborated in legal debates at national and supra-national level. Many authors have stated that the term may represent the main legal value which establishes the health law. Although the power of the term is recognized, still as a term it is problematic to use due to its uncertainty in applicability and cultural beliefs and differences, the gender differences and probabilities, as well as the religious circumstances which influence how the term will be used in practice (Fox, Thomson, 2017). Furthermore, what we do to our own bodies and the bodies of our loved ones should be our own decision not anyone else. It is believed that holding on to the physical integrity of the body is inherent right and by breaching this integrity we are breaching the law (Viens, 2020). Therefore, bodily integrity is a civil right and may be the most important of all human rights (Herring, 2017). It is primary and sacred and it is a fundamental right. The term influences self-determination, ownership, personal autonomy, and so on, and that is why this term is so fragile and it needs to be protected by the legal system, and especially by the health law (Kovačević, 2020).

2. Difference between bodily integrity and autonomy

Bodily autonomy is the right of a person to make decisions about what happens to their body. For example, there is a difference between cases where a patient is accepting treatment and cases where a patient is refusing treatment. A patient right of autonomy is to refuse treatment if he/she wants to or deems right. By enforcing a treatment on a patient when they don't want it, is interfering with their autonomy and bodily integrity. The right to bodily integrity is enhancing the one's autonomy. Bodily integrity is the right of the person not to have their body touched or interfered with without their approval. The right to life is interlinked with the right to bodily integrity and autonomy, therefore we have the right to have our own body's whole and untouched and we have the right to take decisions

[1] Bodily Integrity from class: Civil Rights and Civil Liberties Retrieved from: Bodily Integrity - Vocab, Definition, and Must Know Facts | Fiveable

about our own body and what we do with it. This protects us from physical assaults, torture, medical or other experimentation, forced immunization, sterilization, cruel or degrading treatment or punishment and so many more assaults imaginable (Herring, 2017).

3. Legality of the bodily integrity

Fox and Thomson, believe that the right to bodily integrity is the most important of all human rights, and it protects the sovereignty of the body and it should be respected. But in Anglo-American legal culture, it is rarely discussed, why bodily integrity should be valued or why it should be protected. As an example, for bodily integrity Fox and Thomson use the separation of conjoint twins who would both die if not separated. Surgery would offer the stronger twin a chance to survive, but the weaker twin would die. By approving this kind of surgery, the weaker twin will receive the bodily integrity and dignity. The proposed operation would give these twins the integrity which nature denied them. If they stay conjoined, they would be deprived from the bodily integrity and human dignity which is their right and also, they will not have the chance to live life (Fox, Thomson, 2017). The bodily integrity is closely linked to the right to life and should be observed equally (Vujović, 2020). So this is also debatable since one of the twins will die but she will die as a unity and would own her own body. But the operation will also give the chance to the other twin to live life and have sovereignty over her own body. So, in this respect only one of the twins will have the chance to life, but the other one will receive the bodily integrity and dignity she was denied during her life.

4. Organ donation and the legal process

Organ donation was created on the pillars of altruism. Altruism is the moral value of an individual's actions which are to help another individual, by disregarding the consequences for themselves. Altruism can be obligatory and supererogatory. Obligatory altruism is defined as a moral duty to help others. *Supererogatory* altruism is defined as doing morally good, but it is not required. As the demand for organs donation and transplantation increases, it is essential to

ensure that laws, policies and strategies are ethical, moral and altruistic, and govern the bodily integrity and autonomy (Dalal, 2015).

For organ donation and organ transplantation there are international organizations, conventions and other doctrines that govern these terms and procedures, like the World Health Organization, the European Convention on Human Rights and Biomedicine and its additional Protocols. The European Union, has adopted several action plans, as well as systems and regulations. There are also European organizations that work in this field for organ exchange like Euro transplant, Scan Dia transplant, and The South Alliance for Transplantation (SAT). But in all EU countries, transplantation and organ donation are regulated differently. There are also two organ donation systems: opt-in and opt-out. The main idea behind these systems is to regard people as potential donors. Both systems give the chance for the family to have their saying on the final decision. The opt-out system is a system of presumed approval so organs are taken from deceased if the patient did not oppose the procedure while he/she was alive. Even if there is dilemma about what the deceased wanted, using his/her organs is allowed. Countries that practice this model are: Italy, France, Spain, Belgium, Poland, Austria, Sweden, Croatia. The "soft" version of the opt-out system is in favor of donation, but the family has the last word. The opt-in system refers to the system of specific approval/agreement. Therefore, certain approval must be given as stated in the law. In this case the family has the right to a different decision, opposite of the one the deceased had. Countries that have this system are: Denmark, Germany, and the Netherlands. It needs to be acknowledged that in both of these systems the bodily integrity of the donor is recognized and the donation is in the best interests of the donor (Kovačević, 2020).

5. Organ transplantation

Organ transplantation is a medical procedure that is used to reestablish specific bodily functions of an organ by replacing it with a donor's organ (this is governed by the Transplantation Act). Legally, the process of transplantation is based on donation of an organ for the purpose of placing the organ in another

person so he/she can live a healthy life. Furthermore, organ trafficking is not allowed, because it will place the donor in a state of extortion, since the act of donation is an act of altruism. The organ transplantation principle follows:

a) Removal of organs or tissues from living donors may be carried out solely for the therapeutic benefit of the recipient and if there is no suitable organ or tissue available from a deceased person (cadaver) and no other alternative therapeutic method of comparable effectiveness (Convention of Human Rights and Biomedicine).
b) In addition to medical requirements for transplantation, it is also necessary to satisfy legal requirements referring to the donor's and the recipient's competencies for judging and declaring their relevant wills related to their consents for donating organs.
c) Legal rules should ensure the observance of their autonomy, their rights to self-determination and bodily integrity, and enable them to freely express their will whether they want to donate or to receive an organ for treatment.
d) According to the Human Organs Transplantation Act, a living organ donor must be an adult person of full legal capacity who is required to provide a written consent, as an expression of free will that he/she understands the nature, purpose and duration of the intervention, and that he/she has been sufficiently informed in advance about possible risks and expected successful outcome.
e) It excludes children as donors as well as adult persons fully deprived of legal capacity.
f) When making a decision on behalf of another person, the "best" interest of the person should be assessed and protected.
g) The problem is legally eliminated by allowing the legal representatives (husband, adult child, parent) to decide, or by establishing a professional and ethical team for making a decision related to donating organ after one's death, and under a presumed consent.
h) Organ removal from deceased persons should prevail since this procedure precludes the risk of any potential threat to the health of living donors (Lazić, 2020).

The basic legal and ethical issues of cadaveric organ transplantation are:

a) establishing the moment of death of a potential donor,
b) respecting the deceased persons expressed will,
c) and respecting the family members' belief (Lazić, 2020).

By establishing the above criteria, with the application of advanced medical technology the organs are maintained so they can be used for transplantation and with this act and principle there is increase in the number of organs for transplantation (Lazić, 2020). Organ transplantation has given us another concept to the body image Zwart, 2016).

6. Organ transplantation through the eyes of religion, culture

6.1. The shortage of organs leads to organ trafficking and unlawfulness

Organ transplantation has been transformed from an experimental procedure to an intervention carried out in hospitals all over the world. In the upcoming years heart, liver, and lung transplantation will become standard operations in medical care. 75% of the procedures are successful. Transplantation is saving lives all around the world. But there is no sufficient inflow of organs in order these procedures to happen. The United States, even though it has well-organized distribution system, and a law it still falls behind of around 37,800 people on organ waiting lists. Annually 10% of patients awaiting a heart transplant die (Rothamn et al, 1997). The demand for organs in the EU exceeds the supply. At the end of 2015, a total of 56,000 patients were on waiting lists in the EU (Kovačević, 2020). The gap between demand and supply of organs is even higher in countries where there is higher influence of religious or cultural influences. In the Middle East, religion discourages and prohibits organ donation from dead people. Furthermore, Islam points out the need to maintain the integrity of the body at burial. Other cultures and religions reject the principle of brain death making organ retrieval impossible. Asian cultures also object the idea of brain death and eliminate organ donation from deceased people. Therefore, transplantation from deceased is more rear due to the above. Cultural and religious barriers present a burden to the system for donation and transplantation of organs. In the United

States almost 53% of families refused to allow their deceased to become organ donors. Organ donation is still a taboo subject (Rothamn et al, 1997).

Due to cultural and religious influences as well as other beliefs many patients are willing to pay a lot of money and travel to other countries to secure a transplant. And they do not care how the organ was obtained. These actions have encouraged the trafficking of organs in India, from executed prisoners in China. Also, the cost of the procedure in the eastern countries is lower than that of the western countries ranging from $15,000 to $20000, compared to $40.000 to $70.000 in the west. For the patient, the savings for the surgery may not be important as the availability of the organ. But from the perspective of an Indian or Chinese hospital, the income that is earned is significant. This also leads to other unlawful doings and allegations, like in South America, kidnaping of babies and children and murdering them for their organs (Rothamn et al, 1997). Therefore, organ trafficking is a big problem which leads to many other unlawful doings.

7. Conclusion

To conclude, the right of sovereignty and the right to bodily integrity and autonomy are terms which need to be respected and protected, since they are interlinked to the right to life and they are fundamental human right. As an example of governing these rights we took the organ transplantation and organ donation which are acts of moral and ethical doing, and they are altruistic. A characteristic that few of us as humans possess. Furthermore, there is also the fact that when we give consent to organ donation and transplantation there is no breach of our bodily integrity and autonomy since we as human beings are giving this consent. The only breach of bodily integrity and autonomy is when there exists the unauthorized approval, meaning when there is organ trafficking, and the organs are taken without consent by unlawful means, also when there is a breach in the legal system or breach in the system of organ donation and so on, then there is violation not only of the bodily integrity but there is also a violation of all human rights especially the right to life of one being.

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Vadim Vladimirovič Khilyuta*

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MAN AND CRIMINAL LAW IN THE SOCIAL DIMENSION

The paper examines the main problems of criminal law of post-Soviet states through the prism of global institutional transformations in politics and economy, development of new information relations and stagnation of society. The main features and ways of impact of criminal law on social relations are revealed, where criminal law is given a new global function - ensuring security. For this reason, attention is focused on the essence of crime and criminal law impact. Modern mechanisms of instrumentalisation of criminal law are shown by means of changing the philosophical bases of legal research, projecting science on global problems of implementation of unified standards, expanding the boundaries of criminal law, shifting the emphasis from the institution of punishment to measures of criminal-legal impact, moving away from material constructions in the concept of "crime" and developing its formal attributes with the prospect of introducing the institution of criminal law into national legislation.

Keywords: *criminal law, crime, punishment, morality and law, man and crime, law and freedom.*

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1. The individual and the new reality: what will be the choice?

The history of mankind is filled with various ideas and revelations, and it so happens that these ideas move the world and fill the minds of many people. It has always been so, and always some meta-idea dominated, was the main forerunner of various events, be it revolutions or world wars, shifts in economy or socio-political life.

It was only necessary to indoctrinate a person that a certain social reality is the norm and the correct basis of social existence, and seemingly yesterday unthinkable and forbidden things became a given. At the same time, all this happened not only to the man himself, but also to the values, goods, and standards that surrounded him. Law did not escape this fate either. In general, the twentieth century was in a deep crisis, a crisis that overthrew the human essence and humanistic nature. The rejection of divine principles and revelations in favour of humanism and justice, faith in scientific and technological progress has not really made the world cleaner and freer. Evil still surrounds many people, and the principle of humanity has become hateful, because indifference has filled human hearts. The fruits of this indifference are being reaped today.

Everyone aspires to domination, total domination, the idea of superman has found its embodiment in the minds and hearts of many people, but these same many people have forgotten that it is possible to become such only through the subjugation of others, in fact, making them slaves of their aspirations. Of course, we will not find this in the direct sense today, everything has a much different shape and is obscured by democratic principles and ideas of human rights protection, but the essence of this process is very clear and quite obvious.

The global transformation of society and its social relations is reflected in the refrain on man, his essence and purpose. It is obvious that in the heat of the scientific and technological revolution and all new achievements in science and technology, the essential purpose of man has changed radically. Man has become "sharpened" on his rights and freedoms, their realisation, protection and guarantees, which necessarily has a material component as its basis. Personal success in life is now an indicator of chosenness, a measure of human dignity and a fundamental category of social consciousness. The success of today's man is measured only through one criterion: material wealth multiplied by the social position and

status that a person occupies (a kind of place in the caste hierarchy). Money, status, career - that is the god of the present mankind. Receiving benefits and pleasures, having a good and cheerful time is another component, which is the basis of the modern universe and human goal-setting.

At the same time, there is nothing stable and definite in modern society, as well as in the picture of the world it draws: reality is illusory, a product of imagination, and sometimes it bursts like a soap bubble. In such a world, man has nothing to rely on and nothing to strive for, he must only seize the moment and think less, because, as they say nowadays, "thinking is the idle endeavour of losers". In this paradigm, science has become increasingly self-contained and reduced to elementary technology, where the main goal is not the search for truth, but the commercialisation of its final results. Art is degenerating into a means of entertainment and enjoyment, a meaningless play of the imagination. Design and fantasy constitute the future of such art, where the symbol is the black square - the image of emptiness and the black hole of meaning, the curtain between man and the new existence (Golubev, 2007: 53).

If earlier the credo of human life was success and realisation of vocation, which required real effort and creative abilities, today play has become a fundamental way of being. The game, based on luck and good fortune, epitomises idleness and it (idleness) becomes the holiday of the modern man's soul. Therefore, the purpose of human life is now reduced to pleasure, and the will of chance is the limit of dreams and life strategy. That is, a person prefers not to work on himself, systematically moving towards success and self-realisation, but to wait for chance. Hence the increased fussy social mobility of mankind, the constant change of occupation and priorities, place of residence, work, marriage partners is largely understandable. Modern man does not want to set himself any tasks and his catchphrase becomes the slogan: "I don't owe anyone anything".

At the same time, no matter how we say it, but this is the foundation on which the process of tacit education of the young generation is actually based. Of course, no one directly talks about it and does not teach it, but these values are arbitrarily and involuntarily imposed, society is pushed to the fact that it is always more pleasant to relax and enjoy life than to work, do business and give oneself to one's neighbour and not to another gadget. Thus, the world as a whole does not make sense, it has become filled with uncertainty, false attitudes of searching

for oneself. Life becomes a game, and it is the game that turns from a means to an end.

Man has become enslaved by various passions, tormented by the inner contradictions of choosing between faith and pride. An example of this is computer games. Here man prefers to escape from reality, from the pressurising atmosphere of spiritlessness, material gain, general distrust, trying to be realised in virtual space. Man has become so absorbed in the illusory world of the game that it has become a real idol for him. He (man) lives the life of his virtual character, in the game he is fearless and immortal, but these virtual qualities speak more about the irresponsibility of man, his lack of self-realisation. The price of such behaviour is loneliness, vanity and irritability.

In general, man today, as never before, lives together with his new technical "friend" - gadget, he is completely penetrated and absorbed by it. Electronic means completely control a person. The world of corporeal things has given way to incorporeal things. Virtual reality has become a given and spiritual world (and sometimes a measure) of modern man. All this suggests that each person now has his own virtual world and this individual world of man is in a simple technical device, which practically replaces everything. This minicomputer has become the embodiment of the XXI century. And if the XX century was the century of the book, then without exaggeration the XXI century can be called the century of the mobile phone.

If we talk about gadgets, they have certainly replaced human beings. People prefer to devote their free time to their favourite phone, indiscriminately browsing news, messages, videos, messages and so on. While earlier people used to read more fiction, now most of them read themselves, their opuses and mistakes that are all over social media. People shoot videos, make clips, take selfies and put it all out there for everyone to see. The goal here is very simple. Everyone wants to get more votes, views, likes, etc. In general, everyone wants to become successful and famous. And this success is measured by only one indicator: how many people appreciated you. Maybe these people do not approve of your deed or extravagant selfies, but it is not so important.

Today we can hardly find a young person who does not have a personal page in social networks. On such a page you can learn a lot about his character, about his connections, preferences, hobbies, friends, thoughts, etc. What is all this

done for? What is the meaning behind these actions? In our opinion, the answer is obvious: it is a kind of self-realisation of a person (when the "I" needs the approval of others). Moreover, in this process everyone solves his or her own tasks. Someone is fond of his appearance and flaunts it, someone talks about his business and favourite activities, someone shoots videos about animals, etc., in the end, all this variety cannot be counted. But everyone is trying to do something and to give it all virtual publicity. It turned out that all this was possible because many people lack the basic opportunity to declare themselves, to show their self. And most importantly, many people have lost faith in the objectivity of assessing their capabilities. Hence the logic of all these actions and desires for total self-realisation becomes clear.

Today a gadget can do a lot of things and many people also use this opportunity. Everyone has his own intentions and goals. The consequence of all this is that the main way of social management of mankind becomes stimulation and manipulation. Freedom is no longer needed, it is replaced by comfort, cosiness and conventionality. In such a situation gadget has replaced the human being and strangely enough human communication is becoming less and less. Modern technology is arranged in such a way that communication has become non-verbal, gesture-based. People prefer to just send a text message, repost a picture than just dial a number and communicate live, not to mention face-to-face meetings. Why? After all, a person saves time. It is possible to watch videos, films, play card games, listen to music, virtually attend any lecture, etc. using the phone, which is always at hand. All this has become accessible and really achievable. Man began to save time. This is already a given. But here there is another question: what does he do with the saved time? And the answer to this question hangs in the air.

As we can see, in this virtual reality, which has long been a given, there is no living being, humanity loses visual contact and there is no sense of responsibility for its actions. This reflects the edges of proper behaviour in such a paradigm, where simply the morals of society become a phantom. The world becomes unprincipled.

So, nowadays one can easily find any information, study it, analyse it, etc. However, the effect of action here is equal to counteraction: when information is publicly available, there is less probability of selecting the necessary and correct information. A person simply gets lost in this large array of news and

total awareness. The ultimate availability of knowledge is replaced by mere information. With increasing availability of information, depth and individuality disappears. Information is a means of entertainment where man "kills" time.

Is this a bad thing? Actually, things are not as pessimistic as they may seem. There are many rational things in all this, and it is probably pointless to argue and fight with it. However, what is important in this connection is something else. Man has become closer not to a human being, not to a living being, but to a gadget, a functional technical device. And nothing more. With the development of progress and scientific achievements, the human essence is moving in a proportionally opposite direction, ordinary morality and morals are being replaced by other "rules of the game". And if there is no longer a Christian morality, there is a very different one. This is a place that cannot be unfilled. And that moral foundation is the idea of human rights. In fact, today man has put himself in the place of God and replaced him with himself. The supernova man, about whom F. Nietzsche once wrote, has already appeared. This man believes only in himself, in scientific and technological progress, and the ideology of human rights is the basis of his existence and being. The only thing left is to comprehend the phenomenon of immortality!

Thus, modern man has withdrawn into himself, lives only for himself and his own pleasure, and this ideology of narcissism has begun to penetrate into law, with its total and imperative importance and the dominance of human rights. The deficit of personality (or rather humanity) is natural and has deep causes in the psychology of Western man in the postmodern era. But today, the characteristic feature of such a person is the fashion of searching for the self. However, the reality is that it is technology that has filled the inner world of man. Trends towards simplification programme man to act according to predetermined standards invented by others. Synthesised, artificial perception of the world produces algorithms of behaviour and deprives man of creativity. A person who does not resort to reflexion began to simplify not only the world around him, but also himself. The completeness and multidimensionality of meanings have been replaced by banal consumption of all kinds of information.

It feels as if a person has completely lost feeling and responsibility. It is as if we have become broken into projections of various social roles and cannot

"put ourselves together" at the right moment. In this situation of constant inconsistency with ourselves, everything becomes a mere imitation: virtue, deeds, democracy, freedom. A person can reason about these categories, believe in their words, but never be guided by these values and principles in life (Buck 2014, 34). And this is due to the fact that man has ceased to be himself, has become a function, an embodiment of technology (and all technologies have become subject to market laws). And all progress turns into a cultural brake, simplification and public accessibility.

Along with this, the "cell of society" - the family - has lost its status. It turns out that a person does not need it today. If earlier the family was connected with certain semantic values and rather in some way was an element of survival, now it has simply turned into a vestige of modern mankind.

In order to satisfy his instinctive needs, modern man does not need to have a family, there is no such need for cooking, household services, housekeeping, etc. Today all this can be done and found by one person and for this purpose it is not necessary at all to look for the second half. Mankind has created a lot of opportunities to coexist alone: today a man can easily satisfy his every desire without expecting to give something in return, and he is not obliged to anyone.

Man's self-sufficiency and his independence has exposed the problem of loneliness, but this loneliness is now easily filled with various gadgets and Internet entertainment. Simply modern man is afraid to be alone with himself, to listen to himself and understand the meaning and purpose for which he exists. But does he need to know this meaning? Modern man is in a state of meaning-life crisis, which is aggravated in the context of the development of the individual, society and the whole mankind. In this situation, man is suddenly left alone with himself. This means that the crisis is the line beyond which there is either its overcoming or emptiness, loneliness and ruin of a person, and maybe of the whole mankind (Fironov, 2022: 5).

As we can see, the total informatisation of society carries a lot of risks and they are connected with the alienation of man, his dependence on technology, the instability of the social system itself and the growing stratification of society (Berezina, 2022: 157). The category of "uncertainty" has come to dominate everything, but it can hardly be the basis of social progress. Moreover, entering the era of digital technologies has significantly changed the value system of society,

and in the near future will radically transform its culture, including the cultural code, and will predetermine the further development of civilisation (Pavlovic, 2020: 35).

At the same time, in a world of uncertainty, people are beginning to lose their sense of meaning, and this is partly due to the lack of mutual understanding and communication. People have simply stopped understanding each other, and indifferent attitude to what is happening today in society, politics, economy indicates a change in the priorities of man himself. A man is closing in himself and his own world predetermines his choice. However, the loss of the meaning of life for man has become so great that even it has overshadowed the phobia of the fear of death. The loss of meaning is now the most terrible thing for man. And it must be said that the consumer society leaves man no choice in this unrestrained race and total domination of the ideas of technological and pragmatic behaviour of society.

The sacralisation of human rights and inner narcissism devalues life itself. The reduction of the human being to the property of simply being alive, easily turns into the possibility of becoming dead, becomes, as a result of the practical implementation of the Western power paradigm, a reality in which human life as a living being is practically worthless, can always be questioned by political expediency and become a bargaining chip (Пудовочкин и Щербаков, 2020: 633). Especially when it comes to other ("third") countries and this reflects the *status qvo* of modern existence. Consequently, in a society of hyper-consumption, the value of human life is determined by its economic profitability.

In other words, today there is a human dehumanisation of man, when man himself does not want to make a moral choice, but prefers to simplify life values and the very approach to their understanding. The humanistic component gives way to another. A person becomes alien to other similar people and strives to live in a virtual world and not pay attention to the events taking place in society.

As can be seen, at present, in the conditions of aggravating social conflicts and political contradictions, the fundamental values of human civilisation are weakening and losing the ability to ensure its sustainable existence and development. And as D.V. Miroshnichenko notes, "at this time the axiological theme becomes a priority for humanitarian science" (Miroshnichenko, 2015: 62).

The change of paradigms of society's development, value attitudes and orientations, giving the political component a new reality, complication of economic, social and legal discourse reveals complex problems and metamorphoses due to shifts in the value priorities of society and its essence. Let us also not forget that a person is formed and acquires his moral image within the framework of those values that he experiences and through which his moral image is formed, the ability to adequately assess the events taking place in the lives of many people.

2. Law before choice

This is where the question arises: in this regard, is the law capable of properly regulating new social relations? Due to their seeming permanence, and in fact their impermanence, the law is objectively unable to do so. Moreover, today it is formally unable to fix what already exists. And this poses a global challenge for the law itself: whether it is able to direct new social relations into the legal direction and predict their development, positive and negative processes of the mechanism of their legal regulation as a whole. The answer to this question is not obvious, because it is not clear what the law will be in this paradigm, what role it is destined to play: serving the interests of political elites, ruling classes or fighting for justice, observance of the rule of law and human dignity?

However, the existing trends in the development and functioning of law show that it has become unpredictable, more technological and pragmatic, in some ways standardised, as a result of which:

- there is a breakdown of the basic institutions of law, private law flows into public law and vice versa, the methods of legal regulation become inertial;
- the role of the state as a kind of arbiter, resolving social conflicts and establishing the balance of rights and obligations between social groups is questioned;
- the introduction of digital technologies into social life raises the question of abandoning and modifying established and known structures, but no

one knows the ultimate goal of such a process, and as a result it becomes unclear what we will be dealing with at all;

- man is withdrawing into himself, into his world of digital reality, and this changes the whole context and requires the recognition of other values, which must be juridified and incorporated into the existing reality.

Nevertheless, the globalisation crisis of 2001 and 2020 and the total pandemic of 2020-2021 have only exacerbated the problem of personal identity and human rights, or rather revealed the deep crisis of these institutional formations. This became clearly visible in 2022, when the world order requires reformatting. It is obvious that nowadays there is a rethinking of values and basic constructions of building social relations, because it is not the individual, but the security of society and the state as a whole that is at the centre of attention. Consequently, the law with its arsenal of measures and means of regulation of social relations, as well as the fight against socially dangerous manifestations will have to take into account these changes. And they consist in the fact that mankind shifts emphasis from total globalisation of all spheres of public life to regional development, protection and security of the state in the first place. And the law, by the way, should reflect the interests of its society and territory, taking into account the mental and subjective preferences of specific states and persons inhabiting them. Hence, institutional transformations are inevitable, the essence of which will consist not in protecting the interests of transnational corporations and supranational organisations, adjusting everywhere and in everything, unification of law and its standardisation, but in refracting one's own interests, protecting them and understanding what law is in general, and how deeply it is able to intrude into the sphere of regulation of social relations, what measures of influence are optimal and effective in this case, what are the limits of the mechanism of legal regulation.

The fact is that globalism as a clearly formulated economic project is not based on cultural and ethical values and the idea of building a society of "social welfare". In this case, the facade of human rights and the development of democracy hides quite different goals of universal unification and reflection of hidden interests of certain social groups and political forces. In such a situation, law is only an appendage of this global idea and serves only as a means of ensuring and

realising supranational projects. Simply, law is called to fix the existing state of affairs. And this role is assigned to absolutely all branches of law (both public and private), where law (or a particular branch of law) is viewed through the prism of a peculiar instrument of realisation of practical possibilities of total economic, political and social law and order. This is not in line with the principles of national and sovereign states. It is obvious that in the near future we will face the dilemma of reassessing the principles of international and national law development, and reformatting their classical foundations in the digital era. In this sense, the global instrumentalisation of law is just beginning. And it will take place in the spirit of the security of the national interests of the state and its citizens, where it will be about the de-globalisation of law and its instruments. From this point of view, the human choice should be obvious for the modern Russian, as well as Belarusian society. While preserving true national spiritual and moral values, it is important not to miss the chance to remain a state with a human face in this unrestrained world race, where true moral values are the basis of the foundation for building the state and society. Technologisation cannot and should not replace the moral face of man (Khiluta, 2021: 464).

3. What about criminal law?

In life, it so happens that every new generation tries to overthrow from the pedestal those ideas that were developed by the previous generation and function in society as basic, dominant and a priori true. This is by no means a process of self-assertion, but it is a cyclical progressive movement, as each new generation tries to prove its own consistency and that its idea of what is proper. It concerns almost all spheres of life in society and one cannot do without it. Moreover, it is a natural process of life. It is directly related to criminal law. And if at the level of legislative tendencies the ongoing transformations are not so obvious, then at the level of criminal law doctrine the considered tendencies are clearly visible. Moreover, the issue here is not a fundamental breakdown of the foundations of criminal law, its central institutions, etc., but is to give a new impetus to criminal law regulation, verification of its subject matter and method, scope of action and modification of the very concept of what constitutes a crime. And in the context of what constitutes punishment, here the subject area of criminal law

comes to the mechanism of criminal-legal impact, the essence of which is prevention, not punishment. That is, from this perspective, criminal law turns into a mechanism of social protection, a means of ensuring the security of the state, society, and the individual (and the sequence of criminal law protection looks like this).

In the most general view, the essence of criminal law in this paradigm is reduced in this paradigm to conflict resolution. A conflict that, on the one hand, exists in society and, on the other hand, between specific individuals. But in fact, criminal law fails to fulfil this task, because by resolving the conflict with the arsenal of means at its disposal, it generates a new conflict. This chain is inevitable. And in this case we cannot say that criminal law is a universal tool in the hands of the state in resolving conflict situations. It is just that today there are no other such means.

The socio-political processes currently taking place in society and in the world as a whole raise the question of the transformation of criminal law itself, the need for its adaptation to new institutional formations and the demands of society. However, criminal law has constantly lived in an era of change. These changes have always taken place and are always taking place, as man himself, his essence, is changing. And here the fundamental question is to what extent criminal law itself is capable of reflexion and whether it needs it at all.

Remaining one of the conservative branches of law, criminal law gradually begins to become obsolete, not changing in its nature, it tends to resolve new conflicts in the old ways. And in this respect it still continues to be the "last argument" of the state in the system of ensuring social order and resolving all kinds of disputes and conflict situations. From this point of view, criminal law violence is an element of compromise between society and the state. But if one side loses parity in this issue, it is clear that this is no longer a compromise, but domination. However, in such a plane, the attributive forms of the state's impact on society are generated by the needs for co-existence of the state and society.

Therefore, as pointed out by A.E. Zhalinsky, criminal law "develops under the influence of contradictory interests of power groups and the general pressure of the population, consciously or unconsciously seeking to enhance security through increased repression, and in many situations to psychologically satisfy various aspirations (restoration of justice, revenge, revenge, joining a strong

group, etc.). The problem is that it should still develop on the basis of general regularities, while necessarily taking into account the balanced interests of the country and ensuring equal position of its citizens" (Zhalinsky, 2015: 18).

In determining the meaning of criminal law and its place in the life of a particular person, it is necessary to make a fundamental emphasis on the fact that criminal law is just one of the forms of life activity of society (socium), which (it is society) seeks to protect itself from any arbitrariness on the part of anyone, including the state. Literally, this means that criminal law is not at all a means of solving those tasks that the state faces in a particular historical dimension. These tasks may vary and for obvious reasons they will always vary. Even if we talk about criminal law becoming a means of security, such a means cannot be directed against society itself, against the individual, if only because criminal law is designed to resolve social conflicts, not to generate them.

Positive regulation of social relations is not the subject of criminal law, so it is not at the forefront of those socially significant processes that occur in society. This is the domain of other branches of law. But the question is how quickly and promptly, taking into account the transformation of social relations and mechanisms of their regulation, criminal law should develop its own standard of criminalisation of acts that are socially dangerous, deform the existing social relations and are beyond the boundaries of permissible.

Of course, this is the eternal question of what constitutes an offence and what its normative boundaries are. But today it is also obvious that criminal law cannot remain outside the context of socio-political processes taking place both inside and outside society, outside the process of modification of the social essence of man. Of course, political expediency often predetermines the vector of development of criminal law. But on the other hand, it is also obvious that this vector is unstable and extremely changeable, depending on many factors that are beyond the criminal law itself. Much more important in this question is the answer that allows us to define the boundaries of criminal law in the context of the changing social essence of the individual himself. And in this situation, it seems that the choice of man himself predetermines the contours of the future of criminal law.

Nevertheless, in this question we must bear in mind that the progress of humanity does not lead to the perfection of man himself. The excess of techniques

and technologies, of course, has simplified the life of man, made his life more comfortable and generally accessible, and life itself has become richer and more multifaceted. However, all this, we repeat, has not led to a change in the social essence of man. Man has not become better internally (and does not even strive for this), has not grown spiritually, so all those human passions (bordering on marginal and immoral behaviour from the point of view of the Christian way of life and natural values), which took place earlier, have not disappeared anywhere, but on the contrary, doubled. Therefore, the question that criminal law will gradually fade into oblivion, due to the eradication of crime, is naive and not even up for discussion. And if it is, then in a completely different format, because it is obvious that scientific and technological progress gives rise to new social conflicts and contradictions, which are then translated into crimes of a new form.

At the same time, when we talk about the digitalisation and technologisation of criminal law (and law in general), we overlook one detail that significantly sheds light on the issue under discussion. The point is that digitalisation itself was a product of a more global concept - progress. It was progress in the system of neoliberalism that presupposed the course of human development, shaped the socio-political and legal foundations of society and its institutions. And this state of affairs has taken place over the past decades. However, today mankind began to abandon the idea of progress and global development of society due to its dead-end path of development, stratification of society itself into strata and social classes. The world has reached the threshold of deglobalisation and stratification.

In this system of coordinates, digitalisation is a fragment of the idea of progress, which has no place today. This is why digitalisation has taken on a life of its own, separate from its meta-idea. It is obvious that digitalisation cannot exist for long in such a paradigm, and all attempts to adapt it to the needs of criminal law are doomed to failure, because they are not systematic and do not bring rational principles to the law itself, but actually replace old postulates with a new wrapper, without changing anything in essence. Technological innovations and refinements are only an accompanying part in the development and functioning of the law itself, but they cannot predetermine the course of development of criminal law itself, formulate its subject and method in its basis. Thus, as we have

already pointed out, the value system of liberalism is receding into the background, and the idea of universal globalisation is being abolished. And these processes concern not so much criminal law, but law in general, its basic institutions, which until recently were subject to total control and domination by supranational organisations. In criminal law, this manifested itself in the form of the establishment of new universal principles, systemic criminal law prohibitions, issues of liberalisation and decriminalisation of relations in the sphere of economic activity, interests of the service, etc. However, at present these tendencies are acquiring the opposite character.

It seems, for this reason, that those processes that are currently taking place in society are not realised by criminal law. Therefore, there is a feeling that the criminal law lives its own life, and the society - its own. Hence, for many segments of the population, criminal law prohibitions and prescriptions, often bordering on anachronism, become incomprehensible, and on the other hand, it can also be seen that criminal law cannot realise the social interests and demands of society, being guided only by the position of the state in ensuring total security.

The idea of security, which is now becoming dominant in criminal law, narrows the scope of criminal law itself, as criminal law becomes an appendage of dominant power interests. However, such a paradigm does not develop criminal law and pushes it into a rigid framework of serving the interests of the dominant power elites and the system that is dominant under the circumstances. In this system, the key principles and ideas of criminal law (mainly based on the provisions of the classical school of criminal law) are of secondary importance.

But it also suggests that a new criminal law is emerging, however we may personally feel about it. And this new criminal law breaks old stereotypes, established dogmas and legal principles. This new criminal law is based on the idea of security, and in this context, it is not the act of a person (a physical person, and in some legal families, a legal person) that comes first, but the person himself. Or, if you like, the act and the person are the basis of what we will call the offence.

In this sense, we have to talk about the instrumentalisation of criminal law, when it began to be perceived exclusively as a means (and not even the main one) of solving certain tasks facing the authorities. Here, criminal law is directly derived from those tendencies and mindsets that exist in the institutions of power (but not in society) and is completely predetermined by the legal policy of the

state and the element of expediency. From this perspective, criminal law is a purely dogmatic means of solving political problems. Therefore, there is no reason to have illusions today that criminal law will be a kind of shield in the hands of society against possible arbitrariness on the part of the state. We emphasise that criminal law has never been in the hands of society, on the contrary, it has always been used as a tool for "soft" regulation of social relations and suppression of marginal sentiments in society. In this aspect, it is meaningless to argue further that criminal law will be outside the policy pursued by the state.

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THE LIFE IMPRISONMENT AND HUMAN SAFE GUARD IN EXTRADITION SYSTEM OF CHINA

Extradition is a traditional judicial cooperation between States, which represents the judicial sovereignty, in another side, the human right protection in extradition cooperation is important as well. The relationship between the life imprisonment and extradition is deserved to noted. This paper will first focus on the life Imprisonment in Chinese law system, then by analysis the key cases of European Court of Human Rights, the author discusses the obstacles results by life imprisonment in extradition, and how could resolved the legal obstacles, find the possible alternative solutions to life imprisonment as a legal obstacle in the extradition cooperation.

Keywords: *life imprisonment; extradition; torture; human right.*

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1. Provisions and Interpretations of Life Imprisonment in the European Convention on Human Rights

The protection of human rights is a matter concerning the fundamental rights of all humanity, and it is also an indispensable representation of the spirit of the rule of law in modern society. Furthermore, the protection of basic human rights should be explicitly stipulated and guaranteed in the domestic legal systems of various countries.

1.1. The Curial Article Relatives to the Life Imprisonment in The European Court of Human Rights

The European Convention on Human Rights (hereinafter referred to as the ECHR) is formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms. It is an international treaty aimed at safeguarding human rights and fundamental freedoms in Europe. The drafting of the convention began around 1950, and it was subsequently signed by European nations with the support of the Council of Europe. It officially came into effect on September 3, 1953. Currently, all member states of the Council of Europe are parties to the convention, and newly joining members are also required to ratify it. The ECHR, plays a crucial role in interpreting the Convention in practice. Especially in recent years, the ECHR has provided specific, even nuanced interpretations of the protection of fundamental rights and the boundaries of freedoms through its case law.

Article 3 of the Convention addresses the prohibition of torture, stating: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." This provision is frequently cited in practice, as evidenced by the case law indexing pages published by the ECHR, making it one of the core articles of the Convention to avoid inhuman treatment, including in the extradition procedural.

Humanitarian treatment is reflected in its influence on criminal justice cooperation and extradition, often serving as a standard for evaluating the rule of law protections in the extraditing country. It assesses whether the extradited individual faces a real risk of torture or inhumane treatment after extradition. The case-law of ECHR is also relevant in cases of extradition to countries where death

penalty is still allowed, and the Court established doctrine of death row to reject extradition. (Bošković 2021:176） Then, the determination of whether life imprisonment constitutes torture or inhumane treatment plays a significantly impact on the extradition decisions.

Under the ECHR, the primary concern regarding life imprisonment is the conditions of confinement and the guarantee of basic procedural rights. The crucial focus is whether life sentences that are non-reducible and non-parole can serve as an absolute legal barrier to extradition, and whether they constitute a violation of Article 3 of the Convention.

1.2. Life imprisonment without reduction or parole

According to the latest case law guidelines issued by the European Committee on Crime Problems, Cases cited under extradition and life imprisonment include those involving the death penalty, terrorism offenses, the standards for whether life imprisonment constitutes torture, and the assessment of whether there is a real risk.

In the 2010 case of Babar Ahmad and Others v. the United Kingdom[1] from HCHR, there were six appellants accused of terrorism-related crimes for whom the U.S. requested extradition from the UK. Because these accusations involve terrorism, the individuals could face strict incarceration measures, as well as life sentences or the death penalty upon extradition to the U.S. Ultimately, the ECHR determined that the U.S. extradition request did not violate Article 3 of the Convention and did not constitute torture, agreeing to extradite all six appellants to the United States. Babar, as the first appellant, argues that he faces a significant risk of being subjected to special administrative measures during his detention in federal prison. These measures may include various actions such as solitary confinement, violating Article 3 of the Convention, and restrictions on communication with his lawyer, which contravenes Article 6 of the Convention. The United States' diplomatic assurances state that appellants, including Babar Ahmed, will not face the death penalty after extradition, will be prosecuted in federal court, and will enjoy full rights and protections. It emphasizes that the applicant will not be tried in a military tribunal nor will be classified as an enemy

[1] CASE OF BABAR AHMAD AND OTHERS v. THE UNITED KINGDOM, Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09

combatant. The ECHR has determined that the U.S. diplomatic assurances clarify that he will not be sentenced to death following extradition. Furthermore, in this case, the court found that life imprisonment itself does not violate Article 3 of the Convention, which prohibits torture or inhumane or degrading treatment or punishment. For life sentences that are subject to commutation or parole, a violation of Article 3 would occur only if it can be demonstrated that the applicant's continued detention could not be justified under any legal penal rationale and that the sentence is, in fact, and in law, uncommutable.

In this case, ECHR found that the first, third, fourth, and sixth applicants faced life sentences that could be eligible for commutation or parole, and there was no indication that their treatment posed a real risk under Article 3 of the Convention. Therefore, it can be seen that life imprisonment, including life sentences that are not subject to reduction or parole, does not inherently violate Article 3 of the Convention. Instead, the focus of the ECHR is whether the life sentence itself exceeds the standard of reasonableness. Provided that the assessment of the persistence of legitimate reasons for detention must be carried out at the stage of implementation (ex post), life imprisonment is in any case contrary to the principles of the Convention if the offender is deprived of the possibility of knowing ab initio when, how and what he must do to obtain conditional release.（Mario 2021:495）And whether the sentenced or the person being extradited faces a genuine risk of torture during the execution of the sentence.

1.3. Standards and Understanding of Detention Conditions

Due to the judicial or administrative force of extradition and deportation judgments or decisions, which inevitably involve the detention of the requested person, whether the conditions of detention meet the minimum standards protected by Article 3 of the Convention, and whether the requested person suffers from inhumane treatment due to the harsh conditions of detention, are also important factors for the ECHR in assessing whether the place of detention complies with the standards guaranteed by Article 3 of the Convention in extradition requests and similar appeals.

According to the "Guide on the case-law of the European Convention on Human Rights - Prisoners' rights," detainees should be held in places that respect human rights, and the level of pressure and suffering imposed by the place of

detention, whether it is a prison sentence or other confinement measures, must not exceed that inherent to the detention or imprisonment itself. The assessment of such places also includes appropriate safeguards for the health and treatment of detained individuals. The human rights protections granted by Article 3 of the Convention are foundational to the respect of human rights and represent the most basic rights protection. The ECHR adopts a particularly cautious approach to the implementation of Article 3, without distinguishing whether the country is a member of the Convention. Additionally, the protection of rights is not diminished by the prospect of deporting the individual to another country. Therefore, regardless of whether the appellant is facing extradition proceedings or a review of an entry ban, the standard of review concerning their detention conditions remains consistent.

In other words, the ECHR does not distinguish in its examination of the standards of detention involved in administrative expulsion orders and extradition procedures regarding the protections of Article 3. Violations of the fundamental rights protected by Article 3 of the Convention are linked to the conditions at the place of detention, meaning that the conditions of detention must not exceed the treatment inherent in the deprivation of liberty itself. This implies that places of detention that comply with Article 3 of the Convention must respect fundamental human rights, and the methods and conditions imposed during the execution of imprisonment or other forms of detention must not subject the detainee to a level of stress and suffering that exceeds the suffering included in the detention itself.

Regarding the treatment of detainees, it is essential to first consider the ECHR' definition of the term "place of detention." According to the European Court of Human Rights' "Guide on the case-law of the European Convention on Human Rights-Prisoners' rights," the scope of detention facilities includes all locations used for confinement. This encompasses places where fixed-term and life sentences are served, such as prisons, and also includes sites for temporary detention like police station holding cells, facilities for detaining illegal immigrants, and transitional detention sites used during extradition proceedings all of which fall under the concept of detention facilities as outlined in the Convention. Furthermore, the articles in the Convention that pertain to the treatment of prisoners primarily include Articles 3, 5, and 8. These articles respectively provide the

foundational guarantees for prisoners' treatment in terms of protection against torture, the right to liberty and security, and the respect for private and family life.

Specifically, according to the provisions of the Convention, the treatment of prisoners and the guarantees concerning detention facilities include the following aspects: First, regarding detention conditions, these include (1) whether visits are allowed and recorded follow-up; (2) the facility; (3) food and accommodation; (4) sanitary conditions; (5) clothing and bedding; (6) nutritional conditions; (7) exercise and recreational facilities; (8) research and monitoring; (9) the transportation of prisoners. Second, the right to contact with the outside world, including (1) contact and visits with family; (2) the right to marry; (3) guarantees for different means of communication. Third, medical and health conditions within detention facilities. Fourth, guarantees for life imprisonment prisoners. Fifth, the protection of judicial rights, including the right to legal defense, effective participation in domestic litigation, and effective communication with the court. Sixth, the rights to freedom of thought, speech, and religion. Seventh, other rights, including the right to work, protection of private property, the right to education, the right to vote, protection against discrimination, and the right to obtain effective remedies. Among the aforementioned provisions, the rights primarily concerning detention facilities fall under the first major category regarding detention conditions.

The ECHR takes into account the aforementioned factors in a cumulative manner when assessing detention conditions, as well as the length of detention. It considers that the restrictions faced by detainees accumulate over time, and the harm suffered in an environment that does not meet detention standards becomes more severe with prolonged exposure. Importantly, the assessment of detention conditions must be contextualized within the specific circumstances of each individual case, in order to determine whether the detention conditions faced by the applicant in a particular case comply with the fundamental principles of human rights protection outlined in the Convention.

The extradition's viability is a factor in determining whether the penalties that the receiving country might impose meet the "minimum severity" standard established by Article 3 of the convention. If this standard is met, it may be deemed inhumane and degrading. However, in extradition cases, the considera-

tion of "minimum severity" does not align absolutely with domestic legal contexts. British judge Lord Hoffmann pointed out that viewing the application of Article 3 relativistically is crucial for the ongoing operation of extradition. For instance, in the case of Napier v. Scottish Ministers, the Scottish Court of Appeal ruled that the practice of "slopping out" (requiring prisoners to use a bucket in their cells and dispose of it in the morning) may violate Article 3. According to the judgement, it is said that may skeptical about whether this practice reaches the necessary degree of severity even in a domestic context. However, if applied in an extradition context, it would prevent anyone from being extradited to many countries poorer than Scotland, where, even outside of prisons, people often lack access to flushing toilets.

From a juridical point of view, we establish dignity as a juridical ground and so we stress the equal value of every human being on the mere fact of his existence as such. (Pérez 2021:478） In evaluating whether the conditions in detention facilities constitute inhumane treatment, British judges have indicated in their rulings that whether a violation of Article 3 of the Convention occurs depends on the specific circumstances of each case[2]. There is no universal standard to determine if the treatment in different countries around the world is inhumane or degrading. In extradition cases, it is necessary to specifically assess whether the person being extradited faces inhumane treatment.

2. Regulations on Life Imprisonment in Chinese Domestic Law

2.1. The Life Imprisonment Stipulates in Criminal Code of China

Article 46 of the Criminal Law of the People's Republic of China defines life imprisonment primarily as the deprivation of personal freedom for life. However, due to provisions regarding sentence reduction and parole, in practice, life imprisonment does not necessarily result in lifelong confinement. In China, individuals sentenced to life imprisonment retain the hope of reintegrating into society and are not destined to despair. Those sentenced to life imprisonment can have their sentences reduced or be granted parole if they demonstrate genuine

[2] CASE OF BABAR AHMAD AND OTHERS v. THE UNITED KINGDOM, Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09

efforts to reform. “The key is for them to strive for it themselves.” Therefore, a life sentence does not equate to a prisoner being locked away until death, leaving them hopeless about their future. On the contrary, it can motivate them to reform in pursuit of sentence reduction and parole. In terms of actual enforcement, since the vast majority of prisoners are typically eligible for sentence reductions or parole based on their rehabilitation efforts, the occurrence of individuals being imprisoned for life without any possibility of reduction or parole is quite rare. This practice is largely consistent with that of most countries abroad, where life sentences do not equate to a literal life term.

Certainly, the application of this alternative measure is subject to very strict limitations. On one hand, the eligible subjects are limited exclusively to those convicted of particularly severe cases of embezzlement or bribery that result in a suspended death sentence; it does not apply to other serious crimes. Therefore, life imprisonment is not established as a general rule in the General Principles, but rather specified in the Detailed Provisions concerning sentencing for embezzlement and bribery offenses, thus maintaining the overall stability of the penal system. On the other hand, there are requirements regarding the circumstances of the crime. Life imprisonment does not apply to all offenders sentenced to a suspended death sentence for embezzlement or bribery; instead, the people’s courts decide specifically whether to apply it based on the circumstances of the offense and other factors.

In terms of substantive law, the life imprisonment stipulated in China’s Criminal Law does not mean that reduction of sentence or parole cannot be executed. According to Article 78 of China’s Criminal Law, which outlines the “conditions and limits for sentence reduction”: criminals sentenced to control, detention, fixed-term imprisonment, or life imprisonment may have their sentences reduced during execution if they strictly adhere to prison regulations, accept educational reform, demonstrate genuine remorse, or show meritorious conduct. Sentence reduction should be granted for any of the following significant meritorious acts: (1) preventing others from committing serious criminal activities; (2) reporting major criminal activities inside or outside the prison that are verified to be true; (3) making inventions or significant technological innovations; (4) selflessly saving others in daily production and life; (5) showing outstanding performance

in resisting natural disasters or handling major accidents; (6) making other significant contributions to the country and society.

According to Article 78 of the Chinese Criminal Law, the standards for reducing life imprisonment and fixed-term imprisonment in our country are the same, and different levels of reduction are established. The most fundamental requirement for a reduction in sentence is compliance with prison regulations and acceptance of education and rehabilitation. This aligns with what the ECHR indicates in its guidance on cases regarding the rights of prisoners under the European Convention on Human Rights, which states that the execution of life imprisonment should reflect the goal of re-education for reintegration into society. At the procedural law level, Article 273(2) of the Criminal Procedure Law of our country stipulates that for criminals sentenced to control, detention, fixed-term imprisonment, or life imprisonment, if they demonstrate genuine remorse or meritorious conduct during their sentence, the executing agency should submit a proposal for sentence reduction or parole to the People's Court for review and decision, with a copy of the proposal sent to the People's Procuratorate. The People's Procuratorate can submit written opinions to the People's Court. This provision clearly indicates that in our country, the reduction of life imprisonment and fixed-term imprisonment, as well as parole, are supervised by the executing authority based on the behavior of the convicted person during their sentence. If there are signs of remorse or meritorious performance that meet the legal standards for reduction of sentence or parole, the executing authority has the responsibility to submit a recommendation, which the court will review according to legal procedures. There are established legal procedures for the reduction of sentence and parole for life imprisonment. In addition, regarding specific issues related to sentence reduction, in 2012, the Supreme People's Court issued the "Regulations on Several Issues Concerning the Application of Law in Handling Sentence Reduction and Parole," in which Articles 24 to 26 specifically outline the materials required for courts to hear cases of sentence reduction and parole, the public disclosure of such cases, and the methods of adjudication. Article 26 states that written hearings are generally applicable to cases of sentence reduction and parole, while special circumstances, such as significant meritorious performance, may warrant a court hearing. This corresponds to the provisions of Article 78 of China's Criminal Law, indicating that life imprisonment in Chinese law has the

potential for statutory sentence reduction. The core criteria for considering sentence reduction are the inmate's compliance with prison regulations and their demonstration of remorse.

2.2. The Practice of Life Imprisonment Impact on the Extradition Case of China

In the past, in the extradition practices between China and European countries, the Audiencia Nacional (National Court) of Spain has recognized the possibility of parole for life sentences in its extradition cooperation with China. In its judgment No. 24/2014, dated May 19, 2014, it pointed out: "Conditions for parole, such as those specified in Article 78 of the Criminal Law of the People's Republic of China accepting education, undergoing character correction, complying with prison regulations, demonstrating remorse, and performing meritorious deeds are also generally stipulated in the legislation of various countries, including Spain, as conditions for obtaining preferential treatment in the execution of sentences. The relevant provisions of the Criminal Law of the People's Republic of China state that the people's courts shall respond to individuals who show genuine remorse or perform meritorious deeds and are responsible for ruling on issues of parole, which means that the decision on parole is made by judicial authorities established under the constitutional system of China and can be influenced by the offender's demonstration of remorse." Ultimately, the Spanish National Court concluded: "In summary, Chinese legislation has provided for the modification of life sentences, allowing such penalties to be shortened and no longer considered life imprisonment, thereby concluding that the request for extradition made by the relevant authorities in China concerning the appellant does not violate the Spanish Constitution." It is evident from this conclusion by the Spanish National Court that the ordinary life imprisonment stipulated in Chinese criminal law contains substantive and procedural regulations for parole, and a sentence of life imprisonment does not absolutely imply a lifelong incarceration. Such life imprisonment meets the standards of human rights protection stipulated in Article 3 of the Convention and does not fall under the category of inhuman or degrading punishment that is non-paroleable.

It can be understood that in the future, when making diplomatic commitments regarding life imprisonment in Europe, in order to comply with Article 3

of the Convention, it is essential first to clearly articulate the meanings of our criminal law and criminal procedure law. Life imprisonment includes fixed-term imprisonment. According to Article 78 of our Criminal Law, both life imprisonment and fixed-term imprisonment have the possibility of legal reduction of sentence, and this possibility is mandated by law rather than being optional. Our country provides for two situations in which a sentence can be reduced, both of which are mandatory reductions or parole as stipulated by law. Firstly, concerning the understanding of sentence reduction, a convict who abides by prison regulations and does not commit new or overlooked offenses is entitled to a legal review opportunity for sentence reduction. This is in line with the practical aspects highlighted by the ECHR, which states that individuals sentenced to life imprisonment should have access to judicial review opportunities for sentence mitigation within their home country's judicial system upon return. The legal provision in our Criminal Law regarding the expression of "repentance" is reflected in the convict's compliance with prison rules and their acceptance of education and rehabilitation during incarceration, without any additional legal obligations or preconditions required for sentence reduction.

In addition, the judicial interpretation in our country has further clarified the applicable standards for the possibility of sentence reduction. The Supreme People's Court's 2016 "Regulations on the Specific Application of Laws for Handling Sentence Reduction and Parole Cases" (hereinafter referred to as the "Regulations") stipulates in Article 3 that the expression of genuine remorse refers to the simultaneous fulfillment of the following conditions: (1) confessing guilt and expressing remorse; (2) complying with laws, regulations, and prison rules, and accepting educational reform; (3) actively participating in ideological, cultural, and vocational education; and (4) actively engaging in labor and striving to complete labor tasks. This judicial interpretation clarifies that the specific demonstration of remorsefulness is the compliance of inmates with prison rules and the management norms of the prison environment. Furthermore, the 2021 "Opinions on Strengthening the Substantive Hearing of Sentence Reduction and Parole Cases" issued by the "Two Highs and Two Ministries" (hereinafter referred to as the "Opinions") stipulates in Article 5 that for those eligible for sentence reduction, they must meet the assessment criteria of prison rules, specifically complying with the rules and accepting educational reform. It emphasizes that as long as

inmates comply with prison rules and have not violated any regulations, they can achieve sentence reduction through the assessment system in practice.

Secondly, regarding the understanding of circumstances that warrant a sentence reduction, the criminal law of our country stipulates several significant circumstances under which a sentence reduction is applicable. If a convicted person exhibits behaviors specified in the provisions during their imprisonment, it constitutes a special circumstance for sentence reduction. Article 6 of the "Regulations" clarifies the specific extent of sentence reductions, providing a greater reduction for significant meritorious conduct and other special circumstances. The "Opinions" state that significant circumstances require specialized evidence to be proven. Considering that significant circumstances can lead to a larger sentence reduction according to our criminal law, a more detailed assessment process has been established. Only those significant circumstances that meet the legal standards can be recognized. This also confirms that, in our judicial practice, individuals serving fixed-term or life sentences have a legal possibility of obtaining a sentence reduction as long as they comply with prison regulations. Furthermore, from the perspective of procedural law, our country also has a legal procedure for reducing life sentences, and this procedure operates as an automatic mechanism. As long as the inmate meets the criteria for sentence reduction, they can apply to the court for a reduction without needing to fulfill additional conditions.

3. The Relationship Between Torture and Life Imprisonment

In fact, life imprisonment without the possibility of parole or probation does not inherently constitute a violation of Article 3 of the Convention; rather, it depends on whether this punishment is clearly excessive or disproportionate in severity.

In the 2001 case of Nivette v. France[3], the ECHR ruled that the extradition request involved a U.S. citizen, Nivette, who was accused of murdering his girlfriend. The United States requested his extradition, and France agreed. Afterward, Nivette appealed to the ECHR, arguing that upon extradition to the U.S.,

[3] DÉCISION PARTIELLE SUR LA RECEVABILITÉ de la requête n° 44190/98 présentée par James NIVETTE contre la France.

he could face the death penalty or life imprisonment without the possibility of parole, both of which he considered to be forms of torture. The ECHR, upon reviewing the case, found that the U.S. prosecutor provided an affidavit stating that the charges against Nivette upon his return would not include any circumstances that would definitely lead to the death penalty or life imprisonment without parole. According to the California Penal Code, a death sentence for murder must be based on one of the 12 special circumstances outlined in the code, and the crimes committed by the extraditee did not fall under any of the 12 specified offenses.

The prosecutor's oath simultaneously indicates that her sentencing commitment is legally binding on both her and the government of California, USA. The ECHR thus determined that the extradition request would not pose a serious risk of violating Article 3 of the European Convention on Human Rights for the individual being extradited. Furthermore, the sentencing commitment clearly states that the death penalty will not be imposed, including both not imposing and not executing it. This means that the avoidance of the death penalty encompasses not only the final execution but also the rejection of any potential written judgment that could induce psychological fear in the extradited individual, which also constitutes torture. In the extradition request submitted by the United States, it is clearly stated that based on the charges against the extradited person, they would face a maximum of 35 years in prison and may also be eligible for parole. According to the California Penal Code, offenders may be eligible for parole after serving one-seventh of their sentence.

Ultimately, the ECHR determined that the sentencing assurances provided by the U.S. judicial authorities were clear and could explicitly rule out the possibility of the extradited individual facing the death penalty or torture upon returning to their home country. The court rejected the appellant's request and upheld the extradition decision.

Article 3 of the European Convention on Human Rights addresses the understanding of torture, distinguishing between torture and ill-treatment. Torture refers to inhumane treatment that causes severe or cruel suffering, as defined in Article 1 of the United Nations Convention Against Torture. According to the convention, the act of torture must also have a specific purpose. Torture can take

many forms, including deprivation of sleep, rape, denial of food or forced feeding, and denial of medical treatment.

The ECHR has not excluded the threat of torture from the scope of torture itself. The court believes that in certain special circumstances, the threat of torture can also cause significant psychological fear, achieving the effects and purposes of actual torture. If an extradition request poses a real danger to the individual, the contracting states of the European Convention on Human Rights should not expel or extradite them to the receiving country. This danger refers to the treatment that the extradited person is likely to face, which contradicts the protections provided under Article 3 of the European Convention on Human Rights.

In examining evidence of violations of Article 3, the ECHR does not replace domestic courts in conducting a thorough review of the evidence, but rather assesses the conclusions of domestic courts to ensure they conform to the fundamental rights protected by the European Convention on Human Rights. The evidence for a violation of Article 3 should reach the standard of "beyond reasonable doubt," but the ECHR also allows for evidence that is sufficiently clear, compelling, or irrefutable through inference.

4. Conclusion

Overall, the impact of life imprisonment in extradition cases is a topic worthy of discussion. Through the cases mentioned in the text, we can see that the European Court of Human Rights considers the impact of life imprisonment on extradition decisions based on different circumstances of the cases and the requesting countries, leading to varied handling of the final extradition decisions. Life imprisonment, as a special form of punishment, especially regarding whether life imprisonment without the possibility of reduction or parole constitutes a violation of fundamental human rights, has sparked increasing research and discussion among scholars. Ultimately, when determining whether life imprisonment itself complies with human rights protection in extradition procedures, it is necessary to make specific and objective judgments based on the domestic legal systems of the respective countries.

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THE NEW AGGRAVATING CIRCUMSTANCES REGARDING HOMICIDE AND BODILY HARM, A NEW VISION OF THE ROMANIAN CRIMINAL LEGISLATOR

A series of laws amending the Romanian Criminal Code and the Criminal Procedure Code, adopted in summer of 2023 surprised the legal practitioners. It is not so much the opportunity of the amendments that is surprising, some being necessary for some years, but above all the incoherent way they were adopted, from some more consistent laws (Law no. 200/2023) to others containing a single article (Law no. 217/2023). The enactment of some norms to those decided by the Romanian Constitutional Court was, indeed, an imperative, which, unsatisfied in time, led for a long time to the direct application of the decisions of the Constitutional Court. And with regard to the substance of the changes, a series of clarifications can be made. Law 248/2023, on which we will dwell, is part of this veritable "avalanche" of changes, which rightly confuses the professionist. This document implies new circumstantial elements of aggravation of some delicts and also modifying some criminalization rules. We aim to analyze in our paper the new aggravating special circumstances, among which the "bodily harm", delict, when the victim is in the care, protection, education, or treatment of the perpetrator, if the victim is a minor, if the act is committed in public or if the perpetrator detains a firearm, an object, a device, a substance or an animal that can endanger life, health or bodily integrity of people. Furthermore, we will observe that, in these situations, the prosecutor can draft the accusation even if the victim remains in passivity, and that is, in our opinion, a very important step in protecting the victim rights.

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We will conclude that some of these criminal policy options are useful, but others raise serious problems of predictability and will lead to certain inequities.

***Keywords**: right to integrity, aggravating circumstances, personal injury, minor, public place, vulnerability.*

1. Introductory remarks

Consulting the new criminal policy of the Romanian legislator, Law 248/2023[1] is included in a veritable "avalanche" of changes, which rightly confuses the professionists. This implies the insertion of new circumstantial aggravating elements regarding some crimes and also modifying some criminalization rules.

It is a real difficult discussion regarding the context of this changes, that is one of we can call a populist criminal regime, increasing the punishment for a lot of offences against person, road traffic offences and sexual offences. This was remarked some years ago also in Serbian legislation. It was observed by scholars that "As the right to life is the most valuable human right, in the context of current expansive and explosive populism as a suitable technique of governing, penal populism related to demands for harsher punishment of those who endanger or violate another's right to life has flourished. It is not only harsher punishment that is associated with increasing penal populism and moral panic over fear of crime (especially as serious as murder or another offense resulted in death of another human being), but phenomena that should also be viewed in the same light are new incriminations that cannot always be justified by social or criminal justice needs and requirements" (Jovanović, 2021:148).

We will observe in this paper the recent aggravating circumstances regarding homicide and personal bodily harm in Romanian Criminal law.

2. The new aggravating circumstance in the case of homicide

The aggravating circumstances are, according to the romanian doctrine, factual circumstances which, although not part of the legal content of the crime, are part of its concrete content, attributing to it an aggravated character (Pașca, 2015: 557). After 2014, the main novelty brought to the Romanian Criminal Code was that the judicial aggravations were eliminated, because they would not be predictable (that is, any circumstance could be considered aggravating, even without it being clear at the time of committing the act).

[1] Official Gazette no. 673 from 21 july 2023.

Scholars pointed that "The right to life is the highest civilizational value and the supreme human right. Therefore, human life is in the first place of the scale of values. All the modern states by their highest legal acts protect the right to life which cannot be limited and thereby this most important human right receives a planetary significance. The murder is a general criminal act that endangers mostly the foundations of every society although criminal legal protection of human life did not exist for all members of the human species in the earlier socio-economic formations. In the sense of criminal law the protection of life represents the fundamental dimension of criminal law" (Rakočević, 2017: 517).

According to point I of the abovementioned amending law, in article 189 paragraph (1) Criminal Code, after letter h) a new letter is inserted, letter i), with the following contents:

"i) taking advantage of the obvious vulnerability of the injured person, due to age, health, infirmity or other causes".

It is the crime of "aggravated homicide", which will be met in this version in the situation above. We point out that, given that aggravated murder is, in essence, the most serious crime within the criminal codes, with the most severe sanctioning regime (life imprisonment or even death), the expansion of the circumstantial elements must be done with caution.

According to art. 188 Criminal Code, "murder of a person is punishable by imprisonment from 10 to 20 years and prohibition of the exercise of certain rights".

According to art. 189 Criminal Code, "murder committed in any of the following circumstances:

a) with premeditation;
b) of material interest;
c) to evade himself or another from criminal liability or from the execution of a penalty;
d) to facilitate or conceal the commission of another offence;
e) two or more persons;
f) on a pregnant woman;
g) by cruelty;
h) it is punishable by life imprisonment or imprisonment from 15 to 25 years and the prohibition of the exercise of certain rights".

We observe the legislative technique of "converting" a general circumstance, provided for in art. 77 para. (1) lit. e) Criminal Code[2], in a "special" circumstantial element. In accordance with the romanian contemporary doctrine (Cioclei, 2023: 8), we believe that it will not be possible to retain the two elements of aggravation at the same time, having the source of the same situation.

So, in order to retain this element of aggravation, we distinguish several stages.

First, the victim of the murder must be in a state of vulnerability caused by age, health, infirmity or other causes.

Regarding the aspect that the state of vulnerability is "obvious", some clarifications are required. Analyzing the legal provisions in force, in a short comparative research, we note that in art. 20 para. (2), regulating the "state of necessity", the Criminal Code refers to "obviously more serious consequences" that would occur if the danger were not removed[3].

Regarding the justifying cause regarding the exercise of a right or the fulfillment of an obligation, it speaks of the nature of the action not to be "manifestly illegal". Regarding the unattributable excess (art. 26 Criminal Code) reference is made to the "obviously more serious" consequences of which the perpetrator was not aware. Even when it provides for confiscation in part as a security measure, art. 112 para. (2) Criminal Code refers to the value "obviously disproportionate" to the seriousness of the act of the goods subject to the measure[4].

As a circumstance of aggravation of some crimes [person trafficking, art. 210 para. (1) lit. b) Criminal Code, art. 220 para. (3) lit. b), art. 220 para. (4) lit.

[2] "The following circumstances constitute aggravating circumstances: (...) e) committing the crime by taking advantage of the obvious vulnerability of the injured person, due to age, health, infirmity or other causes".

[3] "The person who commits the act is in a state of necessity in order to save from an immediate danger and which could not be removed otherwise the life, bodily integrity or health of himself or another person or an important asset of his or another person or a general interest, if the consequences of the act are not obviously more serious than those that could have occurred if the danger was not removed".

[4] "In the case provided for in para. (1) lit. b) and letter c), if the value of the assets subject to confiscation is clearly disproportionate to the nature and seriousness of the act, confiscation is ordered in part, by monetary equivalent, taking into account the consequence produced or that could have been produced and the contribution of the asset to it. If the assets were produced, modified or adapted for the purpose of committing the act provided for by the criminal law, their entire confiscation is ordered".

b), art. 220 para. (5) lit. b), art. 221 para. (2) lit. b), art. 247], refer to the "obviously vulnerable" situation of the injured person[5]. In art. 272 Criminal Code the act of influencing the statements must have an "obviously intimidating" effect. Then, the justifying cause from art. 277 para. (3) refers to "obviously illegal" activities[6], and art. 443 Criminal Code speaks of "manifestly disproportionate" damages.

However, no provision explains the meaning of the term "obvious" in any other sense than the common one, that of "evident". It seems that it sets a certain standard of evidence by transferring the object analysed to the field of probatory, and it will be assessed on a case-by-case basis, the intensity of the state that would justify attributing the act to a more serious character. It was noted in classic doctrine (Dongoroz, 1970, I,:323), in this register, regarding the case of special confiscation from the old Criminal Code - art.118 letter e), which referred to "things manifestly acquired by the commission of the offence" that, in this respect, "a simple assumption is not sufficient. The proof of the obvious acquisition can be made with any evidence and means of proof regarding the material situation of the offender before and after the perpetration of the act".

We believe that the term has been removed from that text, given that all decisions on a criminal sanction must exclude the assumption and be close to certainty or at least to conviction beyond reasonable doubt, as is the case of conviction, as is the case of conviction, postponement of penalty enforcement or waiver of penalty enforcement.

Contemporary doctrine (Streteanu, Nițu, 2018: 431) understood by "obvious vulnerability", "the special situation of the injured person that is exposed in relation to the commission of some crimes, being unable to defend himself or to express his will, involving a state of physical or mental helplessness, which does not allow him to react, to defend himself in front of the aggressor, thus facilitating the commission of the crime".

[5] E.g., trafficking a person is more dangerous if "taking advantage of the impossibility of defending oneself or expressing one's will or of the state of obvious vulnerability of that person".

[6] "It is not an offence to disclose manifestly illegal acts or activities committed by the authorities in a criminal case".

Serbian doctrine talks about "injured parties who belong to vulnerable categories, such as minors, pregnant women, persons with disabilities, etc" (Škulić, Miljuš, 2024: 27).

An interesting opinion (Kolaković-Bojović, Baranowska, 2024: 63) is in sense of considering the migrants as persons in a state of vulnerability, due to their special situation. We agree with this opinion, as we also consider that, especially when the migrants are victims of physically abuse, violence or even murder, the perpetrators have in mind their special situations as source of vulnerability.

While we accept that criminal law may use terms in their common sense, we nevertheless consider that keeping the term "obvious" in the places shown and even extending its application affects the predictability of the criminal law rule.

Moreover, with regard to "other cases", as a source of manifest vulnerability, a number of objections can be made in terms of predictability, the text actually constituting, in our opinion a veritable "open content norm", which reminds us of the old art. 75 para. (2) of the Criminal Code from 1968, which stated that "the judge may retain as aggravating circumstances any other aspects which give the act a serious character".

The vulnerability should therefore have as its source one of the situations listed by law (for example, we would say), such as: young age, advanced age, an illness that makes movement difficult, intoxication, etc.

Then, the perpetrator must take advantage of this state of "obvious vulnerability". We appreciate that "taking advantage" of a circumstance has the meaning of conceiving the commission of the act in such a way that the respective state facilitates its commission. If the law had aimed the form of aggravation to be automatically incident in all cases when the victim presents a certain condition, we believe that it would not have inserted the term "taking advantage".

Thus, the action of "taking advantage" is, in our view, compatible exclusively with the direct intent form of guilt. "Taking advantage" of a certain state represents a circumstantial element that places the activity in the immediate vicinity of a premeditation, although, obviously, it does not have to be identified with it.

Moreover, we would say that "to profit" has the meaning of pursuing a benefit, not necessarily a material one, but obviously it is about projecting a profit, an advantage from the commission of the crime.

We also believe that by "taking advantage" of a circumstance, the legislator understands an action of defeating the will of the passive subject, of exploitation, of capitalizing on this state and creating an advantage for the perpetrator of the crime.

In this sense, a practical solution attracts our attention[7]. One Court of Appeal argued that "both through the indictment and through the appealed criminal sentence, it was held that the defendant committed the act (attempted murder, n.n.) with indirect intent. Moreover, in addition to the circumstance that the defendant committed the deed with indirect intention (although she foresaw, did not follow the result of her deed consisting in the death of the victim), she also acted with a spontaneous (sudden) intention, being troubled by a previous quarrel with his common-law partner, because he left the hotel room, leaving the defendant to take care of the child alone. Therefore, considering that the defendant did not aim to kill the victim and acted in a state of disorder, with spontaneous intent, the Court considers that the aggravating circumstance consisting in the commission of the act taking advantage of the victim's obvious vulnerability due to age is not incident. If the defendant wanted to take advantage of the child's obvious vulnerability to kill him, she committed the act in the room where she was alone with him and she could have taken full advantage of the victim's vulnerability, and not by throwing the victim to the floor in the presence of several people, who immediately gave him first aid. In relation to the above, the Court will admit the defendant's appeal and in the retrial will establish a punishment without taking into account the application of the aggravating circumstance of art. 77 lit. e) from the Criminal Code".

The decision seems fair to us, for the reasons explained above.

[7] Decision no. 214/2021 from 10.02.2021, Curtea de Apel Timișoara, cod RJ 48e38d23 (https://www.rejust.ro/juris/48e38d23), accessed 9.09.2024.

The judicial practice, in analysing this circumstance, noted that "the defendants successfully attacked the injured person, taking advantage of the vulnerability of the latter (the injured person was intoxicated)"[8], or "taking advantage of the obvious vulnerability of the injured person due to the early age - 6 years, the defendant ran after it, the victim sliding and falling, then lifted it from the ground, the defendant, he applied a slap to her hand, hit her head against the wall of the house, slammed her to the ground and kicked her back again"[9], or "the act was committed after dark, on a public road, in the presence of several people, including children and the elderly, by applying repeated blows to the injured person, on a public road, the act of the defendants provoking outrage and repulsion among the community, as well as a state of fear, the defendants taking advantage of the vulnerability of the injured person who was alone and defenseless from other people, as well as the fact that their chances of success were higher as they acted together"[10].

3. The new aggravating circumstances regarding the offence of bodily harm

According to art. 193 Criminal Code, "hitting or any violence that causes physical suffering is punishable by imprisonment from 3 months to 2 years or a fine. The act by which traumatic injuries occur or the health of a person is affected, the severity of which is assessed by days of medical care of no more than 90 days, is not, it is punishable by imprisonment from 6 months to 5 years or with a fine".

According to point II of the amendment law, in article 193, after paragraph (2), a new paragraph is inserted, paragraph (2^1), with the following content:

"(2^1) The special limits of the punishment provided for in para. (1) and (2) are increased by one third when:

[8] Decision no. 807/2024 from 23.05.2024, Judecătoria Tulcea, cod RJ 7292g2623 (https://www.rejust.ro/juris/7292g2623), accessed 10.09.2024.

[9] Decision no. 1606/2024 from 22.04.2024, Judecătoria Baia Mare, cod RJ ee7569682 (https://www.rejust.ro/juris/ee7569682), accessed 10.09.2024.

[10] Decision no. 349/2022 din 08.07.2022, Judecătoria Sibiu, cod RJ eeed9g486 (https://www.rejust.ro/juris/eeed9g486), accessed 9.09.2024.

a) the victim is in the care, protection, education, guard or treatment of the perpetrator;
b) the victim is a minor;
c) the act is committed in public;
d) the perpetrator has on him a firearm, an object, a device, a substance or an animal that can endanger the life, health or bodily integrity of persons".

The text of the law above introduces a new aggravated version of each of the previous form, the standard form from art. 193 para. (1) Criminal Code, respectively the aggravated form from art. 193 para. (2). It includes, in the sanctioning register, a case for increasing the penalty limits in the event of the meeting of one or more of the four hypotheses.

Also, the circumstances regard the "aggravated bodily harm", incriminated by art. 194 Criminal Code[11].

In the first case, the victim must be in the care, protection, education, custody or treatment of the perpetrator.

We note some views of the doctrine regarding this circumstance, which is not recent in romanian criminal legal system.

It was stated in an opinion (Udroiu, 2021: 297) that "beeing in care of the perpetrator refers to persons who care for the victim regardless of the form in which they are employed, for example contract of service provision/work or bilateral agreement".

It has also been said (Antoniu, 2015: 219) that "the perpetrator has obligations of care by virtue of the function he performs under the employment contract (for example, care staff in hospitals, sanatoriums, social settlements) or on the basis of a service contract (people employed by individuals) or by virtue of kinship relations, that is, the legal, contractual or moral duty to care for the victim.

[11] "The act provided for in Article 193, which caused any of the following consequences:
a) an infirmity;
b) traumatic injury or damage to a person's health that required more than 90 days of medical care to heal;
c) serious and permanent aesthetic damage;
d) abortion;
e) the endangerment of the person's life is punishable by imprisonment from 2 to 7 years".

Another author showed that "is the question (in the case of aggravations, n.n.) of the rape committed by the tutor, teacher, educator, teacher, doctor, caregiver, guard, guard, on the persons they have in care, protection, supervision, guarding or treatment. Important is that at the time of committing the act to check the dependency of the victim".

It has also been shown (Cioclei, 2016: 187) that "reaction of aggravations is given by the relationship between the offender and the victim, a relationship of dominance, which gives the perpetrator a certain power or influence over the victim. Such situations are based on either some service relationship or some contractual relationship, in which the perpetrator has an obligation to care for the victim".

According to another author (Dobrinoiu, 2016: 165), "victim is in the care of the perpetrator if he was required to provide assistance, such as, for example, health or social care staff (situations, asylum, boarding schools) or persons employed in particular to care for sick or elderly people".

From the reading of the abovementioned doctrine, it follows that essential for determining the incidence of this circumstance is the establishment of a duty of care, legal or contractual. The existence, in certain situations, of a moral duty is also accepted, but it must be based on a certain dependence between the victim and the defendant, on certain relationships established between them, contextual assessment and factual situation, including the ability of the victim to manage the necessary things for the duration during which it is supposed to have been in the care of the accused.

As it can be seen, the aggravation element is specific to crimes against sexual freedom and integrity, but the legislator preferred to adapt it also to crimes against bodily integrity.

However, as the recent doctrine noted (Cioclei, 2023:70), the aggravated variant of the crime of "abusive behavior" [art. 296 par. (2) Criminal Code] will cover practically a series of situations from those covered by the new cause of aggravation, and in other situations, the act will be part of the pattern of domestic violence, provided by art. 199 romanian Criminal Code.

It is therefore difficult to understand the legislator's intention to provide additional protection to victims who previously found benefits under other rules.

We can say that the variant is part of a genuine "overregulation", which did not appear necessary.

Regarding the minor victim, we note, together with other authors, the increased interest of the legislator in the recent period to increase the criminal reaction against crimes that have as victims persons under 18 years old. In comparative law, we note a general aggravating circumstance in the Italian penal code (art. 61-11-quinquies) according to which " aggravates the crime, when there are no constituents or special aggravating circumstances, the following circumstances for offences intended against personal life and integrity, against personal freedom, and the offence referred to in Article 572, have committed the act in the presence or against a minor under 18 or against a pregnant person" (Manna, Ronco, 2017: 213).

As a comparative observation, we remark the legislation in Republika Srpska. When it comes to the Republika Srpska, scholars pointed out that the legal penal policy for the suppression of sexual violence against children and minors was extremely tightened with the adoption of the latest Criminal Code of the Republika Srpska from July 2017. Thus, in the Criminal Code of Republika Srpska, in its special chapter XV separated from criminal offenses against sexual integrity, under the title: "Criminal offenses of sexual abuse and exploitation of a child" (Mitrović, Ikanović, 2024: 185).

The romanian law does not distinguish about the age of the perpetrator, so that even if the offender were himself a minor, we would be subject to aggravating. However, the aggravating may be uneffective, because of the special "educative measures" that are, in romanian legislation, applied to minor offenders.

There was noted that "The protection of dignity and bodily integrity of the child, apart from being closely linked to the right to life and the right to family life, cannot be observed in isolation from the principle of equality of rights. Children, as human beings, also have the right to equal legal protection without discrimination, and this stage in the development of legal thought and legal practice has not been reached immediately and easily, at least when it comes to understanding childhood as a concept and position and rights of children within families. Traditional practices of allowing corporal punishment of a child in the family did not measure physical confrontations with an unknown adult with the same yardstick. The admissibility of corporal punishment of a child and the demand

for the sanctioning of equal treatment of an adult have long and persistently been maintained at both the legislative and practical levels in a large number of democratically governed countries, although the consequences of violation of dignity are unquestionable in both cases" (Vujovic, 2020:79).

Further, according to the new amendments, the offense of bodily injury will be more serious also if committed in public. The term is defined in the General Part of the Criminal Code. According art. 184:

"The act is committed in public when committed:

a) in a place which by its nature or destination is always accessible to the public, even if no person is present;
b) in any other place accessible to the public, if two or more persons are present;
c) in a place not accessible to the public, but with the intention that the act be heard or seen, and if this result occurred against two or more persons;
d) during a meeting of several persons, except for meetings which may be considered to be of a family nature, due to the nature of the relations between the participatins".

Few offenses include among the conditions of place of the objective side committing "in public". We identify in romanian legislation the act of "disorder of public order and tranquility", provided by art. 71 Cr. Code, meaning "the act of the person who, in public, through threats or serious touches to the dignity of persons, disturbs the public order and tranquility", or, in aggravated version, "the act of the person who, in public, through violence committed against persons or goods, disturb the order and tranquility of public", the outrage against public moral (art. 75 Criminal Code), as "the act of the person who, in public, exposes or distributes without right images that explicitly present a sexual activity other than that to which Article 374 refers, as, or commits acts of exhibitionism or other explicit sexual acts", or the offense of art. 438 para. (4), according to which "incitation to commit the crime of genocide, committed directly, committed, in public, it is punishable by imprisonment from 2 to 7 years and prohibition of the exercise of certain rights".

The aggravated version also existed in the anterior Criminal Code, regarding the crime of murder [art. 175 para. (1) letter i) C.pen 1968], the aggravated theft and robbery, but that was abandoned by the legislator later, in 2014.

We think the aggravation hypothesis is useless. Most of the offences provided by art. 193 Cr. Code are committed in public, in the sense of the above-mentioned definition norm. The protection of public order is already provided by art. 371 Criminal Code, so we consider that it was not necessary to establish this aggravated circumstance.

Moreover, as has been observed, a series of confusions will arise, in the sense of absorbing or contrary to the crime against public order in the offense of bodily harm committed in public. After all, we believe that their double apprehension would lead to a double capitalization *in peius* of a single circumstance of place.

According to art. 193 par. (2¹) letter d), the act is more serious if "the perpetrator has a fire weapon, an object, a device, a substance or animal which may endanger the life, health or bodily integrity of persons".

We note that the same aggravated circumstance was introduced in terms of art. 371 Criminal Code.

Apart from these assumptions, we also identify in the Criminal Code other variants of aggravation that involve the detaining of weapons. Dangerous object *per se* and with a strict regime of possession and use, the weapon supposes a greater danger of the one who carries it, by the risk of imminent use. Thus, art. 229 para. (2) Cr. Code more seriously sanctions the theft committed "by a person carrying a weapon", desertion will be sanctioned more severely if the author has a military weapon [art. 414 par. (2) letter b) Cr. Code].

In a comparative approach, we remark (see Nikolic, 2021: 296) the Criminal Code of the Federation of Bosnia and Herzegovina that criminalised more severe forms of extortion, It prescribes the case if weapons or dangerous tools were used in the commission of the basic form of the criminal offence. "This classifying circumstance of extortion, when life and limb of the injured party is endangered by the use of weapons or dangerous tools in the commission of coercion, by using force or threat as a manner of committing extortion, has been criminalised in many other comparative legislations. In addition to classified forms of the offence with regard to the value of acquired property gain and whether they have been committed by a group, the Criminal Code of Republika Srpska incriminates as such the following forms: if, during the commission of the criminal of-

fence, a person was negligently inflicted a bodily injury, if the offence was committed in a dangerous manner - by threatening to directly attack life and limb of a large number of persons, even if the act of commission was undertaken with the use of weapons or dangerous means".

Going back to Romanian legislation, in other cases, the legislator used another normative technique. Kidnapping in the aggravated form is more serious if committed "by an armed person" [(art. 205 para. (3) a) Criminal Code], the same applies to domicile violation [art. 224 para. (2) sentence I Criminal Code] or violation of the professional office [art. 225 para. (2) sentence I Criminal Code] or in the variant of art. 234 para. (1) letter a) of the qualified robbery "by using a weapon or explosive substance, narcotic or paralytic", or, the weapon must be used effectively for the attack.

Under art. 342, the Criminal Code criminalizes "ownership or port of non-lethal weapons in the category of those subject to authorization". Then, it punishes "detaining arms provided in par. (1) and par. (2), without right, in the headquarters of public authorities, public institutions or other legal entities of public interest or in the spaces reserved for the electoral process".

At the same time, art. 372 criminalizes "detaining or the use without the right of dangerous objects", as "the act of wearing without right, at public gatherings, cultural-sporting manifestations, as well as, in specially arranged and authorized places for entertainment or leisure or in public transport:

a) the knife, dagger, box or other such objects manufactured or made specifically for cutting, pricking or striking;
b) non-lethal weapons not subject to authorisation or electrical shock devices;
c) irritant-lacrimogenic or paralyzing substances".

Detaining one of the listed above objects involves only their wearing, even without assuming their use. The primary hypothesis here is that the wearing of these objects generates more boldness to the agent in his violent action.

So, the crime of art. 193 Criminal Code in the qualified form will be retained together with the abovementioned, if the object owned or used will be among the expressly provided. Although not lethal, weapons will represent objects capable of harming. However, this "injurious aptitude" has to be reviewed by the courts, on a case-by-case basis.

If the objects will be used, we will also find ourselves in the situation of aggravating form, because *qui potest plus, potest minus*. If the law deems the possession more serious, it is obvious that it will be serious and their use at harmfull activities. After all, we find that the classic form of the offence will be practically reserved for the violence committed "empty-handed".

The "firearm" is defined by Article 2 item 2 of Law no. 295/2004 on the regime of weapons and ammunition[12], as being "any portable weapon with a pipe that can throw, it is designed to throw or can be converted to throw alice, a bullet or a projectile by the action of a propulsion fuel; it is considered that an object can be transformed to throw a shot, bullet or projectile by the action of a propulsion fuel if it has the appearance of a firearm and, as a result of its construction or the material from which it is made, it can be transformed for this purpose; for the purposes of this law, it, firearms are not included in the definition of firearms in categories D and E of Annex".

Except for the term "firearm", all other items, as has been noted recently, are presented as unclear. According to the new circumstance in discuttion, any object, device, substance or animal may, under certain conditions, endanger the life or bodily integrity of a person, from this perspective the text proving unpredictability and will transform, in, as we have already said, quasi-total type crimes, classic bodily harm or other violence in their qualified forms.

Further, we are surprised by the provision of paragraph 4^1, according to which "in the case of deeds committed under par. (21), the criminal action can be set *ex officio*".

With regard to the minor victim, the provision is a "double" of that of Art. 157 para. (4) Cr. Code, according to which "if the injured person is a person without exercise capacity or with restricted exercise capacity or a legal person who is represented by the perpetrator, or, criminal proceedings may be initiated also *ex officio*". The legislator, by instituting both the "special" norm, intends, we believe, to highlight the possibility of the prosecutor to exercise public action, even in the case of the passivity of the victim of the offence.

[12] Official Gazette no. 425 from 6.10.2014.

With regard to the exercise of *ex officio* criminal action under the assumption in letter a) ("care of the victim"), the norm seems to us justified. However, most of the practical situations are covered by the provisions of art. 199 C.pen (family violence), however, will become the norm of art. 199 para. (2), which stipulates that "in the case of offences provided in art.193 and art. 196 committed on a family member, the criminal action may be initiated also *ex officio*".

In accordance with abovementioned doctrine, we consider that the possibility of *ex officio* criminal proceedings for aggravated forms under letter c) and d) is completely meaningless, representing a manifestation of an authoritarian, even repressive criminal policy, we would say, on some offences where the attitude of the victim should prevail and constitute the rule. Moreover, in case of *ex officio* exercise, reconciliation is not provided, similar to the situation of art. 199 Criminal Code.

4. Conclusions

We notice the legislator's preference to adopt a series of new aggravating circumstances regarding crimes against life and integrity of individuals.

Some of them rightly appear useful and justified, but others can be criticized, because they are find among the general aggravating circumstances and others present questionable predictability.

The research I have undertaken presents a critical view of them. Some of these circumstances are found in the matter of other crimes, such as those against sexual integrity. others concern the age of the victim (minor), and others the increased danger of the aggressor, who uses weapons or other objects.

In our opinion, the amendmens are instituted in a true manifestation of the authoritarian criminal policy, which increases the protection of the bodily integrity and life of individuals, increasing the punishments in these special cases.

So, we conclude the romanian legislator provides an important interest for protection of victims of offences against body integrity.

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Review Paper
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LIFE SENTENCE AND THE RIGHT TO LIFE[**]

In modern criminal legislation, life imprisonment is, after the death penalty, the most severe sanction imposed on persons for the most serious crimes. In the legislation of many countries, it was introduced precisely as a "humane" substitute for the death penalty, because after it, it theoretically assumes the most effective means of special prevention, i.e. preventing a convicted person from repeating criminal acts. On the other hand, many legislations have introduced options that allow convicts to be released, most often in the form of parole, in addition to life imprisonment. In the second half of the 20th century, life imprisonment in many countries, similar to the death penalty, came under the attack of critics who consider it "inhumane" and ineffective, given that life imprisonment by the imposition of that sentence is considered to be permanently expelled from society, i.e. they lose any interest in rehabilitation. In recent decades, international standards in the field of prisoner protection have insisted on creating conditions under which prisoners have access to human rights during the process of execution of the sentence, especially by meeting the requirements for health care of prisoners serving life imprisonment. Those sentenced to life imprisonment have needs and interests as a natural entity, because they are human beings and enjoy natural and objective rights, and the state has the responsibility to ensure such rights, regardless of the extent to which they committed the crime.

Keywords: *life imprisonment, human rights of convicts, international standards, penal legislation*

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1. Introduction

The penalty of deprivation of liberty was introduced into the criminal legislation under the influence of the teachings of the classical school, which advocated the replacement of the death penalty as an inhumane punishment (Igracki, 2020: 17). Carried by the idea of sociological-penological humanism, many countries of the world abolished the death penalty, after which the question remained open, how the state can protect society from the most serious crimes. The answer to this question for the majority of modern criminal legislation was the introduction of life imprisonment (Petrović, Jovašević, 2006: 45). The global position is to abolish and limit the death penalty, and thus in many countries in the world as well as in Europe, life imprisonment has been introduced as the final punishment for the most serious criminals. In Europe, a different criminal policy is being introduced, which is a cornerstone, and emphasis is placed on the absolute prohibition of inhuman and degrading treatment (Jobard, 2017: 12). Prison institutions have a great social responsibility for realizing the purpose and goals of punishing criminals, i.e. the effective execution of pronounced criminal sanctions and crime prevention measures (Igrački, 2019: 395-396).

The situation in the prison system, generally speaking, is very complex: prisons are overcrowded to the limit of endurance, the structure of prisoners is increasingly complex both in the criminological and psychological spheres, the number of drug addicts is increasing, the financial position of both prisons and employees is poor, inadequate personnel potential, unmotivated employees, etc. (Igrački, 2020: 128). The tightening of the penal policy and the application of the repressive concept does not give the expected results in the prevention of crime, on the contrary, crime is increasingly present in the most diverse and brutal forms of manifestation, and the prison population has grown and exceeds 10 million.

The tendency to abolish the death penalty in the second half of the 20th century influenced the increase in the use of life imprisonment. Today, according to available data, about half a million people in the world are serving a life sentence. Life imprisonment is imposed in 183 out of 216 countries and territories, and between 2004 and 2015 there was an increase in the imposition of these sentences by about 84%. Life imprisonment, with the exception of countries where the death penalty is applied, is imposed as the maximum sentence for perpetrators

of the most serious crimes. In different countries, life imprisonment is imposed in different shades: with or without the possibility of parole, depending on the gravity of the crime committed and the social danger of the crime committed, the minimum sentence served, etc. (Igrački, 2021: 264-265). The sentence of deprivation of liberty is imposed for different periods of time, depending on the gravity of the committed criminal act and the degree of social danger. For the most serious crimes and the most dangerous perpetrators of those crimes, all modern criminal legislation provides for: 1) long-term imprisonment (thirty, forty or more years) and 2) life (long-term) imprisonment (Igrački, 2021).

Imposing a life sentence is difficult to reconcile with human dignity, the basic right to life and the right to live without suffering, on the one hand, and on the other hand, the dilemma arises as to how society should respond to inappropriate crimes committed by an individual or a group of people in order to protect the right to the life of the victim and her dignity and integrity. Unfortunately, in reality there are such individuals who are ready to commit incomprehensible crimes against others in a cruel, inhuman and humiliating manner towards the victim. Today, in modern societies, three main goals of punishment stand out: protection of society from criminals, resocialization of criminals and prevention of criminal behavior. Punishment is a consequence of a transgression and a warning to an individual to change his behavior, value system, attitude towards social values. Resocialization is a concept that finds means and methods in order to change the value system and attitude towards social values in criminals. In order to achieve resocialization, it is necessary to individualize the prison sentence, that is, to apply individual prison sentence execution programs, which are implemented in a professional, legal and humane manner with respect for the human rights and dignity of prisoners.

Consequently, international legal standards have strongly developed to ensure that prisoners have access to human rights during the execution process, as well as meeting health care requirements. The CPT[1] briefly addressed the issue of prisoners sentenced to life imprisonment and other prisoners sentenced to long prison terms. More precisely, he expressed his concern that such prisoners are

[1] CPT, 2016. Situation of Life-Sentenced Prisoners. CPT/Inf(2016) 10-par. Extract from the 25th General Report of CPT, from 16 April 2016, https://www.coe.int/en/web/cpt/life-sentenced-prisoners

often not provided with appropriate material conditions, activities and human contact, as well as that they are often exposed to special restrictions that can probably increase the harmful effects of their long stay in prison. As McCorkle states, many prisoners believe that unless a prisoner can credibly project an image that conveys the potential for violence, he is likely to be dominated and exploited during his prison term (McKorkle, 1992: 161). Adjustment to prison is almost always difficult, and behaviors may be dysfunctional during and after adjustment to prison. The psychological effects of imprisonment vary from individual to individual, are often reversible, and the effects that remain are atypical of patterns of life.

The abandonment of rehabilitation also led to the erosion of modest protective norms against cruelty to prisoners. Prison staff soon became far less inclined to deal with prison riots, tensions between prisoner groups and factions, and disciplinary infractions in general, through ameliorative techniques aimed at the root causes of conflict and designed to reduce it. The rapid influx of new prisoners, severe shortages of staff and other resources, as well as the acceptance of an overtly punitive approach to correctional institutions led to the "dequalification" of prison staff who often resorted to extreme forms of prison discipline (such as solitary confinement) that had particularly destructive effects on prisoners and suppressed conflicts before resolving them. The result is increased tensions and higher levels of fear and danger.

Although in recent years more attention has been devoted to the emotional, psychological and physical well-being of prisoners, a prison sentence still means that the offender is in prison, sentenced to a life isolated from the rest of society. Prisoners are an isolated minority subject to oppression and discrimination, not only from "the outside", but also from the strict rules and values of both the authorities and the prison structure and their own codes of silence and loyalty.

2. Life imprisonment in the function of crime prevention

Historically, life imprisonment was equated with the death penalty, and over time it became an alternative punishment for perpetrators of the most serious crimes. The purpose of this substitution, according to the medieval understanding, was not to reduce the sentence of the convicted person, because for perpetrators of criminal acts, life imprisonment with a combination of hard labor and isolation in solitary confinement was considered a less favorable alternative than death itself. There was an argument to retain the death penalty, precisely because life imprisonment with hard labor was a severe punishment that caused more suffering, and was harsher than the death penalty for a convicted person.

In the 1990s, after the ratification of Protocol 6 to the European Convention on Human Rights, which abolished the death penalty, the concept of life imprisonment was adopted. The last execution in a member state of the Council of Europe was carried out in 1997. The death penalty in Serbia was applied from the birth of the modern state in 1804 until 2002, when (February 26) it was abolished by law. The last execution, by firing squad, was carried out on February 14, 1992, and the last death sentences were handed down in 2003. Serbia is bound by the following international conventions that prohibit the death penalty: Second Optional Protocol to the International Covenant on Civil and Political Rights (September 6, 2003) and Protocols no. 6 and 13 of the European Convention on Human Rights (March 3, 2004). According to Art. 24 of the current Constitution (2006). The Constitution of the Federal Republic of Yugoslavia (which consisted only of Serbia and Montenegro) of April 26, 1992 abolished the death penalty for crimes prescribed by federal laws (genocide, war crimes, political and military crimes, etc.), but the federal units retained the right to prescribe the death penalty for acts within their jurisdiction (murder and robbery). Since 2013, Europe has been a legal zone where there is no death penalty (with the exception of Belarus, as a moratorium has been introduced in the Russian Federation).

With the acceptance of the protocol of the European Commission, the death penalty was abolished in the area of the Council of Europe, and the member states began to prescribe the sentence of life imprisonment. Today, it is foreseen in the legislation of all member states of the Council of Europe except Portugal

(Maculan, Ronco, Vianello, 2013). Hence the importance of Recommendation SE (2003)23[2] on the behavior of the prison administration with regard to life sentences and other prison sentences (Rec (2003)23). The recommendation has three general goals: 1) to ensure the security of prison stay for convicts, employees and visitors, 2) to prevent the harmful consequences of long-term or lifelong imprisonment and 3) to increase and improve the possibility of successful inclusion into the society of those sentenced to long-term or life sentences. The prohibition of torture and inhuman or degrading treatment or punishment undoubtedly derives from all major international human rights instruments. Unlike the death penalty, which is undesirable and has already been abolished in the member states of the Council of Europe and the European Union, life imprisonment.

Based on par. 4 a Recommendations of the SE on conditional release from 2003 (Rec (2003) 22[3] on conditional release) stipulates the general principle that, in order to reduce the harmful consequences of deprivation of liberty for the convicted and to enable the progress of the convicted in the treatment, provided that safety is ensured community, the law should provide for the availability of parole for all prisoners, including those sentenced to life imprisonment.

In the 1990s, a prison term of 20 to 35 years was established as a comprehensive minimum for all commuted sentences and new life sentences, without considering individual factors until the end of this period. In some countries, solutions have not been found for prisoners sentenced to life imprisonment tailored to their individual circumstances. All convicted prisoners represented a potential danger, which is why their constant strict control was necessary. After 20 to 25 years, as some prisoners begin to approach the time when they will be able to apply for parole, it is believed that little has been done to give such prisoners

[2] Rec(2003)23. Recommendation of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers' Deputies. Dostupno na: https://pjp-eu.coe.int/documents/41781569/42171329/CMRec+%282003%29+23+on+the+management+of+life+sentence+and+other+long+term+prisoners.pdf/bb16b837-7a88-4b12-b9e8-803c734a6117 .

[3] Rec(2003)22. Recommendation of the Committee of Ministers to member states on conditional release (parole) (Adopted by the Committee of Ministers on 24 September 2003 at the 853*rd* meeting of the Ministers' Deputies) https:// rm.coe.int/16800ccb5d.

realistic hope of reintegration into the community. Long periods of negative treatment in prison, which severely limited the right to maintain relationships with family and friends, as well as the overall lack of release preparation or reintegration planning are likely to seriously reduce the opportunities for prisoners to function in the community. The individualization of the execution of the sentence must enable the progressive progress of the convicted in the execution in order to prepare for life in freedom and to be included in society. The condition is, the prognosis that he does not pose a danger to society and that he will not commit criminal acts (par. 10). Also, in par. 16 Rec(2003)3 emphasizes that risk assessments, needs and opportunities of convicted persons should be periodically corrected in order to achieve the purpose of punishment, because the danger of the convicted person and his criminogenic needs are not constant characteristics. Teaching convicts socially acceptable behavior, through the methods of studying the personality of convicted persons and classification of persons, aims to build and create social responsibility in convicted persons in order to reintegrate them into society as its useful member (Mlađenović-Kupčević, 1972: 133-145)

In Europe, the countries that abolished life imprisonment were Spain, Serbia, Croatia, Bosnia, Portugal; of which only Portugal stipulates that the maximum sentence is 25 years, the other countries are 40 years; in Austria, life imprisonment means that the prisoner must be imprisoned until he or she dies. However, essentially around 15 years after conviction, a person can be released after posting bail and undertaking not to continue to break the law. In Belgium, life sentences are automatically commuted to 30 years, and after a convict has served about a third of that time, he can be considered for release; In Norway, life imprisonment is limited to 21 years. In fact, after serving two-thirds of the sentence, I can be pardoned. In Africa, the Republic of Congo is, also, abolished the sentence of life imprisonment and the maximum limit of the sentence is up to 30 years of imprisonment; In South and Central America, Honduras, Nicaragua, El Salvador, Costa Rica, Colombia and Venezuela have abolished life sentences, and the maximum prison sentence in Honduras is 40 years, while in Costa Rica it is 50 years, and in Colombia it is 60 years. Most countries with life imprisonment do not impose this type of sentence on juvenile offenders. For those sentenced to life imprisonment, the sentence represents a real challenge, especially in the psychological sense. Research conducted by Crewe, Hulley and Wright

(2019: 1-2)[4] comparing young people sentenced to short and long sentences shows that those sentenced to shorter sentences should be helped the most, especially if they are in prison for the first time, because they are in a state of shock for the first time. years, while with a longer stay in prison they somehow mature as individuals, make peace with fate, get used to life in prison and search for the meaning of life.

Prisons are places that are a unique environment, but within the framework of ordinary human experience, therefore its effects are as varied as the effects of any major life change on different groups of people. Some prisoners sink into depression and hopelessness, while others feel comfortable, contented or even happy, although most fall somewhere in between, managing from day to day and minute to minute, and surviving intact more or less.

It should be noted that a number of member states of the Council of Europe do not have a life sentence in their Constitution. Instead, for the most serious crimes, they have defined long sentences that usually range from 20 to 40 years. Based on a sample from 22 countries in relation to which relevant data is available for a longer period of time, the number of prisoners sentenced to life imprisonment increased by 66% 5 from 2004 to 2014. According to the report,6 in some countries prisoners sentenced to life imprisonment were locked in their cells (alone or in pairs) 23 hours a day, they were not allowed to come into contact with others, even with prisoners sentenced to life imprisonment from other cells (including during outdoor exercise), they were not allowed to work outside their cell and were not offered any purposeful activities. Also, in several countries, prisoners sentenced to life imprisonment were systematically handcuffed and/or strip-searched whenever they left their cells. In some institutions, the mentioned prisoners were additionally accompanied by two prison officers with a dog during any movement outside the cells. Since 2000, the number of people sentenced to life imprisonment has almost doubled. Currently, it is estimated that, in the world,

[4] The survey included 313 respondents, 294 men, 19 women with a total response rate of 69% and 147 qualitative interviews were conducted (126 men and 21 women), along with field work undertaken during 2013-2015.

[5] Situation of prisoners sentenced to life imprisonment Extract from the 25th General Report, published in 2016, https://rm.coe.int/16808ef55c

[6] Ibid.

around 536,000 convicts have been sentenced to life imprisonment.7 There are 162,000 in the United States alone convicts serving life imprisonment.[8] For every 100,000 inhabitants, 50 convicts were sentenced to life imprisonment, including a large number of minors. There are known cases where several life sentences are given for multiple murders, which means that getting out of prison "in this life" is not possible. In America, in the period from 1992 to 2016, the number of life sentences imposed increased by 328%. It is characteristic for America that life imprisonment is also imposed on minors and that there are currently around 2,300 persons who have been sentenced to life imprisonment as minors. In particular, the number of life sentences imposed in South Africa increased enormously by as much as 818%. There are 1,831 people[9] (1,720 men and 111 women) serving life sentences in Germany, and this sentence, as in most countries, has assumed the role of the death penalty.

An empirical study of the consequences of long-term incarceration conducted in Canada (John Howard Society of Alberta, 1999: 16) shows that convicts who have been in prison for a long time have developed some way of coping with the experience, while under the stress of being sentenced to long terms, newly accepted for the execution of the sentence. It depends on the structure of the personality whether they will leave the prison rehabilitated, become permanently unable to live independently or angry with society and eager for revenge (John Howard Society of Alberta, 1999: 15). Research data indicate that, at the end of 2010, before this study began, there were over 2,300 prisoners serving an indeterminate sentence of at least 15 years, and in the previous decade, the number of offenders with a sentence (i.e. minimum term) of 15 years or more increased by 240%. [10] Between 2003-2012, the average life sentence for murder rose from 12.5

[7] This number also includes convicts who have multiple life sentences and very high sentences that, realistically, do not allow them to get out of prison.

[8] https://qz.com/974658 / life-prison-sentences-are-far-more-common-in-the-us-than-anywhere-else/

[9] According to data from March 2017

[10] Information obtained from Ministry of Justice, by Susannah Hulley, Freedom of Information request FOI/68152, December 2010.

years to 21.1 years,[11] in large part due to changes in sentencing frameworks resulting from the Criminal Justice Act 2003.[12] Many of these long sentences are handed down to young people: at the end of 2010, for example, 319 of the 2,300 prisoners serving prison terms sentenced to at least 15 years were between the ages of eighteen and twenty.[13] More recent data shows that at the end of December 2018, there were 9,572 prisoners, including 3,624 with life sentences of 10-20 years, and 1,862 with sentences of more than twenty years (including life sentences).[14]

In Canada, life imprisonment is imposed for multiple forms of murder, high treason, piracy, hijacking an aircraft, endangering an aircraft or airport, taking control of a ship by force, or platform, illegal handling of explosive and radioactive substances that lead to serious consequences, various terrorist activities, and other criminal acts. Life imprisonment exists in several European countries. The Criminal Code of the Russian Federation stipulates that for an attack on the life of a statesman or public figure, imprisonment for up to 20 years, life imprisonment, or the death penalty can be imposed. The French Penal Code prescribes this punishment for several crimes against international law, special forms of murder, torture and barbarism, serious forms of rape, drug trafficking, hijacking of an aircraft, ship or other means of mass transportation of people, blackmail committed by an organized group and other serious criminal acts. As a rule, life imprisonment is prescribed as the only punishment, without the application of secondary punishments, the imposition of other obligations on the convicted person and without a special regime of execution. There are legislations that represent an exception in this sense as well. Thus, the Criminal Code of the Republic of Turkey from 2016 prescribes two types of this punishment. The first is the

[11]Information obtained from Ministry of Justice by Jonathan Bild, Faculty of Law, University of Cambridge: Freedom of Information request FOI/89346.

[12] The Criminal Justice Act 2003 introduced a statutory minimum tariff of 15 years for murder for all cases where the date of offence is on or after 18 Dec 2003.

[13] Information obtained from Ministry of Justice, by Susannah Hulley: Freedom of Information request FOI/68520/10, January 2011.

[14] Ministry of Justice (2019) Offender management statistics quarterly: July to September 2018. Ministry of Justice.
https://www.gov.uk/government/statistics/offender-management-statisticsquarterly-july-to-september-2018

"classic" sentence of life imprisonment, which lasts until the biological death of the condemned. The second is called a severe sentence of life imprisonment, it also lasts until the biological death of the convicted, but is carried out under strict measures of the security regime, which are defined by law and other regulations. This means that he cannot be pardoned or amnestied, he serves his sentence in solitary confinement, and the right to visit and communicate is reduced to a minimum. No species is as destructive as human aggression and violence, which is present in all stages of the development of human civilization, and there is a constant social activity to reduce this human aggression and violence, both towards others and towards oneself (Igrački, 2019: 147).

Amendments to the Criminal Code of the Republic of Serbia (CC RS, 2005) in 2019 changed the existing punishment system by introducing life imprisonment instead of 30 to 40 years in prison. Not only were the changes made ad hoc, but the proposal of the commission for the drafting of the law was corrected by amendments in the adoption process in such a way that the right to parole was excluded for those sentenced to life imprisonment for aggravated murder and the most serious crimes of rape, assault on with a weak face, they cheat with the child and cheat by abusing their position. However, if someone is sentenced to life imprisonment for the crime of genocide or for killing people as a terrorist, he could be released on parole after 27 years if he meets other legal requirements. Certainty of life imprisonment should be ensured by the unconstitutional provision 1 of Art. 108 of the Criminal Code of RS, which stipulates that criminal prosecution and execution of the sentence shall not become statute-barred for all criminal offenses for which the penalty of life imprisonment is prescribed. Against the introduction of the sentence of life imprisonment in the criminal justice system of the Republic of Serbia, the fact remains that the imposition of this sentence in the future will lead to an increase in the number of elderly persons in institutions for the execution of criminal sanctions. One of the reasons for age discrimination is age within one's own framework. The manifestation of old age today is mainly reflected in the negative social representations of these people, presented as a homogeneous social group in terms of lifestyle and as the embodiment of "problematic" old age, inevitably deficient, dependent or even demented (Igrački, 2023: 472-474). Within the prison population, there are additional differences and needs, physical, psychological and mental abilities of older

convicts. Therefore, older prisoners often represent a group that is additionally threatened in the prison institution (Jovanić, Ilijić, 2015). In Serbia, official statistics show that convicted persons over the age of 50 accounted for 14.7% of the total number of convicted persons accepted to serve a sentence in 1999, 18.8% in 2006, 19.1% in 2015 and 20.1% in 2020, which represents an empirical increase in their percentage representation.[15]

Older prisoners have become the fastest growing age group in prison (Doron, Love, 2013; Forsyth et al., 2015; Wilkinson, Caulfield, 2020; B. A. Williams et al., 2012). In the US, the number of elderly prisoners increased by 181% between 2000 and 2010, in contrast to the total prison population, which increased by only 17%.[16] As presented, 19% of the current US prison population is over 50 years of age (Wilkinson, Caulfield, 2020). In Australia, the number of prisoners over the age of 50 increased by 37% between 2000 and 2010, with the largest increase among the over 65s whose proportion increased by 142%, in contrast to a 36% increase in the general prison population (Baidavi et al., 2011).

According to previous studies, the prison environment has been rated as harmful to the health of detainees. Poor health normally thrives in an environment of poverty, conflict, discrimination and apathy, and prison is an environment that concentrates precisely these difficulties. At the same time, prisoners serving a life sentence still have natural needs and interests as a natural entity because they are human beings and enjoy natural, inherent and objective rights. A whole series of international provisions and legal acts is necessary[17] which regulate the standardization of living and working conditions in prison, maintenance of hygiene needs, nutrition and health care, and work and educational training (Pavlović, 2020, p. 54). Ensuring minimum conditions for those serving short prison sentences, as well as for convicts serving life sentences, is a particularly mandatory requirement under both national and international law. Respect for human dignity is a basic principle, which is mostly mentioned in important international documents

[15] Statistical Office of the Republic of Serbia, 2004, 2011, 2016, 2022

[16] Bureau of Justice Statistics, 2011

[17] 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.

since the Second World War (Obradović, 2020). Accordingly, vocational training, education and recreation should be the focal point of treatment programs that will contribute to reducing recidivism rates. However, the social, educational and recreational programs of prisoners are suitable for younger people (Milićević, Ilijić, 2022). All prisoners should be guaranteed humane, dignified and professional imprisonment for all ages, while rehabilitation, education and recreation programs should be adapted according to individual characteristics, such as physical condition, disability, mental status or risk to everyone (Doron, Love, 2013).

Many prisons are dangerous places from which there is no way out or escape, inmates are irritable and always alert and ready for signs of threat or personal risk. The criminal infection is increasingly pronounced, the formal system is increasingly weak and ineffective, which calls into question the realization of the basic functions of prisons (Stevanović, Igrački, 2011: 411-415). The effectiveness of imprisonment is measured by the recidivism rate, and research shows that it is high. Recently, more and more doubts have been raised the positive effects of prison sentences and institutional resocialization of delinquents, because the results so far indicate that most forms of treatment applied in the resocialization process have not met expectations (Igrački, 2019: 393-395).

It depends on the structure of the personality whether they will leave prison rehabilitated, become permanently unable to live independently or angry with society and eager for revenge (John Howard Society of Alberta, 1999, p. 15). However, recent studies suggest that not only is this deterministic premise too simplistic, but that the methodology employed in many studies has yielded little corroborating, empirical evidence.

Today, there is a widespread understanding that special prevention, and not only that which starts from the idea of resocialization, cannot make a serious contribution to the realization of the protective function of criminal law. This does not diminish the importance of the application of criminal sanctions for the realization of the protective function of criminal law, but not so much for special reasons as for general prevention. Special prevention can have an advantage only in relation to a narrow circle of perpetrators on whom, due to their psychological defects or other reasons, the threat of punishment cannot work, and where other criminal sanctions should be applied independently or in addition to the punishment (Stojanović, 2011: 3-25). In addition to other questions about the role of

general prevention, there is also the question of the legitimacy of the function of general prevention, which consists in intimidation with the threat of punishment. The objection of retributivist theories to general prevention is well known, that no one can serve as a means to intimidate others, that is, that a person cannot serve as a means to achieve utilitarian goals, that he and his goods cannot be sacrificed regardless of what social benefit is achieved. It is widely known that this view originates from Kant and Hegel. Can Kant's attitude cast doubt on the legitimacy of general prevention, which should be achieved through prescribed, threatened punishment? A threat directed at potential perpetrators does not serve anyone to intimidate others, nor is it an instrument for achieving goals outside of the one to whom the threat refers, so Kant's argument can only apply to the application of punishment. If someone is punished only to influence others not to commit criminal acts, then it is an unjust punishment that cannot be justified by utilitarian goals. However, this would be the case only in the case of punishing an innocent person (a hypothetical example that is often encountered in the philosophical literature in the field of the ethics of punishment), or if someone would be punished more severely than what he deserves, i.e. with a more severe punishment than the one required by the degree of his guilt and the gravity of the committed act. Someone is not punished because of others, but because of his actions, because the threat that was addressed to him would be realized (Stojanović, 2011: 3-25).[18]

The conditions of detention and treatment of prisoners serving life sentences are often worse than those of other prisoners and are more likely to fall below international human rights standards. Life imprisonment, especially in prison without the possibility of parole, contributes to the overuse of prisons, a phenomenon based on the belief that prisons are society's only mechanism for crime and social control problems. Prisoners sentenced to life imprisonment should have the same rights as other categories of prisoners, and should comply with United Nations (UN) Human Rights standards, including the Standard Minimum Rules for the Treatment of Prisoners. Prisoners sentenced to life imprisonment should have access to as complete an activity regime as possible, and with

[18] Recommendation of the Committee of Ministers of the Council of Europe, https://www.npm.rs/attachments/Kompilacija%20dokumenata%20SE-zatvori.pdf

other prisoners under normal circumstances. Convicts should engage in some of the activities that prison has to offer, such as work, education, sports, cultural activities and hobbies, which are crucial in promoting social and mental well-being and providing transferable skills that will be useful during the prison term, but also after that. The involvement of prisoners in these activities, in addition to their participation in interventions against criminal behavior, is an important factor in the ongoing assessment of each person's performance. They allow staff of all categories to better understand prisoners and make informed decisions about when it would be appropriate for a prisoner to progress through the regime and be provided with less secure conditions. The possibility of such advancement is of fundamental importance for the prison administration and for the prisoner. It motivates and rewards the inmate, providing stages in the process, in their otherwise undefined world, and provides a deeper relationship between the assessment staff and the inmate, which contributes to dynamic security.[19]

The ECtHR[20] considers that life imprisonment is not prohibited and necessarily incompatible with Article 3 of the Convention. A life sentence can remain compatible with Article 3 of the Convention only if there is both the possibility of release and the possibility of review, both of which must exist from the time the sentence is imposed. The life sentence must de iure and de facto be reduced through such a view, which should entail either executive giving reasons or judicial review, so as to avoid even the appearance of arbitrariness. Access to judicial review whether the conditions and reasons (not) for release must be determined in advance, objective and known to prisoners. Those reasons and conditions should be based on legitimate penological grounds, and the audit procedure itself should be accompanied by sufficient procedural guarantees. Since the penological bases of life imprisonment vary over time / do not necessarily exist all the time, the review procedure should ensure a periodic check of their existence, starting no later than 25 years after the deprivation of liberty. Given this, prisoners cannot be denied the possibility of rehabilitation, and therefore the state

[19] CPT, 2016. Situation of Life-Sentenced Prisoners. CPT/Inf(2016) 10-par. Extract from the 25th General Report of CPT, from 16. 4. 2016., https://www.coe.int/en/web/cpt/life-sentenced-prisoners

[20] Evropske konvencija za zaštitu ljudskih prava i osnovnih sloboda, ("Sl. list SCG - Međunarodni ugovori", br. 9/2003, 5/2005 i 7/2005 - ispr. i "Sl. glasnik RS - Međunarodni ugovori", br. 12/2010 i 10/2015)

has a positive the obligation to ensure a prison regime for life prisoners that is compatible with the goal of rehabilitation.

3. Imprisonment for life in Serbia

The area of enforcement of criminal sanctions represents an extremely important but also delicate phase in the process of crime control and prevention. Upon sentencing, the perpetrator of the crime is deprived of certain assets. Those goods must be significant enough (life, freedom, property) for the perpetrator and potential perpetrators to understand the extent to which society condemns the crime committed (Ignjatović, 2000: 251). The purpose of punishment is reflected in: 1) preventing the perpetrator from committing criminal acts and influencing him not to commit criminal acts in the future; 2) influencing others not to commit criminal acts; 3) expressing social condemnation for a criminal act, strengthening morale and strengthening the obligation to obey the law; 4) achieving fairness and proportionality between the committed act and the severity of the criminal sanction (Article 42 CC). The way of reacting to crime depends on several factors and changes and adapts to certain social, social, psychological and other circumstances (Igrački, 2019: 394-396).

Today, there is a dual approach to sentencing, whereby severe punishments are provided for criminals who are labeled as dangerous to society, while milder short-term punishments or alternative sanctions are applied to lighter criminals, as well as the process of restorative justice. If we look at the prison sentence as the most severe punishment and its effectiveness through the recidivism of convicts, we can conclude that the effectiveness of the prison sentence is controversial. Namely, the recidivism rate in Serbia is around 60%, and on a global level it is over 60%. We can conclude that individual prevention showed modest results. When it comes to the retributive purpose of punishment, it should be borne in mind that the realization of justice and proportionality of the committed act and the severity of the criminal sanction, which represents a peculiar type of retribution, as the purpose of punishment, is prescribed when the punishment of life

imprisonment is also introduced[21] The idea of accepting the philosophy of retribution, with our legislator, which is based on the belief that the punishment must be revenge for the damage caused to others, is in accordance with the attitude and belief of the public and political structures of many countries, where, as in our country, in recent decades, became the ruling understanding, with a decreasing orientation towards rehabilitation (Stevanović, 2016: 429).

When we talk about persons who have been sentenced to life imprisonment, for crimes for which it is not possible to be paroled, the request for repeating the criminal proceedings is particularly significant, which, in addition to other reasons for repeating the proceedings, also prescribes the case if new facts are presented or new ones are submitted evidence that was not present when the prison sentence was imposed or the court did not know about it even though it existed, and it would obviously lead to a milder criminal sanction (Article 473 paragraph 1 point 6 of the CPC)[22] When we say new facts, we mean the penological reasons, which the advocates of parole emphasize and bring to the fore, when they advocate the possibility of parole for a sentence of life imprisonment, it can be stated that this idea can also be realized through this extraordinary legal remedy.[23]

The first life sentence, first degree, in Serbia was pronounced on January 5, 2021.[24]

Criminal legislation of Serbia in 2019[25] a sentence of life imprisonment was introduced to a prison term of 30 to 40 years. New legal solutions in the criminal legislation of Serbia are being introduced for the most serious crimes. Life imprisonment for aggravated murder, rape, sexual intercourse with a minor, a pregnant woman and a helpless person was foreseen, and it was launched by

[21] Criminal Code Official Gazette of the RS, number 35/19.

[22] Criminal Procedure Law, "Sl. Gazette of the RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.

[23] Ibid.

[24] Sentenced for kidnapping and molesting a twelve-year-old girl.

[25] Law on Amendments to the Criminal Code, Official Gazette of the Republic of Serbia, No. 35/2019, in use

since December 2019.
https://www.paragraf.rs/izmene_i_dopune/210519-zakon-o-izmenama-i-dopunamazakonika-o-krivicnom-postupku.html

the "Tijana Jurić" Foundation in 2017 and was signed by almost 160,000 people. Life imprisonment has been extended to all other crimes punishable by a sentence of 30 to 40 years, such as the murder of a representative of the highest state authorities, a serious crime against the constitutional order and security of Serbia, conspiracy to commit a crime, genocide, crimes against humanity, war crimes against civilians and other serious crimes. The legislator provided for the possibility of parole for those sentenced to life imprisonment after serving 27 years of the sentence, except for the five most serious and brutal crimes (felony murder, rape resulting in death, sexual intercourse with a helpless person with fatal outcome, sexual intercourse with a child with fatal outcome and adultery abuse of position with fatal outcome). The court will not be able to impose a sentence of life imprisonment for those who committed a crime at the time when they were under 21 years of age, as well as in situations where there is a possibility of mitigation or even exemption from the sentence (exceeding the limits of necessary defense, significantly reduced mental capacity, etc.).

In the past five years, 69 first-instance verdicts were handed down in Belgrade for brutal murders, more specifically for the criminal offense of aggravated murder, among which the largest number of defendants were sentenced to maximum prison sentences or prison sentences close to the maximum. From the total number of convicts for that crime, from 2018 to 2023, the High Court in Belgrade sentenced 36 people to, until recently, the highest possible prison sentence of 30 to 40 years. It has been in Serbia since 2019, when it was introduced life imprisonment, eight such sentences were imposed for the most serious crimes, mostly for brutal murders and rapes. Of the eight verdicts handed down, three are final, while the fourth one was served by Ninoslav Jovanović, better known as the Barber of Malčan, who died in prison last year. Jovanović, otherwise a multiple returnee, was sentenced to life imprisonment for the kidnapping and abuse of a twelve-year-old girl.

4. Conclusion

Encouraged by the ideas of sociological-penological humanism, many countries of the world abolished the death penalty, after which the question remained open as to how the state can protect society from the most serious crimes. The answer to this question for most modern criminal legislations was the introduction of life imprisonment. With the introduction of life imprisonment and the abolition of the death penalty in all but a few criminal laws around the world, prison is a humane response to serious crimes. Although, a long period in prison imposes psychological effects on prisoners that can be cruel as well as physical torture. Long periods in prison seem to have very different effects on the individual reactions of prisoners: some leave prison rehabilitated, others leave dependent and unable to lead productive lives in the community, and a few leave angry and full of revenge. Policy makers must create new ways of managing long-sentence prisons so that these offenders are not returned to the community in a worse state, physically and mentally, than when they entered. Reintegration of offenders is necessary to ensure that offenders can be productive after release. They must also be taught how to live productive lives as law-abiding citizens so that they can reintegrate into society without jeopardizing community safety. These goals can be achieved, but to do so, policymakers must prioritize rehabilitation over retribution and punishment.

There is no doubt that there are life-sentenced prisoners in prisons who are very dangerous. However, the approach should be the same as for other sentenced prisoners, and it includes: detailed assessments of the individual situation of the mentioned prisoners; risk management with plans to address the needs of individuals and reduce the likelihood of reoffending in the long term, while providing the necessary level of protection to others; regular audits of security measures. The goal, as with all dangerous prisoners, should be to reduce the level of danger through appropriate interventions and return the prisoner to normal circulation as soon as possible.

It is necessary to do everything necessary to ensure that those sentenced to life imprisonment have a regime tailored to their needs and to help them reduce the level of risk they pose, to minimize the harm that indeterminate sentences necessarily cause, and to enable prisoners to have contact with the outside world.,

to be offered the option of release into the community on license and to ensure that release can be safely granted, at least in the vast majority of cases. This can be done by introducing a procedure that allows the revision of the sentence. This indicates precisely that it is not enough to have a formal opportunity to submit a request for release after a certain period, but that this opportunity should be realistic and effective.

Research conducted in Europe and Canada indicates that it is necessary to help those sentenced to shorter prison sentences if they are in prison for the first time, because they are in a state of shock in the first years. while with a longer stay in prison they somehow mature as individuals, make peace with fate, get used to life in prison and search for the meaning of life. It depends on the structure of the personality whether they will leave the prison rehabilitated, become permanently unable to live independently or angry with society and eager for revenge.

The development of penal policies in Europe speaks of the growing importance of the reintegration of convicts into society after serving long sentences, which is supported by a "system of progression": the convict should move progressively through the penitentiary system, from the early days of the sentence, when the emphasis is on his punishment and retribution, until the last stage, when the emphasis should be on his preparation for release., it is necessary to make every possible effort to provide prisoners sentenced to life imprisonment with a regime adapted to their needs and to help them reduce the level of risk they pose, to minimize the harm that indeterminate sentences necessarily cause, to enable prisoners to have contact with the outside world, to be offered the possibility of release into the community under certain conditions, and to enable the approval of requests for release based on reliable criteria, at least in the vast majority of cases. For this purpose, it is necessary to introduce procedures that allow the review of the sentence. The results of criminological research have so far never confirmed the hypothesis that harsher punishment has a significant effect on general prevention.

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United Nations Standard Minimum Rules for the Treatment of Prisoners (Mendelian Rules).

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Review Paper
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MERCY KILLING IN LEGISLATION AND JUDICIAL PRACTICE

The right to life and bodily integrity is the most important human right. In the criminal legislation of the Republic of Serbia, deprivation of life out of compassion (mercy killing), at the express and serious request of an adult person suffering a terminal health condition, is a form of "privileged" murder (homicide) which is punishable by a term of imprisonment ranging from six months to five years. Euthanasia is a serious legal and criminological problem. Although there are numerous reasons for decriminalization of mercy killing, in the analysis of this criminal offence the authors start from the elements of this crime, provided in Article 117 of the Criminal Code of the Republic of Serbia. In addition to the criminal-law analysis of this criminal offense, the authors also examine the available judicial practice, presenting and analyzing the decisions of competent courts in cases involving this criminal offense. The paper aims is to draw attention to the complexity of the criminal act of mercy killing, taking into account its legal, social and ethical characteristics.

***Keywords**: mercy killing, euthanasia, criminal law, judicial practice.*

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1. Introduction

Etymologically, the word *euthanasia* derives from Greek words (*εὖ*/eu meaning 'good' and θάνατος/thanatos meaning 'death'), literally meaning "good death", or gentle or easy death (Etymology Dictionary, 2024).[1] It refers to painless death aimed at eliminating pain and suffering (Vujaklija, 1986, p. 305), i.e. an act of causing a painless death to a chronically or terminally ill individuals "suffering from painful and incurable disease or incapacitating physical disorder, or allowing them to die by withholding treatment or withdrawing artificial life-support measures" (Britannica, 2024).[2]

Although it may be concluded from the etymological meaning that taking a life out of compassion is a humane act, it is not so from the perspective of substantive criminal law. Namely, mercy killing was legally sactioned in the past[3] and, in the criminal legislations of most modern countries, it is envisaged as a "privileged" form of murder (homicide) which is sanctioned by a milder punishment. The "privilege" of this form of murder refers to the fact that an adult is deprived of life out of compassion, due to the serious health condition and at such person's explicit and serious request (Stojanović, 2024, p. 477).

The right to life and bodily integrity is the most important human right explicitly guranteed in both national and international laws. On the other hand, the right to die or the right to a dignified death, which entails allowing terminally ill patients diagnosed with incurable diseases or conditions to choose when an how they die, is still a highly controversial issue which raises numerous moral, ethical, social, medical and legal concerns. In this context, euthanasia (mercy killing or deprivation of one's life out of compassion) is a serious legal and criminological problem. Although there are numerous reasons for decriminalization of euthanasia, the authors' analysis of this controversial issue will start from the legal provision on the criminal offence of mercy killing envisaged in Article 117

[1] Etymology Dictionary (2024).Euthanasia, in*: Online Ethymology Dictionary*, https://www.etymonline.com/search?q=euthanasia

[2] Britannica (2024). Euthanasia , in: *Encyclodaedia Britannica* (online), last updared 24.Aug. 2024; https://www.britannica.com/topic/euthanasia

[3] The term "legally sanctioned mercy killing" was recorded in English by 1869 (Etymology Dictionary, 2024).

of the Criminal Code of the Republic of Serbia.[4] In addition to the criminal-law analysis of this criminal offense, the authors will explore the available judicial practice, and present and analyze the decisions of the competent courts in cases involving the criminal act of mercy killing. The paper aims to draw attention to the complexity of the mercy killing, taking into account the legal, social and ethical characteristics of this criminal act.

2. Criminal-law characteristics of the criminal offence of Mercy Killing in the Republic of Serbia

Pursuant to Article 117 of the Criminal Code of the Republic of Serbia (hereinafter: the CC RS), the criminal offence of mercy killing is a criminal act which is committed by a person who takes life or causes death of an adult person out of compassion due to a serious health condition and at an explicit and serious request of such person; the offender shall be punished by a term of imprisonment ranging from six months to five years. Thus, mercy killing is a priviledged form of murder (homicide) which exists only if certain legal requirements have been fullfilled. For this criminal offence to exist, the following conditions must be cumulatively met: 1) the person in question is an adult; 2) the person was deprived of life out of compassion due to the person's serious health condition; and 3) the act was performed at the explicit and serious request of that person (Lazarević, 2006, p. 358)

The passive subject must be an adult person in "a serious health condition". This medical criterion is fulfilled when the adult is in such a severe or terminal health condition that there is no possibility of curing that person, and which will almost certainly result in death. In terms of criminal law, the key requirement is that the passive subject (victim) has been exposed to severe physical or mental pain and suffering due to his/her terminal health condition. The intention of the perpetrator is to "end the torments" of the victim by taking his/her life (as an act of mercy). If this condition is not met, the crime is not regarded as mercy killing

[4] The Criminal Code of the Republic of Serbia (Krivični zakonik Republike Srbije), *Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005- corr., 107/2005- corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, and 35/2019; https://www.mpravde.gov.rs/files/Criminal%20%20%20Code_2019.pdf

(a priviledged form of murder or homicide) but as a crime of murder or aggravated murder (Lazarević, 2006, p. 359). The object of protection in this criminal offense is the life of an adult person. As for the perpetrator, the key legal requirement is intent (Jovašević, 2006, p. 274). The next important requirement that must be fulfilled in order for this criminal offense to exist is that the deprivation of life is carried out at the explicit and serious request of a person who is in a severe and terminal health condition. The request may be expressed in writing, orally, or in some other form, but it must be clearly revealed, articulated, and given without coercion, threat or delusion (Jovašević, 2006, p. 32).

As the Serbian legislator did not define the criminal act of comission of this crime, for the purpose of further analysis, we should refer to different types and forms of euthanasia. In literature, there is a general distinction between active euthanasia and passive euthanasia. *Active (direct) euthanasia* is the taking of a patient's life by a doctor acting at the express request of a patient strongly affected by the subjective feeling of unbearable and hopeless suffering (Banović, Turanjanin, Ćorović, 2018, p. 275). Active euthanasia entails an active participation of the doctor in the process of taking the patient's life.[5] *Passive (indirect) euthanasia* entails the absence of action and "letting the person die out of mercy"; thus, the consequence of the act occurs due to inactivity (Rešetar, 2017, p. 110), i.e. omission or failure to act. Under the Serbian criminal law, the offender is punishable both in case of active (direct) and passive (indirect) eutanasia because the Serbian legislator does not recognize "the consent of the injured party as a basis for excluding illegality." (Đurđević, 2020, p. 262). Thus, it seems that illegality is not excluded no matter how the doctor acts; the only question is whether it will be qualified as criminal or misdemeanor liability. We may assume that the doctor would choose the "lesser evil" and continue to treat the patient (Đurđević, 2020, p. 262-263).

In literature, we encounter different forms of euthanasia: voluntary and involuntary euthanasia assisted death or suicide, medically or physician-assisted

[5] Yet, active euthanasia can be direct and indirect. *Direct active eutanasia* implies the termination of one's life by administering a medical therapy or a lethal injection with the intention to sedate the terminally ill patient, stop the pain and end one's life. *Indirect active euthanas*ia implies ending the patient's life by the "incidental effect" of the administered medical treatment aimed at relieving the pain (e.g. terminal sedation) (Golijan, 2020, p. 423).

death or suicide. Golijan observed that "strictly observed, both cases involve euthanasia based on the will of the patient, just in the case of involuntary euthanasia, the patient, before losing consciousness or other capacities to express their decision, clearly expressed their desire to be submitted to euthanasia at certain circumstances of the ter-minal stage of the disease, but the immediate decision, now, based on the will of the patient, needs to be made by someone else, usually a person the patient authorised for that" (Golijan, 2020, p. 425). On the other hand, same author noticed that "physician-assisted suicide, unlike assisting in suicide, can certainly be treat-ed as euthanasia. This type of euthanasia implies the explicit request of the patient to be subjected to lethal treatment, and a physician assists the patient in that, by, for instance, indicating which medical devices will cause a rapid and painless death, or by supplying the mentioned devices. In this case, the patients themselves are the agents of termination of life, but the activities of another person are necessary in order to achieve the deprivation of life, which is why this is a specific form of euthanasia" (Golijan, 2020, p. 424). These forms of euthanasia and others forms of deprivetion of life are very important for judicial practice.

In addition to the criminal law provision on mercy killing in Article 117 of the Serbian Criminal Code a, this subject matter is also regulated in the Patients' Rights Act[6] (hereinafter: the PRA) but in a different way. Article 15 of the Patients' Rights Act (on patient's consent) prescribes: "The patient has the right to freely decide on all issues concerning his/her life and health, except in cases where it directly threatens the life and health of other persons. As a rule, no medical measure may be taken without the patient's consent. Medical measures against the pateient's will (or against the will of the patient's legal representative/guardian in case the pateiend is deprived of legal capacity) may be taken only in exceptional cases, established by the law and in accordance with medical ethics." Further, Article 17 of the PRA expressly prescribes that "a patient capable of reasoning has the right to refuse the proposed medical treatment/measure, even when the measure is aimed at saving or maintaining his/her life. The competent medical professional is obliged to inform the patient about the consequences of

[6] The Patients' Rights Act (Zakon o pravima pacijenata), *Official Gazette of the Republic of Serbia*, no. 45/2013 and 25/2019 -another act.; https://www.paragraf.rs/propisi/zakon_o_pravima_pacijenata.html

his/her decision to refuse the proposed medical treatment/measures. The patient is required to give a written statement on refusal, which is kept in the patient's medical documentation. In case the patient refuses to give the written statement on refusing treatment, the medical staff is required to make an official note on that. The competent medical professional shall also enter information on the patient's or his/her legal representative/guardian's consent to the proposed medical treatment, as well as information on the refusal of such measure, into the medical documentation" (Article 17 of the PRA).

The observed inconsistency between the two legal texts should be taken into account by the legislator when revising the legislation in this area. Such a situation can create a series of moral and ethical dilemmas for medical personnel in practice. In the next part of the paper, we provide an overview of the moral and ethical dilemmas arising from the controversial issue of mercy killing as a social and legal phenomenon.

3. Ethical Dilemmas and Euthanasia Pros and Cons

3.1. Ethical Dilemmas: the right to life and the right to a dignified death

Is there a right to human dignity? If there are human rights, then the right to dignity should be one of them, or the first among them, because respect for everyone's dignity is intrinsically correlated with the fundamental possibility of establishing any right and any value: the presence of true freedom as an actual reality, as something that exists really and not only declaratively. On the other hand, freedom can be abused in many different ways. The possibility of choosing evil is a metaphysical assumption of the possibility that freedom exists; otherwise, there is necessity, the principled absence of choice and the impossibility of establishing responsibility. Therefore, we can say that freedom is not a value *per se* but a necessary assumption of every value, both positive and negative (Babić, 2020, p. 27).

Perceived as the negation of life, death has an inevitable impact on all social and personal dimensions of human life. For every man, the inevitability of death and mortality is a specific burden, which makes it impossible to approach death without a sense of immediate involvement. The fact of human mortality

naturally generates certain opinions, attitudes and sometimes prejudices towards the idea of personal death, while the experience of death (dying relatives and friends) accompanied by feelings of sadness, pain and loss generates a specific emotional impact. Hence, the difficulties in explaining the phenomenon of death aggravate the efforts to achieve scientific objectivity (Stevanović, 2023, p. 124).

Looking at the historical development of euthanasia, it may come as a surprise that euthanasia (mercy killing) has always existed in the history of humankind, and that it has been practiced since ancient times (Jerotić, 2008, p. 331). As noted by Stevanovic (2023), "the process of aging, dying and death in all traditional societies of the world is connected with certain customs enabling the person to transcend mere physical existence. All these customs presuppose a metaphysical framework for establishing one's relation toward eternity. The moral values of a particular society create an essential criterion for the metaphysical validation of the individual. Forcible promotion of individual free will as the sole criterion of the moral values, as in the case of the human rights ideology, precludes even the possibility of obtaining dignity as universally accepted good. We can legally promote dignity only through indirect legal measures to strengthen the moral community capable of promoting generally accepted moral values for its members. This means that we should not legally introduce measures which potentially threaten the accepted public morality unless we want to deliberately create tacit prerequisites for the social anomia". In human rights ideology, dignity is "a personal capacity to create one's own 'eternal' values"; yet, forcible introduction of this meaning of dignity in the legal system "will certainly diminish all possibilities for introducing dignity as a moral quality. […] Ethics cannot be proclaimed by the law […] In order to promote a dignified death, we must try to promote the morality" (Stevanović, 2023, p. 134).

Under the Hippocratic Oath (WMA, 1948)[7], doctors "solemnly pledge to dedicate life to the service of humanity, health and well-being of their patients, to maintain utmost respect for human life, and to respect the autonomy and dignity

[7] The WMA Declaration of Geneva (The modern Hypocrathic Oath) of the World Medical Association's (WMA), adopted by the 2nd General Assembly in Geneva (Switzerland) in 1948, amended by the WMA in 1968, 1983, 1994, 2005, 2006, and 2011; https://www.wma.net/policies-post/wma-declaration-of-geneva/; Dom zdravlja Aleksinac (2024). Hipokratova zakletva, https://dzaleksinac.co.rs/hipokratova-zakletva;

of their parients". Consequently, the Code of Medical Ethics of the Medical Chamber of Serbia[8] expressly prohibits euthanasia, but in a somewhat vague and ambiguous way. Thus, Article 67 of the Medical Ethics Code (hereinafter: the MEC) states that it is forbidden to take actions that actively shorten the life of a dying patient (Article 67 §2 of the MEC), which is contrary to the medical ethics. However, "in case where delaying the inevitable death for a dying patient would only represent an inhumane prolongation of suffering, the doctor may, in accordance with the freely expressed will of the patient capable of reasoning on refusing further measures to prolong life, limit further treatment only to the effective relief of the patient's suffering (Article 67 §3 of the MEC). This provision envisages the doctor's obligation to respect the wish of a well-informed and fully aware patient, suffering from an incurable disease, not to apply any medical measure that would save or prolong his life (Arsić, 2022, p. 30). Thus, this provision is contradictory to the provision on the prohibition of euthanasia.

3.2. Euthanasia Pros and Cons

In this context, there are different arguments for and against euthanasia. The moral arguments in favor of euthanasia are most often related to respect for the principle of autonomy of will, which is essentially the patient's right to decide on the course of further treatment. The arguments proposed by the supporters of eutanasia often rely on the principles of humanity and the freedom of choice for patients capable of reasoning to take their lives at their express request, which is the embodiment of patients' rights. Another argument in favor of euthanasia are economic indicators, considering that the application of eutanasia can significantly reduce health care costs. In modern medicine, due to increasingly complex medical diagnostic and therapeutic procedures, maintaining the life of patients with serious and life-threatening conditions can significantly burden the budget allocated for these purposes. According to Wesley J. Smith, a senior associate at the Discovery Institute, a drug that can kill a patient costs $40, while keeping him alive and preventing him "to choose life or death" costs $40,000. Thus, there is a

[8] The Code of Medical Ethics of the Medical Chamber of Serbia, *the Official Gazette of the Republic of Serbia*, no. 104/2016; https://www.paragraf.rs/propisi/kodeks_medicinske_etike_lekarske_komore_srbije.html

risk that the medical staff will succumb to the pressure of their administrations who take care of the financial costs of treatment (Gajić, 2012, p. 176).

On the other hand, there are numerous arguments against the legalization of euthanasia. The first argument commonly refers to medical ethics. Under the Hippocratic Oath, doctors pledge to have respect for human life, take care of the patients' health and well-being, and respect the patients' autonomy and dignity rather than help them die. The next disputable issue is the presence of the free will of a patient suffering unbearable physical pain and mental distress, and his/her capacity for free decision-making. Hence, criminal law protection of the elderly against abuse and discrimination is particularly important (Igrački, 2023, p. 467). Common arguments against euthanasia also include the possibility of making a wrong diagnosis, the time frame of the "terminal phase of the disease", and the possibility of subsequent discovery of a cure. Yet, the most important moral and ethical argument against euthanasia is that it is a kind of "negation of the right to life" because it rejects the importance and value of life (Gajić, 2012, p. 177).

The results of research conducted in 2015 (Živković, Pavlović, 2019) about the need to legalize euthanasia in the Republic of Serbia may be interesting as a solid basis for further research and consideration. In response to the statement: "I believe that euthanasia is an expression of the free will of each individual", the largest number of respondents completely agreed (58.4%); a significant percentage of respondents (30.7%) both agreed and disagreed, while 10.9% of respondents fully disagreed. In response to the statement: "Euthanasia is inadequately qualified in our Criminal Code", the largest number of respondents both agreed and disagreed (46.1%), while 35.4% of respondents fully agreed. In response to the statement "Euthanasia should be qualified as suicide in law", the largest number of respondents (56.9%) disagreed with the statement. In response to the statement: "In our society and health institutions, the passive form of euthanasia (without a written request) is frequently applied, without sanctioning the perpetrator", the respondents provided different replies; the largest number of respondents (53.8%) both agreed and disagreed, but the percentage of those who disagreed was higher (27.7%) as compared to those who agreeed (18.5%). In response to the statement: "I believe that a public discussion is needed before the legalization of euthanasia", a vast majority of respondents (81.5%) fully agree

with the statement. In response to the statement: "I believe that it is necessary to legalize euthanasia with strict legal restrictions that would prevent abuses", an overwhelming majority of respondents (73.8%) agreed with the statement, but a significant number of (male and younger) respondents both agreed and disagreed with the statement. In response to the statement: "The final decision on performing euthanasia must not be left to a single person - the doctor", the vast majority of respondents (92.3%) agreed with the statement (Živković, Pavlović, 2019, pp. 78-79).

Without intending to plead for or against the legalization of eutanasia (as a medical act), it is quite clear that the issue of decriminalization and legalization of euthanasia requires further multidisciplinary research and careful consideration of its intricate aspects.

4. Deprivation of life (Mercy Killing) in Judical Practice

Searching through available databases of court decisions, we could not find any decisions of the domestic courts on the subject matter of euthanasia, which is prohibited in the Republic of Serbia. Thus, in this part of the paper, we will present relevant decisions of the European Court of Human Rights (ECtHR), which refer to different moral, ethical, social and legal aspects of euthanasia (mercy killing).

In the case *Pretty v. United Kingdom* (application no. 2345/02)[9], the applicant (Mrs Pretty, aged 43) was diagnosed in 1999 with a degenerative and incurable motor neuron disease, which affects her muscles and breathing, and results in death. As her health condition rapidly deteriorated, the desease was in an advance stage; she was paralyzed from neck down and had to be tube-fed but her mental capacity was unimapaired. To be spared of suffering, humiliation and undignified life, she wished to commit suicide but she could not do it without her husband's assistance. Under the English law, suicide is not a crime, but assisting another to commit suicide is a punishable offence. The applicant's request to the

[9] ECtHR case: *Pretty vs. United Kingdom* (Application no. 2346/02). European Court of Human Rights.

Director of Public Prosecutions to grant an immunity from prosecution to her husband if he assisted was rejected. After exhausting the legal remedies in the UK, she filed an application with the ECtHR claiming that the prohibition of assisting suicide in domestic law constituted a violation of her rights under Articles 2 (right to life), 3 (inhuman and degrading treatment and punishment), 8 (right to privacy), 9 (freedom of conscience), and 14 (prohibition of the discrimination) of the Convention. The ECtHR found that there was no violation of the applicant's rights on any of the grounds raised in the application.

In the case *Ada Rosi and others v. Italy* (2008)[10], applicants were six Italian citizens, six associations whose members were relatives and friends of the people with severe disabilities, doctors, psychologists and lawyers, and a human rights organization. After sustaining severe head injuries in a car accident, a 20-year-old girl (E.E.) fell into a coma in January 1992, and her condition developed into a vegetative state with spastic tetraplegia and loss of all higher cognitive function. In January 1999, her father (as guardian) initiated proceedings in Italy, seeking authorisation to discontinue his daughter's artificial nutrition based on the arguments about his daughter's personality and ideas on life and dignity expressed before the accident. His request was rejected by the first instance court, and twice on appeal (in 1999 and 2003). In 2005, the Court of Cassation quashed the 2003 ruling of the Milan Court of Appeal (CA) and reversed the case for retrial, specifying that the father's request could not be granted without exact proof of the daughter's wishes expressed before the accident; the Court of Cassation also established two criteria: the judicial authority could authorize the suspension of nutrition if the person concerned was in a permanent vegetative state and if there was evidence that the person would have opposed medical treatment if he/she had had all capacities. In June 2008, relying on these two criteria, the Milan CA granted the requested authorization. In November 2008, the Court of Cassation dismissed the prosecutor's appeal on points of law for lack of capacity to act. In their applications to the ECtHR, relying on Articles 2 (right ro life), Article 3 (prohibition of inhuman and degading treatment), and Article 6 § 1

[10] ECtHR case: *Ada Rosi and Others v. Italy*, (Appl. nos.55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08 and 58424/08), Press release, ECtHR, 2008; Factsheet: End of life and the ECHR (Press Unit), ECtHR, Nov. 2023, https://prd-echr.coe.int/documents/d/echr/FS_Euthanasia_ENG

(right to a fair hearing), the applicants complained about the harmful effects that the execution of the Milan CA decision in E.E. case could have on them. In its judgment, the ECtHR held that there was no violation of Articles 2, 3 and 6 of the Convention because the decisions of the domestic courts referred only to the participants directly involved in the E.E. case, and did not apply to individuals/associations that were not directly affected by the domestic court decision. First, the Court first found that the individual applicants had no direct relation to E.E, nor were they directly or personally affected by the Milan CA decision which refered only to the facts and parties in the E.E. case, and not to the applicants who were not directly involved in the case. Thus, the Court declared the complaints inadmissible because "individual applicants cannot be said to be the victims of alledged violations and the failure of the Italian state to protect their rights guaranteed underArticles 2 and 3 of the Convention". Second, considering that "a victim status may be granted to an association (not its members) if it is directly affected by the specific measure", the Court held that the applicant associations were not victims of the violations of these rights because the Milan CA decision had no impact on their activities, and declared their complaints inadmissible. In terms of Article 6, the Court declared the complaints inadmissible and clearly ill-founded because "the proceedings in question had involved third parties, and the applicants had not been parties to those proceedings". Therefore, in this case, the ECtHR took a stand that the domestic court decisions refer only to the participants directly involved in the proceedings and could not be applied to other similar cases. From the point of view of the associations and persons who are in a similar situation, we believe that their fears are well-founded. In such cases, courts should decide on the merits of each individual case and in the best interest of the person whose fate is at issue. In order to preclude the abuse of the right to euthanasia, such decisions should be in compliance with the domestic and international law,

In the case *Gard and Others v Great Britain* (Application no. 39793/17) [11], the infant (Charles Gard, born in 2016) was admitted to hospital in October 2016 and diagnosed with a severe genetical degeneration of the DNA on the mitochondrial level. As his condition deteriorated, he did not respond to therapy and could not interact with the doctor and parents; he was attached to life-support

[11] ECtHR case: Gard and Others v. The United Kingdom, Application number 39793/17, ECtHR,

equipment and unconscious. Considering that Ch.G. was in a terminal state of illness, the hospital proposed to take him off the life-support devices and put him in palliative care to ease his pain. The parents disagreed, claiming that his condition was better than suggested by doctors, that he had a regular sleep/wake cycle, and that it would be useless to keep him alive if there was no hope of improvement; they noted that a USA doctor suggested experimental therapy with nucleotides. Several UK medical experts provided opinions that such treatment could slighly improve the child's condition but not reverse the damage to his brain. In February 2017, the hospital asked the High Court (HC) to issue a declarative order on whether it would be lawful to remove the child from life-support devices and transfer him to palliative care. The HC appointed an independent legal guardian to protect the child's interests. In view of the child's health and emotional well-being, the HC concluded that it would be lawful and in the child's best interst to withdraw life-support treatment and to put him in palliative care as the child was likely to suffer significant harm from prologned treatment without any realistic prospect of improvement. Base on the UK medical experts' consensus that the experimental therapy would be aimless and ineffective, that it would expose ChG to unnecessary pain and complications, and that transport could be complicated and detrimental, the HC ruled that the child should not be transported to the USA. On parents' appeal, the UK Court of Appeal (CA) ruled that the hospital had not exceeded its authorizations and that the HC considered the "child's best interests". In the UK Supreme Court (SC), the parents contested the interference with their parental rights (Article 8 of the Convention). Relying on the primary relevance of "the best interests of the child", the hospital and Ch.G's guardian indicated that taking a terminally ill child to the US for the experimental treatment was not in the child's best interest. The UK SC affirmed the CA decision, stating that, even if the "best interest" were replaced by the test of "least harm", the child was most likely to be exposed to suffering with no realistic prospect of improvement. In the application to the ECtHR, the applicants (ChG and parents) referred to Articles 2, 5, and 8 in conjunction with Article 6 of the Convention. The Court held that there was no violation of the applicants'rights guaranteed in these articles and declared the complaints ill-founded.

In terms of Article 2 (arbitrary deprivation of the right to life) and Article 5 (right to liberty and security), the Court concluded that applicant's complaints

were inadmissible and ill-founded because the the State did not arbitrarily deprive the child of the right to life, First, the court decisions to disallow the child's transport to the USA for experimental treatment was based on the UK expert opinion on the detrimental nature of csuch activity due to child's critical health condititon. Second, the UK has a relevant regulatory framework on the use of the experimental treatment/drugs upon approval of the medical ethics committee. Third, although the child could not express his will, his best interests were safeguared by an independant legal guardian, appointed by the courtl he had access to the best UK medical practitioners, and his parents were fully involved and duly informed, and had full access to courts. Considering that Articles 2 and 5 could not be interpreted in terms of enabling access to the unapproved medical procedures to terminally ill patients, the Court found there was no violationf of Article 2 and Article 5 of the Convention.

In terms of Article 8 (right to respect for private and family life) in conjunction with Article 6 (right to a fair trial), the applicants claimed arbitrary interference into the private and family life by public authorities (the hospital's request for a declarative order to remore the child from life-support devices and transfer him to palliative care) in spite of the parents' complaints, which implies interference uinto theirr parental rights as well as interference in the child's right to private life, especially his right to physical integrity. Given the conflict of interests (parents' will and medical opinions) on the child's medical treatment, the Court found that the hospital's interference was justifiable, as all participants had a chance to present their opinions in court to get a solution. The Court pointed out that there must exist a balance between the conflicting interests: the legitimate interest of the child, parents and the public order, but that the primary criterion in adjudicating all cases involving children is generally accepted international standard of the best interest of the child. Thus, the interference was necessary in order to consider whether the proposed medical measures could be justified and sufficient in light of the case facts and the law. It was in the best interest of the terminally ill child: to ease his pain and suffering which could be prolonged and further aggravated by the experimental treatment, which offered no realistic prospect of improvement but could have a detrimental effect on child's progressively deteriorating health condition. The Court noted that decisions had been based on meticulous and thorough investigation and review at three levels of jurisdiction,

and full legal representation of all interested parties (the child/applicants/experts/third parties) As the Court could find no elements of arbitrary and inappropriate interference, the applicants' complaints were declared inadmissible.

In the case *Daniel Karsai v Hungary* (Application no. 32312/23),[12] the applicant (D.K, 47, a prominent human rights' lawyer) was diagnosed in 2022 with amyotrophic lateral sclerosis (ALS), incurable progressive neurodegenerative (motor) disease leading to inevitable death. Due to the nature of the disease, patients progressively lose the ability to move limbs, talk, swallow and breathe, but in most cases their intellect stays intact. D.K. wanted to choose the moment of death while was fully conscious and able to express his consent to die; he wanted to die with dignity and not to end in palliative care, awaiting death. He wanted to be assisted in ending his life by a doctor, but medically assisted death/suicide and voluntary euthanasia are illegal in Hungary. In Europe, five states have legalised the medically assisted death/suicide: Belgium, Luxemburg, Netherlands, Spain and Portugal, while some states recognize only some forms of assisted suicide (EJIL: Talk, 2024).[13] In Hungary, doctors are prohibited to participate in assisted death/euthanasia because (under the Hippocratic Oath) they are obliged to save the patients' lives and ease their pain, not to facilitate death. Moreover, there is a special institute of palliative care where terminally ill patients may be sedated or given symptomatic therapy to ease their pain while awaiting death. In his application to the ECtHR, D.K. referred to the violation of his rights under Article 8 (right to private life) and Article 14 (prohibition of discrimination) in conjunction with Article 8. The Court held that there was no violation of either article. First, the Court stated that assisted suicide and euthanasia are morally and ethically sensitive issues which should be approached with due diligence. In the majority of the Council of Europe member states, euthanasia is

[12] Daniel *Karsai v Hungary*, Application no. 32312/23, European Court of Human Rights, 2023; https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-234151%22]}; https://hudoc.echr.coe.int/eng#_Toc168912011

Factsheet : End of life and the ECHR, European Court of Human Rights, Press unit, 2024; https://prd-echr.coe.int/documents/d/echr/FS_Euthanasia_ENG;

[13] EJIL:Talk (2024). Palliative Care and Assisted Suicide at the ECtHR: Dániel *Karsai v. Hungary*, by G.G.Escobar, Blog of the European Journal od International Law, https://www.ejiltalk.org/palliative-care-and-assisted-suicide-at-the-ecthr-daniel-karsai-v-hungary/ (20 July 2024)

prohibited because Article 2 of the Convention envisages that everyone has a right to life and protection from arbitrary deprivation of life. Referring to Article 8 of the Convention (right to private life), D.K. asserted that Hungary violated his right to self-determination and dignified medially assisted death. As doctor-assisted suicide/death and autanasia are prohibited in Hungary, the Court found that Hungarian authorities had not failed to strike a fair balance between the competing private and public interests, particularly considering the potentially broad social implications and risks of error and abuse involved in the provision of physician-assisted dying. While the need for appropriate legal measures should be reviewed in line with international standards on medical ethics, assisted suicide is not an alternative measure, which was clearly confirmed by domestic courts which rejected DK's request for medically assisted death. The Court further considered that high-quality palliative care, including access to effective pain management, was essential to ensuring a dignified end of life. It was fully available to D.K. who also had the right to reject such alternative treatment. Regarding the violation of Article 14 (discrimination), D.K claimed that Hungarian law did not provide him with an option to hasten his death, which is provided to to terminally ill patients who were dependent on life-sustaining treatment. The Court found that the right to refuse or withdraw life-supporting treatment in terminal phases of diseases is generally accepted in many states. In the opinion of the medical profession, it is intrinsically linked to the right to free and informed consent rather than a right to be assisted to die. Thus, it is justified to make a distinction between seeking consent to withdraw/refuse life-support treatment and seeking illegal medical assitance in dying with a help of a doctor. Considering that the alleged difference in treatment of the aforementioned two groups of terminally ill patients was objectively and reasonably justified, the Court held that the was no violation of Article 14.

The analysed case law of the ECtHR shows different opinions about the right to life and assisted death. In its case law, the ECtHR has underlined that the issue of euthanasia is a very complex and sensitive matter, not only form the legal perspective but also from the moral and ethical perspectives. Yet, in its last landmark case (*Daniel Karsai v. Hungary, 2023*), the ECtHR has taken the stand that palliative care has priority over assisted death/suicide, thus confirming the importance of life as the most important human right and ultimate value.

5. In Lieu of Conclusion

Euthanasia (mercy killing or deprivation of life out of compassion) is a multifaceted legal and social phenomenon that has been present in human history in various forms since anceient times. In the criminal law theory and practice of the Republic of Serbia, there are different views on whether euthanasia should be decriminalized or not. In order to be properly addressed, this extremely complex question requires a multidisciplinary approach. Decision-making in cases related to euthanasia is very complicated because it requires consideration of various moral, social, medical, psychological and legal issues, which have been the subject matter of judicial assessment in a number of presented ECtHR judgments. For these reasons, the idea of possible decriminalization of euthanasia must be carefully considered, clearly justified and substantiated with rational objectives, which are to be achieved without interference with or violation of the guaranteed fundamental human rights.

Until a social consensus is reached on the possible decriminalization of euthanasia, we believe that the norms of the Serbian criminal legislation should be strictly observed and applied. By defining mercy killing as a form of privileged deprivation of life (homicide) punishable by a term of imprisonment ranging from six months to five years, the Serbian legislation provides a safeguard aimed at protecting human life and preventing possible abuses. During all scientific and professional discussions of the issue of (de)criminalization of euthanasia, it should be borne in mind that the right to life is the fundamental human right that is protected by moral, social and legal norms.

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ARTIFICIAL INTELLIGENCE AND MEDICALLY ASSISTED PROCREATION: AN ANALYSIS OF PREIMPLANTATION GENETIC TESTING (PGT) IN THE LIGHT OF BRAZILIAN CRIMINAL LAW

The aim of the present investigation is to analyze the legal limits of preimplantation genetic testing - PGT and their possible criminal implications under Brazilian criminal law. To this end, we will initially address the particularities of these procedures and how artificial intelligence has been applied in order to improve them. Subsequently, we will analyze the legal regime of PGT in Brazil, investigating the requirements and limits imposed by Brazilian legislation on these techniques. At the end of the investigation, we will demonstrate the existence of an undeniable responsibility gap in when it comes to disregarding rules on medically assisted reproduction. However, there may be liability for the disposal of surplus embryos without the parents' consent.

Keywords: *artificial intelligence; medical law; criminal law; Brazilian law; medically assisted procreation; preimplantation genetic testing.*

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Introduction

It is indisputable that artificial intelligence has impacted several sectors of society[1]. Among its main and most promising areas of application, healthcare is certainly one of the most relevant, but also most controversial. Clinical Decision Support Systems, wearable devices and intelligent prosthetics are just some of the current and future examples of the so-called "medicine 4.0"[2].

The present investigation focuses, however, on a more specific - and perhaps more controversial - aspect of this relationship between health and technology: With advances around reproductive medicine and genetics, the so-called "preimplantation genetic testing - PGT" has become more precise, making it possible, with increasing accuracy, to obtain genetic data from the embryo (hereditary diseases, chromosomal anomalies, and even other physical and psychological characteristics)[3]. Therefore, these techniques make it possible to not only eliminate sick embryos, but even select a baby according to the characteristics desired by the parents.

As can be readily seen, however, these are procedures that, although technically viable, raise countless ethical, moral and legal controversies[4]. In view of these considerations, the aim of this investigation is precisely to analyze the legal limits of these procedures and their possible criminal implications[5]. To this end, we will initially address the particularities of the "preimplantation genetic test-

[1] The specificities of this technology in areas such as road traffic, capital markets and access to justice will not be addressed here. For further details, see: Januário, 2020a, 2021, 2023 and 2024.

[2] For a broad analysis of some of these issues, see: Januário, Rodrigues, 2024, Januário, 2020b and 2022.

[3] For Abellán, this is one of the most spectacular advances in recent times in terms of detecting genetic diseases. See: Abellán, 2006: 22.

[4] Silva Sánchez draws attention, for example, to the selective and eugenic nature of these procedures, which lead to the non-implantation of embryos that do not have the desired characteristics. According to the author, their diagnostic nature is also questionable, since they do not lead to any therapeutic option. See details at: Silva Sánchez, 2020: 310. On this issue, see also: Eser, 1998: 221.

[5] As Maria João Antunes rightly points out, the field of medically assisted procreation, precisely because of the diverse approaches it allows - philosophical, moral, ethical, religious, scientific - is "one of the ideal fields for testing the criteria that legitimize penal intervention" [free translation]. See: Antunes, 2010: 82-83.

ing" procedures, in order to provide a precise understanding of how they are performed. We will also discuss how artificial intelligence has been applied to make them more effective. Once this is done, we will analyze the legal regime of PGT in Brazil, investigating the requirements and limits imposed by Brazilian legislation on these techniques.

Based on the conclusions reached in the first two topics, we will answer, at the end of the investigation, the main question of the paper, which is: are there criminal implications for the subjects involved in these procedures? In the present investigation, we will apply the deductive methodology and analyze mainly Brazilian legislation, doctrine and jurisprudence, without prejudice to any brief considerations of comparative law that may be necessary. Furthermore, with regard to materials, we believe that an interdisciplinary approach to the topic in question is imperative, going beyond legal documents and also including medical publications[6].

1. Genetic engineering and preimplantation genetic testing: some necessary definitions, classifications and distinctions

Genetic engineering can be understood as the set of techniques that, aiming to alter structural or functional characteristics of human beings, animals or plants, carry out specific and intentional interventions at the molecular level of DNA or RNA function (genetic insertion, substitution, modification, suppression or inhibition) (Nuffield Council on Bioethics, 2016: 4).

[6] Critically analyzing Portuguese legislation, Faria Costa highlights how the correct assessment of the meaning of some terms used in legislation on medically assisted procreation escapes the hands of the criminal legislator. In this sense: "However, how can an interpreter know what "artificial insemination" or "in vitro fertilization" is? The rule that the perception and awareness of the elements of this crime should be limited to the layman's sphere cannot apply here. More is required. Much more. It must be science and medical thought that defines what "artificial insemination" and "in vitro fertilization" are. Thus, it can be seen that the scope of incrimination is not entirely in the hands of the criminal legislator. Due to the circumstances and the subject matter on which he/she has to legislate, the latter must abdicate his/her constitutional duty - the constitutional duty to define, in homage to the principle of legality, exactly the criminally prohibited behaviors - and within certain limits define the normative contents that incriminate medical science and thought. Which means that - precisely because science is, in its essence and always, innovation, change, correction, and therefore creative fluidity - the incriminating elements "float" as, precisely, the science that determines them "floats", certainly with the advances" [free translation] (Costa, 2009: 119-120).

There are four distinct ways to proceed with gene editing: (i) the introduction of a new gene without interfering with the existing defective gene (gene insertion); (ii) the modification of the defective gene (genetic modification); (iii) the replacement of the defective gene with a normal version (gene replacement); (iv) and the targeted suppression of specific cells or targeted inhibition of gene expression (genetic suppression or inhibition). Furthermore, for us to be within the scope of genetic engineering, there must be the intention to modify the genome (Figueiredo, 2019: 25-26).

Those techniques can be classified as i) *positive gene editing* and ii) *negative gene editing*. The first group includes cases that seek preventive-therapeutic purposes, i.e., the elimination of defective or disease-causing genes, preventing their possible appearance in the future or making the edited organism healthy. Furthermore, the objective may be to provide the individual with certain positive physical or psychological characteristics, even without therapeutic purposes. The second group includes cases in which the objective is to provide the individual with characteristics generally classified as negative, disadvantageous or limiting, such as diseases or disabilities (Figueiredo, 2021: 58-59).

Genome editing can also be classified according to the type of cell line undergoing the intervention (somatic or germline) and the genome that is the target of the intervention (nuclear or mitochondrial DNA) (Figueiredo, 2019: 26).

The admissibility of *negative gene editing* practices has been widely rejected by scholars. As for *positive gene editing* practices, international and supranational regulations point, with rare exceptions, to the exclusive admissibility of gene editing of somatic cells for preventive-therapeutic purposes (also known as "gene therapy"). Gene editing of germ cells for preventive-therapeutic purposes and gene editing for the improvement of human beings have been essentially rejected (Figueiredo, 2021: 59).

Regarding predictive and diagnostic genetics, Figueiredo highlights the current developments in DNA analysis, specifically with regard to the emergence of Next Generation Sequencing Genetic Tests, which are increasingly reliable, accurate and accessible (Figueiredo, 2021: 59).

Despite the relevance of these issues and their possible legal implications, our object of study is restricted to a specific technique applied in the context of in vitro fertilization. *Preimplantation genetic testing* (PGT) consists of genetic

tests performed on embryos up to 3 days old, before transferring them to the woman's body, to find out whether they are possible carriers of genetic characteristics likely to generate hereditary genetic problems and diseases (Reis, 2008: 340; Xavier, 2017: 72).

Although initially applied with families in which a mutation was already known, to avoid the hereditary transmission of a genetic anomaly (linked to the X chromosome) or structural chromosomal anomaly, this technique has been increasingly used to support procreation, aiming to analyze genes and evaluate the quality of embryos produced in vitro (Lopes, Rodrigues, 2016: 128).

As Lopes and Rodrigues explain, "by submitting an embryo to a precautionary genetic examination to search for anomalies, whether of the embryo already in the mother's womb (prenatal diagnosis) or of the embryo that will be implanted in the uterus (pre-implantation diagnosis)", in the event of genetic anomalies, chromosomal or gene pathologies being detected in the embryo, "the possibility is opened up for the parents, given their knowledge of the embryo's genome, to decide not to implant it or, even after implantation, to no longer want its development" (Lopes, Rodrigues, 2016: 128).

In practice, however, in addition to enabling the prior identification of diseased embryos, this technique also makes it possible to perform embryonic genetic selection according to the parents' preferences, i.e., gender and eyes, hair and skin color. Furthermore, the issue regarding the disposal of embryos with the potential for life but which are classified as "unhealthy" is quite questionable. (Cardin, Cazelatto, Oliveira, 2022: 2-5)[7].

More recently, there has been a growing use of artificial intelligence to increase the effectiveness of screening embryos that are more likely to develop fully and healthily (Cardin, Cazelatto, Oliveira, 2022: 6). An example is provided by Meseguer Escriva et al., pointing out the greater accuracy of artificial intelligence models in detecting embryo characteristics related to ploidy, thus facilitating their triage (Meseguer Escriva et al, 2022).

As explained by Jiang et al., although there is a high pregnancy success rate when euploid embryos are screened by PGT-A (approximately 50%), this technique ended up encountering resistance for a number of reasons, such as: i)

[7] For a complete analysis of the dilemmas related to embryo selection, see: Guimarães, 1999: 169ff.

need for invasive biopsy; ii) high financial costs for the tests; iii) clinical delays in the results and difficulties in their interpretation, especially in the presence of embryonic mosaicism, iv) "attrition in freeze-all cycles may occur based on each clinic's biopsy and cryopreservation criteria, eliminating lower quality blastocysts with potential for clinical pregnancy after fresh transfer"; v) when there are a limited number of embryos, sometimes all transferable embryos end up being eliminated by PGT-A, instead of serving only as "a screening tool without diagnostic verification"; vi) finally, as the mere transfer of euploid embryos does not guarantee pregnancy, there is a loss of confidence in this technique on the part of patients (Jiang et al., 2023: 228).

Artificial intelligence is presented precisely as an alternative that seeks to alleviate these problems in the scope in question, as the authors explain:

"Artificial intelligence provides promising options for noninvasive genetic screening for embryo selection, particularly as studies start integrating large, multicenter databases into model training. The power of AI lies in rapid decision making for embryo selection before transfer in the absence of available genetic testing. […] In addition, AI will consolidate resources by providing rapid, digital embryo analysis as compared with the time-consuming, costly, and resource intensive process of PGT-A or alternative noninvasive genetic testing methods, such as spent media testing or blastocoel fluid testing. Integrating reliable, accurate algorithms into microscopy equipment and Embryoscope platforms will be the next key step to allow widespread access to noninvasive genetic testing. As hardware integration is tackled, software development of algorithms that optimize minimal-necessary covariates for ease of use alongside clinical considerations, such as partial aneuploidy and mosaicism, will strengthen the predictive value of AI algorithms among clinical users. Ultimately, AI-based ploidy prediction will work alongside embryologists to reinforce embryo selection before fresh or frozen transfer, aiming to improve clinical pregnancy rates while decreasing cost per cycle" (Jiang et al., 2023: 233-234).

An exemplary AI system in this scope is the so-called ERICA, which acts precisely in anticipating the ploidy potential of blastocysts by extracting texture patterns from static or time-lapse images and subsequent ranking the embryos "based on the identification and scoring of blastocysts using extracted image-based features, and combining them with the metadata for each embryo using a

binary classification model generated by a deep neural network" (Chavez Badiola et al., 2024: 2, 2020). Studies also suggest that, in addition to helping in the decision about whether to transfer embryos, this test has the potential to provide major information regarding the degree of risk of spontaneous abortions (Chavez Badiola et al., 2024).

2. Preimplantation genetic testing according to Brazilian law

Article 225 of the Brazilian Federal Constitution expressly provides for the right of all to an ecologically balanced environment. To ensure the effectiveness of this right, it is the duty of the government, among other measures, to control the production and use of techniques that pose risks to life, quality of life and the environment, as well as to preserve the diversity and integrity of the country's genetic heritage, and to supervise entities dedicated to research and manipulation of genetic material (Brasil, 1988).

The regulation of this constitutional provision is made by Law 11.105 of 2005, which "establishes safety standards and inspection mechanisms for the construction, cultivation, production, handling, transportation, transfer, import, export, storage, research, selling, consumption, release into the environment and disposal of genetically modified organisms - GMOs and their derivatives, with guidelines for encouraging scientific advancement in the area of biosafety and biotechnology, protecting human, animal and plant life and health, and observing the precautionary principle for protecting the environment" [free translation] (Brasil, 2005).

For the purposes of this law, genetic engineering is considered only the activity of producing and manipulating recombinant DNA/RNA molecules, that is, "molecules manipulated outside living cells by modifying segments of natural or synthetic DNA/RNA and which can multiply in a living cell, or even the DNA/RNA molecules resulting from this multiplication; segments of synthetic DNA/RNA equivalent to those of natural DNA/RNA are also considered as such". From this concept comes the definition of genetically modified organism, understood as "an organism whose genetic material - DNA/RNA has been modified by any genetic engineering technique" [free translation] (Brasil, 2005).

It should be noted, however, that the Law expressly excludes from the category of genetically modified organisms those resulting from techniques that "involve the direct introduction, into an organism, of hereditary material, provided that they do not involve the use of recombinant DNA/RNA molecules or genetically modified organisms, including in vitro fertilization, conjugation, transduction, transformation, polyploid induction and any other natural process" [free translation] (Brasil, 2005)[8].

Reinforcing this position, Article 5th of the Law in question expressly provides that: "It is allowed the use of embryonic stem cells obtained from human embryos produced by in vitro fertilization and not used in the respective procedure, for research and therapy purposes, provided the following conditions are met: I - they are nonviable embryos; or II - they are embryos frozen for 3 (three) years or more, on the date of publication of this Law, or that, already frozen on the date of publication of this Law, after completing 3 (three) years, counted from the date of freezing. § 1 In any case, the consent of the parents is required. § 2 Research institutions and health services that carry out research or therapy with human embryonic stem cells must submit their projects for consideration and approval by the respective research ethics committees. § 3 The commercialization of the biological material referred to in this article is prohibited and its practice implies the crime defined in art. 15 of Law n. 9.434, of February 4, 1997" [free translation] (Brasil, 2005).

The prohibitions, therefore, provided for in this Law, are essentially limited to: "I - implementation of a project related to a genetically modified organism without maintaining a record of its individual monitoring; II - genetic engineering in a living organism or the in vitro handling of natural or recombinant DNA/RNA, carried out in disagreement with the standards provided for in this Law; III - genetic engineering in human germ cells, human zygotes and human embryos; IV - human cloning; V - destruction or disposal in the environment of GMOs and their

[8] "The processes excluded from the manipulation category have in common the fact that the forms of modification of genetic material that are allowed are those in which human intervention occurs only as a means of accelerating a causality that already exists, that is, when the genetic material (the molecule) has not undergone previous alteration by the hands of man or those in which the alteration may also occur as a result of chance. This is the hypothesis of mutagenesis, provided for in item I of Article 4th of the Law, in which the modification may occur spontaneously" [free translation] (Minahim, 2020: 294).

derivatives in disagreement with the standards established by CTNBio, by the registration and inspection bodies and entities, referred to in art. 16 of this Law, and those contained in this Law and its regulations; VI - release into the environment of GMOs or their derivatives, within the scope of research activities, without a favorable technical decision by CTNBio and, in cases of commercial release, without a favorable technical opinion by CTNBio, or without licensing by the responsible environmental body or entity, when CTNBio considers the activity to be potentially causing environmental degradation, or without the authorization of the competent environmental body or entity, approval of the National Biosafety Council - CNBS, when the process has been taken up by it, in accordance with this Law and its regulations; VII - the use, commercialization, registration, patenting and licensing of genetic technologies for restricting use" [free translation] (Brasil, 2005).

Therefore, despite its relevance, preimplantation genetic testing is practically not addressed by the Brazilian Biosafety Law, and its regulation is relegated to the medical regulatory body in Brazil. Resolution 2.320/2022 of the Brazilian Federal Council of Medicine is the main regulatory instrument to provide for the ethical guidelines to be adopted by doctors in cases of medically assisted reproduction. Chapter VI sets out the rules for preimplantation genetic testing of embryos, establishing that "assisted reproduction techniques may be applied to the selection of embryos that have undergone diagnosis of genetic alterations that cause diseases - in which case they may be donated for research or discarded, according to the decision of the patient(s) duly documented in a specific informed consent form" [free translation]. Furthermore, they can also be used to type the human leukocyte antigen system of the embryo, aiming at the selection of "HLA-compatible embryos with a sibling already affected by the disease and whose effective treatment is stem cell transplant, in accordance with current legislation" [free translation] (Brasil. Conselho Federal de Medicina, 2022).

However, the resolution expressly provides for that assisted reproduction techniques "cannot be applied with the intention of selecting the sex (presence or absence of the Y chromosome) or any other biological characteristic of the future child, except to avoid diseases in the possible descendant" [free translation] (Brasil. Conselho Federal de Medicina, 2022).

It is therefore observed that there is no room in Brazilian legislation for the application of preimplantation genetic testing for the purpose of choosing the characteristics of the future child, but only for cases involving diseases. Attention is also drawn to the fact that unselected embryos may be sent for research or for disposal, according to the patients' will, and, in any case, there must be free and informed consent.

3. Is there a role for criminal law to play in non-compliance with PGT rules in Brazil?

Chapter VIII of Brazilian Law 11.105/2005 provides for, between Articles 24 and 29, a list of six crimes, with penalties ranging from 1 to 5 years in prison. Among the criminalized behaviors are the use of human embryos in disagreement with the rules set out in Article 5th (Article 24, with a penalty of 1 to 3 years and a fine), the practice of genetic engineering on human germ cells, human zygotes or human embryos (Article 25, with a penalty of 1 to 4 years and a fine) and human cloning (Article 26, with a penalty of 2 to 5 years and a fine) (Brasil, 2005).

It is noted, however, that, in line with the spirit of Law 11.105/2005, the crimes in question are related, in general, to prohibited genetic engineering practices or have genetically modified organisms as their object. An example of this is the crime provided for in Article 27, which provides for a penalty of 1 to 4 years for anyone who disobeys CTNBio rules for the release or disposal of genetically modified organisms into the environment (Brasil, 2005).

There is, therefore, an undeniable gap in criminal liability when it comes to disregarding rules on medically assisted reproduction. Hypothetical cases such as the use of preimplantation genetic testing for the purpose of selecting characteristics of the future child, including gender and physical attributes, would constitute an undeniable ethical violation by the doctors in charge, but not a crime, due to the lack of legal provision in this matter.

With regard, however, to an improper disposal of surplus embryos, there may be room for the application of the crime provided for in Article 24 of Law 11.105/2005 According to this provision, a penalty of 1 to 3 years will be imposed on anyone who uses human embryos in violation of Article 5th. The latter, in

turn, clarifies that surplus embryos may be used in research when they are unviable[9] or have been frozen for more than three years, provided that, in either case, there is consent from the parents. Therefore, if there is no such consent, we may be faced with this crime (Siqueira, Marqueti, 2021: 486).

A highly controversial issue is whether it constitutes a crime when a viable embryo is discarded before the 3-year period, but with the consent of the parents. The basis of this discussion, as Siqueira and Marqueti rightly point out, lies in the dilemma of whether the *Rechtsgut* (legal good) protected by the crime would be "life"[10] or "genetic heritage". We agree with the authors that it seems strange to base the prohibition on the use of an embryo frozen less than 3 years ago on the protection of life, "since there is no apparent reason why the freezing period should determine whether or not it is permitted to attempt against the supposed life of the embryo, considering that embryos frozen more than 10 years ago have already been successfully implanted" [free translation]. Furthermore, it makes no sense to grant parents the right to dispose, with their consent, of the life of the embryo, as suggested in Article 5th, § 1st (Siqueira, Marqueti, 2021: 505, Minahim, 2020: 298).

Therefore, we also agree with the conclusions that the crime in question protects genetic heritage, a *Rechtsgut* of an individual nature, owned by the future parents. That being said, we can also conclude that respect for their autonomy[11] necessarily encompasses their power to dispose of the good. That is the reason why we understand that it is not appropriate to consider the disposal of these embryos before the three-year period as unlawful, when it is the result of the free exercise of the power of disposal of the owners of the good, that is, when the free and informed consent of the parents is present.

[9] "The concept of viability, although not expressed, must be biological, that is, it must be an embryo that does not have the organic conditions to develop in the gestational process to reach other stages of development" [free translation] (Minahim, 2020: 297).

[10] On the relevance of discussions on the protection of the rights of unborn children, see: Pavlović, 2022. On the difficulties in defining what we can understand as life: Ćorić, 2021.

[11] For a detailed analysis of autonomy in its most varied facets, see: Heberling, 2021: 595.

Conclusion

As we have observed throughout the investigation, among the numerous areas of medicine that have been influenced by new technologies and the most recent scientific discoveries, medically assisted procreation is certainly among the most relevant. In this regard, preimplantation genetic testing and especially the application of artificial intelligence to make it more effective are a significant example of how science and technology can work together to ensure the best healthcare for society.

However, it has also been demonstrated that this technique presents undeniable controversies and therefore encounter express limitations and legal requirements. In Brazil, although the Biosafety Law is silent on the matter, Resolution 2.320/2022 of the Federal Council of Medicine allows the use of these tests for the purpose of diagnosing genetic alterations that can cause diseases, with the consequent donation of diseased embryos for research or disposal, in accordance with the free and informed consent of the parents. On the other hand, the use of PGT for the purpose of selecting the gender or other physical characteristics of the future child is expressly prohibited by the resolution.

Despite the relevance of the issue, we identified a clear gap in criminal liability regarding the failure to comply with the rules of medically assisted reproduction, with the use of PGT for purposes other than those provided for in the Resolution not being considered a crime. However, it is possible to consider the disposal or donation of surplus embryos without the free and informed consent of the parents as a crime, in accordance with Article 24 of Law 11.105/2005. In the presence of such consent, we understand that there is no crime, even if the 3-year time period has not been observed.

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Review Paper
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RELIGIOUS KILLING: A REVIEW OF THE MURDERS OF TYLEE RYAN AND J. J. VALLOW

The case of taking the lives of Tyla Ryan and J. J. Vallow is a complex illustration of criminal behavior motivated by religious beliefs. This paper delves into the intricacies of the case, examining the background, circumstances and legal implications surrounding the tragic deaths of two children, focusing on the perpetrators' alleged religious justifications for their actions and the court proceedings that followed. Through a comprehensive analysis of the relevant legal frameworks, including the doctrines of mens rea, religious freedom and insanity, this review clarifies the challenges and dilemmas faced by the criminal justice system in adjudicating cases involving (aggravated) religious murder. In addition, this paper highlights the wider social implications of such crimes, emphasizing the imperative of legal and social mechanisms to address religious extremism and protect the basic rights and safety of individuals, especially vulnerable children. The phenomenon of murder motivated by religious beliefs represents a disturbing intersection of religion, ideology and criminal behavior. The case of the murders of Tyler Ryan and J. J. Vallow attracted widespread public attention for the gruesome display of religious fanaticism that culminated in the tragic loss of life. Against the backdrop of an ardent religious movement, the victims, aged 17 and 7 respectively, fell victim to the heinous acts of individuals who allegedly acted in accordance with their religious beliefs. This paper tries to break down the multiple layers of the case, revealing the legal, psychological and social dimensions underlying the killings for religious reasons.

Keywords: *murder, religious extremism, legal implications, child victims, mens rea.*

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Introduction

The intersection of religious belief and criminal behavior presents a complex and often troubling dimension of legal and criminological study. Religious convictions, while typically associated with moral guidance and community cohesion, can sometimes devolve into a rationale for extreme and violent actions. This paradox is starkly illustrated in the case of Lori Vallow Daybell and Chad Daybell, whose involvement in what has been widely termed the "Vallow-Daybell Doomsday Murders" raises significant questions about the role of religious ideology in motivating criminal acts. The murders of Tylee Ryan and J. J. Vallow, both of whom were Lori Vallow Daybell's children, have garnered widespread media attention and legal scrutiny, not only due to the tragic loss of life but also because of the deeply disturbing beliefs that appear to have underpinned these acts.

This article examines the phenomenon of religiously motivated killings through the lens of the Vallow-Daybell case, exploring how religious conviction can be weaponized as a justification for murder. Drawing on criminological theories and legal precedents, this review seeks to understand the psychological and sociological factors that contribute to such extreme outcomes. It also considers the broader implications for law enforcement and legal systems when confronted with crimes that are intricately linked to religious ideology. By delving into the specifics of the Vallow-Daybell case, this study aims to contribute to the broader discourse on the intersection of religion and criminality, offering insights into how legal frameworks might better address and mitigate the risks posed by radicalized religious beliefs.

People kill for religious reasons due to a complex interplay of psychological, sociocultural, and ideological factors.[1] While religion typically promotes

[1] Life is regarded as a fundamental social and legal value, serving as the cornerstone upon which many legal systems and human rights frameworks are built. This principle is enshrined in international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which assert the inherent right to life as a universal and inalienable right. The protection of life is not only a legal obligation but also a moral imperative that reflects the intrinsic worth of each individual and the need for society to safeguard human existence. From a social perspective, the sanctity of life underpins ethical norms and societal values. It dictates that every individual, irrespective of age, race, gender, or social status, possesses an inherent dignity that must be respected and protected. The recognition of life as a core value

moral behavior, it can also be interpreted or manipulated in ways that justify violence. Firstly, some individuals or groups adopt extreme interpretations of religious teachings, believing they are fulfilling a divine mandate. This can lead to the belief that violent acts are justified or even required to defend or spread their faith. Religious texts or doctrines may be selectively interpreted to support these views, often in ways that deviate from mainstream religious teachings. Secondly, religion often provides a strong sense of identity and community. In some cases, individuals may feel compelled to commit violence to protect their religious group from perceived threats or to assert the superiority of their beliefs. This is particularly prevalent in contexts where religious groups are in conflict with one another. Thirdly, some individuals may believe they have received a direct message from a deity, commanding them to commit violent acts. This can occur in contexts where mental illness intersects with religious belief, leading to delusional thinking that rationalizes murder as a divine command. Fourthly, certain religious sects or movements hold apocalyptic or messianic beliefs, where adherents believe the end of the world is imminent. In these contexts, violence may be seen as a necessary step to bring about or prevent a prophesied event, or to fulfill a religious mission believed to be of cosmic significance.

Furthermore, charismatic religious leaders can exert significant influence over their followers, sometimes convincing them that violent acts are necessary to fulfill a religious purpose. This is particularly dangerous in closed, insular communities where questioning authority is discouraged. And last but not least, in some cases, religiously motivated violence is intertwined with social, political, or economic grievances. Religion can be used as a rallying cry or justification for

reinforces the idea that society has a duty to create conditions conducive to the flourishing of its members, ensuring their physical safety and well-being. This respect for life fosters a sense of security, stability, and mutual respect within communities, which is essential for social harmony and cohesion. Legally, the protection of life is paramount, guiding the formulation of laws and policies designed to prevent arbitrary deprivation of life. Criminal laws across jurisdictions are structured to deter and punish acts that threaten life, such as murder, manslaughter, and serious bodily harm. Additionally, life is a key consideration in the development of public policies related to healthcare, safety regulations, and environmental protection, all of which aim to preserve and enhance human life (Stevanović & Grozdić, 2021). In essence, life as a social and legal value underscores the recognition of the inherent dignity and worth of every individual. This fundamental principle shapes the moral and legal obligations of society, requiring both the protection of life and the promotion of conditions that allow individuals to live with dignity and security.

violence in situations where groups feel oppressed or marginalized. The religious aspect provides a powerful moral justification for actions that might otherwise be seen as criminal. Draw to a close, people may kill for religious reasons when religious beliefs are radicalized, manipulated, or otherwise interpreted in ways that legitimize violence. These acts are often driven by a combination of personal conviction, group identity, and the influence of leaders, and they are sometimes exacerbated by social and political conditions. Understanding these motivations is crucial for addressing and preventing religiously motivated violence.

1. Vallow-Daybell Case Backround

Chad Daybell and Lori Vallow are central figures in a case that has drawn national and international attention due to the tragic and bizarre nature of the events surrounding them. Both individuals had backgrounds deeply intertwined with religious beliefs, which played a crucial role in the crimes they (allegedly) committed.

Chad Daybell was born on August 11, 1968, in Provo, Utah (USA), and was raised in a devoutly religious environment as a member of The Church of Jesus Christ of Latter-day Saints (LDS Church). He graduated from Brigham Young University with a degree in Journalism, and initially pursued a career as a writer and publisher (Melendez, 2024; Sottile, 2022). Daybell authored and self-published numerous books, primarily focusing on themes of near-death experiences, the afterlife, and apocalyptic scenarios. His writings, while initially resonating with certain segments of the LDS community, gradually evolved into more extreme interpretations of religious prophecy and end-times theology. Over time, Daybell's views became increasingly radical (McBride, 2020). He began to present himself as a prophet with unique insights into the future, including the imminent end of the world. His beliefs diverged significantly from mainstream LDS doctrine, particularly in his assertions about the impending apocalypse and the need for spiritual preparation for the end times. These views found a receptive audience among certain individuals, including Lori Vallow, whom he met in 2018.

Lori Vallow was born on June 26, 1973, in San Bernardino, California (USA). Like Daybell, she was raised in a religious household as a member of the

LDS Church. Throughout her life, Vallow was known for her deep and fervent religious beliefs, which became increasingly unorthodox over time (Miller, 2020). Before her marriage to Chad Daybell, Vallow had been married multiple times and had several children, including Tylee Ryan and Joshua "J. J." Vallow (Sharp, 2023). Vallow's religious convictions intensified after she encountered Daybell's teachings. She became deeply engrossed in his apocalyptic prophecies and his claims of possessing special spiritual powers (Krutzig, 2020). Vallow reportedly began to believe that she had a divine mission and that certain people in her life, including her own children, were "zombies" or possessed by dark spirits. This delusional belief system, heavily influenced by Daybell, contributed to the tragic events that unfolded.

Lori Vallow and Chad Daybell met in 2018 through a mutual interest in preparing for the apocalypse. Their relationship quickly became romantic, and they married in November 2019, shortly after the suspicious deaths of both of their previous spouses (Seariac, 2023; Mark, 2021; Eaton, 2020a). Their marriage marked the culmination of a series of events that led to the disappearance and subsequent deaths of Vallow's children, Tylee and J. J., in 2019.

Together, Vallow and Daybell shared and reinforced each other's extreme beliefs, forming a partnership that would ultimately lead to a series of heinous crimes. Their case highlights the dangers of religious extremism and the way in which shared delusional beliefs can escalate into criminal behavior, with devastating consequences for those involved. The deaths of Tylee and J. J., as well as the deaths of other individuals connected to the couple, shocked the public in the United States and prompted widespread media coverage and legal proceedings.[2] The case today serves as a chilling example of how deeply held religious

[2] The act of taking a child's life, particularly for low motives, constitutes a grave violation of human dignity, infringing upon the child's inherent right to dignity. Human dignity, as recognized in international human rights law, forms the foundation of all rights and freedoms. It embodies the intrinsic worth of each individual, regardless of age, and mandates respect and protection from inhumane and degrading treatment. The United Nations Convention on the Rights of the Child underscores the child's right to life, survival, and development, reflecting a recognition of the inherent dignity and the equal and inalienable rights of all members of the human family, including children. The deliberate taking of a child's life, especially driven by low motives - such as personal gain, revenge, or prejudice - strips away the child's inherent worth and value as a human being. Such acts degrade the child's personhood, treating them not as a bearer of rights and dignity but as an object to be discarded. This dehumanization is fundamentally at odds with the principles enshrined in the Con-

convictions, when taken to an extreme and manipulated by charismatic figures, can result in unimaginable tragedy.

2. Vallow-Daybell Criminal Charges and Trials

On February 20, 2020, Lori was apprehended in Hawaii by the Kauai Police Department, subsequently being extradited back to Idaho on March 5, 2020 (Burke & Paredes, 2020). In Madison County, Idaho, she faced charges including two felony counts of desertion and nonsupport of dependent children, along with three misdemeanor charges (Miller & Culver, 2020). Following Lori's arrest, Chad returned to Idaho and attempted to persuade the Gilberts to use their

vention on the Rights of the Child and other human rights instruments that seek to protect the sanctity of life and dignity. Furthermore, the heinous nature of low-motive killings magnifies the offense against human dignity. These acts are not merely a violation of the right to life but are also an affront to the very concept of human decency, signaling a profound disregard for the moral and ethical values that bind human society. The recognition of a child's right to dignity is essential to safeguarding their well-being and ensuring their development as autonomous individuals. The unlawful taking of a child's life for trivial or ignoble reasons thus stands as a repudiation of these fundamental values, underscoring the critical need for robust legal and social mechanisms to protect children's rights and uphold their inherent dignity (Velasco Guerrero, 2022). Children, whether as perpetrators or victims of crimes, occupy a distinct and protected status within the criminal justice system, a status grounded in the recognition of their developmental vulnerabilities and their potential for rehabilitation. This special status acknowledges that children, due to their physical, psychological, and emotional immaturity, require a legal system that is sensitive to their needs and capable of providing appropriate care and protection. As perpetrators, children are often viewed through the lens of rehabilitation rather than punishment. Juvenile justice systems, established in many jurisdictions, focus on diversion, education, and rehabilitation, aiming to reintegrate the child into society as a responsible individual. This approach is informed by the understanding that children's behavior is more malleable than that of adults and that punitive measures may hinder rather than help their development. Legal provisions often include alternatives to detention, such as counseling, community service, and educational programs, ensuring that the response to juvenile delinquency is proportionate, constructive, and conducive to personal growth. As victims, children require tailored protective measures due to their heightened vulnerability to harm and their dependency on adults. Criminal justice systems must ensure that children are treated with care, respect, and sensitivity throughout legal processes. Special procedures, such as child-friendly interviewing techniques and the use of trained professionals, are designed to minimize trauma and prevent re-victimization. Legal frameworks also prioritize the confidentiality and protection of child victims, emphasizing their right to be heard and to have their best interests considered in all proceedings. Thus, the distinct status of children as both perpetrators and victims within the criminal justice system reflects a broader commitment to upholding their rights, dignity, and future well-being, recognizing the unique challenges they face and the importance of fostering their development as integral members of society (Baćićani & Hubić Burković, 2022).

home as collateral for Lori's bail, claiming that this idea was divinely inspired. When confronted by Alice Gilbert about the children, Chad deflected by suggesting it was a custody issue and used past tense when referring to Lori's daughter, Tylee, indicating that she "didn't like people" and did not like him. On June 9, law enforcement discovered human remains buried in unmarked graves in the backyard of Chad's residence. These remains were found in an area the Daybell family referred to as the "pet cemetery", where they had previously buried cats and dogs (Boone, 2020). During the search of his property, Chad called Lori in jail to warn her, and upon realizing that the police were uncovering the bodies, he attempted to flee the scene but was apprehended and charged with obstruction or concealment of evidence (Gearty, 2020).

The decision to search Daybell's property was influenced by tracking data from Alex Cox's cell phone. On September 9, 2019, the day after Tylee's last confirmed sighting, Cox's phone records placed him at Lori's residence during the night and at Chad's home in the morning. Similarly, on September 23, the day following J. J.'s last confirmed sighting, Cox's phone again pinged at Chad's property (Eaton, 2020b). Further suspicion was raised when the FBI intercepted a text message from Chad to his then-wife Tammy on September 9, wherein Chad claimed to have shot a large raccoon in their backyard and buried it in the "pet cemetery", despite raccoons being typically nocturnal animals (Truesdell, 2020).

On June 10, the families of the victims, the Woodcocks and Ryans, confirmed that the human remains discovered on Chad's property were those of Tylee and J. J., a finding that was officially verified by Rexburg police on June 13 (Burke, 2020). Tylee's remains showed signs of burning, with her hands severed, while J. J.'s body was found wrapped in plastic (Conclin, 2023). J. J. had been buried with significant care, surrounded by rocks and wooden planks, contrasting with the treatment of Tylee's remains (Cesaric, 2023). It was determined that J. J. died from asphyxiation with a plastic bag and duct tape covering his mouth. However, due to the condition of Tylee's remains, her cause of death was listed as "homicide by unspecified means", with fractures in her bones suggesting an attempt to dismember her body. Tylee's DNA was later discovered on a pickaxe and shovel found at Daybell's residence (Conclin, 2023). Additionally, Alex Cox's fingerprints and Lori's hair were identified on the plastic and duct tape used on J. J.'s body. In August 2020, Chad Daybell was excommunicated from

the Church of Jesus Christ of Latter-day Saints due to his religious teachings, which were later characterized by media as aligning with a "doomsday cult" (CBS News, 2024).

On July 2, 2020, prosecutors dismissed two of Lori's felony charges related to the desertion and nonsupport of her dependent children, instead charging her with obstruction or concealment of evidence pertaining to the remains of her children (Eaton, 2020b). On May 25, 2021, both Chad and Lori were indicted on charges of conspiracy to commit first-degree murder for the deaths of Tylee, J. J., and Tammy, as well as on charges of grand theft by deception related to the children. Lori was also charged with grand theft for illegally accessing her children's Social Security Survivor benefits. Chad faced an additional charge of insurance fraud related to Tammy's life insurance policy (Eaton, 2020c). In June 2021, Lori was indicted by a Maricopa County grand jury in Arizona for conspiracy to commit first-degree murder in the death of her former husband, Charles Vallow (Vera, Alsup & Razek, 2021). According to police reports, Charles' murder was a premeditated act intended to prevent him and others from challenging Lori's extreme religious beliefs, thus facilitating Lori and Chad's marriage and the fulfillment of their religious prophecy (Grossarth, 2021). However, in July 2021, Maricopa County prosecutors declined to bring charges against Chad regarding Charles Vallow's death, citing insufficient likelihood of a conviction. In September 2021, Chad Daybell's children publicly defended their father, asserting that he had been misled by Lori in a tragic and deadly manner (Vigliotti, 2021). In 2022, Lori was indicted on an additional count of first-degree premeditated murder, related to allegations that she conspired with her brother, Alex Cox, to murder Brandon Boudreaux, purportedly to gain access to Boudreaux's financial assets through her niece (Boone, 2023).

A jury trial for the charges against Lori Vallow Daybell in Madison County was originally scheduled for January 25-29, 2021 (Eaton, 2020d). However, on May 27, 2021, Lori was declared incompetent and unfit to stand trial, resulting in a stay of her case (Deliso, 2021). After undergoing mental health treatment, she was deemed competent to stand trial on April 11, 2022. On October 6, 2022, Judge Steven W. Boyce issued an order suspending the case following several motions filed by Lori's attorney, necessitating a further determination of her competency. She was again found competent on November 16, 2022 (Seikaly,

2022; Ellis, 2022). Both Lori and Chad Daybell pleaded not guilty to all charges in Idaho. Their cases were severed in March 2023 at Chad's request, as his attorneys cited the need for additional time to review DNA evidence and pointed to the "mutually antagonistic nature of the defendants' positions". Since Lori had not waived her right to a speedy trial, the court ruled that her case would proceed as scheduled. On March 21, 2023, the judge removed the death penalty as an option for Lori Vallow Daybell due to the late discovery of new DNA evidence that could not be tested and admitted in court before the trial began (AP News, 2023).

Lori Vallow Daybell's trial commenced on April 3, 2023, in Boise, Idaho (Sharp, 2023). She chose not to testify in her defense, and her lawyers did not call any witnesses, while the prosecution presented testimony from approximately 60 witnesses (McCarthy, 2023; Bianco 2023). In light of evidence suggesting Alex Cox's direct involvement in the murders, prosecutors argued that Lori had "groomed" and "manipulated" her brother to participate in her crimes. Lori's sister, Summer Shiflet, testified that Alex had suffered brain damage in a car accident, which left his decision-making abilities "stuck at a teenage level" (Brizee, 2023). Zulema Pastenes testified that Alex was under the complete influence of Chad and Lori, who had convinced him that he was a reincarnated warrior of God with the sole purpose of protecting Lori. In his closing argument, Lori's attorney, Jim Archibald, portrayed her as being under Chad Daybell's psychological control (Polisek, 2023). On May 12, 2023, Lori Vallow Daybell was found guilty of all criminal charges, including two counts of first-degree murder and three counts of conspiracy (*Idaho v. Vallow aka Daybell*, Case No. CR22-21-1624, Verdict, 12th May 2023).

She was subsequently sentenced on July 31, 2023, to consecutive life sentences without the possibility of parole for the murders of Tylee Ryan, J. J. Vallow, and the conspiracy to commit the murder of Tammy Daybell. In addition to these sentences, she was fined and ordered to pay restitution for grand theft charges (Madani, 2023). During sentencing, Judge Boyce stated that Lori had murdered her children to "remove them as obstacles and to profit financially", choosing "the most evil and destructive path possible" and descending into a "bizarre, religious rabbit hole" to justify their killings (Andone, 2023). Before her sentencing, Lori made her first public statement since her arrest, claiming she had

been communicating with Jesus, her children, and Tammy. She asserted that Tylee, J. J., and Tammy were "happy and extremely busy" in heaven, and stated, "Jesus Christ knows that no one was murdered in this case. Accidental deaths happen, suicides happen, fatal side effects from medications happen" (Madani, 2023; Andone, 2023). In November 2023, Lori was extradited to Arizona to face two conspiracy charges (Eaton, 2024a). She pleaded not guilty to both. In February 2024, her trial was scheduled to begin on August 1 of the same year, though the judge noted that the date might be postponed due to the volume of evidence to be processed (Lum, 2024a). In June, Lori's lawyers filed a motion to delay the trial, but Lori objected, insisting on her right to a speedy trial (Eaton, 2024b). On July 2, the request for a delay was granted, and the trial date was moved to February 24, 2025 (Lum, 2024b).

On November 9, 2023, Chad Daybell's legal team filed three motions to remove the death penalty in his murder trial, arguing that Lori had "manipulated" Chad through "emotional and sexual control" and that Chad had "lesser culpability than his co-defendant, who did not face the death penalty" (Grossorth, 2021). These motions were denied in December (Curtis, 2023). Chad Daybell's trial began on April 10, 2024. In his opening statement, prosecutor Rob Wood characterized Chad as a man driven by "sex, money, and power", who viewed his spouse and Lori's children as obstacles to his perceived destiny. Chad's attorney, John Prior, presented him as a religious man who had been "lured" into an inappropriate relationship by Lori Vallow, focusing on Alex Cox's history of violence and his role as "Lori's protector" (Sanchez, 2024). Chad did not take the stand in his defense (Herrera, 2024). In closing arguments, prosecutor Lindsey Blake summarized the evidence demonstrating Chad's pivotal role in orchestrating and providing a religious justification for the murders. John Prior portrayed Lori and Alex Cox as the true culprits, arguing that Lori was motivated by greed, that she had manipulated Chad throughout, and that Chad might have been her next victim (Eaton, 2024c). On May 30, 2024, the jury found Chad guilty of first-degree murder and conspiracy in the deaths of Tammy, Tylee, and J. J. He was also found guilty of grand theft by deception related to the children's killings and of insurance fraud related to Tammy's death. The Woodcocks, who had closely followed the trial, expressed their satisfaction with the verdict, with Larry Woodcock commenting on the futility and devastation caused by Chad and Lori's crimes: "What

did they accomplish? Nothing. What did they do? They destroyed families" (Boone, 2024; Eaton, 2024d). At his sentencing hearing, Chad chose not to present any mitigation evidence (Pace, 2024). On June 1, 2024, he was sentenced to death.[3] For the insurance fraud charges, he received a 15-year prison sentence, to run concurrently with his death sentence, and was ordered to pay restitution of $ 130,000 plus $ 300,000. No fines were added to the insurance fraud sentence due to Chad's indigent status (Hart, 2024).[4]

[3] Capital punishment remains a legal form of punishment in Idaho, reflecting a broader, ongoing debate within the United States about the appropriateness and morality of the death penalty. Idaho's legal framework permits the death penalty for certain severe crimes, such as first-degree murder with aggravating circumstances. The use of capital punishment in Idaho underscores the state's commitment to a retributive form of justice, wherein the most severe crimes are met with the most severe penalties. Proponents argue that the death penalty serves as a deterrent to heinous crimes and ensures that justice is served by proportionally punishing those who commit egregious acts of violence. In contrast, several states in the United States have abolished the death penalty, highlighting a shift towards a more rehabilitative or restorative justice model. States such as California, New York, and Illinois have either banned capital punishment or imposed moratoriums, citing concerns about wrongful convictions, racial bias, the high costs associated with death penalty cases, and ethical considerations regarding the state's role in taking a life. The abolition of the death penalty in these states reflects a growing recognition of human rights, emphasizing the value of life and the potential for rehabilitation and redemption even among those who have committed serious offenses (Škulić, 2022; Desai & Garret, 2019). The right to spend the rest of one's life in prison rather than face the death penalty is seen by many as a humane alternative, respecting the intrinsic human dignity of the individual, regardless of their actions. Life imprisonment without the possibility of parole provides a severe, yet non-lethal, punishment that allows for the possibility of introspection, remorse, and transformation over time. It also eliminates the risk of executing an innocent person, a critical concern in the administration of justice. This alternative underscores a broader ethical and legal argument: that the state's responsibility is to protect life, even when addressing the gravest of crimes, and that justice does not necessarily require taking a life to uphold the law (Matić Bošković & László Gál, 2021).

[4] The sentencing of Lori Vallow Daybell and Chad Daybell in connection with the deaths of Tylee Ryan and J. J. Vallow represents a critical instance of providing access to justice for the victims' grandparents and, more broadly, for older people affected by crime. This case, which involved the murder of two children by their mother and her partner, profoundly impacted the extended family, particularly the grandparents, who sought accountability and closure. The criminal justice system's successful prosecution and sentencing of Vallow and Daybell serve not only to punish the perpetrators but also to affirm the rights of the victims' family members to seek justice and acknowledgment of their profound loss. Access to justice is vital for ensuring that the rights and interests of all parties affected by crime are recognized and respected. For the grandparents of Tylee Ryan and J. J. Vallow, this process of justice provides a sense of vindication and a public acknowledgment of the suffering and emotional distress caused by the tragic loss of their grandchildren. The legal proceedings allowed them to participate in the judicial process, share their grief, and voice the impact of the crimes, thereby fulfilling an essential need for emotional healing and societal recognition. This involvement in the justice process underscores the importance of transparency and fairness in criminal cases, particularly for those directly affected by the crime. Providing access to justice for

3. Why Do People Kill for Religion?

Religious motivations have long been a driving force behind acts of violence, including homicide (Wellman & Tokuno, 2004). From historical conflicts to contemporary incidents, the notion of killing for religion remains a complex and multifaceted phenomenon. One of the most recent and harrowing examples of this is the case of the Vallow-Daybell doomsday murders, which shocked the world with its gruesome details and apparent religious motivations. This part of the paper aims to explore why individuals kill for religion by analyzing the Vallow-Daybell murders within the broader context of religiously motivated violence. It delves into the psychological, sociological, and theological factors that drive such extreme actions and examines how religious beliefs can be manipulated to justify murder.

Religious violence can be understood as acts of aggression or harm that are either motivated by religious beliefs, doctrines, or texts, or are perpetrated in reaction to the religious identity, precepts, or practices of others. This form of violence encompasses a wide range of actions, including attacks on religious institutions, individuals, sacred objects, and events associated with religious expression. However, categorizing and understanding religious violence is inherently complex and context-dependent, necessitating a nuanced approach that avoids oversimplification. Religious violence, like other forms of violence, should be seen as a cultural and social process that unfolds within specific histor-

older people, especially in criminal cases, is crucial for several reasons. Firstly, older individuals often face unique vulnerabilities, including physical, emotional, and financial challenges that can be exacerbated by involvement in criminal cases. Ensuring that they have the opportunity to participate fully and meaningfully in the justice process helps protect their rights and promotes their dignity. Secondly, older people often play meaningful roles in family structures, serving as caregivers, guardians, or primary support systems. In cases where they suffer the loss of loved ones, their emotional and psychological needs must be addressed through the justice system, offering them a pathway to closure and healing. Furthermore, access to justice for older individuals reinforces societal values of respect, fairness, and the rule of law. It acknowledges that justice should be inclusive and accessible to all, regardless of age, and that the perspectives and rights of older people are integral to the broader pursuit of justice (Matić Bošković, 2023). In the context of the Vallow-Daybell case, the ability of the grandparents to seek justice affirms these principles, ensuring that their voices are heard and their loss is recognized, thereby contributing to a more just and compassionate legal system.

ical, political, and social contexts. This complexity makes it challenging to pinpoint religion as the sole or even primary cause of violent acts. As anthropologist Talal Asad suggests, the very notion of religious violence is deeply entwined with cultural processes that are themselves influenced by a multitude of factors, including economic conditions, political conflicts, social tensions, and ethnic rivalries (Asad, 2007). Therefore, attributing violence purely to religious motivations often oversimplifies the reality of these multifaceted events, ignoring the broader sociopolitical contexts in which they occur. For instance, studies examining purported cases of religious violence frequently find that these acts are less about religious doctrines themselves and more about underlying ethnic, economic, or political conflicts. This is evident in cases where violence is ostensibly justified through religious rhetoric but, upon closer examination, is primarily driven by longstanding ethnic animosities or competition over resources. The conflict in the Balkans during the 1990s, often framed as a religious war between Christians and Muslims, was, in fact, driven significantly by ethnic nationalism and historical grievances, with religion serving as a marker of identity rather than the primary cause of the conflict (Carmichael, 2002).

The relationship between religion and violence is further complicated by the fragmented and context-dependent nature of religious beliefs and practices. Decades of anthropological, sociological, and psychological research have shown that individuals' religious beliefs do not directly dictate their behaviors. Religious ideas are often inconsistent, loosely connected, and highly influenced by personal experiences, social environment, and cultural norms (Geertz, 1973; Boyer, 2001). This fragmentation means that the link between religious belief and violent behavior is not straightforward. The decision to engage in violence is rarely, if ever, based solely on religious tenets but rather emerges from a complex interplay of personal, social, and situational factors.

It is essential to recognize that religions, ethical systems, and societies typically do not promote violence as an end in itself. While sacred texts and religious doctrines may contain passages that appear to endorse violence, these are often interpreted within specific historical and theological contexts. Many religious traditions emphasize principles of compassion, peace, and the sanctity of life, advocating for non-violence as a fundamental value. However, within these same traditions, there can be allowances for the use of violence under certain

conditions, such as self-defense or the protection of the community, which are seen as morally justified responses to greater perceived evils (Juergensmeyer, 2003). The tension between the desire to avoid violence and the acceptance of its justifiable use is a recurrent theme in many religious and ethical systems. For instance, the concept of jihad in Islam, often misunderstood and misrepresented, traditionally encompasses both a spiritual struggle for personal moral improvement and, in certain contexts, a physical struggle to protect the Muslim community against oppression and injustice (Bonner, 2006). Similarly, Christian just war theory, developed by theologians like Augustine of Hippo and Thomas Aquinas, sets out ethical guidelines for when the use of force is permissible, emphasizing that violence must be a last resort, conducted by legitimate authority, and proportionate to the threat faced (Johnson, 1981).

Given the complexities involved, it is often difficult to discern the extent to which religion itself is a significant cause of violence. Religious motivations are typically intertwined with other sociopolitical factors, making it challenging to isolate religion as the primary driver. The notion that religious violence can be neatly separated from political, ethnic, or economic violence is increasingly seen as a false dichotomy, as religious and secular identities often overlap and influence each other in significant ways (Cavanaugh, 2009).

One of the key psychological factors that can drive individuals to commit murder for religious reasons is cognitive dissonance. This concept, rooted in psychological theory, refers to the mental discomfort that arises when a person holds two or more contradictory beliefs, values, or attitudes (Festinger *et al.*, 1956). In the case of Lori Vallow and Chad Daybell, the cognitive dissonance likely stemmed from their deeply held apocalyptic beliefs, which were incongruent with societal norms and laws. To resolve this dissonance, they may have felt compelled to act in ways that aligned with their beliefs, even if those actions involved murder.

Also, the process of radicalization also plays a crucial role in understanding why people kill for religion. Radicalization often involves a gradual adoption of extreme religious or ideological views that justify violence as a means to an end. In the Vallow-Daybell case, Lori and Chad's belief system evolved to the point where they viewed themselves as divine agents tasked with preparing for the apocalypse. This sense of a divine mission, coupled with a black-and-white

worldview that categorized individuals as either "light" or "dark", allowed them to dehumanize their victims (Harris, 2004). Such dehumanization is a common feature in cases of religiously motivated violence, as it enables perpetrators to view their actions as morally justified.

Religion can often create a strong sense of community and belonging. However, when religious beliefs take on a cult-like nature, these same dynamics can lead to social isolation and an "us versus them" mentality (Wright, 1987). Lori and Chad interactions with like-minded individuals reinforced their apocalyptic beliefs and isolated them from outside perspectives. This echo chamber effect, where only conforming views are accepted and dissenting voices are excluded, can foster an environment where extreme actions become normalized (Kimball, 2008). In addition, the role of group dynamics in the radicalization process cannot be understated. The Vallow-Daybell murders were not merely the actions of isolated individuals but were influenced by the larger context of a group dynamic that reinforced and validated their beliefs. In cult-like settings, charismatic leaders can exert significant control over followers, often manipulating them into committing acts they would not otherwise consider. In this case, Chad Daybell's role as a self-styled religious leader and his influence over Lori Vallow provided a powerful framework within which violent actions were rationalized as necessary for a higher purpose (Wright, 1987).

Theological interpretations, also, play a central role in understanding why people commit murder in the name of religion. Apocalyptic beliefs, in particular, have a long history of inciting violence (Catlos, 2014). The Vallow-Daybell case is a contemporary example of how apocalyptic theology can be twisted to justify heinous acts. Apocalyptic thinking typically involves a sense of urgency and a belief in the imminent end of the world, which can lead individuals to adopt extreme measures in preparation for the perceived final confrontation between good and evil (Hall *et al.*, 2000). In the Vallow-Daybell case, the belief in doomsday prophecies and the idea of being part of a chosen group tasked with ushering in a new era created a framework within which murder was seen as a necessary evil. This narrative often involves a dualistic worldview that sees the world in stark terms of good versus evil, light versus dark. Those labeled as "dark" or "evil" are viewed as threats that must be eliminated to achieve the

prophesied utopia. This form of moral absolutism can erode empathy and justify violence as a righteous act.

Travis Hirschi's control theory, particularly his social bond theory, provides a compelling framework for understanding deviant behavior by emphasizing the role of societal bonds in preventing crime. This theory posits that individuals with strong ties to society are less likely to engage in deviant or criminal activities, as these ties encourage conformity to societal norms (Hirschi, 1969). In contrast, weak social bonds may result in a lack of self-control and increased susceptibility to deviant behavior. The Vallow-Daybell doomsday murders, a case that has captured multi-national attention due to its shocking details and complex web of religious extremism and familial betrayal, offer a poignant illustration of Hirschi's theory.

Attachment. - Hirschi's concept of attachment refers to the emotional and psychological bonds individuals have with others, particularly family, friends, and institutions (Hirschi, 1969). These bonds foster a sense of care and responsibility, discouraging deviant behavior due to fear of disappointing or hurting those one is attached to. In the Vallow-Daybell case, Lori Vallow's weakening attachment to her family members, particularly her children, is a critical factor (Glatt, 2022). Reports suggest that Vallow became increasingly absorbed in the apocalyptic teachings of Chad Daybell, whom she married after a short courtship. Her attachment to Daybell and his beliefs appeared to eclipse her attachment to her children. This shift in attachment likely contributed to her perception of her children as obstacles to her new life, rather than as individuals she was emotionally and morally obligated to protect. Moreover, Lori Vallow's relationship with her extended family, including her previous spouses and her surviving children, deteriorated as her involvement with Daybell intensified. Vallow's estrangement from her family and the subsequent alienation she experienced could have weakened her sense of connection and responsibility, facilitating her participation in the murders. The detachment she exhibited - refusing to disclose the whereabouts of her children and lying to investigators - suggests a profound breakdown in the natural attachment a mother would typically have towards her offspring, underscoring Hirschi's argument that weakened social bonds increase the likelihood of deviant behavior (Glatt, 2022).

Commitment. - Commitment, as outlined by Hirschi, refers to the investment one has in conventional activities, such as career goals, education, and family life (Hirschi, 1969). Individuals with high levels of commitment to these conventional paths are less likely to engage in criminal behavior due to the fear of losing their investments. The Vallow-Daybell case reveals a disturbing abandonment of such commitments. Lori Vallow, once seen as a devoted mother, appeared to shift her commitment away from her family and societal expectations and toward a doomsday belief system. This shift involved the acceptance of radical ideas about the end times and a subsequent realignment of her priorities, which seemingly placed less value on the lives of her children and more on the fulfillment of a prophetic vision shared with Chad Daybell. Vallow's and Daybell's commitments to their apocalyptic beliefs arguably eclipsed their previous commitments to social norms and familial responsibilities (Glatt, 2022). Their actions can be viewed as attempts to fulfill these new commitments at any cost, even if it meant engaging in criminal activities, such as conspiracy and murder. In this light, their investment in the doomsday ideology led them to perceive conventional social bonds as hindrances to their higher goals, illustrating Hirschi's notion that a lack of commitment to societal norms can facilitate criminal behavior.

Involvement. - Involvement in conventional activities serves as another deterrent to deviant behavior, according to Hirschi (1969). The more time individuals spend in socially approved activities, the less time they have to engage in deviant behavior. Lori Vallow's increasing involvement in the extremist religious teachings promoted by Chad Daybell, which included participation in doomsday preparation and belief in a divine mission, left little room for conventional societal involvement. Her withdrawal from traditional roles, such as nurturing her children and engaging in normal community activities, illustrates a significant shift in her lifestyle and priorities. The Vallow-Daybell case demonstrates how immersion in a subculture that glorifies deviant behavior, under the guise of religious conviction, can replace involvement in conventional activities. This immersion created an alternative reality for Vallow and Daybell, where traditional societal norms and laws were no longer binding. Their involvement in apocalyptic preparations and their identification with a radical subculture acted as a substitute for normative societal engagement, thus enabling their criminal behavior.

Belief. - Hirschi's control theory also highlights the importance of belief in the validity of societal rules and laws. Strong belief in the moral legitimacy of societal norms acts as a deterrent to criminal behavior (Hirschi, 1969). Lori Vallow and Chad Daybell's acceptance of extreme religious doctrines that justified violence undermined their belief in conventional moral and legal standards. Their adoption of a belief system that viewed certain individuals as "zombies" or threats to their divine mission provided a distorted moral justification for their actions. In the Vallow-Daybell case, the couple's radical beliefs eroded any respect they may have once held for the law and societal expectations. This loss of belief in societal norms aligned with Hirschi's theory that weakened belief systems can facilitate deviant behavior, as individuals no longer feel morally obligated to adhere to societal rules.

The Vallow-Daybell doomsday murders present a tragic example of how weakened or distorted social bonds, as explained by Travis Hirschi's control theory, can lead to criminal behavior. Through attachment, commitment, involvement, and belief, Hirschi's framework provides valuable insights into the psychological and sociological processes that contributed to the unfolding of these horrific events. The case underscores the importance of maintaining healthy social bonds and societal engagement as protective factors against deviant behavior, highlighting the profound consequences when these bonds are severed or corrupted.

The intersection of religion and violence poses significant challenges for legal systems, especially when assessing culpability and intent. In cases like the Vallow-Daybell murders, defendants may argue that their actions were a result of genuine religious beliefs, raising questions about the role of religious freedom and mental health in criminal liability (Wright, 1987). The legal system must balance the right to religious belief with the need to protect individuals from harm, which often involves difficult determinations about the sincerity of beliefs and the influence of mental illness (Kimball, 2008). From an ethical standpoint, the Vallow-Daybell case raises questions about the limits of religious tolerance and the responsibility of society to intervene when religious beliefs appear to be leading to harmful actions. While religious freedom is a fundamental right, it is not absolute. The challenge lies in identifying when religious practices cross the line

into criminal behavior and how to address such situations without infringing on individual rights.

To wind-up, the Vallow-Daybell doomsday murders underscore the complex interplay of psychological, sociological, and theological factors that can lead individuals to commit murder in the name of religion. Cognitive dissonance, radicalization, group dynamics, social isolation, and apocalyptic beliefs all contributed to a distorted worldview where murder was seen as a justified means to a divine end. Understanding these factors is crucial for preventing similar tragedies in the future and for addressing the broader issue of religiously motivated violence. As society continues to grapple with the dark side of religious extremism, it must remain vigilant in promoting tolerance, critical thinking, and open dialogue to counteract the forces that drive individuals toward violent actions. By examining cases like the Vallow-Daybell murders through an interdisciplinary lens, we can better understand the underlying motivations behind religious violence and develop more effective strategies for prevention and intervention. As the boundaries between religious belief and criminal behavior become increasingly blurred, a nuanced approach that respects religious freedom while safeguarding public safety becomes essential.

Conclusion

The tragic case of Tylee Ryan and J. J. Vallow's murders serves as a profound illustration of how religious extremism, when intertwined with personal and psychological factors, can lead to heinous criminal acts. Through the lens of the Vallow-Daybell case, this paper has explored the multifaceted role of religious beliefs in motivating and justifying violence. The intersection of apocalyptic theology, cognitive dissonance, and social isolation played a significant role in transforming Lori Vallow and Chad Daybell's religious convictions into a destructive force, culminating in the senseless loss of innocent lives.

From a criminological perspective, this case highlights the dangers of radicalization and the impact of charismatic leaders who manipulate religious ideologies for personal gain or to fulfill perceived divine missions. It underscores the necessity for robust legal frameworks and law enforcement strategies that can

effectively address crimes committed under the guise of religious beliefs, ensuring that the rights to religious freedom do not extend to the perpetration of violence. This case also raises critical ethical and legal questions about the limits of religious freedom, the role of mental health in criminal responsibility, and society's responsibility to protect vulnerable individuals from the harmful impacts of radical ideologies. As we continue to grapple with the complexities of religiously motivated violence, this case serves as a reminder of the need for a balanced approach that respects religious liberties while safeguarding public safety.

Ultimately, the Vallow-Daybell murders call for a comprehensive understanding of the psychological, sociological, and theological factors that contribute to religiously motivated violence. Only through a multidisciplinary approach can society hope to prevent similar tragedies and promote a future where religious beliefs are a source of compassion and community, rather than division and destruction.

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Chapter 2

The right to life and bodily integrity in the context of family and sexual freedom

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PERMISSION FOR UNDERAGE MARRIAGE: DENYING THE CHILD'S RIGHT TO PROTECTION

The purpose of this paper is to identify, through the analysis of the rules of court procedure and established practice, the various implications of the license for child marriage on the key players in the procedure – the child, the parents, the guardian, in order to provide additional insight into the way in which protection of children at risk of early marriage is organized and ensured in Serbian legislation, and to make a scientific contribution to the research of this topic on a critical, contextual and conceptual level and support the national implementation of the recommendations of the UN Committee on the Rights of the Child regarding the removal of exceptions that enable the conclusion of child marriages.

***Keywords**: child, underage marriage, child marriage, guardianship authority, court, marriage license.*

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1. Introduction

A cursory glance at the statistics leads to the conclusion that underage marriages in Serbia are a rare phenomenon and that the number of such marriages is decreasing year by year. The number of marriage-like child partnership unions, of which the competent authorities have knowledge and which they record on the basis of reports submitted for various reasons, is also not large, but the big question is whether that number reflects the actual situation.[1] According to the latest published data, in 2023, centers for social work in Serbia identified a total of 182 children (170 girls and 12 boys) in the so–called child marriages[2]. These are children, mostly girls, who established a life union that was not formalized as a marriage, but is that in its essence, and this number also includes children who requested court permission to enter into a underage marriage (there are 47 court requests). The most affected by the so-called by child marriages are Roma children. Of the total number of registered cases, only 7.9% were girls who do not live in Roma settlements. Among registered Roma girls, 32.7% are under 15 years

[1] On the trends and prevalence of underage marriages, see the report Kljajić, S. *The role of the social protection system in preventing child marriages* (presentation at the Second Meeting of the Coalition for the Prevention of Child Marriages, held in Belgrade, 17 June 2019). The report states that the survey conducted by the Republic Institute for Social Protection in 2019 showed that 73% of centers for social work had only one to five reported cases of so-called of child marriages on an annual basis, only 2% of centers for social work had more than 10 cases, while 19% had no reported cases. According to the latest available report of the Republic Institute for Social Protection, in 2023, 27.6% of the total number of centers for social work in the Republic of Serbia had children victims of child marriage on their records.

[2] "Child" and "underage marriage" are terms that refer to a union in which one of the spouses is under 18 years of age, i.e. is not an adult, with the fact that "underage marriage" in domestic literature generally means a regularly concluded marriage (with court permission) in which both or one of the spouses are minors, while the term "child marriage" is broader and includes minor unions that were not concluded before the competent authority in the form of marriage, for which no court permission was given or even requested, but they actually exist as a marriage. The term "early marriage" is often used as a synonym for child marriage and underage marriage, but in the literature it is also used to denote marriages in which both partners are 18 or older but are not mature enough to give their consent to the marriage for various reasons, such as the level of physical, emotional, sexual and psychosocial development or the lack of information about possible life choices, etc. On the content of these terms in international law, see Rangita de Silva de Alwis, 2008, *Child marriage and the law, Legislative Reform Initiative Paper Series*, UNICEF, New York; UN Human Rights Council, Preventing and eliminating child, early and forced marriage: Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/26/, 2 April 2014, 3-4, https://undocs.org (accessed 4 April 2024).

old. A quarter of all registered children in child marriages are under 16 years of age. Compared to 2022, 10.3% fewer children were identified as having entered into some type of marriage-like underage union.[3]

Various factors contribute to the existence of underage, i.e. child and early marriages, among which poverty, structural inequality and lack of education, customs and cultural practices stand out. Hence, this phenomenon, in Serbia, as well as in the world, is most often related to girls and is mostly present in marginalized groups. Research shows that 22.6% of girls from the poorest households, and as many as 55.7% of girls from segregated Roma settlements enter some kind of cohabitation (extramarital partnership or marriage) before the age of 18 (UNICEF, 2021: 8). In some parts of eastern and southern Serbia, such as the Timočka Krajina, Banat, the area around Soko Banja, Kosovo and Metohija, the custom of underage marriages and the entry of minors into extramarital unions has persisted for a long time (Stanković, G., 1982: 197). The social attitude towards different social groups is generated through the creation of certain institutions. Institutions are the answer to the problems that life itself poses to society (Stevanović, A, 2022: 32). In addition to the institutional one, society's response to certain phenomena and problems is given through the legislative framework. In fact, one of the functions of legislation is to reflect the legal, political and institutional approach of the state to a certain problem. It is a kind of platform for policies and programs to support changes in society. The establishment of legal and institutional guarantees of human rights in practice is largely determined by the commitment of legislators.

International law, whether through universal or regional instruments, frames and shapes national legislation (Kolaković-Bojović, 2022: 64). The Republic of Serbia is a member of the UN Convention on the Rights of the Child and its national legislation is largely aligned with that document. And yet, some of the recommendations of the UN Committee on the Rights of the Child, including recommendations related to child marriage, await national implementation. More than two decades ago, the UN Committee on the Rights of the Child acknowledged that early marriage and childbearing are significant factors in

[3] Source: Republic Institute for Social Protection, data was taken from the *Report on the work of centers for social work for the year 2023* and the *5th Report on the work of social welfare institutions in the protection of children from child marriage for the year 2023* (hereinafter: RISP, 2024).

health problems related to sexual and reproductive health, including HIV/AIDS, and that the legal minimum age for marriage, especially for girls, is still too low in some contracting parties (CRC/GC/2003/4). Other concerns were also noted that are not only related to health, but also to other rights of children entering marriage, which is why they are often forced to drop out of school and are socially marginalized. In addition, in many countries, married children are considered to be legally of age (with full working capacity) even though they have not reached the age of 18, thus denying them all the special protection they are entitled to according to the UN Convention on the Right of the Child. The Committee's recommendation is that the contracting parties review and, where necessary, amend their laws and practices so as to raise the minimum age for marriage, with or without parental consent, to 18 years of age, for both boys and girls (CRC/GC/2003/4, Par. 21).

Within the framework of the Council of Europe, forced marriages and child marriages[4] are also recognized as a violation of the human rights of children, which is why all member states of this regional organization, by adopting Resolution 1468 (2005) on forced and child marriages, are invited to harmonize their national legislation, inter alia, by determining or raising the legal minimum age limit for men and women to get married - to 18 years.

Eliminating child marriages by 2030 is a goal within the Sustainable Development Goals (UN Resolution A/RES /70/1, 2015). However, no region is on track to eliminate underage, early and forced marriage by 2030, as outlined in *The 2030 Agenda for Sustainable Development.* Serbia is not an exception in this regard. To end the practice globally, progress must be significantly accelerated and sustainable. Without further acceleration, it is estimated that by 2030, more than 170 million girls in the world will be married before their 18th birthday, and that there will be about 14,000 of them with that status in Serbia (UNICEF, 2021: 6).

[4] Forced marriages are marriages in which one or both parties have not personally expressed their full and free consent to such a union, and in this context child marriage is also considered a form of forced marriage. For the full definition of forced marriage, see the first *EU directive to combat violence against women and domestic violence*, approved by the European Parliament and the Council, 16 April 2024.

Serbian family legislation is harmonized with the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), which obliges the signatory states to take all necessary legislative measures to specify the minimum age for marriage.[5] In the Republic of Serbia, the age limit for getting married is specified and is equal to the age limit for acquiring full working capacity – 18 years. And yet, if there are "justifiable reasons", the court can allow marriage to "a minor who has reached the age of 16 and has reached the physical and mental maturity required to exercise the rights and duties in marriage" (FL, 2005, art. 23. par 2). The procedure is conducted at the request of the minor, before a non-litigation court. Before deciding on the permission for underage marriage, the court is obliged to listen to the minor, his/her parents, i.e. guardian, the person with whom he/she intends to enter into marriage, obtain the opinion of the health institution and "achieve appropriate cooperation" with the guardianship authority (LNLP, 1982, art. 82. par. 2). Legal theory did not particularly address this procedure, or the position of the guardianship authority (centers for social work) in that procedure, except to the extent that, mostly in family law textbooks and in some commentaries on procedural laws, strict legal norms are interpreted, with sporadic presentation of positions on certain procedural issues. Thus, in a small number of texts, the prevailing opinion is that the legal wording "to achieve appropriate cooperation" indicates that the guardianship authority appears in these proceedings in the role of an associate of the court, i.e. an expert, who collects certain data by order of the court and submits a finding and expert opinion to the court, and that the law did not grant them other procedural powers (which they normally have in long non-litigation proceedings in which the rights and interests of minors, as persons under special social protection, are decided). In practice, the involvement of the guardianship authority in the procedure of granting permission for the conclusion of an underage marriage is really reduced to a mere formality. That authority mainly limits its participation in the procedure to the formal submission of a report to the court (findings and expert opinion), which is deprived of critical insight and deeper research into the motives and assessment of the circumstances in which the child is, which

[5] According to Article 2 of the Convention, marriage cannot be legally concluded by a person who has not reached the prescribed age, unless there is an exemption given by the competent authority "for serious reasons and in the interest of the future spouses".

should be its basic function. Thus, one of the problematic areas of this procedure becomes the issue of protecting the best interests of the child and applying the legal standard "justifiable reason" (for entering into a marriage). An already established and functioning union, pregnancy and the birth of a child, cultural patterns of the community to which the minor belongs and respect for customary norms are most often cited as "justifiable reasons" for granting a marriage license. The prevailing position, according to which the guardianship authority does not have the right to appeal against the court decision allowing the conclusion of a child marriage, leads to the fact that that authority does not essentially engage in the assessment of the best interests of the child, but only states the established facts (the existence of a minor union, pregnancy, customs, etc.). These procedures also lack an assessment of relevant aspects of the exercise of parental rights, although underage marriage is high on the risk scale of abuse of parental rights. Moreover, decisive importance is given, without a deeper analysis, to the attitude, opinion and wishes of the parents of the minor applicant. Thus, the opinion and position of the parents actually grows into the opinion and position of the guardianship authority, and since the court most often bases its decision on the position and opinion of the guardianship authority, it is further translated into a court permit. This renders the entire court proceedings meaningless.

The recommendations made by the Committee for the Rights of the Child to the Republic of Serbia in relation to the elimination of exceptions that allow the conclusion of underage marriages and the establishment of a system for monitoring these cases (CRC/C/SRB/CO/2-3, par. 20 & 21) propelled the relevant ministry to require a change in the practice of the guardianship authority, thus, by adopting the Instruction on the way of work of the Center for Social Work – guardianship authority in protecting children from child marriage, on 20 May 2019, the Ministry of Labor, Employment, Veterans and Social Affairs obliged the guardianship authority to form a team of experts, after receiving the court's request for the submission of findings and opinions, in order to raise the protection of children at risk of child marriage to a higher level – the level of team assessment (par. 8.2). The instruction specified the measures and services undertaken to protect the child at risk of child marriage, aimed mainly at informing about the harmfulness of early marriages, counseling, and empowering the child and his/her family of origin (par. 10). Although the formal prerequisites for the

improvement of the practice were created in this way, the fact is that no significant progress has been made in terms of assessing the "justification" of the reasons for granting permission for underage marriages. In truth, that was not even the goal of the Instruction, given that the text of that document itself foresees its limited application – until domestic laws are harmonized with international law regarding the minimum age for marriage (par. 13).

When considering everything presented above, the question arises as to whose interests are protected by the granting a permission to enter into a marriage before the adult age, and that, primarily, in the context of the consequences – legal effects of the court permission. Are these the interests of the minor who intends to enter into marriage (and what exactly are his/her interests that take precedence over the right to health, education, development and special protection) or are the interests of others at issue: adult partner, parents, family, wider community? Society has a clear interest in preventing child marriages, for several reasons. The first and perhaps the most important is the health aspect, because children at that age, in the psychophysical sense, are not sufficiently or completely formed, and the consequences of early entry into intimate relationships and early pregnancies can be extremely serious. In addition, premature marriage and the creation of offspring at an early stage of life most often leaves minors with a low level of education, which later represents a major obstacle for the independent economic and material development of the family (Počuča, Šarkić, 2016: 109), thus creating a new circle of people dependent on the social welfare system. By entering into a marriage with the court's permission, the minor him/herself acquires full legal capacity before reaching the age of 18, and thereby loses the right to special protection that belongs to children. In certain situations, parents benefit from child marriage. In these cases, the child is often used as a means to realize certain interests of the parents. It is mainly about the financial benefits associated with various types of illegal activities, such as, for example, child trafficking, and even when this is not the primary motive, parents are certainly freed from the duty of supporting a child who has entered into a marriage. It is indicative that as many as 49.1% of parents of children who have been registered as being in child marriage in the last five years are unemployed. In addition, the permission to marry before the child reaches the age of majority provides

the parents (and the same applies to the adult partner of the child) with protection from criminal prosecution.

Even Immanuel Kant, a prominent German philosopher, asserting that human being as a rational being exists by himself, excluded any possibility of using a human being as a means, promoting the right to life and the right to dignity as immanent categories (Kant, 1932). In order to eliminate the danger of turning a human being into a means to an end, the theory emphasizes the necessity of eliminating existential fear, non-discrimination and preserving the identity and integrity of the person, and a special category of that framework is to limit and determine the extent to which state power and the rule of law can be applied to an individual (Pavlović, 2020: 47). This aspect of the use of children is by no means to be ignored, especially if one takes into account the fact that among children who have been recorded as being in "child marriage" in the last five years, the share of children who are under parental care is continuously high, with an average share of 87.9% and that it is clear that parents are responsible for their early entry into a partnership and early marriage, that they encourage, support or, at the very least, have a positive attitude in relation to this phenomenon. By the very fact that it is legally possible to allow a child to marry, centers for social work are essentially unable to apply appropriate protection mechanisms.

2. Court proceedings deciding on the permission to enter into an underage marriage

2.1. Process aspects - law, theory, practice

As stated, in Serbian family legislation, underage represents a marital impediment. And yet, for "justifiable reasons", the court may allow the marriage of a minor who has reached the age of 16 and has reached the physical and mental maturity required for the exercise of rights and duties in marriage (FL, art. 23). Therefore, minors over the age of 16 are a rectifiable marital impediment, and making a decision on dispensation from this marital impediment, i.e. on the recognition of marital capacity, falls within the jurisdiction of the court. Getting married before reaching the age of majority with the permission of the court is one of the ways to acquire full legal capacity before reaching the age of 18 (FL, art. 11. par. 2).

The judicial procedure in which the fulfillment of the conditions for granting permission to enter into marriage before the age of majority is granted is regulated by Chapter VI, Art. 79-86 of the Law on Non-Litigation Procedure (hereinafter: LNLP). According to that Law, the court is obliged to investigate in an appropriate way all the circumstances that are important for determining whether there is a free will and desire of the minor to enter into marriage and whether the minor has reached the physical and mental maturity required to exercise the marital rights and duties. In order to determine this, the court is obliged to obtain the opinion of the health institution, to achieve appropriate cooperation with the guardianship authority, to hear the minor (as a rule without the presence of other participants), to hear his/her parents or guardian, the person with whom the minor intends to enter into marriage, and if necessary, it can present other evidence and obtain other data. The law also stipulates that a parent who has been deprived of parental rights will not be heard, and that the court is free to evaluate and decide whether to hear a parent who does not exercise parental rights without justifiable reasons. The court is obliged to examine the personal characteristics, property status and other important circumstances related to the person with whom the minor wishes to enter into marriage.

Court proceedings can be initiated only at the proposal of a minor who wants to enter into marriage, which is in accordance with the rule that only one who is affected by a certain marital impediment can request a dispensation from marital impediment (LNLP, art. 80. par. 1). Therefore, a minor who intends to enter into marriage and has reached the age of 16, regardless of other personal characteristics, has the recognized procedural and postulation capacity in this procedure. If both persons intending to enter into marriage are minors, the procedure is initiated at their joint proposal. If the person with whom the minor wishes to enter into marriage is an adult, then he/she is not a party to the proceedings, but has the procedural position of a witness "who should provide the court with the necessary data regarding the economic, financial and other circumstances in which the future married life would take place" (Stanković, Trgovčević Prokić, 2015: 410).

Unlike other procedures related to minors, in this procedure the guardianship authority does not have the position of the petitioner. It would not be able to initiate the procedure for granting a license for the conclusion of a minor's

marriage, even if the minor is under its immediate guardianship.[6] For the same reason, the position of the petitioner is not recognized by law even for the parents of minors, who exercise parental rights.

The court decision allowing marriage before the age of majority is a legally transformative act. It is adopted in the form of a decision that has constitutive effect. It establishes a new right for minors - the right to marry.

With regard to legal remedies, special rules apply, both in relation to the circle of authorized subjects, and in relation to the type of decision that can be contested by legal remedy. In the special part of the Law, in which this procedure is regulated, it is prescribed that an appeal is allowed against the court decision rejecting the proposal to allow a minor to marry (negative decision) and that appeal can only be filed by a minor (LNLP, art. 84). There are no other special rules regarding legal remedies. The modest normative substrate opens up numerous questions, above all when it comes to who has the right to contest the so-called positive court decisions. It is quite certain that a minor, as the authorized initiator of the procedure (petitioner), could not file an appeal against the decision that approves his/her proposal and grants permission to enter into a marriage (positive decision), because he/she lacks a legal interest in filing an appeal. Among legal theorists, this interpretation is not disputed, but in the case law there is also an opposite point of view - that the petitioner can file an appeal against the decision allowing the conclusion of the marriage. It was presented by the Court of Appeal in Belgrade, in response to the question (*Collection of Sentences from Civil Law and Civil Procedure Law*, 2018: 521), in which response it is stated that an appeal against a decision allowing the conclusion of a marriage can only be filed by a person who submitted the petition for the adoption of that decision. The cited interpretation of the Court of Appeal is unacceptable. Apart from having no legal interest in refuting the decision by which his/her proposal was adopted, the minor does not even need to, because he/she does not have to use the granted court permission - the minor has the right to change his/her mind and to give up the marriage at any time and after receiving the court's permission.

[6] In certain situations, the guardianship authority may decide not to appoint a guardian for a minor without parental care, but to perform this duty directly. By the decision on the immediate performance of the duties of the guardian, the expert of the guardianship authority will be determined who will perform the duties of the guardian on behalf of that body (FL, art. 131).

Parents and guardians of minors cannot file an appeal against the decision allowing a minor to marry, because they do not have the right to represent the minor in this procedure, and they do not have the status of a party. For the same reason - the lack of party status, the person with whom the minor intends to marry, if he is of age, does not have the right to file an appeal. Regarding the position of the guardianship authority and its right to exercise legal remedy, there is no uniform position in legal theory. Therefore, more will be said about this issue in the appropriate place in the continuation of the text.

The applicable law does not prescribe to whom the court decision is to be delivered. In one of the comments of the LNLP, it is stated that the decision approving the petition shall be delivered to the minor petitioner, as well as the parents, i.e. the guardian and the guardianship authority (Stanković, Trgovčević Prokić, 2019: 412), without specifying the reason for delivering the court decision to those subjects. In older legal literature, one can find the point of view that the decision on the granting of permission to enter into a minor marriage is delivered to the minor petitioner, but that it is also delivered to the parents, i.e. the guardian and the guardianship authority, "because they are also authorized to file an appeal against the decision".[7] However, it should be pointed out that the aforementioned legal position was built by the case law established before the entry into force of the current LNLP, applying the legal rules of pre-war law.[8]

2.2. Substantive legal aspects

2.2.1. Maturity and will of minors

In order to obtain permission to enter into an underage marriage, in addition to the prescribed age (16 years of age), the law stipulates a special substantive legal condition - that the minor has reached the physical and mental maturity to exercise rights and duties in marriage (LNLP, art. 82. par. 1). In legal theory, maturity is also interpreted as the ability of minors "to understand the significance and consequences of a decision made" (Šarkić, Počuča, 2013: 170). The condition "maturity to exercise rights and duties in marriage" requires consideration in a

[7] See Stanković, 1982: 209 (par. 35).

[8] See Instruction of the Supreme Court of the FNRY on the procedure of the courts when resolving applications for marriage, Su 165/49, issued at the General Session held on 22 March 1949.

broader context, one that takes into account the legal consequences of marriage. It is necessary to look at the overall physical, psychological, emotional and social maturity of the minor, i.e. his/her ability to assume and perform the rights and duties implied by emancipation, as such. In other words, to determine the minor's ability to make thoughtful life decisions and take responsibility for them. This is a rather complex task for the court, which, in order to fulfill it, requires the engagement of experts, professionals of various specialties (psychologists, psychiatrists, etc.). In connection with the stated requirements regarding the maturity of a minor intending to enter into marriage, an objection could be made that even persons who have acquired full legal capacity upon reaching adulthood sometimes lack such maturity. However, the question of the maturity of a person who has reached the age of 18 and thereby acquired full legal capacity is not in the domain of the individual decision and responsibility of the court and the guardianship authority, but is a matter of general social consensus embodied in an imperative legal norm for which neither the court nor the guardianship authority is responsible. Therefore, both the court and the guardianship authority are required to act with increased care in the status matter in question. Both the court and the guardianship authority are obliged to conduct an interview with the minor, as a rule, without the presence of other persons; the guardianship authority - to apply the rules of professional social, psychological and pedagogical work in examining the fulfillment of this condition, and the court to obtain the opinion of the health institution.

The physical and mental maturity of minors is an important element of the assessment because without the required level of psychophysical maturity there is no legally relevant will to enter into marriage. The will must be free. The absence of free will is an obstacle to entering into marriage (FL, art. 24), and it is of crucial importance to establish that there is a real intention, that is, the desire and freely expressed will of a psychophysically capable minor to enter into marriage with a certain person. Free will implies the absence of defects of the will. Therefore, in this procedure, it is necessary to establish that there is no pressure from parents or other persons (Ponjavić, 2017: 111), that there is no coercion, blackmail or other impermissible influence on the will of the minor from anyone,

and to eliminate the suspicion that the minor may be a victim of human trafficking.[9]

Despite all of the above, the question arises whether the best interest of the child is exhausted in respecting the desire and freely expressed will to enter into marriage or the content of that principle in this case is somewhat more complex. The freely expressed will and desire of a minor is not always and not necessarily in his/her best interest.

2.2.2. Justification of reasons for granting permission to enter into marriage before the age of majority

In order to obtain permission to enter into an underage marriage, it is also required that there are "justifiable reasons" (FL, art. 23). According to the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (art. 2), a dispensation from marital impediment related to minors can be granted "for serious reasons and in the interest of the future spouses". The existence of "justified" or "serious" reasons for early marriage should be evaluated by the court in each specific case. Some legal writers believe that it is necessary to assess "whether it is more in the interest of the minor to stay in his/her parents' family or to marry" (Draškić, 2016: 87). There are also opinions that, when assessing whether there is a justified reason, the court should take into account the established moral principles and cultural patterns of behavior in a certain community, i.e. "the customs and understanding of the environment in which the petitioner lives" (Stanković, Trgovčević Prokić, 2015: 410), as well as "whether the possible conclusion of the marriage will have implications for third parties" (Stanković, Boranijašević, 2022: 682). The justification of the reasons for entering into marriage, as a legal standard, the content of which is determined in each specific case by the authority conducting the procedure (taking into account all specific, objective and subjective, circumstances of the specific case), belongs to the sphere of value assumptions and ethical principles that apply in a society and it largely depends on the value judgments and subjective value system

[9] If, during the evaluation procedure, the existence of indicators that preliminarily point to human trafficking is established, the guardianship authority is obliged to immediately inform the Center for the Protection of Victims of Human Trafficking, for the sake of coordinated action (Instructions on the work of the center for social work - guardianship authority in the protection of children from child marriages, par. 10. 2).

of the acting judge. What is "justified" in one value system may be completely unacceptable for others, and this is a problem when proving the fulfillment of conditions related to general legal standards.

In order to determine the fulfillment of the conditions and the justification of the reasons for entering into an underage marriage, the subject of assessment is also "personal characteristics, property status and other important circumstances related to the person with whom the minor wishes to enter into marriage" (LNLP, art. 82. par. 4). Since the list of mandatory assessment elements prescribed by FL and LNLP is rather short, the court is left with the possibility to "produce other evidence and obtain other data if necessary" (LNLP, art. 82. par. 2). Identifying "important circumstances" and "other data" on which the decision about what a justified reason for marriage in a specific case is and what represents the best interest of minors depends to a large extent on the court's ability to recognize these factors. Since judges do not have this specific knowledge, they, in this regard, mainly rely on the specific professional knowledge and skills of guardianship authority experts and on their ability to apply standards and recommendations arising from relevant domestic and international legal acts, professional documents, guidelines and rules of professional work. At the same time, everything that has been said regarding the value judgments of the acting judge and the question of the application of general legal standards, equally applies to the value judgments and subjective value system of the experts of the guardianship authority participating in this procedure.

Practice shows that already established extramarital unions and pregnancy are the most common situations that the court accepts as a "justifiable reason" for granting a license to enter into an underage marriage (Jović Prlainović, 2019: 106; UNICEF, 2016: 21) and that the courts are "generally sympathetic to such requests and very rarely reject them" (Ponjavić, 2017: 111). From the perspective of the legal system, the existence of an underage extramarital union and the pregnancy of a minor require the competent state authorities to take various measures of family law, criminal law and social protection of the minor who founded that union. It is part of his/her right to special protection. In this context, the question arises whether the special protection of a minor who is already living in an extramarital union and is expecting a child is achieved by simply granting permission to marry before reaching the age of majority, or is it just the opposite

- marrying before reaching the age of majority cancels the child's right to special protection they are entitled to according to the Constitution, the Law and the CRC. It seems that the issues of protecting the best interests of a minor intending to marry (and his/her unborn child) require a more comprehensive consideration and a different response of the state.

The criminal law aspect of this phenomenon deserves special attention. In Serbian law, extramarital union with a minor is a criminal offense (CC, art. 190), and child marriage is recognized as an instrument of abuse of parental rights. Abuse of parental rights is prohibited (FL, art. 7, par. 3). The guardianship authority, as an exponent of the state, is obliged to supervise the way in which parents exercise their parental rights (FL, art. 79 & 80), and this is one of the ways to prevent abuse of the child by the parents. Prison sentences are envisaged for a parent (and the same applies to an adoptive parent or guardian) who allows a minor to live in an extramarital union with an adult or induces him/her to do so, (prison for up to three years, and if the act was done out of self-interest - imprisonment for six months up to five years; if human trafficking is proven, imprisonment for at least five years). The law, in the above context, is used as an instrument for prohibition and punishment. However, practice shows that the law can also be used as a means to avoid punishment. Since underage is a rectifiable marriage impediment, in the event that the marriage is subsequently concluded (for justified reasons, with court permission), the prosecution of the parents for enabling or inducing the child to live in an extramarital union will not be undertaken, and if undertaken, it will be suspended (CC, art. 190. pat. 4). It follows that granting permission to enter into an underage marriage is a way to remove the mark of illegality from a parent's behavior that has all the features of a criminal act. In the introductory part of this paper, it was already mentioned that among minors at risk of early marriage, the majority are those under parental care (87.9%), and that almost half of the parents of those minors are unemployed. In her scientific work "Child Marriages in the Shadow of Crimes" (2022), the author Slađana Jovanović considered this situation from the aspect of practice, with an emphasis on the criminal legal context in which this phenomenon can be found, bearing in mind the observed connection with criminal acts such as coercion, neglect and abuse of a minor or domestic violence, extramarital union with a minor, adultery with a child, human trafficking. Along with the remark that refers to the unequal

treatment by public prosecutors, the aforementioned author cites very indicative reasons for rejecting criminal charges against the parents of children who are in the so-called child marriage: "the consent of all actors, the beginning of a union after the birth of a child, belonging to a certain national minority, i.e. the observance of customary norms, and in several cases the institute of "deed of minor importance" was applied, with the explanation that the minor is pregnant, that harmony reigns in the community, etc. (Jovanović, 2022: 57). With reference to the Annual Report on Child Marriage in Serbia for 2021 with special emphasis on the work of public prosecutors, N. Marković /2022/: Belgrade, pp. 8-12, the same author states that there have been cases in which the criminal complaint was dismissed after the conclusion of an underage marriage, after a significant period of time had passed since the filing of the criminal complaint (one to two years) expressing the logical conclusion that it can be reasonably suspected that they were just waiting for the fulfillment of the conditions for concluding the marriage.

2.3. The position of parents, i.e. guardians and guardianship authorities

2.3.1. The legal and factual significance of the position and opinion of the parents

In this procedure, the parents do not appear as representatives of their minor child (because in this procedure the child is recognized by the law as having procedural and postulation capacity), but they are in the role of witnesses (Stanković, Trgovčević Prokić, 2015: 408). The same applies to the guardian of a minor who is not under parental care. The law establishes the duty of the court to listen to the parents exercising parental rights, and if the minor is without parental care, to listen to the guardian. The court has the discretion to decide whether to hear a parent who does not exercise parental rights without justifiable reasons. Parents deprived of parental rights are not heard (LNLP, art. 82. par. 2).

The limitation that applies to the court does not apply to the guardianship authority. In the procedure before the guardianship authority, data can be collected from all persons who can provide relevant information, including from a parent who is deprived of parental rights or does not exercise that right without a justified reason - if such a parent is available and if during the procedure it is assessed that it is useful and that in this way relevant information can be obtained (Rulebook on organization, norms and work standards of the center for social work, art. 54 & 55).

The hearing (before the court), i.e. interview with the parents (before the guardianship authority) is part of the prescribed procedure and one of the elements of the expert assessment. The opinion of the parents, their consent, as well as their opposition aimed at preventing the conclusion of an underage marriage, from the point of view of the law, is not of decisive influence. Legal theory is also of the opinion that in this procedure the parents' opinion can only have a consultative character (Ponjavić, 2017: 111; Jović Prlainović, 2019: 106).

However, sporadic and limited practice research indicates that both the court and the guardianship authority attach decisive importance to the opinion and position of the parents, without critically evaluating and checking the obtained data in relation to the facts of the case. In the report (findings and opinion) submitted to the court, the guardianship authority relies heavily on the consent of the minor's parents for marriage,[10] so in a situation where such consent exists, as a rule, a deeper analysis of the minor's ability and capacity to respond to the demands of the new life situation and other elements on which the assessment of his/her best interest depends.[11] If we add to that the fact that the court largely relies on the opinion of the guardianship authority, and that the court decision as a rule summarizes the results of the work of the guardianship authority, and there is no explanation why the court accepted the findings and opinion of that specific expert (Nedeljković, 2019: 78), it is clear that neither the court nor the guardianship authority fully responded to the task.

2.3.2. The position and role of guardianship authority in court proceedings

The *ratio legis* of the guardianship authority's participation in this procedure is related to the child's right to special protection - in order to, on the one

[10] An illustrative example of the usual model of action is given in the research conducted in 2019 for the purposes of preparing a master's thesis at the Faculty of Law in Niš. The analysis has included the actions of a municipal center for social work in central Serbia, according to the court's requests for the delivery of findings and opinions in the procedure of granting permission for underage marriage, received in the previous three consecutive years. It was established that in all the procedures conducted (there were three of them), the finding and opinion of the guardianship authority had the same content: "Taking into account the personality of the minor [...], the fact that she is emotionally mature, well socialized, and has no disorders in her personality structure and behavior , as well as the fact that her parents gave declarations of consent before this authority that their daughter […] can marry […], I believe that she should be allowed to marry before reaching the age of majority." (Nedeljković, 2019: 77).

[11] UNICEF, 2016, p. 21.

hand, take into account the interests and ensure the protection of the minor from him/herself, "from his/her own weaknesses, inexperience and uncertainty" (Mitić, 1969: 351), and on the other hand, to prevent the abuse of minors by their parents and other persons who have legal or factual responsibility for their upbringing and development. Child abuse related to child marriage is, as previously noted, real, and child marriage is often just a cover behind which human trafficking, child trafficking for sexual exploitation, labor exploitation, forced begging and other criminal activities hide, which inflict harm and violate children's rights (Aleksić, 2015: 44-63; Božić, 2017: 48). In spite of this, some courts grant permission for the conclusion of an underage marriage without notifying the local competent guardianship authority about the initiation and conduct of the proceedings, that is, without any participation of the guardianship authority in the proceedings.

Until the adoption of the Instruction on the Way of Work of the Center for Social Work - the guardianship authority in the protection of children from child marriage, in 2019, the relevant facts were mostly collected and evaluated by one professional worker - the case manager. With the adoption of the Instruction, that segment of professional social work was raised to the level of team assessment (Instruction, par. 8.2).

Since the basic role of the guardianship authority is to perform, among other things, family and child protection tasks, in implementing the necessary professional procedures and making decisions related to children, the guardianship authority must have in mind the best interests of the child (FL, art. 6. Par. 1). The protection of the best interests is not only a fundamental right of the child from Article 3, paragraph 1 of the CRC, but also an interpretive principle and procedural rule. The value of that principle is manifold. It is a dynamic concept that requires assessment in accordance with the circumstances of each specific case. Through this prism, the outcomes of the court proceedings, i.e. the effects and scope of the court decision, are viewed (Vujović, 2019: 175). The court's decision on permission to enter into an underage marriage would have to meet that standard - to be in accordance with the best interests of the child. This means that the guardianship authority is obliged to determine which elements of the child's best interest should be evaluated and taken into account when making a decision. In a situation where underage marriage is legally allowed, this request

seems impossible: early marriage is simply not in the best interest of any child. It may just be less harmful than some other option under the circumstances.

In legal theory, there are different points of view regarding the position of the guardianship authority in the procedure of granting permission for the conclusion of an underage marriage. Some legal writers are explicit in their position that the guardianship authority, since it does not have the status of a party in the proceedings, does not have the legitimacy to file an appeal against the court decision (see, for example, Stanković, Trgovčević Prokić, 2015:. 412). However, different conclusions can (and must) be drawn from the overall position and role of guardianship authority in the legal system of the Republic of Serbia. From the way in which the legal norm is designed in Article 82, paragraph 2 of the LNLP: "the court shall *achieve* appropriate cooperation with the guardianship authority", it follows that the participation of the guardianship authority in this procedure is mandatory. The guardianship authority is an associate of the court, which collects data on the personal and family circumstances of the parties by order of the court. In this way, "it helps the court to exercise its official and inquisitorial powers, which it has in terms of collecting the necessary procedural materials that represent the basis for decision-making" (Stanković, 2013: 15). In addition to the position of an associate (auxiliary investigative body of the court), in this procedure the guardianship authority simultaneously has the procedural role of a mandatory expert - an expert ex officio. By collecting data by order of the court, the guardianship authority also collects the data necessary to take a position on the best interests of the child, because its basic, systemic role is to protect the interests of the child. The guardianship authority is expected to carefully determine the decisive facts during the proceedings on the order of the court and, if it establishes a risk of abuse of the child through the institution of underage marriage, to have a ready effective protection strategy and a set of alternative measures to ensure the safety and protect the rights of the child (Instructions, par. 10). This implies its right to a legal remedy against the court decision that decides on the rights and legal position of the child - if the court decision contradicts the opinion of the guardianship authority about the best interests of the child.. This position is based on the general provisions of the LNLP that apply to all non-litigation procedures (unless otherwise prescribed in a separate part of that law). According to LNLP, art. 5, "the guardianship authority that participates in the procedure even when it

is not authorized by law to initiate the procedure, is authorized to undertake all actions in the procedure for the purpose of protecting the rights and interests of minors and other persons under special social protection, and in particular to present facts that the participants failed to state, to propose presentation of evidence and to declare legal remedies". And yet, some legal writers believe that the guardianship authority does not have the right to appeal against the decision allowing the conclusion of a minor marriage (Stanković, Trgovčević Prokić, 2015: 412). This position leads to the conclusion that an appeal cannot be filed at all against a decision allowing a minor to marry, although an appeal in this case is not excluded by any special provision of the LNLP.[12] From Article 5 of the LNLP, which stipulates the general authority of the guardianship authority to declare legal remedies in non-litigation procedure for the protection of the rights and legal interests of minors "even when it is not authorized by law to initiate proceedings", it follows that the guardianship authority (although it is not authorized to initiate proceedings in this legal matter) has the right to file an appeal against the court's decision allowing a minor to enter into marriage, if such a decision contradicts its findings and opinion. Since the status and rights of minors are decided in the procedure for granting permission to enter into an underage marriage, the general powers from Art. 4 and 5 of the LNLP are also applicable in that procedure. The fact that the guardianship authority is not authorized by law to initiate this non-litigation procedure does not affect its general authority to take part in the procedure concerning minors, at any time during the procedure, and to declare legal remedies against court decisions that in its opinion are not in the best interest of minors. To be honest, this question has a purely theoretical significance. In the case law, there are no examples of the guardianship authority using the aforementioned procedural powers, since the courts base their decisions in these proceedings, without exception, on the (positive) opinion of the guardianship authority presented in the report submitted to the court, thus there was no need to file an appeal.

[12] According to the general rule of non-litigation proceedings from Art. 19 of the LNLP, an appeal against the decision made in the first instance can be filed within 15 days from the date of delivery of the copy of the decision, unless otherwise stipulated by that or another law. Among the special rules of the LNLP, which regulate the procedure for granting a marriage license, there is no provision with a different content.

2.4. Legal consequences of a court license to enter into marriage before the age of majority

Both the court and the guardianship authority must take into account the legal consequences of the court's permission - the fact that the act of entering into a marriage with the permission of the court leads to emancipation. In truth, the mere adoption and submission of a decision on granting the license to a minor to marry does not automatically affect his/her legal capacity. With such a court decision, one marriage impediment is eliminated and the effect of that decision stops there. Also, that permission is not given in general, but only for marrying a certain person.[13] But, once a minor marriage has been concluded on the basis of court permission, the legal consequence is permanent - by entering into a marriage with the permission of the court, a minor has acquired full legal capacity, so in the event that the marriage ends before reaching the age of majority, the same minor can enter into another marriage without a new court permission. Therefore, through the act of marriage, a minor acquires complete emancipation. With that act, he/she has acquired the right to divorce the marriage, but also the right to enter into a new marriage, without anyone's special permission. And he/she lost the right to special protection guaranteed to children under the age of 18 by the Constitution of the Republic of Serbia and the CRC.

3. Conclusion

The phenomenon of underage marriages, sometimes referred to in the literature as child or early marriages (although these terms are not entirely the same) and their impact on the further life and development of children have long been recognized in the field of human and children's rights as a serious social problem and a harmful practice. Marrying before adulthood carries a higher risk of child trafficking, sexual exploitation, abuse, psychological trauma, risk of death or injury during childbirth, and the likelihood of dropping out of school. Despite this, many modern legislations permit the conclusion of underage marriages.

[13] In the decision granting a marriage license, the court is obliged to state the names of the persons between whom the entry of marriage is permitted (LNLP, art. 83).

In Serbian law, permission to enter into an underage marriage is given in an extremely formalized court procedure in which the best interests of the minor are not fully considered. The guardianship authority also participates in this procedure, in a role that seems to move away from the primary one - protecting the best interests of the child and focuses on "justifying" the reasons for entering into a marriage with a minor, mainly with the arguments advocated by the parents. The obscure normative substrate opens up space for different interpretations, among other things, regarding the position and role of the guardianship authority in that procedure, to the extent that the possibility of using the procedural powers it has in other procedures, which are in the function of special protection of minors, is denied.

The legal consequences of underage marriage are irreversible. Marriage directly emancipates the minor. Married children are considered adults even though they have not reached the age of 18, further denying them all the special protections to which they are entitled under the CRC.

The established international standards regarding the prevention of the practice of child marriages put the Serbian legislator in front of the serious task of revising the family material and procedural legislation, in order to ensure a more complete protection of children's rights. At the same time, it must be taken into consideration that the prohibition of underage marriages is not a guarantee for eradicating the harmful practice of establishing underage partnerships, but it is a condition for completely eliminating the space for dispensation of parents from criminal responsibility in this case. In addition, it is a way to manifest the state's attitude towards a certain issue and thus establish a platform for policies and programs to support changes in attitudes, cultural patterns and value systems.

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Original Scientific Paper
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CRIMINAL OFFENSES AGAINST SEXUAL FREEDOM - ASSESSMENT OF THE TESTIMONY OF JUVENILE VICTIMS

Women in general, regardless of age, are exposed to a high risk of sexual violence. This group also includes minors, i.e. children. The paper points to certain significant international regulations, as well as the most important domestic regulations that provide protection to victims of sexual violence. The question important for court proceedings is being considered - to what extent can the testimony of children or minor victims of sexual violence be believed, given the fact that these victims are usually alone against the perpetrator of the crime to their detriment, as a rule, a person older than them. Through examples from individual court cases, the importance of evaluating the testimony of that category of victims as acceptable evidence for passing a conviction is indicated.

***Keywords**: criminal acts, sexual violence, minor victims, powerless persons, testimony.*

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1. Introduction

Violence in its various forms is a part of everyday life, both globally and in Serbia. All forms of violence are included, as reported regularly by the media, often focusing on different types of physical violence, which constitute criminal offenses. The most attention is given to homicides, robberies, rapes, and traffic accidents involving casualties. In these reports, details are provided regarding the participants and the manner in which the criminal offense was committed. Whenever possible, as many details as possible are included about the monstrosity of individual criminal acts, regardless of the victims' gender or age. Generally speaking, in these reports on harmed individuals - victims in criminal proceedings, particularly criminal proceedings in the Republic of Serbia - and the protection of their human dignity, there is still insufficient consideration given (Obradović, 2020: 218). The dignity of every human being is a fundamental principle in the theory of human rights, the one on which all other human rights are based and through the prism of which the degree of their realization is evaluated (Vujović, 2020:78). Although there is no uniform definition of what dignity is - which leaves the concept of dignity open to interpretation - it is generally understood in legal contexts to include the right to full development of the personality and the autonomy (Stanila, 2020: 272).

An increasing number of violence cases reported in the media fall under the category of criminal offenses against sexual freedoms - such as rape, sexual assault, and unlawful sexual acts. In many of these cases, the victims are children of various ages - ranging from very young children to those up to 18 years old, encompassing all age categories considered children under the provisions of the United Nations Convention on the Rights of the Child adopted in 1989 (hereinafter: the Convention)[1]. This age range is also accepted in our criminal legislation - both in the Criminal Code and in the Law on Misdemeanors - as the boundary separating minors from adults. Unlike the Convention, our regulations distinguish between children, minors, and juvenile persons.

[1] Zakon o ratifikacije Konvencije Ujedinjenih nacija o pravima deteta, Sl.list SFRJ - Međunarodni ugovori br. 15/90

The paper will highlight the protection of children through domestic regulations, primarily in the field of criminal law, but also in certain other areas, as well as specific accepted international treaties that have been ratified and thus become part of our domestic law. Special attention will be given to the presentation of certain legally concluded criminal proceedings for offenses against sexual freedoms where children were harmed - victims, in all cases involving female victims, and how the court assessed the testimonies of these victims. To the extent necessary, the role of experts from relevant fields who were involved in these court proceedings will be addressed, focusing on obtaining valid testimonies from child victims.

2. Certain Significant International and Domestic Regulations Pertinent to Child Protection

A significant step towards more comprehensive protection of sexual freedoms, sexual integrity, and privacy of women is marked by the adoption of Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[2](hereinafter: CETS 210). The member states of the Council of Europe are mostly the signatories of CETS 210, including all members of the European Union (hereinafter: the EU), since the EU, although not a state, signed the convention to demonstrate its adherence to its standards. In fact, EU bodies continue legislative activities in order to achieve uniform and efficient implementation of CETS 210.[3]

The Republic of Serbia, as a candidate country for EU accession, has signed and ratified the convention[4], although it has not fully implemented it. This international document, through ratification, has become part of domestic law,

[2] Council of Europe, Convention on preventing and combating violence against women and domestic violence, (adopted 7 May 2011, entry into force 1 August 2014) CETS 210 (Istanbul Convention), available at https://rm.coe.int/168008482e.

[3] European Commission, Proposal for a Directive of the European Parliament and of the Coucil on combating violence against women and domestic violence, Strasbourg, 8.3.2022 COM(2022) 105 final 2022/0066 (COD), available at: https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/com_2022_105_1_en.pdf

[4] Zakon o potvrđivanju konvencije Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici, *Službeni glasnik RS - Međunarodni ugovori*, br. 12/2013.

protecting certain categories of victims in criminal proceedings, including children, and specifically females. In order to align with CETS 210, amendments and additions to the Criminal Code (hereinafter: CC)[5] were made in 2016; however, a provision defining sexual violence (including rape) as encompassing any sexual intercourse or sexual act without the woman's consent was not adopted. Paradoxically, in accordance with CETS 210, the CC of 2016 introduced other criminal offenses from the category of offenses against sexual freedoms: sexual harassment, as well as certain criminal acts from other categories of criminal offenses specified in the CC, such as female genital mutilation, stalking, and forced marriage.

Among domestic regulations, the most important is the Constitution of the Republic of Serbia (hereinafter: the Constitution)[6], which guarantees fundamental human rights and freedoms, such as the right to the inviolability of physical and psychological integrity and the prohibition of torture, the right to equal legal protection without discrimination, the right to judicial protection in cases of violation or denial of human or minority rights guaranteed by the Constitution, and the right to remedy the consequences of such violations. It also guarantees the right to life, the inviolability of psychological and physical integrity, the right to a fair trial, rehabilitation and compensation for damages, the right to equal protection of rights, and legal remedies. The Constitution also guarantees the right to appeal to international institutions for the protection of freedoms and rights and to ensure respect for these rights. The Constitution also contains special provisions on the protection of children from psychological, physical, economic and any other exploitation or abuse, and prescribes that the rights of children and their protection shall be regulated by law (Constitution of the Republic of Serbia 2006, Art. 21-24, Art. 64, Art. 3 and 4 and Art. 125. par. 1 and 2) (Vujović, 2020: 81-82).

In addition to the Constitution, there is also a large number of laws and subordinate regulations, as well as strategies adopted at the state level, which indirectly relate to the protection of children.

[5] Krivični zakonik "Sl. glasnik RS" 85/2005, 88/2005., 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019

[6] Ustav Republike Srbije "Sl. glasnik RS" br. 98/2006

Some regulations link criminal law with civil proceedings and the Family Law. Among these regulations, the Law on Prevention of Domestic Violence (hereinafter: the Law)[7] stands out, which has been recognized in practice and has been fully implemented throughout Serbia in protecting victims of domestic violence, regardless of age, including in cases of violence against children. In direct relation to the position of children in criminal regulations, in addition to the Criminal Code, it is important to mention two other laws: the Law on Misdemeanors (hereinafter: LOM) [8] and the Law on Road Traffic Safet[9]

It is significant to mention the National Strategy for the Implementation of Victim and Witness Rights of criminal acts in the Republic of Serbia for the period 2020-2025, adopted at the session of the Government of the Republic of Serbia on July 30, 2025.[10] The essence is that, in their procedural capacity as victims, individuals in the legal system of the Republic of Serbia have been entitled to a range of rights for decades. These rights are recognized and codified by Directive (2012)029 EU of the European Parliament and Council of October 25, 2012, which establishes minimum standards regarding the rights, support, and protection of victims of criminal offenses and replaces Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012). This strategy notes, among other things, that various factors such as age, health status, disability, gender, sexual orientation, ethnic, religious or social group affiliation, as well as refugee or migrant status, can influence the particular vulnerability of individuals.

The focus of this paper is on criminal offenses against sexual freedoms committed against children, and thus, the paper will not provide a detailed review of other regulations that also mention and emphasize the protection of children.

[7] Zakon o sprečavanju nasilja u porodici "Sl. glasnik RS" br. 94/2016

[8] Zakon o prekršajima "Sl.glasnik RS" 65/2013, 13/2016, 98/2016, 91/2019 i 91/2019

[9] Zakon o bezbednosti saobraćaja na putevima "Sl. glasnik RS" br.41/09 od 2.6.2009. godine, stupio na snagu 10.6.2009.godine, počeo sa primenom 11.12.2009. godine, 53/2010, 101/2011, 32/2013, 55/2014, 96/2015, 9/2016, 24/2018, 41/2018, 87/2918, 23/2019, 128/2020 i 76/2023

[10] Nacionalna strategija za ostvarivanje prava žrtava i svedoka krivičnih dela u Republici Srbiji za period 2020-2025.godine, usvojena na sednici Vlade RS 30.7.2020.godine

3. Brief Overview of Child Protection in Serbian Criminal Legislation

In the Republic of Serbia, children receive criminal protection through provisions in two general legal acts - the Criminal Procedure Code (hereinafter: the Code) [11] and the Criminal Code (CC) - as well as through provisions in two special laws: the Law on Juvenile Offenders and the Criminal Protection of Juvenile Persons (hereinafter: JL)[12] and the Law on Special Measures for the Prevention of Criminal Offenses Against Sexual Freedoms Committed Against Juvenile Persons (hereinafter: the Law).**[13]**

In the CC the provisions defining terms are as follows: "A **child** is considered to be a person who has not reached the age of fourteen; a **minor** is considered to be a person who has reached the age of fourteen but not yet eighteen; a **juvenile** is considered to be a person who has not reached the age of eighteen." [14] In the LOM, a distinction is made between a **child** - defined as a person under the age of fourteen, who is considered legally irresponsible for misdemeanors - and a **minor** - defined as a person aged fourteen to eighteen, who is considered legally responsible for misdemeanors**[15]**.

The age-related distinction regarding criminal (in)responsibility has also been adopted in the provisions of the JL, which contains provisions primarily applicable to juvenile offenders but also to certain categories of adults - namely younger adults.**[16]** This law comprehensively regulates issues related to substantive criminal law, the organs applying it, criminal proceedings, and the execution of criminal sanctions for these offenders. It also includes special provisions on

[11] Zakonik o krivičnom postupku, "Sl.glasnik RS" br.72/2011,101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/19, 27/21, 62/21.

[12] Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, "Sl. glasnik RS" br.85/05

[13] Zakon o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima, "Sl. glasnik RS" br.32/13

[14] Čl.112 tač. 8, 9 i 10 Krivičnog zakonika (art. 112 item 8,9 and 10 CC)

[15] Čl. 71 Zakona o prekršajima (art.71 LOM)

[16] Čl. 1 i 2 Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica (art.1 and 2 JL)

the protection of children and minors (hereinafter: juvenile persons) as victims in criminal proceedings.

4. Protection of Children through General and Special Criminal Regulations

4.1. General Criminal Regulations

4.1.1. Protection of Children in the Criminal Code

Juvenile persons, potential victims in criminal offenses with elements of violence, are recognized in the provisions of the CC, whether they are minors or children, and they are explicitly afforded enhanced criminal protection. The CC includes certain categories of criminal offenses that involve violence, as indicated in their titles - such as offenses against life and body (one of the prescribed forms of a serious criminal offense is the murder of a child); and offenses against sexual freedom (criminal offenses specifically mentioned in the provisions of the third part of JL.

Juvenile persons can also appear as victims within other categories of criminal offenses in the CC, especially those criminal offenses involving violence where children may be the victims - for example, in the category of offenses against property, offenses against marriage and family, as well as in other categories of criminal offenses listed in the CC.

In this paper, we had to mention certain other categories of criminal offenses, but the focus is on the category of offenses against sexual freedoms involving violence against juvenile persons and the assessment of their testimonies, which are crucial for decision-making in criminal proceedings.

4.1.2. Protection of Children in the Criminal Procedure Code

In the Code, persons who are victims of criminal offenses, including children, are entitled to certain rights when they appear as private prosecutors, as victims who are prosecutors, or as victims and witnesses. The Code defines a victim as a person whose personal or property rights have been violated or endangered by a criminal offense (Article 2, paragraph 1, item 11). Children most commonly appear in criminal proceedings as victims or as witnesses who are vic-

tims. The Code contains several provisions of significance for children who appear as victims in criminal proceedings. Primarily, this includes the provision related to particularly vulnerable witnesses according to Article 103 of the Code. This provision prevents the direct presence of the offender in the room where any of these individuals are present, thereby preventing secondary victimization of the affected persons. And every state is obliged to protect the victim from secondary victimization and the discrediting of their identity during the cross-examination stage.[17] The Code also includes provisions for child witnesses in criminal proceedings, allowing them to be questioned in their own home if they are unable to respond to a summons (Article 108), as well as a provision allowing for the reading of the testimony of witnesses who are unable to attend court due to their age or if their attendance is significantly impeded (Article 337).

In relation to criminal offenses committed against children, there is also the need for their expert evaluation in judicial proceedings, typically conducted by a panel of experts from medical and psychological fields. The expert assessment is determined based on various factors - such as whether the children are capable of participating in legal proceedings and providing their testimonies, whether their testimonies can be trusted, and whether they are prone to falsehoods, confabulations, etc.

4.2. Special Criminal Regulations

The third part of the JL titled "Special Provisions on the Protection of Juvenile Persons as Victims in Criminal Proceedings," contains specific rules for handling cases where the victims are juvenile persons (Articles 150-157 of ZM). Article 150, paragraph 1 of JL explicitly lists 27 criminal offenses in which protection is provided to juvenile persons in criminal proceedings, including certain offenses from the category of sexual offenses committed against juvenile persons (minors or children). These are 8 criminal offenses prescribed in the CC: Rape

[17] In the case of Y. v. Slovenia (Application no. 41107/10, judgment of 28 May 2015), the ECHR held Slovenia responsible for violating Article 8 of the ECHR as during the cross-examination of the plaintiff in the course of a trial for sexual abuse, the court had failed to prevent the accused from making degrading and insulting remarks against the plaintiff. The court warned that cross-examination should not be used as a means of intimidating and humiliating witnesses (para. 108), as additional prohibitions would not unduly restrict the right to defend the plaintiffs who have been allowed detailed cross-examination but would certainly reduce the plaintiff's anxiety (para. 109).

(art. 178); Sexual Intercourse with a Helpless Person (art. 179); Sexual Intercourse with a Child (art. 180); Sexual Intercourse through Abuse of Position (art. 181); Prohibited Sexual Acts (art. 182); Pimping and Procuring (art. 183); Mediation in Prostitution (art. 184) i Showing, Procuring and Possessing Pornographic Material and Minor Person Pornography (art. 185).

Additional protection for juvenile persons is provided by the provisions of the Law whose purpose is to prevent adult offenders from committing criminal offenses against sexual freedoms against juvenile persons (Article 2). This law addresses a total of 10 criminal offenses from the category of sexual offenses, in addition to the 8 previously mentioned offenses, including yet two additional offenses: Inducing a Child to Attend Sexual Acts (art. 185a CC); Abuse of Computer Networks or other Technical Means of Communication for Committing Criminal Offences against Sexual Freedom of the Minor (art. 185b CC).

This Law, like the JL, stipulates that for all matters not regulated by its provisions, the provisions of the CC and the Code shall apply accordingly.

5. Specific Issues in Judicial Proceedings Involving Juvenile Victims of Sexual Offenses

After the discovery of a criminal offense from the category of sexual offenses, it is essential to involve medical experts - psychiatrists and/or specialists in medical psychology - at the earliest possible stage of the criminal proceedings, during the investigation or preparatory phase. This is crucial depending on whether the perpetrator of the criminal offense against the child is an adult or a juvenile, as seen in judicial practice. Ideally, specialists in child psychiatry or child psychology should be involved. Unfortunately, there are few such experts in our country, which is why public prosecutors and judges typically engage experts from their local areas. In exceptional cases, especially severe cases, experts from specific clinics and institutes are engaged early in the process.

In the court practice of the Higher Court in Valjevo children were most often the victims of the most serious crimes from the group against sexual freedom - Sexual Intercourse with a Helpless Person (art. 179 CC); Sexual Intercourse with a Child (art. 180 CC); Sexual Intercourse through Abuse of Position (art. 181 CC); Prohibited Sexual Acts (art. 182 CC); that is, criminal acts from

the group against life and limb - murder or attempted murder; as well as from the group of crimes against property - robbery. that is, criminal acts from the group against life and limb - murder or attempted murder; as well as from the group of crimes against property - robbery.

This paper focuses exclusively on specific cases where minor girls of various ages were victims of different criminal offenses from the category of sexual offenses and the role of experts in these cases. The common denominator in all the cases discussed is as follows: all minor victims were granted the status of particularly vulnerable witnesses, witnesses to critical events for which there was no confirmation of the victims' testimony in any of the cases. In all instances, close associates of the minor victims subsequently learned about events that, by their nature, constitute a criminal offense, and these individuals later reported the crimes to the relevant police authorities. Expert evaluations of the accused and minor victims - i.e., the victims during the investigation - were conducted by panels of experts consisting of neuropsychiatrists and specialists in medical psychology. In all these cases, after receiving written reports and opinions from the expert panels, indictments were filed, and following the examination of the expert panel representatives at the main hearing, convictions were rendered, which became final.

In addition to all these characteristics that pertain to each individual case, there are always specificities that pose additional problems.

In one practical example from the court practice of the Higher Court in Valjevo,[18] there were several aggravating circumstances during the questioning of a minor victim of the criminal offense of sexual intercourse with an incapacitated person. The victim was born with cerebral palsy and hemiparesis of the right side, as a result of which she suffered an impairment of her psychomotor skills. She was diagnosed with mental retardation at the age of one and a half, needing psychiatric treatment since childhood. She attended a school for children with special needs. A 53-year-old accused man exploited his friendship with the mother of the plaintiff, then an under-aged girl (16 years old) with intellectual disabilities and forced intercourse on her while her mother slept in the same room,

[18] Pravosnažno presuđen predmet br. K 17/18, pravna kvalifikacija: obljuba nad nemoćnim licem iz čl. 179 st. 2 u vezi st. 1 KZ, iz lične arhive sudije Dragana Obradovića.

being under the influence of opiates and alcohol. Due to combined disability, the victim was not able to offer adequate defiance. The defendant first touched the victim on the chest and body, and then had sex with her. The gynecological examination of the victim determined that she had had sexual intercourse during the previous 72 hours. What was crucial to the outcome of the proceedings was that the victim immediately informed her father, who filed a criminal complaint on her behalf, and a criminal proceeding was initiated relatively quickly and the necessary evidence was established. The circumstances related to the committing of the crime were determined on the basis of the victim's testimony. She was questioned as a witness by a speech therapist or a court deaf interpreter and in the presence of an expert in the medical profession - a neuro-psychiatrist and a specialist of medical psychology. In the mentioned case, the key problem was to establish contact with the victimized minor, as she was mentally retarded and deaf and dumb. This was why she was questioned during the investigation and at the main trial via a speech therapist - a court deaf interpreter. (Mrvić Petrović, Obradović, 2022).

In the criminal proceedings in other countries, is is common that victims with intellectual disabilities have significant difficulties in communicating with state authorities during the reporting of criminal offenses and testifying in criminal proceedings.[19]

A particular problem faced by the procedural authorities (prosecutors and police during the investigation and pre-trial phase, and judges during the main trial phase) is the elapsed time between the commission of the criminal offense and its reporting. Sometimes, this period extends over several years, during which there are often no witnesses. Even if some witnesses were available, after such a

[19] Researchers from Spain, Northern Ireland and Switzerland, independently of each other, agreed that people with intellectual disabilities have an unequal position in criminal proceedings compared to other participants. They have episodic memory and memory gaps, especially concerning details (time, place), they are suggestive and compliant, and as they fail to understand the legal terminology, they refute their earlier statements or arbitrarily leave the impression that they understood the question to avoid shame or embarrassment (Jacobo Cendra López *et al*., 'Victims with Intellectual Disabilities through the Spanish Criminal Justice System,' *New Journal of European Criminal Law*, vol. 7, no. 1, 2016, 92-93, 96; Alan Cusack, 435, 436, Sussana Niehaus *et al.*, 'Intellectually Disabled Victims of Sexual Abuse in the Criminal Justice System,' *Psychology, vol. 4*, no. 3A, 2013, 377).

long time their whereabouts are often unknown, reducing the case to an assessment of the testimony of the accused and the victim, who may have reached adulthood in the meantime, and whom the court will choose to believe in this situation.

In one practical example from the court practice of the Higher Court in Valjevo,[20] there were several aggravating circumstances during the questioning of a minor victim of the prolonged criminal offense of Sexual intercourse through Abuse of Position. The criminal act was committed from an unspecified date in the year 2000 to August 10, 2008. year, in Trebinje and Valjevo. The perpetrator of the crime was the stepfather to the detriment of his stepdaughter - then a minor child born on August 10, 1994. At that time, the perpetrator of the criminal act lived with the mother of the victim in the family house in Trebinje and Valjevo, and he committed the criminal act in various ways to the detriment of the minor victim, which is precisely stated in the indictment.

Before the criminal offense was discovered, the victim attempted suicide by swallowing tablets on one occasion, but fortunately, her attempt was discovered and prevented in time. After the criminal offense was discovered and reported to the police during 2017, procedural issues began, which the accused tried to address in various ways. In addition to denying the commission of the offense, the accused invoked post-traumatic stress disorder as a result of participation in the war in the former Bosnia and Herzegovina.

Given the elapsed time since the commission of the criminal offense against her, which occurred over a period of 8 years while the victim was still a child, the key evidence that assisted the court in reaching its verdict was the expert evaluation of the victim and the accused conducted by a panel of experts from the Institute of Mental Health in Belgrade, Adult Clinic, Forensic Psychiatry Department, during the investigation in 2018.

Based on the results obtained from the psychiatric and psychological examination, the opinion concluded that the victim currently shows no signs of permanent or temporary mental illness, temporary mental disorder, delayed mental development, or severe mental disorder. In its conclusion, the panel of experts

[20] Pravosnažno presuđen predmet br. K 16/18, pravna kvalifikacija: produženo krivično delo obljuba zloupotrebom položaja iz čl. 181 st. 3 u vezi st. 2 KZ u vezi sa čl.61 KZ, iz lične arhive sudije Dragana Obradovića.

stated that the victim has preserved reality testing, shows no indicators of compromised memory and reproduction of experienced content, and there is no evidence of tendencies toward simulation or fabrication of content. Based on the results obtained from the psychiatric and psychological evaluation of the accused, the panel of experts determined that the accused was assessed as suffering from chronic post-traumatic stress disorder, with moderate to severe depressive mood. The conclusion stated that the accused currently exhibits a persistent personality change (F62) (chronic post-traumatic stress disorder) and a depressive disorder. It was noted that there is no current alcohol abuse, reality testing is preserved, and the attitude towards the past and the current situation is sadistic, morbid, and cynical, imbued with a sense of helplessness. There are no test indicators of compromised memory and reproduction of experienced content. At the stage of the main trial, after a re-evaluation of the accused, it was concluded that the accused has the preserved ability to understand the nature and purpose of the criminal proceedings, comprehend procedural actions and their consequences, and is capable of defending himself or herself either independently or with the assistance of a defense attorney. Therefore, the accused was deemed processually competent. A representative of the expert panel remained present during the main trial for this finding and opinion.

There are many more examples like these in the case law of the Higher Court in Valjevo, as well as in other courts across the Republic of Serbia, undoubtedly. All these examples share similar characteristics. They are all marked by the fact that minor victims were alone at the time the criminal acts were committed against them and that they must appear before the competent state authorities - police, public prosecution, and the court - and provide their statements.

One of the important steps that the state has taken towards protecting victims in criminal proceedings before regular courts is the establishment of the Witness and Victim Support Service in higher courts, as well as in other courts designated by the High Council of the Judiciary, during 2016 through amendments to the Court Rules (Obradović, 2020:228).[21] This is a significant step towards protecting victims in criminal proceedings, especially in cases involving

[21] Dragan Obradović**,** 'Respect for the right to human dignity of victims of criminal offenses during criminal proceedings in Serbia', in Zoran Pavlović (ed), *Yearbook Human righst protection the*

offenses against sexual freedom. However, the establishment of the Service alone is not sufficient given certain specific situations, one of which is highlighted in this paper - the case where the victim was a person with a disability who was also mentally retarded. In such cases, representatives of this Service are powerless to provide support to such victims. Therefore, it is necessary to consider international experiences, and in each such case, in addition to the expert committee, it is essential to include a sign language interpreter at the appropriate stage of the procedure. If necessary, in the initial phase of taking the victim's testimony during the investigation, it should also be considered to involve a person close to the victim who communicates well with the victim and who is not directly involved in any capacity in the criminal proceedings. In this way, additional assistance would be provided to the procedural authorities to help the victim feel more at ease and, in the presence of a familiar person, give their statement in the criminal proceedings in their own manner through the interpreter.

6. Conclusion

The protection of the best interests of the child in criminal proceedings is the obligation of all procedural authorities in the Republic of Serbia, regardless of the capacity in which minor persons (children or juveniles) appear in the criminal proceedings.

In these criminal proceedings, and especially in criminal cases involving offenses against sexual freedom where the victims are minors, experts from the medical field, primarily neuropsychiatrists and specialists in medical psychology, provide significant assistance to the procedural authorities (police, public prosecutors, and judges) in assessing the credibility of the testimonies of minor witnesses. They express their opinions on specific important facts relevant to evaluating the testimonies of minors in the proceedings.

Through specific criminal cases from judicial practice that have been definitively concluded, which related to certain offenses against sexual freedom, the

right to human dignity, Number 3, Provincial Protector of Citizens - Ombudsman, Institute of Criminological and Sociological Research, Novi Sad - Beograd, 2020, 228.

role of experts in protecting the best interests of minor victims (children) in these criminal proceedings has been highlighted.

When it comes to special categories of minor victims who are disabled, it is essential to provide systematic and comprehensive support and assistance to such victims through proactive engagement, primarily by social services but also by the non-governmental sector, to the extent that representatives of that sector show interest in such engagement.

In relation to persons with disabilities in general, and especially concerning minor victims of criminal offenses, particularly offenses against sexual freedom, it is necessary to organize appropriate training for police officers and members of the judiciary (public prosecutors and judges) to increase their knowledge about the causes and consequences of disability and to mitigate the potential harmful impact of prejudices and stereotypes about women with (intellectual) disabilities as victims of sexual crimes, regardless of the age of these victims.

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Original Scientific Paper
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SOCIAL MANAGEMENT OF PARENTHOOD: FORCED STERILIZATION OF MENTALLY DISABLED WOMEN[**]

The paper will present a retrospective overview of the practices of forced sterilization of mentally disabled persons in the USA and European countries, and will point to ethical dilemmas accompanying this practice. We have tried to understand forced sterilization through Foucault's concept of biopolitics - a series of practices and technologies used by the powerful in order to govern society. The application of forced sterilization in modern Western societies over those who are considered unable to make decisions regarding parenthood, reveals the nature of the parenthood discourse. This discourse points to sharp polarization between those who can be parents and those who cannot, although ultimately both groups are objects of disciplining. It is conducted by various techniques, which are justified by citing socio-utilitarian reasons and/or welfare. The question remains open as to whether social management of parenthood, either regarding its abolition or norming of parenthood practices, constitutes the violation of human rights.

***Keywords**: forced sterilization, mentally disabled persons, parenthood, women.*

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Introduction

Mental disability, learning difficulties or, by all accounts, politically incorrect *term* retardation,[1] have been known since ancient times. The relationship towards people with such difficulties has, according to the claims, gone through three stages. It ranged 1. from complete rejection; 2. via partial acceptance and attempts to learn the reasons for this condition in a scientific manner. It was understood as a mistake of nature, and then the reasoning was found for establishing practices which required that such *faults* should be prevented, and then, in the 1970s, the process began of 3. integrating persons with mental disabilities in society (Ljubenović, 2007).

However, as it will be shown in this text, it seems that the last claim is rather unsteady. Namely, when it comes to integration in society and prevention of discrimination it certainly seems that the greatest progress has been made in the domain of language - denotation, so that nowadays there is a struggle over euphemisms used to denote these people. The agreement about the terminology we will use in order to describe them - the *popular* terms being handicap, disability, and impairment, to name but a few (Ljubenović, 2007), essentially does not make the nature of their condition different from the way it has been seen throughout history. We still speak about people who deviate from normal, healthy population[2] (Ljubenović, 2007). In fact, the modern biomedical model and vocabulary used by it do not take our perception farther from that we are already familiar with. People involved in this domain use their practices to convince us in the reality of impairment, while at the same time advocating the necessity of

[1] Gumbić (2005) states that the term "mental retardation" has not been used as of the 1990s because it is considered to have a negative meaning, since it reduces a mentally disabled child to a disorder.

[2] The terminological variety and rather frequently present vagueness (which is no doubt expressed in the syntagm *people in the first place*), make it almost impossible to try making a distinction between physical or intellectual disabilities. A direct consequence of that is the categorization of all into the same class, which ultimately makes them all individually invisible. Namely, we have come across the information that globally there are about 16% people with impairments (https://reliefweb.int/report/world/2023-global-survey-report-persons-disabilities-and-disasters). When it comes to persons with intellectual difficulties, the numbers vary significantly, so that some claim that about 1% of the world's population belongs to this category (Pradhan et al., 2022), while others mention a substantially higher percentage, or 3% (https://www.specialolympics.org/about/intellectual-disabilities/what-is-intellectual-disability).

introducing inclusion in order to improve the quality of these people's lives. For that sake, owing to this model and practices deriving from it, the disabled encounter the multiplied supervision over their everyday lives. Therefore, the imperative that we should be politically correct does not make our acting politically correct, particularly not in the domain of respecting certain rights. We may claim without reservation whatsoever that we are still cruel, to say the least, to these people.

We will attempt to prove this claim by dealing with the sterilization practices of the mentally disabled and arguments serving to justify such practices.

We will start by the following order.

1. Sterilization of the mentally disabled: a short historical overview and the current state of affairs

Eugenic sterilization - or sterilization in the name of eugenics - was largely practiced in the first half of the 20th century, actually through to the 1970s, while most historical evidence referring to sterilization of women[3] with intellectual impairment comes from those societies in which this practice was legally permitted and from institutions in which these women were placed (and sterilized). However, when it comes to numbers, one must be particularly cautious - it is not easy to find accurate data and, moreover, one must bear in mind the absence of legal regulation which did not prevent the implementation of forced sterilization of mentally disabled persons.[4]

For the first time in history, it was legalized in the state of Louisiana in 1907 (Carlson, 2011, according to: Chaparro-Buitrago, 2024). Between 1907 and 1939, 32 American federal states followed suit and allowed the sterilization of the residents of institutions for mentally handicapped persons and persons with mentally disorders. It is estimated that until the beginning of the Second World War, minimum 60,000 people were sterilized in the USA: forced sterilization was

[3] Sterilization is also practised among men, but, as it is asserted, to a much smaller extent (Ending forced sterilization of women and girls with disabilities, 2017). It seems that much less is known about this topic than concerning sterilization of women.

[4] For example, in the United Kingdom, the law on forced sterilization of mentally disabled persons has never been enacted, but it does not mean that there has been no forced sterilization. It is proved by oral history (Tilley, Earle, Walmsley, 2012).

stipulated by law for certain categories - "criminals"; "rapists", "epileptics", "the mad and idiots" (Ending forced sterilization of women and girls with disabilities, 2017: 9).

After gruesome discoveries related to Nazi eugenics[5], with German hereditary health medical courts allowing minimum 400,000 operations of this kind in less than one decade[6], sterilization programs in the USA lost their popularity (Reilly, 2015). Nevertheless, judging by insufficient data, this claim must be taken with reservation. For example, in the Virginia State Colony for the Epileptics and Feeble Minded, a state-run institution intended for the mentally disabled and persons with mental disorders, in which the greatest number of sterilizations was performed in the state of Virginia, this practice continued until as late as 1973. In 1985, when twenty-eight residents raised collective charges against the institution[7], cruel details were brought to the light of day: these people were subjected to brutal, dehumanizing practices, with forced sterilization being only one of them. They described sexual abuse they were exposed to; experiments were performed on them, and one of the cruellest practices was assisting during operations (Tromblei, 1988, according to: Rowlands, Amy, 2017).

The practice of forced sterilization in the USA has survived until today. Thus, it is stated that in two women's prisons in California, in only four years (2006-2010), about 150 women were sterilized, mostly migrants, without their consent (Johnson 2013, according to: Lira, Minna Stern, 2014). Finally, the information that during the first half of the 20th century in California, among the

[5] In 1935, the Nazi regime accepted the program of an extreme version of positive eugenics (*Lebensborn*), which was supposed to compensate for the casualties in the First World War and to ensure racial purity. Medical experts and social workers willingly participated in this program, sending suitable girls and boys to conception and family care camps. Apart from positive eugenics, there is also negative eugenics which was practiced both in Nazi Germany and elsewhere - it implies that some people, based on their characteristics (racial, national, mental, intellectual etc.) are deprived of the right to reproduction (Reilly, 2015). There are much more examples of the application of negative than of positive eugenics.

[6] In Nazi Germany, the Law on the Prevention of Progeny with Hereditary Diseases or the Sterilization Law, was adopted in 1933 and was used to cleanse the Aryan race. It was applied with the aim of eradicating bad genes of paupers, epileptics, alcoholics, mentally disabled and impaired (Roy et al., 2012).

[7] In the meantime, this institution changed both its name and the composition of its residents. In the beginning, this institution accommodated only white people, and only later Afro-Americans. Both races had the same diagnoses: epilepsy, mental disorders or mental disabilities.

people whose sterilization was sponsored by the government, there was the largest number of those of Mexican origin, who were marked by the *truth* of being promiscuous and mentally deficient in comparison to the white race (Lira, Minna Stern, 2014). This certainly speaks in favour of the existence of specific biopolitics which survives, with minor changes in its discourse, to date, which will be discussed further in another place.

In 1928, Canada - its two provinces, Alberta and British Columbia, introduced the Law on Eugenic Sterilization which was similar to the US law. Until 1972, when this Law was abolished, more than 2,800 people were sterilized, and after the lawsuit initiated against the government in 1995 by a group of women[8], we learn that they were deprived of the possibility to become mothers without their consent (Roy et al., 2012). The example of Japan is interesting, since it is one of the few, and perhaps the only country which adopted the Law on Eugenic Protection after the Second World War. This Law allowed for the sterilization, as a rule forced, of 16,500 of mostly residentially institutionalized people. Good news is that since 2015 there have been no state programs which can implement forced sterilization for eugenic reasons (Reilly, 2015), while in Australia, despite the fact that there is no law directly regulating this issue, there is ample evidence about the forced sterilization of women, mostly intellectually disabled (Ending forced sterilization of women and girls with disabilities, 2017).

Sterilization of mentally disabled persons as a practice is not (and was not) is not unfamiliar to Europeans either. At the beginning of the 20th century, it was legalized in Sweden, Island, Switzerland, Austria, Denmark and Norway (Tilley, Earle, Walmsley, 2012). The program of eugenic sterilization in Sweden was implemented in the period 1934-1976. And, judging by the report of the Swedish government from 2000, it included 27,000 institutionalized people. Out of that number, 6.000 consented willingly to sterilization, while it was forced in the case of all others. It should also be said that consent to sterilization both in Sweden and in Iceland was the precondition for leaving the institution, as well as that the procedure was rather routinely performed (Stefansdottir & Hreinsdottir, 2011, according to: Tilley, Earle, Walmsley, 2012).

[8] It is not such a small number of persons undergoing forced sterilization - 850 of them.

Although it is claimed that forced sterilization of the mentally disabled has been restricted since the 1970s, the data obtained from different sources, e.g., reports of the media and non-governmental organizations, lead us to suspect that this practice has been abandoned. For example, we can see that, in France, women and girls with intellectual difficulties were subjected to forced sterilization until as late as the 1990s. In fact, it has been found out that about 15,000 institutionalized mentally disabled persons in this country underwent forced sterilization. A similar practice is implemented in Spain over women and girls with intellectual disabilities and other forms of psycho-social disabilities, without their consent and/or without clear understanding of the finality of the intervention to which they were subjected. The UN Committee for the Rights of Persons with Disabilities has found that, in Europe, sterilization is implemented in Estonia, Switzerland and Iceland, while there is a particular concern over the practices existing in Croatia and Germany, where sterilization is implemented over children and adults with disabilities without their consent in case their custodians/parents demand it.[9] The situation is similar in Italy, while the above-mentioned Committee, in its report mentions the Lithuanian civil code as an example of an inadequate legal solution (and practices deriving from it), because it allows for the possibility of mentally disabled persons, deprived of business capabilities, being subjected to surgical interventions (including sterilization or castration), abortions, and organ removal operations (with the court approval) (Ending forced sterilization of women and girls with disabilities, 2017; Nikolić, 2022). In Portugal, Hungary and the Czech Republic, forced sterilization can also be implemented on minors (Uldry, 2022).

Among the European Union member-states, there is no uniform legislative framework regarding forced sterilization,[10] bit the states themselves regulate this issue (https://www.edf-feph.org/content/uploads/2022/09/Final-Forced-Sterilisarion-Report-2022-European-Union-copia_compressed.pdf). Forced sterilization is legal or, at least, not strictly prohibited in 12 out of 27 EU member-states.

[9] It can be an extremely traumatic experience for a person subjected to sterilization because "the attack comes from those we love" (Cyrulnik, 2002: 100).

[10] The Law on the Protection of Persons with Mental Disabilities of the Republic of Serbia (2013) prohibits forced sterilization (Article 56) over insufficiently mentally developed persons with mental disorders or addiction diseases (Article 2).

Those are Bulgaria, Cyprus, Croatia, Denmark, Estonia, Hungary, Finland, Latvia, Lithuania, Portugal, Slovakia and the Czech Republic. In these countries, despite the fact that they are also signatories to the so-called Istanbul Convention and the International Convention on the Rights of Persons with Disabilities, mentally disabled women are deprived of the right to motherhood. Namely, in both above-mentioned conventions, forced sterilization of mentally disabled women is considered the violation of their human rights to freedom, respect and personal integrity, and the implementation of such procedures, in case they are forced, is sharply criticized (https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence; Pradhan et al., 2022). In fact, regardless of whether the decision about sterilization has been made by the court or not, before the person in question gives consent, this is considered a forced and unethical practice (Ending forced sterilization of women and girls with disabilities, 2017). It is an act of violence, a form of social control, cruel, inhuman or degrading treatment or punishment, but it is the fact that this unnecessary and non-therapeutic medical intervention is still performed over young women with intellectual disabilities throughout the world (Ending forced sterilization of women and girls with disabilities, 2017).

In particular, we find it necessary to underline the conclusion reached by some authors - that this topic has been put aside: by far the largest number of our contemporaries do not think about it, nor are aware of forced sterilization being a reality for some people. It is interesting to mention that the most agile in combatting this practice are activists. Their message is clear: forced sterilization does not only belong to the past, but is still present as a form of subtle eugenics (Yupanqui-Concha, Aranda-Fariasa, Ferrer-Perez, 2021).

But how should the presence of such inhumane practices be understood in modern time? The arguments used (now and in the past) to justify negative eugenics will be further discussed below.

2. Forced sterilization: the justification of "good violence"

Sterilization - as we will see, not only of the intellectually disabled, but also of the unaccepted of all sorts - has been allowed for by surgery practice as well as, conditionally speaking, medical findings, for example those about deficient germinal plasma,[11] on the one hand, and the public discourse about the causes of poverty, degeneration and economic burden placed on taxpayers by the *different ones*, on the other hand. Richard Dugdale was among the first who began proving the latter thesis in his 1877 study about the Jukes family, whose many descendants were not only had the burden of mental disorders and retardation, but were also socially dangerous. A doctor from Massachusetts described the feeble-minded as "parasites unable to provide for themselves" (Holmes, 1930, according to: Lira, Minna Stern, 2014). He saw a special danger I n the fact that they had children who were feeble-minded as well, and that these children should not be born because they are burden both for the family and the state, and even for the whole civilization. In the following four decades, numerous studies were written with similar conclusions, and the codification[12] of forced sterilization of the mentally disabled was only a logical step from theory towards practice (Reilly, 2015; Chaparro-Buitrago, 2024).

Negative eugenics which relies on the idea that it is necessary to *defend* a society's genetic fund from deficiencies, reached its peak in the 1920s and 10930s. Then the rhetoric changed: forced sterilization was supposed to protect vulnerable women from unwanted pregnancy. Namely, they were considered persons who could not take care of themselves at all, or control their sexuality (unlike "normal" girls or women) and their "leaky" bodies. The norms of body regulation which make us human beings are not valid for the intellectually impaired: the functions of their bodies make them closer to animals, and their instincts and behaviour must be carefully directed and controlled, otherwise they may become an object of abuse (Steele, 2014).

[11] The term "gene" was still not in use at the time (Reilly, 2015).

[12] Largely relying on the vasectomy program initiated by Doctor Harvey Sharp, a surgeon in the prison Jeffersonville, in 1905, convinced that in that way he would prevent intergenerational transmission of criminality (Reilly, 2015).

Such discourse and practice were supported by a number of myths, for example the one about intellectually impaired women's inability to be good mothers (Ending forced sterilization of women and girls with disabilities, 2017). Moreover, the advocates of sterilization claimed that this intervention should enable the intellectually disabled to live outside institutions, independently, without fearing pregnancy or sexual abuses (Reilly, 2015). However, behind these, we may discern certain different motives and policies of reproduction management. Sterilized women no longer constituted an economic burden to society: they could not have offspring, nor was it necessary for them to be institutionalized.

Furthermore, the legitimacy of such acting is also given by the fact that this is not considered violence, at least not bad violence (Steele, 2014), for minimum to *self-explanatory* reasons. The first one starts from the belief that medicine cannot act with an evil intention, which is a motto contained in the imperative "do not cause harm" (Pradhan et al., 2022). Every practice, including this surgical and medical practice, has a halo of being objective, benign and therapeutically beneficial, and placed into such discourse, sterilization becomes an act of saving (by removing the risk of pregnancy), and not invasion (Steele, 2014).

The second justification lies in the belief in the legality of court acting which starts from the doctrine *parens patriae*. According to it, the state and/or the court provides protection to its citizens and, in case someone is unable to decide about the matters of their rights (due to mental, intellectual or other handicap), decisions are made instead of them. Thus, the state, family or Supreme Court has the competence to approve the requests of custodians[13] of the mentally disabled asking for the implementation of different medical interventions over them. It transpires that the law protects intellectually disabled women from bad violence (e.g., illegal abortion) by doing what is allowed by the law. In other words, from the viewpoint of medicine as well as law, such acting is aimed at protecting a mentally impaired person (by all accounts, from himself/herself).

Looking at this practice, Chaparro-Buitrago (2024) claims, from the feminist point of view, that forced sterilization is an instrument of supervision and closing, and observes that the state uses typical mechanisms to keep potentially

[13] Sterilization also enters into the domain of family law, which implies that parents' obligation is to take care of their mentally disabled children (Komodromou, 2019).

unsuitable ones under control, conditioning their freedom or material existence by renouncing the right to having children. It is specific biopolitics which governs the reproduction rights of the vulnerable ones (as well). Such practices always go along with the discourse about danger and/or burden potentially posed to taxpayers by the impaired, the poor or the coloured. As a matter of fact, although one would expect these ideas to belong to the past, we learn that modern practices of sterilization which cover all those recognized as a threat to social cohesion - migrants, members of minorities, and all other socially unacceptable ones - are organized around the topics of economic stagnation, costs, peace threats and immigration (Chaparro-Buitrago, 2024). Thus we are occasionally shocked by the findings about forced sterilization of people at the bottom of the social ladder. We will list several examples: in 2005, an independent counsellor of the Czech Republic's government found out that dozens of women of Roma origin had undergone forced sterilization in the period between 1979 and 2001. Consent to sterilization was a condition for the continuance of their receiving the government aid in the future. During Fujimori's ten-year long reign (1990-2000), hundreds of thousands of forced sterilizations were performed on the members of autochthonous peoples Quechuas and Aymaras. We should also add that this program was recognized not only as part of the public health package for the Peruvian nation, but was also financially supported by the USA and the United Nations Population Fund. There are similar reports about Brazil as well: the female members of the Pataxó tribe in Bahia were subjected to forced sterilization, whereas Israel is also accused of implementing birth control over minorities without their consent (Reilly, 2015). In the USA, doctors employed in the Indian Health Service within the Department of Health sterilized about 150,000 Indian women in the ten-year period (1960-1970) - (it is claimed that this was on a voluntary basis, but the authors do not agree with this claim). It is stated that from 1947 to 1951 in Iowa about 145 women, mostly poor and living in villages, were sterilized annually. Sterilization was not aimed at preventing the birth of children with intellectual disabilities, but the staff of the clinic (Birthright) in which sterilization was performed tried to convince young women that, due to poverty, they would not be able to raise their children and that they should renounce the right to have children. It is also necessary to mention the so-called *family caps* - the service in the social protection system existing in 24 federal states in the USA since 2015,

which is in charge of supervising reproduction and placing restrictions for the payment of welfare assistance in case families have a certain number of children (Reilly, 2015; Ljubičić Dragišić Labaš, 2024). Pradhan et al. (2022) state the finding about a judge from Tennessee who conditioned the reduced prison sentence by a voluntary consent to sterilization. There is also a case of a woman from Oklahoma who was convicted of cashing a forged check in 2018, but whose sentence was reduced after she had undergone sterilization (Pradhan et al., 2022). Finally, in 2020, terrifying stories were revealed about forced sterilizations and reproductive abuse over Uyghurs in China and female immigrants in the USA, particularly those who were deprived of freedom (Chaparro-Buitrago, 2024).

How should these practices be understood? How can we understand the paradox that, in the world in which human rights have the halo of sanctity (Joas, 2018), those rights are not available to some people?

3. Biopolitics and reproductive rights

If we try to understand the above-described practices from the perspective of biopolitics - a specific phenomenology of the physical and the political (Jurić, 2022: 238), which regulates the way of thinking and behaviour, which determines us in relation to extremely intimate matters, depriving one man of the right to govern his own life, in the name of the government's care for its citizens (Isanović, 2022), we will agree that it is a governance technique aimed at population control and regulation. Those are political strategy and intervention mechanisms (Žitko, 2020). This Real-politik practice is called biopolitical neo-totalitarianism by Koljević Grifit (2023: 67), who notices that it is not only comprehensive - targeting the space of the public, the private, the individual, and the collective, but it is also dichotomous at the same time. There are friends and enemies, and an opinion different from the official discourse is placed in the category of the unacceptable. From that perspective, the state determines who is suitable for reproduction and who should be deprived of that right (Alavi, 2021). Bodies become an object of state intervention and reproductive legislation (Alavi, 2021) and the basis for building racism, discrimination and marginalization.

Biopolitics was previously founded on the ideas of negative eugenics - the prevention of transmitting deficient genes, while nowadays the deprivation of

the right to parenthood is justified by welfare, security and reproductive responsibility.[14]

However, are human rights violated in that manner?

According to a number of authors, the answer is affirmative. Joas (2018: 51) presents a claim with which we fully agree: although a person is sacralised in today's world, the processes leading to its beatification are fragile and easily inverted into their opposite. Thus, although motherhood and pregnancy are recognized as part of the rights of women with disabilities, they are not considered a right, particularly by custodians (Pradhan et al., 2022).

Finally, when we shift from the macro level to the individual, personal level, we observe a dimension which we have not discussed so far. It is human suffering of a number of the mentally disabled and forcefully sterilised women who were deprived of the right to motherhood (Hurtes, 2023). Exploring the matters of motherhood and intellectual disability, Hillier, Johnson & Traustadóttir (2007) have learnt about women's moving testimonies. They speak about the felling of loss and sorrow because of being forced to have an abortion and/or being deprived of the possibility to become mothers. The key argument - that they cannot take sufficiently good care of their children - was denied in rare studies. The findings speak in favour of the fact that women with intellectual disabilities are aware of the possibility of their children being taken from them because they do not take sufficiently good care of them; they are concerned by this possibility and, with adequate support, they manage to raise their offspring (Hiller, Johnson & Traustadóttir, 2007; Beltran-Arreche, Fullana Noell, Pallisera Díaz, 2024). Furthermore, the researchers find that these women want to be mothers, that being mother is an empowering role for them, that they love their children, as well as that family support is not only welcome to them, but also a challenge they are faced with (Shpigelman, Bar, 2023).

[14] The Chinese government justifies forced sterilization of Uyghur women by the danger from Islam extremism and poverty (Reilly, 2015).

Instead of a conclusion

The modern discourse about motherhood, which allows someone's right to parenthood and prohibits someone else's right parenthood, is based on technologies related to reproduction, relying on a set of disciplinary techniques. They include the system of knowledge: classification, measurements, testing etc.., as governing technologies over reproduction. The power of knowledge - at least not an openly repressive mechanism, is based on subtle techniques of supervision, control, and conditioning (Sawicki, (2017). Disciplining power is exercised both over those who are allowed to be parents and those who are deprived of that right, e.g., the mentally disabled, since they are considered unable to be responsible. Although it may seem that the disciplining strategies are in favour of both the individual and society, they are basically governing. That is why it is not surprising that, thanks to them, the desirable and the undesirable are often redefined, including conventions which were never doubted beforehand. Ultimately, it means that our human rights are not an inviolable value (Ljubičić, 2021; Ljubičić Ignjatović, 2022; Pavlović, 2022), but a variable category (Ljubičić Ignjatović, 2022; Ljubičić, Dragišić Labaš, 2024), largely shaped by specific social constellations and the moment.

It can be seen particularly in the example of forced sterilization of mentally disabled persons: although they should be entitled to their body integrity, decisions about their bodies are, as a rule, made by others. It undoubtedly leaves consequences on them, both physical and emotional.

We know very little about it because this group, as well as many others vulnerable ones, is still invisible. As long as it stays like this, as long as one "social situation remains outside social reach, it can be denied" (Cyrulnik, 2002: 111). Finally, the whole truth is contained in the instruction given by Cyrulnik to prevent us from making mistakes in acting towards those who suffer. For someone to heal, it is not necessary for us to act on his injury but on his environment (Cyrulnik, 2002: 249).

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STERILIZATION AND DISABILITY: FROM ATYPICALITY TO CRIMINALIZATION

Physical integrity is a right recognized in various bills of rights, as well as in constitutional and political texts. A right considered absolute and not subject to limitation, not even by the will of the person holding it, bodily affectation is only accepted in those cases authorized by law.

In Spain, the impact on physical integrity in cases of voluntary sterilization, organ donation and sex change operations are decriminalized. This decriminalization was also extended to persons with disabilities in 1995. However, social criticism has led to its repeal in 2020.

This paper seeks to analyze the regulations related to the sterilization of judicially incapacitated people with disabilities in Spain, its origin and evolution, and to make a comparative analysis of the regulation in different European countries. The aim is to understand the changes that have occurred in the different legislations and the current legal framework.

Keywords*: dignity, human rights, body integrity, sterilization, disable person.*

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1. Introduction

Physical integrity is a right recognized in various bills of rights, as well as in constitutional and political texts. It is considered an absolute right, not subject to limitation, not even by the will of the person holding it. Bodily affectation is only accepted in cases authorized by law. In Spain, the impact on physical integrity in cases of voluntary sterilization, organ donation, and sex change operations is decriminalized.

This decriminalization was also extended to persons with disabilities. The 1995 reform of the Criminal Law included Article 428, which addressed the sterilization of an incapacitated person, stating that "the sterilization of an incapacitated person suffering from a serious mental deficiency shall not be punishable" provided that "it has been authorized by a judge at the request of the legal representative of the incapacitated person, after hearing the opinion of two specialists, the Public Prosecutor's Office, and after an examination of the incapacitated person." Although this was considered a measure in accordance with the Constitution and international declarations of rights by the Constitutional Court, social criticism led to its repeal in 2020 through the approval of Organic Law 2/2020 of December 16, 2020, which amended the Criminal Law to eradicate forced or non-consensual sterilization of judicially incapacitated persons with disabilities.

This paper seeks to analyze the regulations related to the sterilization of judicially incapacitated people with disabilities in Spain, including their origin and evolution, and to provide a comparative analysis of the regulations in different European countries. The aim is to understand the changes that have occurred in the legislation and the social and anthropological motivations underlying them.

2. The sterilization of an incapable person suffering from a serious mental deficiency: the Spanish case

The Spanish regulations regarding the sterilization of an incapacitated person suffering from a serious mental deficiency have undergone profound changes. To understand these changes, we examine the regulations, judicial decisions, and parliamentary debates of recent years.

The 1973 Penal Code regulated matters relating to physical integrity in Chapter IV, entitled "Injuries." Article 428 stated: "The penalties indicated in the previous chapter shall be imposed in their respective cases even if there is consent from the injured party."[1]

In 1983, during the Second Legislature, the Socialist Government introduced a bill for the Urgent and Partial Reform of the Penal Code. In it, although the good of the integrity of the person continues to be affirmed as an absolute right[2] the bill, for the first time, included a cause of atypicality "in the cases of organ transplantation carried out in accordance with the provisions of the Law, sterilizations and transsexual surgery carried out by a doctor". Provided that such consent is "valid, free, conscious, and expressly given". Although consent will not be valid, according to law, when "it has been obtained vitiatedly, or by means of a price or reward, or if the grantor is a minor or incapable" (Bolentín Oficial del Estado, 1983).

During the III Legislature, the bill presented by the Socialist Government to update the Penal Code was approved. Article six of that law added to Article 428 a ground for atypicality regarding the sterilization of an incapacitated person, stating that "the sterilization of an incapacitated person suffering from a serious mental deficiency shall not be punishable," provided that "it has been authorized by a judge at the request of the legal representative of the incapacitated person, after hearing the opinion of two specialists, the Public Prosecutor's Office, and after examining the incapacitated person."

Finally, in the final vote on the bill, out of 254 votes cast, 205 were in favor, 3 were against, and there were 46 abstentions (Diario de Sesiones del Congreso de los Diputados, 1989, pp. 11324 y ss.).

In July 1994, the Constitutional Court ruled in its judgment 215/1994 on the issue under study. In this judgment, the Plenary resolved the question of unconstitutionality 1.415/1992 in relation to the modification introduced by Article 6 of Organic Law 3/1989

[1] Own translation of the official texts cited in the document from Spanish to English.

[2] Article Six: "The penalties indicated in the preceding chapter shall be imposed in their respective cases even if there is consent of the injured party."

The Plenary of the Court begins by considering sterilization as an act protected by fundamental rights, as the legislation recognizes "the self-determination of the person regarding their physical integrity in this case and in others contemplated in Article 428 of the Criminal Code - organ transplantation in accordance with the provisions of the law and transsexual surgery." It does not imply inhuman or degrading treatment because "it is not intended to humiliate or debase, nor does its medical practice involve any inhuman or degrading treatment." Consequently, since incapacitated persons enjoy the same rights, "the convenience that this possibility granted to capable persons may be extended, exclusively for their benefit, to those who, due to serious mental illness, are not capable of giving the free consent required by the law."

The question, therefore, lies in the validity of consent, which, "by definition, cannot be given by someone who suffers from a serious mental deficiency. Hence, the legal provision requires authorization that, at the request of the legal representatives of the disabled person, the judge must grant or refuse." This is in accordance with the law, as otherwise, the incapacitated person would be denied "any medical treatment - and especially an ablative surgical intervention - essential for life or simply beneficial to the health of the severely mentally handicapped. Sterilization itself may be medically indicated for these purposes."

In addition, the Court considers that "the sterilization of the incapacitated person, of course always subject to the requirements and guarantees already examined that Article 428 of the Penal Code imposes for judicial authorization," is necessary to respect their fundamental rights since "it allows them not to be subjected to constant surveillance that could be contrary to their dignity (Article 10.1 of the Constitution) and their moral integrity (Article 15.1 of the Constitution)." Additionally, it makes "possible the exercise of their sexuality" to the extent of their abilities, "without the risk of possible procreation" - pregnancy and paternity - "the consequences of which they cannot foresee or consciously assume due to their mental illness." For all these reasons, the Court declares the contested rule constitutional.

During the Fifth Legislature (1993-1996), the reform of the Penal Code in Spain was approved through an Organic Law. Title III, entitled "Injuries," regulates criminal offenses related to violations of the right to physical integrity (Article 15 of the 1978 Constitution). Article 156 establishes that:

> "However, the sterilization of an incapacitated person suffering from a serious mental deficiency shall not be punishable when the sterilization has been authorized by a judge, either in the same incapacitation procedure or in a voluntary jurisdiction proceeding processed after that procedure, at the request of the legal representative of the incapacitated person, after hearing the opinion of two specialists, the Public Prosecutor's Office, and after examining the incapacitated person."

In 2006, the Convention on the Rights of Persons with Disabilities was approved. Spain ratified it in April 2008. Article 23, entitled "Respect for the home and family," states:

> States Parties shall take effective and appropriate measures to put an end to discrimination against persons with disabilities in all matters relating to marriage, family, parenthood, and personal relations, and to ensure that persons with disabilities are on an equal basis with others.
>
> The following sections establish that such measures must aim to:
>
> a) Recognize the right of all persons with disabilities of marriageable age to marry and found a family on the basis of the free and full consent of the future spouses;
> b) Ensure the right of persons with disabilities to decide freely and responsibly on the number of children they wish to have and the time between births, and to have access to age-appropriate information, reproductive education, and family planning, as well as provide the necessary means to enable them to exercise these rights;
> c) Ensure that persons with disabilities, including children, maintain their fertility on an equal basis with others. (Boletin Oficial del Estado, 2008)

The ratification of this Convention was a turning point in the social and legislative debate on the regulations in force in Spain. This led to the reform of the Penal Code carried out during the X Legislature, which introduced modifications to the article that is the subject of this study. In the preamble to the law, point XXVII states:

> "People with disabilities must be subject to reinforced criminal protection in view of their special vulnerability. The provisions of the Penal Code that serve this purpose must be in accordance with the International

> Convention on the Rights of Persons with Disabilities, signed in New York on December 13, 2006."

To this end, among the measures taken is the modification of the terms used[3] and with regard to our object of study, the preamble indicates that:

> Similarly, better treatment is given to sterilization agreed by a judicial body, which is limited to exceptional cases in which there is a serious conflict of protected legal rights. The new article 156 refers to the civil procedure laws, which will regulate the cases of sterilization in the most appropriate way and guarantee the rights of the affected persons. Until this new regulation is issued, the current regulation contemplated in the Code will remain in force.

Consequently, the wording of the second paragraph of Article 156 is modified, which now states that:

> Sterilization ordered by a judicial body shall not be punishable in the case of persons who are permanently unable to give the consent referred to in the preceding subparagraph, provided that the case is an exceptional case in which there is a serious conflict of protected legal interests, in order to safeguard the best interests of the person concerned, all in accordance with the provisions of civil legislation.

In 2020, Organic Law 2/2020 was approved. This law amends Article 156 of the Criminal Code to eliminate the atypicality clause related to the sterilization of incapacitated persons. It states that "the grantor is a minor or absolutely unfit to provide consent, in which case the consent provided by them or by their legal representatives will not be valid."

The bill originated in the Senate. In the preamble of the Initiative (BOCG, March 6, 2020), it is indicated that the purpose of the Initiative is to align Spanish legislation with the Convention on the Rights of Persons with Disabilities, approved in 2006. The atypicality clause contemplated in Article 156 was deemed

[3] "The original text of the Penal Code inappropriately refers to "handicap" or "incapacitated", a terminology that has already been superseded in our legal system prior to the Convention, since the approval of Law 51/2003, of 2 December, on equal opportunities, non-discrimination and universal accessibility for persons with disabilities, and which should be replaced by the more appropriate terms of "disability" and "person with disabilities in need of special protection"".

a violation of "the rights of persons with disabilities by perpetuating myths such as 'the good of the family,' 'the inability of women with disabilities to be mothers,' or 'for their sake,' which are in direct violation of Article 23 of the Convention." This is particularly relevant in the case of women and girls, as indicated in Article 6[4] of the Convention and in General Comments No. 1 and No. 3[5] of the Committee on the Rights of Persons with Disabilities. As recommended by the United Nations in 2011 to Spain[6].

It is also stated in the preamble that "forced sterilization is a more widespread practice than public opinion considers. According to data from the General Council of the Judiciary, over the last decade more than a thousand forced sterilizations have been performed in Spain, the majority of which were on women. In 2016 alone, CERMI, based on official data, reported 140 cases, with an additional 865 cases between 2005 and 2013."

The rule was approved with all deputies voting in favor: Yes: 348, No: 0, Abstentions: 0.

It is relevant for the study to examine the Journal of Plenary Sessions of Congress (Boletín Oficial de las Cortes Generales 2020, pp. 116 et seq.) and the Journal of Senate Sessions (Boletín Oficial de las Cortes Generales, 2020, pp. 107 et seq.). All parliamentary groups support the reform of the law. The arguments in favor of the modification are diverse and can be broadly classified into

[4] "Furthermore, in its article 6, on women and girls with disabilities, it stresses that States Parties recognize that women and girls with disabilities are subject to multiple forms of discrimination and, in this regard, shall take measures to ensure that they can fully and equally enjoy all human rights and fundamental freedoms."

[5] "Despite these findings and international agreements, the Committee on the Rights of Persons with Disabilities, in its General Comment No. 1, confirms that women with disabilities are subject to high rates of forced sterilization, and are often denied control of their reproductive health and decision-making, assuming that they are not capable of consenting to sex.

In its general comment No. 3 on women and girls with disabilities, it indicates that some forms of violence, exploitation and abuse may be considered cruel, inhuman or degrading treatment or punishment and a violation of various international human rights treaties. These include: pregnancy or forced sterilization performed under coercion, or involuntarily; all medical procedures and interventions performed without free and informed consent, including those related to contraception and abortion."

[6] "The United Nations, through the Committee on the Rights of Persons with Disabilities, already officially recommended, in 2011, to the Kingdom of Spain the adaptation of its internal legislation (Penal Code) on this point, so that this guarantee would not be violated."

three groups. First, the assessment of the previous norm as contrary to international law. Second, the classification of the sterilization of persons declared incapable with severe disabilities as forced sterilizations. Third, the consideration of the practice as an attack on the dignity of persons declared incapable with severe disabilities - imposing such a significant decision by a third party, the absence of guarantees, the control of maternity by third parties, and the discriminatory nature of the measure.

There is no mention of the criteria and arguments put forward in previous reforms at the legislative, parliamentary, or judicial levels.

3. The sterilization of an incapable person suffering from a serious mental deficiency: comparative European Law

The process carried out in Spain is not common to all neighbouring countries, where varied legislation with diverse criteria and requirements can be found.

At the European level, references to forced sterilization appear in various documents. For example, the 2011 Istanbul Convention on Action against Violence against Women and Domestic Violence, adopted by the Council of Europe, addresses issues related to abortion and forced sterilization. Article 39 states:

> The Parties shall adopt the legislative or other measures necessary to establish as a criminal offence, when committed intentionally: (...) (b) the performance of a surgical intervention which has the purpose or effect of terminating a woman's ability to reproduce naturally without her prior and informed consent or understanding of the procedure.

This Convention is "is the first European regional instrument of international law of a binding nature that sets international standards for the prevention and protection of women against violence with which each country that has acceded to the Convention must be harmonized" (Delibasić, 2018: 23).

Article 7 of the Rome Statute of the International Criminal Court also establishes that

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic

> attack directed against any civilian population, with knowledge of the attack" and in the letter g, list as an act (…) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

As "crimes against humanity have not been codified in an international treaty" this definition has been considered the "latest consensus of the international community, and, for the time being, is considered the most authoritative definition (Soltvedt and Heberling, 2018: 257).

However, the lack of specific mention of incapacitated persons results in diverse national legislation across different states. At the level of Spain, that is, with a ban on the sterilization of people with disabilities, there are 7 countries: Ireland, Belgium, Sweden, Austria, Italy, Slovenia and Poland.

In France and Germany, sterilization is prohibited, but similar to the Spanish Penal Code of 1995, their regulations allow for the sterilization of disabled individuals under guardianship with judicial authorization. This authorization is granted only after consultation with their guardian and the individual with disabilities.

In contrast, there are 14 countries that permit the sterilization of some people with disabilities in their legislation: Portugal, Denmark, the Czech Republic, Slovakia, Hungary, Croatia, Malta, Finland, Estonia, Latvia, Lithuania, Bulgaria, and Cyprus. Among these, three countries - Portugal, the Czech Republic, and Hungary - legally allow the sterilization of minors. The legislation varies, and the authorization is subject to various judicial guarantees. In some of these countries, decisions are made by specialized entities, such as a special council or commission (Denmark and Slovenia) or the Commissioner for Mental Health (Malta) (EDF Report, 2022).

4. Conclusiones

Voluntary sterilization has been decriminalized in some legislations as an act resulting from an individual's self-determination regarding their reproductive choices. However, non-voluntary sterilization is considered by various countries' regulations and international agreements to be an act contrary to human dignity. The issue addressed in this research is the regulation of sterilization for individuals who, due to severe disabilities, are unable to provide consent.

The twentieth century was marked by a strong eugenic mentality that led to the systematic sterilization of people with disabilities (Rowlands & Amy, 2019). For example, by 1935 in the USA, "30 states had passed sterilization laws, hoping to improve the population as a whole." As a result of these laws, approximately 60,000 individuals with mental illness and intellectual disabilities were involuntarily sterilized during the early part of this century (Denekens, Nys, Stuer, 1999). In Germany, it is estimated that 225,000 people had been sterilized by 1937 (Denekens, Nys, Stuer, 1999). This legislation and its practices were considered a direct violation of human dignity, as they went against the "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" (Velasco Guerrero, L, 2022: 230).

That is why, in the Spanish case, the decriminalization of this conduct was pursued with the maximum normative guarantees, ensuring that it would only be carried out for the benefit of the person with disabilities. The regulatory changes analyzed have eliminated this possibility in all cases. This situation places Spain among a minority of countries in the field of comparative law.

However, in the debate at both the Spanish and European levels, while the systematic abuses experienced in these cases have been highlighted, the questions raised at the time of decriminalization have not been addressed. Specifically, whether decriminalization for individuals with severe disabilities is necessary for respecting their fundamental rights, as it "allows them not to be subjected to constant surveillance that could be contrary to their dignity (art. 10.1 C.E.) and their moral integrity (art. 15.1 C.E.)". Additionally, it enables "the exercise of their sexuality" to the extent of their abilities, "without the risk of possible procreation"

- pregnancy and paternity - the consequences of which they cannot foresee or consciously assume due to their mental illness (STC 215/1994).

Although I believe that the current legislation aims to guarantee dignity and autonomy for people with disabilities, the harsh reality of severe disability often means that these individuals are unable to understand the process or provide informed consent. Therefore, considering the various arguments, I do not think this debate is closed. Given the ongoing discussions and differing perspectives, it is likely that regulations will continue to be debated and reassessed in the coming years.

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Original Scientific Paper
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FEMICIDE/FEMINICIDE IN CRIMINAL LAW: DO WE NEED A NEW CRIMINAL OFFENCE?

The author examines relevant definitions, surveys and actual legal responses to femicide, focusing on the state of affairs in the Republic of Serbia, especially dilemma about introducing femicide as a new, separate criminal offence. The actual data on femicide are presented, as well as the overview of the historic perspective, and the difficulties in defining the phenomenon in order to collect accurate and comparable data as the solid base for creating adequate responses. The author focuses on arguments pro and contra introducing femicide as separate criminal offence having in mind actual trends in Serbian criminal law characterized by penal populism, as well as often hastily made interventions without much thinking about their outcomes in practice and lack of adequate implementation of already existing good provisions and preventive mechanisms.

Keywords: *gender-related killing, femicide/feminicide, new/separate criminal offence, gender violence, domestic violence.*

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1. Introduction

The term femicide[1] was used in England in 1801 for the first time to refer to the "killing of a woman" [2]. In 1848, it was incorporated in Wharton's Law Lexicon, suggesting it had become a prosecutable offence[3], thus indicating that the practice of taking the life of women had long been tolerated.

Pretty simple and often used, but not enough clear and accurate is the definition of femicide as the intentional killing of women because they are women (WHO, 2012:1). More complex one (and used in relevant documents and studies on femicide) is "gender-related killing of women and girls" or "killing of women and girls because of their gender" or "intentional killing committed on the grounds of gender-related factors"[4] (such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable behaviour of women).

According to the latest report on gender-based killings of women approximately 48,800 women and girls lost their lives at the hands of intimate partners or other family members in 2022 (that is 3800 victims more then in previous year (UNODC, UN Women, 2023: 5). On average, more than 133 women or girls are killed every day by someone in their own family. Africa was the region with the largest absolute number of killings, and also with the highest level of violence relative to the size of its female population. Europe was on the fourth place, after Asia, and Americas (Ibid: 3-4).

Despite the overwhelming majority of homicides worldwide are committed against men and boys (80%), women and girls are disproportionately affected

[1] In the literature, the term gynecide appears as a synonym. The term gynecide was for the first time used by radical feminist Mary Daly to describe the systematic mutilation, rape and murder of women by men (Daly, 1978:3).

[2] History of the Term Femicide. Available at: History of the Term Femicide - Femicide in Canada, accessed on 1.6.2024.

[3] The Oxford English Dictionary, 1989, p. 285.

[4] UN General Assembly resolutions A/RES/68/191 adopted in 2013 and A/RES/70/176 adopted in 2016; UN General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para. 19 (CEDAW/C/GC/35); UNODC, UN Women, 2023; EIGE, 2023.

by homicidal violence in the private sphere. Approximately 53% of all female homicides are committed by intimate partners or other family members, while only 11% of all male homicides are perpetrated in the private sphere (Ibid: 17).

The perpetrator - often male intimate partner usually punishes "his" woman or takes revenge on her - for adultery, separation, but also for supposedly socially valuable, but fatal reasons for the woman such as love, honour or tradition. When it comes to honour and tradition, another family member, even another woman, may be on the side of the perpetrator. Nevertheless, femicide could occur in public sphere too, committed by known or unknown perpetrator, (especially in context related to sex work, human trafficking, war and conflict settings, witch-hunting, etc[5]. This fact (the multidimensionality of the phenomenon) has often been overlooked, so the proper understanding of femicide and its (covert) forms is of great importance.

Despite the efforts of the modern, "civilized" community to eradicate this practice and provide equal opportunities for both sexes, it is still present in all parts of the world, but in poorer, more patriarchal societies, and those with a high tolerance of violence in general, it has its more open expression, while in others it is covert[6]. This is linked to another characteristic of femicide, as its peculiarity is also the contribution of society to its universality and survival, if not through encouragement and support, then through inadequate response and failure to prevent femicidal victimization. One of the possible responses/recommendations is the introduction of a specific criminal offence of femicide (EIGE, 2023: 73) which is strongly supported by women's rights proponents.

[5] More details about different types of femicides: Simeunović-Patić, Jovanović, 2011: 281-283; Corradi, 2021: 6-7; EIGE, 2023: 7.

[6] More about Ciudad Juárez – "city of dead women" or " Mexico's femicide capital" and femicidal practice in Latin America that increased interest of Europe in the problem of femicide: Simeunović-Patić, Jovanović, 2011.

2. Gender-related factors as differentia specifica of homicidal victimization of women

Femicide is characterized by the specific context or motivation of homicidal victimization of women related to gender. Within the feminist approach, femicide is understood as murder with misogynistic motives (Russell,Van de Ven, 1976). When the gender[7] of the victim is not within the motive of the perpetrator, the murder of a woman does not constitute femicide, or, to put it simply, femicide is the murder of women by men, because they are women (Radford, Russell, 1992). Soon, the concept of femicide evolved from misogynistic to all forms of sexist killings (motivated by men's contempt for women, their feelings of power, superiority, dominance over women, or the belief that they own and control them).

It is noteworthy to point out that feminists in Latin America insist on the term feminicide (*feminicidio*) as more appropriate (so it is used alongside term femicide in many documents, evene European ones) arguing that the term femicide emphasizes only the sex of the victim as differentia specifica, while feminicide emphasizes the misogynistic connotation of murder, and the phenomenon itself is associated with a crime backed up/abolished by a state that does not protect women's rights to a life free from violence (Lagarde,2006: 223). In 2006, the Special Commission for Monitoring Investigations and Access to Justice in Femicide Cases even stated: "Femicide is a crime of the state". (Brugger, 2009: 6)

In addition to murders related to violence such as rape or beating, femicide, as a form of discrimination/violence against women, also includes murders, i.e. deaths related to genital mutilation, sacrificing widows by burning (*sati*), dowry killings and other femicide practices in India, as well as "honor crimes/killings" [8]. Femicide can also be classified as a covert form of violence against women resulting in their death, which consist of not providing help, i.e. leaving women to death due to misogynistic or sexist motives or social constructs. For

[7] Homicides motivated by gender of the victim are definied also as *gendercide* (eng.) that could be femicide and androcide (Warren, 1985).

[8] Noteworthy is practice of "honor-killing" (karo-kari) from Pakistan that is gender neutral in terms that victims are men and women accussed for adultery. Nevertheless, much more women are sacrificed in the name of honour of the family then men (Simeunović-Patić, Jovanović, 2011: 282).

example, traditionally male children are valued more than female children, and many girls starve to provide food for their brothers. In connection with the above, we must not forget still widespread practice of infanticide, i.e. foeticide, whose victims are also more often female fetuses, while in the background there is a desire to provide male offspring as more valuable. A covert form of femicide could also include suicides committed by women due to the violence. One specific form of femicide is so-called "femicide-suicide": intentional killing of a woman followed by the perpetrator's suicide is an incident reported in almost all European countries (Corradi, 2021: 7; Simeunović-Patić, Jovanović, 2013: 19-20, 34-35).

In order to provide a universal definition of femicide, and thus create a solid base for collection of accurate, comparable data, for better understanding of the phenomenon and creation of appropriate social and state responses, the UN Statistical Commission endorsed the Statistical framework for measuring the gender-related killings of women and girls (femicide/feminicide)", based on the results of the global consultation, in 2022 (UNODC, UN Women, 2022).

In the foundation of the definition of gender-related killing of women and girls (femicide/feminicide) is "gender-related motivation" or context in which killing of woman occurs. It refers to the root causes - such as stereotyped gender roles, discrimination towards women and girls, inequality and unequal power relations between women and men in society - that characterize the specific context in which such killings take place. These factors can trigger violence by perpetrators when a woman's behavior is perceived not to be in line with social norms or stereotyped gender roles. In this context, the term "gender-related motivation" does not refer to the subjective intent of the perpetrator to commit the homicide, but to its underlying root causes. (Ibid: 3).

As femicide could also occur in the public sphere, homicide modus operandi meets at least one of the following criteria: the homicide victim had a previous record of physical, sexual, or psychological violence/harassment perpetrated by the author of the killing; the homicide victim was a victim of forms of illegal exploitation, e. g. in relation to trafficking in persons, forced labour or slavery; the homicide victim was in a situation where she was abducted or illegally deprived of her liberty; the victim was working in the sex industry; sexual violence against the victim was committed before and/or after the killing; the

killing was accompanied by mutilation of the body of the victim; the body of the victim was disposed of in a public space; the killing of the woman or girl constituted a gender-based hate crime, i.e. she was targeted because of a specific bias against women on the part of the perpetrator(s) (Ibid: 9).

Risk factors that should be addressed in all policies and actions in order to prevent femicide (especially its well-known type - perpetrated by intimate partner/family member) include previous violence (violent model of conflict resolution, in general, and especially intense physical abuse of the partner (and other family members), verbal aggressiveness; death and/or suicide threats), pathological possessiveness (related to issues of power imbalance and control tactics within the partnership), jealousy and pronounced ambivalence towards the partner ("I can't live with you, I can't live without you"). Separation could be at the same time a solution, by ending an abusive relationship, but also a point at which the violence can escalate, when a man refuses to let "his woman" go. Important risk-factors are also: the presence of mental disorders, such as alcoholism, alcoholophilia, paranoid or schizophrenic psychosis, depression or certain personality traits (psychopathic structure, passive-dependent personalities, etc.), as well as the possession, or more precisely - the availability of firearms (Simeunović-Patić, Jovanović, 2013: 145-146 and 2017: 36-37; Corradi, 2021: 9). Previous victimization by violence or the presence of violent patterns of communication in the primary family are important, but social factors on the side of wider social community/context must not be neglected (such as nurturing macho-culture, tolerating violence, neglecting the principle of gender equality/not eradicating harmful customs and practices, war or other social conflicts...).

3. International and Serbian legal framework

Alarming rates of femicide (and violence against women in general) in Latin American countries contributed to the adoption of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994 (Belém do Pará Convention) by the General Assembly of the

Organization of American States[9]. Since then, the development of mechanisms to counter this problem in Latin American countries has begun, as well as increasing Europe's interest in the problem, its recognition and responses, regardless of where it occurs.

In 2005, the Parliamentary Assembly of the Council of Europe adopted Resolution 1454(2005) on the disappearance and murder of a large number of women and girls in Mexico [10] emphasizing the concept of femicide that could also find its place in European criminal law. Resolution adopted in 2009 even got the title *Feminicides*[11]. It highlights the existence of femicide in Europe as well, and requires special attention to be paid to immigrant communities that should restrain from harmful practices and customs that imply violence against women. It is also recommended to punish more severely gender-related violence against women, including femicide. There is also a need to establish a special observatory that will collect data on violence against women, and especially femicide, in European countries, in order to identify gaps in achieving the protection of women and take measures to overcome them[12].

In 2007, the European Parliament took into consideration the Report on the murders of women (feminicides) in Central America and Mexico and the role of the EU in combating this phenomenon, as well as the Motion for a European Parliament Resolution[13]. This document, as well as those of the Council of Europe, in addition to the promise of support to countries where feminicide is widespread, draws the attention of EU member states to this phenomenon, while countries-candidates for membership in the EU must prove that they respect women's

[9] Inter-American Convention on the Prevention, Punishment and Eradication otf Violence against Women "Covention of Belém do Pará", http://scm.oas.org/pdfs.agres/ag03808E01.pdf

[10] Council of Europe Parliamentary Assembly, Resolution 1454(2005) Disappeareance and murder of a great number of women and girls in Mexico, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17351&lang=en

[11] Council of Europe Parliamentary Assembly, Resolution 1654(2009)Feminicides, http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1654.htm

[12] Council of Europe Parliamentary Assembly, Reccommendation 1861(2009)Feminicides, http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/EREC1861.htm

[13] REPORT on the murders of women (feminicides) in Central America and Mexico and the role of the European Union in fighting this phenomenon | A6-0338/2007 | European Parliament (europa.eu) (2007/2025(INI))

human rights and protect women from violence and femicide. Within the UN, Vienna Declaration on Femicide was adopted more than a decade ago[14][15].

International interest in feminicide has led to changes in legislation in Latin American countries. In 2007, Mexico adopted the General Law on Women's Access to a Life Free from Violence, which defines the concept of femicide, while on July 27, 2011, feminicide has been criminalized. This criminal offence consists in "inflicting obvious and humiliating injuries on a woman before or after deprivation of life", and the perpetrator can be punished by imprisonment up to 60 years. The aggravated form of the offence exists in the case of an emotional bond (romantic or a relationship of trust) between the perpetrator and the victim, kinship or a relationship of supremacy. The criminal procedural provisions have also been changed, and those conducting the investigation are required to strictly adhere to the established protocols regarding the crime of femicide in order to ensure efficiency in identifying the victim and perpetrator. Since 2004, there has been a Special Prosecutor for Violence against Women in Mexico.[16][17]. Nevertheless, the country still has a very high rate of femicide. In 2020, official national data registered 948 femicides (aprox. 2.5 daily), whereas, the grass roots associations reported 11 femicides per day (Corradi, 2021: 21). It clearly indicates that the roots of the problem are not in the normative sphere, but in the comprehensive understanding and acceptance of the problem, willingness and capacities of the society and state to counter it.

The Council of Europe's legally binding document, the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention, adopted in 2011[18] and ratified by Serbia in 2013[19]) doesn't mention the term femicide/feminicide. Nevertheless, it sets firmer obligations for

[14] UN, Economic and Social Council, Vienna Declaration on Femicide, E/CN.15/2013/NGO/1

[15] About UN efforts to counter femicide: Jovanović, Simeunović-Patić, 2017: 205-207

[16]LACWHN, Mexico City defines Feminicide in the Penal Code. Available at: http://www.reddesalud.org/news/act1_int.php?id=288, accessed on 2. 8. 2024.

[17] About Latino American countries' incriminations of femicide: UNODC, 2019: 57-62.

[18] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, http://conventions.coe.int/Treaty/EN/Treaties/HTML/DomesticViolence.htm

[19] Law on Ratification of the COE Convention on Preventing and Combating Violence against Women and Domestic Violence, Official Gazette of the RS - International Treaties, No. 12/2013

States Parties to prevent and combat violence against women, defining and broadening the definition of violence against women in comparison to the definition in the Inter-American Convention. In such a broad framework of violence against women (Article 3a), there is certainly place for femicide, and the Article 51 envisages requirements regarding assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence in order to manage the risk and if necessary to provide co-ordinated safety and support. The relevant assessment is imortant at all stages of the investigation and application of protective measures, especially if perpetrators possess or have access to firearms.

In Europe, specific, but rather indirect responses to femicide exist (in terms that there is no mention of the femicide, and the relevant incriminations are mostly gender-neutral, and primarily related to domestic/family violence). The most often, murder becomes aggravated if it is committed by a family member/partner or this circumstance is taken as aggravating one in the determination of the sentence (Spinelli, 2011: 42). It is in compliance with the requirements of the Istanbul Convention, but such solution does not cover all forms of femicide that have been discussed, so efforts are still being made to better understand this phenomenon and find more adequate (criminal law) responses.

The European country that has gone the furthest in the sphere of protection of women from violence, including femicide, because it fosters a holistic approach to the problem is Spain, known for its Organic Law 1/2004 on comprehensive protection measures against gender-based violence. In 2004, a public prosecutor for cases of violence against women was appointed, and Spain is the only Member State that has established specialised courts for handling gender-based violence cases and has guidelines on judicial action against gender-based violence issued by a group of experts of the General Council of the Judiciary. As noted in Organic Act 1/2004, these new courts are mandated to examine and rule on criminal cases involving violence against women and any related civil causes. The perpetrator of a femicide can be held liable for murder or homicide under the Spanish Criminal Law which could be aggravated, if committed against a spouse, ex-spouse, partner or ex-partner or a person of particular vulnerability (without mentioning gender-related motivation). However, Organic Law 1/2015 of 30 March 2015 further strengthened the protection of victims of gender-based violence by specifying that committing a crime motivated by the victim's gender

must be considered an aggravating circumstance. Therefore, this law offers legal protection in all cases of violence motivated by gender, which goes beyond violent acts committed in intimate partner relationships. Moreover, in 2015, the Spanish Supreme Tribunal clarified that this provision needed to be applied in all instances in which the victim was a woman and the harmful action was motivated by a man's desire to subject the woman to his will, demonstrating superiority or an attempt to dominate her[2021]. Several European countries adopted specific amendments regarding femicide - Malta, Cyprus[22], Croatia[23].

In Serbia, data on femicide are not officially collected (which is undoubtedly a big flaw from the aspect of (more declarative) efforts of the state to counter violence against women, as well as from the aspect of international legal recommendations regarding the mandatory collection of data. Some outlines about phenomenon and the state response to it could be find in the reports of the Network "Women against Violence", as well as in some empirical analysis of judicial decisions (Simeunović-Patić, 2003; Simeunović-Patić, Jovanović, 2013; Beker, 2023). Since 2010, an average of 30 women per year have been victimized by men (by murder or attempted murder) in a family/partner context,[24] and according to UNODC data from 2019, Serbia is one of the countries with a medium rate of femicides - 0,65 (rate - per 100,000 female population). Latvia has the highest rate and Ireland has the lowest (UNODC, 2019).

In most cases, the violence that preceded murder was noted, as well as the victims' call for help and contacts with relevant institutions (but adequate help was not obtained). Firearms (very often in legal possession) were common means

[20] Critic tones about this kind of state response which undermines human (men's) dignity in some judicial cases in practice has to be taken into consideration. See: Muñoz Pérez, 2021: 477-488.

[21] More details on Spanish and other European legal responses to femicide: EIGE, 2023.

[22] The concept of femicide was introduced into Maltese criminal law in 2022**,** thus a homicide can be considered a femicide if a woman is killed as a result of domestic violence, honour killings, misogynistic intentions, religious practices such as genital mutilation, and sexual abuse (Calleja, 2022). Similar method was used in Cypriot criminal law (Hazou, E., 2022).

[23] See: Artice 111a of the CC of the Republic of Croatia (Aggravated Murder of a Female Person) NN 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24.

[24] Reports of the Network "Women against Violence", *Femicid in Serbia*, Available at: http://www.zeneprotivnasilja.net/femicid-u-srbiji, accessed on: 5. 8. 2024.

of committing crime. The same picture (in terms of the motivation of the perpetrator, the use of weapons and prior violence to which the institutions did not react in a timely/adequate manner) is shown by the surveys on judicial practice in Serbia (Simeunović-Patić, Jovanović, 2013; Beker, 2023) as well as by survey on institutional support and assistance prior to femicide in period 2017-2018 (Lacmanović, 2022).

When it comes to criminal law responses, Serbia is one of the European countries that do not recognize the specific crime with gender dimension, nor does femicide as the notion appear in current (strategic and other) documents. However, it could be said that Serbian criminal law (indirectly) complies with international recommendations when it comes to intimate partnership/family gender-related killing, with the gender-neutral incrimination providing protection to all family members that have previously been subjected to abuse (regardless of gender/and motivation). It is a form of aggravated murder - murder of a family member who has been previously abused by the perpetrator (Article 114, para. 1, item 10 of the Criminal Code (hereinafter: CC)[25]. This specific form of aggravated murder was meant to improve protection of women, i.e. family members who are most often victims of domestic violence (which can end in homicidal victimization). Also, the criminal offence of domestic violence acquires the most aggravated form if it results in death of the victim (in relation to death as a consequence, there is negligence on the part of the perpetrator (Article 194, para. 4 CC)). The prescribed punishment for this offence was increased in 2019, so it is now at the level of the punishment prescribed for murder (Article 113 CC), and if the victim is a minor the minimum of the punishment is the same as the minimum prescribed for aggravated murder[26]. This legal intervention should also indicate the increased interest of the state in the problem of violence against women and its aggravated forms (at least declaratively and indirectly, because the incrimination itself is also gender-neutral, the only relevant circumstance is the context in which the fatal consequence occurred - domestic violence). However, there is

[25] Criminal Code, Official Gazette of the RS, Nos. 85/2005, 88/2005 - correction, 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/ 2013, 108/2014, 94/2016, 35/2019.

[26] Law on Ammendments to the CC, Official Gazette of the RS, No. 35/2019

still a direct non-compliance with European requirements regarding the interpretation of a constitutive element of the offence - a family member. Namely, according to the interpretation given by the legislator (Article 112, para. 28 CC) an important determinant in the case of ex-spouses (without child) is living in a common household, while former common-law partners (without child) do not enjoy any protection (under the provisions on family violence offence), although it is a well-known fact that the termination of a relationship does not mean the end of violence and that, as it has been emphasized, separation is often a trigger for murder. On the other hand, the Istanbul Convention envisages wider circle of possible perpetrators and victims (Article 3b). The same is envisaged in the latest EU Directive on Combating Violence against Women and Domestic Violence[27].

Also, a murder of a pregnant woman is a form of aggravated murder (Article 114, para. 1, item 9 CC), but gender-related motives are not relevant, and the murder out of callous revenge or other base motives (Article 114, para. 1, item 5) could also be applied in the cases of femicide. Serbian Criminal Code envisages other suitable incriminations that could be applied in cases of violence against women resulting in victim's death, but they are also gender-neutral (except for the offence of female genital mutilation) and death is envisaged as the consequence which is not caused intentionally (but negligently) by the perpetrator (e.g. Human Trafficking - Article 388. para. 5 CC; Stalking - 138a, para. 3 CC, and Female Genital Mutilation - Article 121a, para. 4 CC). The prescribed sentences for aggravated murder are at least ten years (up to 20 years) of imprisonment, but life imprisonment could be pronounced too, alternatively. In case of other previously mentioned offences (with death as the graver consequence) it is at least 10 years (up to 20 years) of imprisonment, and in case of Female Genital Mutilation is two to twelve years of imprisonment (which could be criticized as some other features of that particular incrimination, that could be linked to misunderstanding of the phenomenon and its absence in Serbian tradition and culture). However, when speaking of protection of women against violence, the main problem is not normative framework as it is its (adequate) implementation. For example - incrimination of aggravated murder - murder of a family member who

[27] Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, OJ L, 2024/1385, 24.5.2024, ELI: http://data.europa.eu/eli/dir/2024/1385/oj

was previously abused by the perpetrator is very rare in practice, although it seemed that have been grounds for that qualification in judicial practice (Simeunović-Patić, Jovanović, 2013: 166-169). Just two cases of murder of a previously abused family member in Serbia were mentioned by Turanjanin et al. (2020) in the period 2006-2016. The problem is related to the incrimination itself (the interpretation of the notion of a family member, and the interpretation of the notion of previous abuse (Simeunović-Patić, Jovanović, 2013: 167; Đorđević, 2005). Let's conclude: the incrimination "does not work" properly; it has no application in practice, and judging by the data on domestic violence and stability of the rate of femicide - something else is crucial.

In cases of femicide, aggravated murder from callous revenge or other base motives (Article 114, para. 1, item 5 CC) can also be applied, but such cases are also rare in judicial practice. It looks like judicial practice is in line with media coverage of femicide cases - a man who kills his wife because she left him, "couldn't really live without her" or "he suffered from the inability to preserve his marriage", and most often "still loves her" [28]. Given the moment we live in and the research results showing that jealousy is often the reason for murder, this attitude should be radically changed. Recent survey on femicide emphasizes that the most frequent motive for committing femicide is jealousy, arising from the desire for exclusive possession of the partner, inability to control her behaviour and manage her life (Beker, 2023:54).

The same outcome is related to circumstance that should be considered as an aggravated one in determining a punishment for a criminal offence committed in hatred[29]. There are no cases in court practice regarding issue of violence against women or other vulnerable groups (Mršević, 2017: 202; Kolaković-Bojović, Đukanović, 2023: 104). The aggravating circumstances that must be considered in determination of the sentence (Article 46 of the Istanbul Convention) are also not applied properly in Serbian judicial practice. There is an automatic-

[28] About media coverage: Mršević, 2013:104-105.

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

ity/scheme in listing circumstances in the process of determination of the sentence; mitigating circumstances dominate (disputable ones, which are stated automatically, as those related to age, marital/familial status, parenthood), and the institute of mitigation of punishment is applied in almost every case of attempted murder of female intimate partner (Simeunović-Patić, Jovanović, 2013: 164). The latest survey on judicial practice mentions the same problems in relation to the sentencing (circumstances related to marital or family status are present as mitigating circumstances (married/unmarried, "marital union was terminated", age of a perpetrator, number of children), but the some positive steps are noticed, regarding aggravated circumstances: presence of children when the criminal offence was committed, children losing their mother, the perpetrator's strong desire for the consequence to occur, intense persistence and premeditation" (Beker, 2023: 55-56). Serbia's approach towards protection against violence and femicide within criminal law sphere could be additionally well illustrated by the review of the new incriminations (both in normative and practical aspects), introduced in (non)compliance with the requirements of the Istanbul Convention. Some of the new amendments have serious flaws, thus indicating more declarative approach in the process of making compliance with ratified Istanbul Convention (and protection of women against violence). The Article 121a, para. 2 CC (Female Genital Mutilation)[30] is even in the contradiction to Istanbul Convention spirit and requirements, thus displaying deep misunderstanding of gender-based violence (Jovanović, 2017: 230-236; Jovanović, Vujičić, 2022: 2015-2016). The other ones are not flawless, too (Jovanović, 2019 and 2024), so GREVIO also made different comments and suggestions regarding new incriminations and their implementation (GREVIO, 2020).

It seems that in the background of previously mention problems with implementation of the existing (good) provisions is a long time ago observed problem of underestimating of seriousness of the reported cases of violence against

[30] It defines a lighter form of the crime: if there are some particularly extenuating circumstances under which the act specified in paragraph 1 of this Article has been committed, the perpetrator shall be punished with imprisonment of three months to three years (instead of with imprisonment of one to eight years which is the punishment for the basic form of the criminal offence stipulated by paragraph 1). The Convention does not envisage such cases, and in Article 42 even envisages that culture, custom, religion, tradition, or so-called "honor" shall not be regarded as justification for such acts.

women and/or untimely/inadequate reaction to them (Jovanović, 2010: 157-275). Even the latest survey on femicide shows that "old practice" is still present, that the new preventive measures (envisaged by the Law on Prevention of Domestic Violence[31]) have not been implemented in order to prevent femicidal victimization (Beker, 2023: 58). The work of the groups for coordination and cooperation was criticized (as they should provide a timely, coordinated and individualized response in cases of domestic violence, and should take care of the safety of the victims, as well as the adequate risk assessment) also by the Protector of Citizens (2020 and 2022) and GREVIO (2020).

Let us recall that in such cases, the state violates the principle of due diligence which implies its obligation to prevent, investigate and punish acts of violence. Such omissions could take Serbia before European Court for Human Rights for the violation of the principle of due diligence and obligation to protect right to life in cases of domestic violence[32].

4. Femicide: new criminal offence in Serbian Criminal Code?

There are proposals to introduce femicide as a separate criminal offence in the group of crimes against life and body, and to define it as an offence which will include any gender-motivated killing of a woman, regardless of whether it was committed intentionally or the woman's death occurred due to the perpetrator's negligence, provided that the death occurred as a result of gender-motivated violence (Beker, 2023: 58). Defining femicide as a separate criminal offence, with many forms and precise determinants, would be an extremely difficult job, given the complexity of the phenomenon (even the proponents of femicide have not made a concrete proposal), and need of precise and understandable incrimination. The other possibility is to define it as new form of aggravated murder (similar to proposition made in Croatian initiatives launched by women's organizations (Kujundžić, 2024).

[31] Law on Prevention of Domestic Violence, Official Gazette of the RS, No. 94/2016, 10/2023.

[32] About judicial decisions of the ECHR in cases of domestic violence: Ilić, 2014: 383-393; Josifović, Kambovski, 2021: 447-461.

Would really new incrimination, new form of aggravated murder bring better protection for women against violence and lower femicide rate in Serbia? Are we going to change the CC again in order to boast in the reports that we have a new incrimination (even though we have not properly regulated the other ones that are supposed to protect women from violence) (Jovanović, Vujičić, 2022; GREVIO, 2020), and even though we are not using existing prevention mechanisms in the right way? Or, would it primarily bring some political gain to decision makers in the context of penal populism and carceral orientation of the lay public, that are obvious in current trends in Serbian criminal law (Stojanović, 2010; Ignjatović, 2017: 27-28). These trends (as well as hastily done interventions) could be clearly seen in the existing concept of aggravated murders in Serbian Criminal Code (Jovanović, 2021).

The expectations from a new incrimination are greater visibility and awareness- raising. So, the Criminal Code would be used as educational material for the general public, but also for the professionals, as new incrimination should force them to apply the law in the right way. Undoubtedly, such innovative amendments to the Criminal Code would absorb attention of all media, as the intervention into criminal law is too often used as an excellent tool for starting and/or deepening conversations on certain socially sensitive topics, drawing attention and raising public awareness. However, it is not the main social role of the criminal law.

Of course, the deterrent effect of the new incrimination is also counted on, i.e. its preventive effects, even in relation to domestic violence cases, bearing in mind that this form of murder (as aggravated one) would be punishable by life imprisonment. However, a long time ago, in XVIII century, Beccaria concluded that harsh punishment (as well as hyper-criminalization) does not have the desired deterrent effects, and that prevention and certain, timely and just punishment are right solutions.

Having in mind the state of affairs in Serbia (which was previously discussed and the need to use criminal law as ultima ratio) it does not seem that femicide as separate offence/new form of aggravated murder would be a miraculous solution, because there are existing incriminations which can be used in cases

of femicide. Why they are not created and/or used properly in such cases is the right question (GREVIO posed it also in its latest report on Serbia)[33].

5. Concluding remarks

Relevant international instruments and studies are important impetus for making more efforts to counter problem of femicide, not just within the context of domestic violence, but in wider context. One of the possible responses and most visible one is introducing new criminal offence - femicide in national legislations (and policies addressing discrimination/violence against women). Expectations from it are related to benefits such as: awareness raising, prevention and applying the law adequately (EIGE, 2023: 68).

In Serbia, generally speaking, the current state of the normative criminal law response to violence against women, including femicide, cannot be assessed as bad, as much as the problem that neither the existing relevant incriminations nor the existing prevention and protection mechanisms are properly applied in practice. Thus, the fate of the new incrimination would probably be more at the level of declaration than operationalization. However, insufficient knowledge of this phenomenon in general, burdened with prejudices and/or insufficient interest in the problem are greater obstacles on the way to protecting women from violence and femicide, than the absence of specific incrimination. Coping with risk factors, such as availability of firearms is of paramount importance, as it is necessary to intervene in the existing regulations related to the link between gun ownership/availability and possible femicide, having in mind that some constructive suggestions have already been made (UNDP, 2021: 79-85)).

To be brief, Latin American countries introduced separate offence and specific procedural mechanisms, but do not have lower rate of femicides. Obviously, the solutions should be sought elsewhere, as incriminations-declarations promising severe punishment have no effect.

[33] The aggravated murder that refers to murder out of callous revenge or other base motives is suitable also for some femicide cases, and perhaps it could be amended by specifying the gender-related motivation of the perpetrator. Or, the base motives could be specified under Article 112 of the CC in order to clarify femicide cases in law implementation.

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FEMICIDE AS A CRIMINAL LAW DEED - PRO ET CONTRA

The subject of the paper is the analysis of arguments and counter-arguments for the legalization of femicide as a criminal offense. The activist understanding of femicide relies on the position of the global feminist movement, according to which femicide is the killing of a woman due to hatred, contempt by a man over a woman. Formulating femicide in this way is justified, necessary and well-founded in the activist, academic and artistic sense but not as the Criminal Code deed. The tex's author argues that there is no need to introduce the element of feminist anger into the nature of the crime, because there are femicides without that emotional element, which is always processwise difficult to prove. The main problem is the lack of official data on the number of femicides in Serbia. The need for data on the gender of killers and their victims should be solved by introducing gender/sex-disaggregated data on murders and their victims not by introduciong femicid as Criminal Code deed.

***Keywords**: femicid, global feminist movement, man's hatred of women, Croatia, gender disaggregated data, argumenst agains femicid as criminal law offence.*

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1. Introduction

Femicide is the term used to denote the killing of women by men. It is a gender-based murder, committed against women, girls, girls, and even female babies by men. In order for a murder to be characterized as a femicide, the gender of the victim must be relevant, i.e. that the murder occurred because the victim was a woman. The term femicide, by the way, is not new and has existed in the English language since 1801 and means the killing of women, and in 1848 the term was first published in Wharton's Law Lexicon. This term has entered the scientific terminology of the study of violence against women since the article "Femicide: speaking about the unspoken", which was published in Ms magazine in 1990. It is a critical analysis of the massacre of female students in Montreal in 1989, when today's formulation, femicide, first appeared - intentional killing of women by men (Mršević, 2011: 55-58).

The actuality of femicide has existed since then until today. In Italy, a film about femicide recently attracted a lot of attention from the audience, precisely because of the topic it deals with. The film There's Still Tomorrow (C'e Ancora Domani) about femicide was directed by a woman, Paola Cortelezi (Ide, W. 2024: April 28th) and is now showing across Europe. Both in Italy and Serbia, femicide is sometimes the fatal outcome of a relationship that began as love and romance[1].

2. The concept of femicide

Femicide is a crime against women motivated by hatred of women, the killer's contempt for women, his sense of superiority over women, and the femicide believes that he has the right to take a woman's life (Mršević, 2013: 52). Femicide by an intimate partner is the most widespread subtype of femicide, but

[1] Last year he made more money than both Barbie and Oppenheimer. As of last month, it had grossed around £31.5 million in cinemas, making it the highest-grossing film of 2023 and the highest-grossing film directed by an Italian woman to date. In the film, Delia is a housewife and mother living in poverty in post-war Rome in 1946, the year Italian women first got the vote. The film's story resonates with contemporary Italian audiences because according to recent police statistics, 120 women were murdered in Italy in 2023, roughly one every three days (Nova.S: 2024 April 04th).

it is not the only one. Femicide includes several types of gender-based violence, from "ordinary" femicide, through rape and murder, to burning widows on the husband's pyre and murder for "insulting family honor", which used to occur (until the middle of the twentieth century) mainly in the Mediterranean area, the Middle East and still in the area of the Indian subcontinent and South Asia (Mršević, 2011: 47-48).

In modern times, it is observed that femicide represents a type of continuous gender-based terror, which begins with physical and psychological abuse of rape. It moves through torture and abuse with hatred of women, due to the perpetrator's feelings of superiority, sadistic pleasures and/or the exercise of power by a man over a subjugated woman, which in some cases escalates to intentional killing (Mršević, 2011: 55-56). The authors Caputi and Russell define the death of women in those circumstances as femicide (Drew, 2009: 24). While the most common forms of violence experienced by men are physical attacks and robberies in public spaces outside the home, the most common violence against women is everyday violence in the home, in the family, which in some cases leads to femicide in the family-partner context, which as such constitutes a significant part of all murders of women (Drew, 2009: 206).

Domestic murder is preceded by domestic violence, which, although comprehensively present, is largely hidden from public view. Many families that are outwardly harmonious and "solid" conceal violence against women and are reluctant to seek external help from social services or enforcement agencies (Drew, 2009: 2006). Violence by an intimate partner can occur in any relationship, regardless of class or ethnic affiliation, and the observed regularity is that abusers most often grew up in violent families themselves. They grew up there in an atmosphere of permissibility of control and violence against women, so they themselves exercise control and power in the relationship with their intimate partner and are intensely jealous and vengeful. The use of drugs or alcohol intensifies these problems (Drew, 2009: 213), and the availability of firearms facilitates and guarantees the realization of the killer's decision to take a woman's life.

3. Hegemonic masculinity

Although the police around the world most often emphasize the causal connection between the individual pathology of the killer and the committed femicide, as well as the unpredictability and randomness of the act of murder itself, experts in the field of phenomenology of violence do not agree with the police's position that the violent act could not have been foreseen (Drew, 2009: 216). Especially those experts who professionally deal with domestic violence, consider femicides in the family-partner context to be very predictable and as such could have been prevented by sanctioning domestic violence (Drew, 2009: 221). In fact, femicide could be said to represent the most predictable murder (Mršević, 2014: 87).

Authors from the field of phenomenology of violence point out that gender-based violence is one way of manifesting gender in conflictual family situations. By studying the characteristics of typical perpetrators of gender-based violence, along with the characteristics of those criminal acts, criminologist Barbara Perry determined that committing such criminal acts is a way of achieving a kind of masculinity, the so-called hegemonic masculinity (Renzetti, Edleson, 2008: 270). Hegemonic masculinity is a model of practicing male dominance over women. The term "hegemonic" refers to the contextually tolerated ways in which men practice masculinity, which includes violence to subjugate women (Drew, 2009: 3), denying the victim's right to leave or end an abusive relationship, lead her own life, seek and receive help institution etc

The social contextuality of hegemonic masculinity is reflected in the permissibility of male jealousy and its violent manifestation. Thus, it was recorded that the Russian writer Maxim Gorky was once beaten unconscious by a group of Russian peasants because he tried to defend a woman, who was stripped naked in front of a crowd that roared with approval, and her husband whipped him with a horse whip for alleged fraud (Margaret, Usborne, 1999). The message is clear, not even a man can with impunity oppose hegemonic masculinity manifested as a man's right to express his jealousy through extremely violent acts. Men are violent when they are jealous for no reason, and when they themselves are not faithful, and even when they are the ones who left their ex-partners for other women.

4. Initiatives to introduce femicide as a separate crime

Activists for women's rights demand that this crime be viewed as femicide - a gender-based murder, that is, what the Criminal Code treats as a separate offense and qualifies it as aggravated murder. The Association of Judges and Prosecutors of Serbia responds that the law does not recognize gender, and lawyers also reject such a proposal - they say that the legislator has foreseen a space in which every act would be adequately punished (RTS, 2024: 15.04). Activism regularly comes up with the argument of a large number of femicides, which indicates the increased social danger of that act.

In Serbia, there are no official data on the number of femicides, and at the same time, there is a strong need for that data expressed by many parties for a long, two-decade period. The activist understanding of femicide relies on the position of the global and domestic feminist movement, according to which femicide is the killing of a woman due to hatred, contempt, a sense of superiority or ownership of a man over a woman. Formulating the category of femicide in this way is completely justified, necessary and well-founded in the activist, academic and artistic sense. When I teach Phenomenology of Violence and Gender Studies, at the Faculty of European Legal and Political Studies, I use such an approach to femicide, but with full awareness that theory is one thing and legislative and judicial practice is another. The problem is that in practice there are a significant number of murders of women in which the emotional moment cannot be identified (accidental, mistaken murder, the killer of an unknown woman, or women as collateral unintentional victims whom their killers neither despised nor hated because they did not even know them) (Mršević, 2024a: 13.05). Examples of "wrong" women in our country are Biljana Paić murdered in 2014 (swapped the room and bed with the intended victim) (Glas Srpske, 2014: 24.01), and Teodora Kaćanski murdered in 2013 (got out of her boyfriend's jeep for whom the murder was intended) (Bogosav, 2003: 19.11).

There is no publicly available database on the number of femicides in Serbia. Some of us who are engaged in the analysis of violence against women get a daily Ebart pressclipping and by counting the number of women killed annually, monthly, semi-annually, we get some insight into the number of femicides, with full awareness that media reports do not include all cases of femicides.

Various initiatives and efforts that the MoI[2], which alone has all the data on women killed by men, has a problem with electronic data processing, explained by different understandings of the term femicide. Women's groups strongly insist that hatred, contempt, possessiveness, etc. motivational moment is key to understanding femicide, while others believe that the fact that a man killed a woman is sufficient for the concept of femicide, and there are those who would like the concept of femicide to be completely avoided as potentially irritating due to its roots in feminist context. The MoI then replies that they cannot classify the data if there is no legal, criminal definition of femicide, and so in Serbia for years we have a stalemate that we do not actually know the number of femicides, although different data appear in the public, but they all come from counting cases (putting "x" signs) from media reports (Mršević, 2024a: 13.05).

A decade ago, South American activists initiated the UN Commission on the Status of Women to consider the killing of a woman in the face of criminal gangs and drug cartels, i.e. accidental victims, as femicide. According to the decision of that UN body, that extended concept of femicide also included such murders, so even though there is no hatred towards the specific murdered woman, there is still femicide. Due to all such possible confusions, I believe that there is no need to introduce the element of feminist anger into the being of the criminal offense at all by incorporating male hatred as a constitutive element, because there are murders of women without that, or any, emotional element, which is otherwise difficult to prove in every case of murder, but who is the killer and who is the victim (Manjoo, 2012: 4).

"International documents ratified in Serbia, e.g. UN Resolution 1325 (S/RES/1325, 2000), as well as the Istanbul Convention (CoE, 2011), do not recognize the term femicide. A number of international organizations relevant to gender equality prefer to use the term "killing of women by men" European Institute for Gender Equality, (EIGE, 2006), or occasional, irregular use of the term femicide, e.g. UN Commission on status on women - CSW (Commission, 1946)." (Mršević, 2024a: 13.05).

The police should have clearly visible data on the number of women killed by men, but they have the excuse that femicide does not exist as a crime.

[2] Ministry of the Interior

Records do not even need to exist, we only need gender disaggregated data on murders, that is, how many men killed women and how many men, and how many women killed men and women. Nothing more, and that can be easily extracted from the data of the MUP. The problem is represented by activists of women's groups who misunderstand femicide by relying on feminist theory, according to which femicide is the killing of a woman due to hatred, contempt, a sense of superiority or ownership of a man over a woman. Theory is one thing and practice is another, so we can agree with such a feminist approach, but then the murders of women in which that emotional moment cannot be identified remain beyond our reach, such as, for example. killing a random woman.

Not to get into theory, femicide is simply the killing of a woman by a man. There is no need to bring feminist anger into the whole thing and in that future work we see male hatred and the like[3].

5. Seeing where the real problem is

In Serbia, there are no official data on the number of femicides, and at the same time, there is a strong need for that data expressed by many parties for a long, many decades-long period. There is no publicly available database on the number of femicides in Serbia. Some of us who are engaged in the analysis of violence against women get a daily Ebart pressclipping and by counting the number of women killed annually, monthly, semi-annually, we get some insight into the number of femicides, with full awareness that media reports do not include all cases of femicides.

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[3] This discussion in the women's movement has been going on for a long time, always the same women from FemPlatz and AŽC strive for it, but in fact, they only want nice foreign grants to receive permanently, and in an easy way, counting femicides.

the relationship between men and women, male social supremacy in relation to women and the widespread belief of many that they have the "right" to demonstrate this supremacy by force.

6. Myths and facts about femicide as a separate crime[4]

Should femicide be included in the Criminal Code as a separate crime because the gender of the victim is not legally recognized as relevant, is a controversy that has been going on for some time in Serbia (RTS, 2024: 15.04). Experts point out that it is much more important to implement existing laws than to write new ones. (2024: 11. 09). The main argument in those public discussions is the social danger of femicide, the alleged increase in the number of murders of women, the relatively (until recently) mild punishment policy in relation to murderers of women, often citing examples of insufficient understanding by the competent institutions of the complexity of this criminal act, which is often preceded by the multi-decade duration of violence that the killer perpetrated on the murdered (RTS, 2024: 15.04). That is why it is first of all necessary to demystify inaccurate representations, myths, which are presented as true facts in those discussions (Mršević, 2024b: 29.05).

Myth: Countries in the region already have femicide in their criminal laws. **Fact**: They don't. But in March, Croatia adopted amendments to the Penal Code with a new criminal offense in Article 111a "Aggravated murder of a female." Femicide is being prepared as a criminal offense in Slovenia, which will probably be adopted, but not yet. There are initiatives and proposals to recognize femicide as a separate crime, in order to better emphasize the specific gender-based motive in these crimes, but so far this has not yet been formally included in the legislation in North Macedonia which currently does not have a special crime called "femicide" in its criminal code. However, murders of women can be prosecuted under the general provisions for murder.

[4]Both texts published in the daily newspaper Danas on May 13 and 29, 2024, in which arguments deny the need for the legalization of a special criminal offense of femicide in Serbia, did not receive a single denial in the comments or any expression of rejection of the author's personal position. On the contrary, the professional, academic and activist scene expressed agreement and support.

Myth: EU countries have femicide in their criminal laws. **Fact:** They don't. Femicide as a crime only exists in Malta and Cyprus.

Myth: The Criminal Code of the Republic of Serbia does not adequately sanction femicide with the existing crime of murder and its forms. **Fact:** There is. In Serbia, there is the possibility of imposing the most severe criminal sanction, life imprisonment for crimes of aggravated murder, in which form some cases of femicide may also be included. That sentence was already pronounced for the act of femicide committed in 2019. in Novi Sad and confirmed by the Appellate Court.

Myth: Femicide, as a separate act, allows for more adequate (stricter) punishment of murderers of women than is currently the case in Serbia. **Fact:** Even now there is a possibility of life imprisonment for the crime of murdering a woman. Any further insistence on stricter punishment can only open the issue of returning the death penalty to the Serbian legal system.

Myth: Introducing femicide as a separate crime in the Criminal Code is actually a small intervention. A small step for a legislator, but a big and significant one for women. **Fact:** No CC change, no matter how seemingly small, is insignificant. As a systemic code, the CC is changed only with a systemic approach and not with ad hoc initiatives, case by case, "piecemeal" supported by not always well-informed international organizations

Myth: Activists of the women's movement are the ones who are advocating that femicide be included in the Criminal Code as a separate crime. **Fact:** There are only a few, actually a small number (one organization), who are financially rewarded by foreign foundations for that commitment through projects.

Myth: The Ministry of Interior (hides) does not allow the public to see the number of femicides. **Fact:** False. There are different understandings of that term. According to some, the constitutive part of the being of the criminal offense of femicide should be hatred, contempt, the feeling of superiority and/or ownership of the male murderer of the woman, according to others, the emotional moment is only of a theoretical character, but it is not a necessary part of the being of the criminal offense of femicide, which, according to those understandings, is every murder committed by a man against a woman. In this situation of different understandings, the Ministry of Interior considers that the registration of femicide on their part would be possible only if there was a criminal offense of femicide

when they, without entering into different understandings of that term, could register it as such.

Myth: Femicide as a special crime means that a woman's life is more valuable and important than a man's life in the eyes of the legislator. **Fact:** False. The term femicide does not have that meaning, but was created based on the fact that women's lives are far more and more often threatened by men in private and public spaces and relationships than is the case with the reverse division of "roles". For severe forms of the crime of murder, it is still possible to impose the most severe sanctions, depending on the circumstances of the crime.

Myth: Women will be better protected from murder if femicide is a separate offense in the Criminal Code. **Fact:** There is no evidence that this would actually be the case, but there is plenty of domestic and foreign research evidence that strict legal provisions in most cases do not have the expected general preventive effect, which has the certainty of detection and prosecution. Women's lives are better protected by good functional prevention.

Myth: Some people do not like femicide being a separate crime in the Criminal Code of the Republic of Serbia. **Fact:** Paradoxical (at first glance), but above all to those same activists who are project "advocating" for its legalization. Namely, if there are no records, they can receive grants from foreign foundations for counting femicides from media reports many years in advance, as is the case many years ago. If femicide were a separate crime, then the MoI could also have public records of committed femicides and no one would receive such projects to count femicides.

Myth: A body to monitor femicide is necessary for a better understanding and a better response of institutions to that act. **Fact:** The establishment of a body to monitor femicide would exclude all but the initiators, who are again the same activists. This would exclude all other, far more numerous activists of human and women's rights, against violence, etc., research actors and actresses, the media, science, students and the entire academic community, social work institutions and educational institutions, etc., who would all of them had the body for monitoring femicide as the only source of data, and not the official MUP data. It would be a discriminatory exclusion of everyone else except those who would thereby unjustifiably gain the status of the only "truth holders" about femicide.

Myth: The problem of the lack of official records of the number of femicides in Serbia cannot be solved without the existence of the criminal offense of femicide. **Fact:** Very false. It is possible by changing the MUP's practice of recording murders. Without the need for a separate criminal offense of femicide, the MUP should and can simply sort data on killers and their victims by gender, so that one can see how many men killed women (and how many men), as well as how many women killed men and how many women. From that ideologically neutral data, everyone can benefit, both those who advocate for a feminist understanding of femicide and those who mean by it any killing of a woman by a man.

Myth: The views of independent institutions support femicide as a separate crime. **Fact:** There is no explicit declaration so far, but there are indications that independent institutions do not support that concept, or that they at least differ among themselves.

Myth: One of the benefits of femicide as a separate criminal offense would be the final existence of official data on the number of femicides in Serbia. **Fact:** In fact, it would not even exist as a benefit because the crime of femicide would include a feminist understanding of the special emotional relationship of the male killer in relation to the victim, which would make all other murders of women by men unrecorded as such, and the number of femicides would actually be reduced (women as collateral damage of the crackdown on criminal gangs, accidentally killed women, killers of unknown women, etc.).

7. Croatia, an example that should not be followed

On March 14, 2024, the Croatian Parliament adopted the Decision on the Promulgation of the Law on Amendments to the Criminal Code (Law on Amendments to the Criminal Code. Official Gazette of the Republic of Croatia, No. 36/2024). In Chapter Ten, Art. 111a. there is a new act: Aggravated murder of a female person, which literally stipulates: "(1) Whoever commits the gender-based murder of a female person shall be punished by a prison sentence of at least ten years or a long-term prison sentence. (2) When determining the criminal offense referred to in paragraph 1 of this article, it will be taken into account that the offense was committed against a close person, a person whom the perpetrator has

previously abused, a vulnerable person, a person who is in a relationship of subordination or dependence, or the offense is committed in circumstances of sexual violence or because of a relationship that puts women in an unequal position or that there are other circumstances that indicate that it is gender-based violence."

That decision was preceded, as in Serbia, by numerous controversies in which, as in Serbia, the gravity and prevalence of this act was cited as the main reason for the legalization of femicide, but also, as in Serbia, in the background of the argumentation, there is also the problem of the lack of records of how many women were actually killed by men (Beta, 2023: 13.09). It is pointed out that the scale of the problem can be seen by just looking at the Save Me platform, which is. A Facebook page where tens of thousands of women have been writing for the sixth year asking for help and advice in the fight against domestic violence, the most radical outcome of which is femicide. In contrast to Serbia, where it seems clear that this is not the case, in Croatia they wrongly refer to the Istanbul Convention as an argument for the legalization of femicide (DNEVNIK.hr, 2024: 24. 05) and therefore the challenges are moving in the domains of defense against challenging "gender ideology".

"Gender-based violence really exists and the world and Europe are very aware of it, there are numerous statistics and works on it, that's why the Istanbul Convention was adopted to bring gender-based violence under control and to ensure women's protection." "The Istanbul Convention is being implemented, the laws have been tightened. We introduced the criminal offense of femicide. We also increased the penalties for rape. This act has the characteristics of the aggravated murder of a woman precisely because she is a woman," Prime Minister Andrej Plenković said in April.

The ombudsman for gender equality, Višnja Ljubičić, advocates as a necessary element the closeness of the murdered woman and her killer: "So the murder must be committed against a close person, that person must be in some kind of subordinate relationship, or it was about circumstances of severe sexual violence, or it was about the question of a vulnerable person or some other circumstances connected with gender-based violence," says Ljubičić. In the end, this was included in the legal text, which, in addition to partner femicide, actually excluded a considerable number of other types of femicide (old women living alone, journalists, nurses, students, hitchhikers, girls, errant women, members of

other marginalized groups (Obradović, 2023: 316), etc.) who were also killed by men, also because they could do it as physically and socially superior. Elderly women remain outside the protection of this criminal offense if they are not in a union with the murderer, which leaves them in a vulnerable situation because otherwise elderly people have weaker legal protection (/Kostić, 2013: 330).

A special weakness of this criminal offense is that it does not include any form of non-partner femicide, to which older women are especially exposed (Janković, 2023: 665). Also, in a procedural sense, it is necessary to prove that the murderer had previously abused the murdered person, that she is a vulnerable person, a person in a relationship of subordination or dependence, or that the act was committed in circumstances of sexual violence or because of a relationship that puts women in an unequal position. The unanswered question remains whether every partnership, marriage and extramarital union is a relationship that puts a woman in a subordinate position, or whether it is a characteristic of only some unions, which must then be proven in court proceedings in each specific case. Victims of obstetric violence also remain unaffected by that criminal act, as well as potential victims of violence and gross neglect in homes for the elderly. All of this greatly limits the practical application of this criminal offense, which leaves the effectiveness of this offense questionable because many murders of women by men will simply remain "under the radar", that is, not covered by the bombastically announced introduction of the criminal offense of femicide in Croatia, as, in this respect, the first country in the region.

8. Conclusion

We conclude that the creation of the criminal offense of femicide in Serbia is legally, politically and nomothetically unfounded. The need for data on the gender of killers and their victims should be solved by introducing gender/sex-disaggregated data on killers/murders: how many men killed women and how many men, and how many women killed men and how many women. It is necessary to change the MoI's practice of classifying murders, without elements of feminism or any ideology, while avoiding different understandings of the term femicide.

Otherwise, the criminal policy for murderers of women will neither become stricter nor more effective if we have the criminal offense of femicide, because even now the existing criminal offenses allow for the most severe sentence of life imprisonment (the Court of Appeal in Novi Sad confirmed the sentence of life imprisonment to Dejan Dabović (30) from Herceg Novi due to the murder of ex-girlfriend Dušanka Jocović (25) at the end of December 2019) (Beta, 2021: 27.08).

Being against femicide as a separate crime does not at all mean diminishing male violence against women, nor diminishing the criminal responsibility of a male murderer of a woman, and even less enabling a reduced punishment policy for murderers of women. It just means enabling a good categorization of murders and, therefore, a correct perception of the problem of femicide while avoiding different understandings of the term.

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Review Paper
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THREATENING THE RIGHTS, HEALTH, AND LIVES OF WOMEN WHILE PROTECTING THEIR REPRODUCTIVE HEALTH

Obstetric violence opened up as a topic in the Republic of Serbia at the beginning of 2022, when two women publicly announced their experiences: violence during an induced abortion, and serious health consequences after the death of the baby (four uterine ruptures). Encouraged by the story of those who came forward publicly in the media, hundreds of women shared their experiences of gynecological-obstetrical violence in Serbian maternity hospitals. Some repeated their story, some spoke for the first time; some have fresh memories, and some have experienced traumatic events years before. The names of doctors and midwives, institutions, and cities differ, and the outcomes of difficult births differ. But in all these cases, two things are the same - trauma, the consequences of which women feel for a long time, and the silence of health workers and institutions. The conclusion contains proposals for possible solutions.

Keywords: *reproductive health, medical treatments, gynecological-obstetric facilities, obstetric violence, legal protection.*

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1. Introduction

Violation of women's rights related to reproductive health can be summed up under one term - obstetric violence. This term implies abuse and violence against women - from verbal, and physical, through the absence of informed consent and denial of the right to choose. Human lives are much more endangered today because multiple risks are increasing. (Janković, 2023: 675)

Research at the international level shows that various forms of obstetric violence are present and that their form ranges from verbal insults, through abuse with serious physical injuries, to fatal outcomes for women or babies. In each form of obstetric violence, different intensities of violence with varying degrees of consequences were observed. Relevant reports on the position of women in reproductive health exist at various levels, from national to international - for example: reports of the World Health Organization[1] and the Parliamentary Assembly of the Council of Europe[2,] guidelines of the World Health Organization[3], reports of the United Nations special rapporteur[4], statistics of the International Human Rights Organization during births[5], an analysis by the National Center for Biotechnology Information[6], a 12-country[7] study by the Burlo Garofolo Pediatric Institute.[8]

There are norms in national regulations that protect women within the provision of health care. In practical terms, obstetric violence is the treatment of women in gynecological-obstetric institutions in Serbia, which does not follow international regulations and standards, as well as domestic norms. Women who stayed in gynecological-obstetrical institutions publicly announced their negative

[1] https://www.who.int/

[2] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28236&lang=en

[3] https://www.mhtf.org/document/care-in-normal-birth-a-practical-guide/

[4] https://digitallibrary.un.org/record/3823698?ln=en

[5] https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/DeprivedLiberty/CSO/Human_Rights_in_Childbirth.pdf

[6] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7348458/

[7] https://www.burlo.trieste.it/ricerca/imagine-euro-improving-maternal-newborn-care-euro-region (anketa);

https://www.sciencedirect.com/science/article/pii/S2666776221002544 (rezultati istraživanja).

[8] https://www.burlo.trieste.it/

experiences in medical treatment from the moment of entering the institution to the last stage in the provision of medical services. In Serbia, women experienced 16 types of violence during various medical treatments in gynecological and obstetric institutions. (Mijatović, Stanković, and Soković-Krsmanović, 2022: 4) Women perceived medical treatments as violence (Cristeller procedure, episiotomy, etc.) when they were performed without the patient's consent, with her opposition, causing great suffering and pain, as well as causing serious negative consequences for health and life.

The topic of obstetric violence opened up in early 2022 when two women, from Šabac and Belgrade, publicly announced their experiences. One experienced obstetric violence during an induced abortion, and in another case, the baby died, and she had serious health consequences (four uterine ruptures) due to obstetric violence. Both cases took place in the largest maternity hospital in Serbia, the Gynecology and Obstetrics Clinic "Narodni Front". These two women were influenced to raise the topic of obstetric violence and to encourage all women who experienced similar abuse to report inhumane treatment in gynecological-obstetric institutions. To create a free space for announcements about obstetric violence, the group "Stop Violence in Maternity Hospitals!" was formed on Facebook, which has almost five thousand members. The data that the women made public and displayed in the Facebook group confirm that obstetric violence has all the elements of a systemic violation of women's rights in the protection of their reproductive health. Violence, abuse, and neglect are particular problems when it comes to older women who in the conditions of gynecological interventions may be additionally exposed to disparagement, ridicule, and neglect due to their age. (Mršević, 2023: 413) And it is necessary to provide all women with the opportunity for legal protection due to the violation of their rights.

2. International regulatory visor

General norms regulating human rights:

• *The Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter: CEDAW) defines measures to prevent all forms of direct and indirect discrimination against women. Countries that are signatories

to the Convention must ensure that women enjoy the same civil, political, economic, social, and cultural rights as men. The right to health care also belongs to the group of social rights. [9]

• *The Universal Declaration of Human Rights*[10] proclaims that all human beings are born free- bottom and equal in dignity and rights, and no one should be subjected to torture or cruel, inhuman, or degrading treatment or punishment. [11]

The International Covenant on Civil and Political Rights[12] defined the prohibition of torture in more detail, not only in institutions such as prisons and detention centers, but also prohibited the administration of medical treatment without consent: No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment. It is especially forbidden to subject a person to medical or scientific experiments without his free consent.

• *The Convention against Torture and Other Cruel, Inhuman, and Degrading Punishments or Procedures of the United Nations,* hereinafter: CAT UN, (Official Gazette of the SFRY - International Treaties, No. 9/91) [13] contains a definition of the prohibition of torture[14], but also expressly forbids states so they can invoke exceptional circumstances to justify torture. [15] Therefore, an absolute ban on torture under any circumstances was introduced.

• *European Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter: ECHR,* (Official Gazette of the SC - International

[9] The Convention on the Elimination of All Forms of Discrimination against Women, adopted by UN General Assembly Resolution 34/180 on December 18, 1979, entered into force on September 3, 1981 in accordance with Article 27. The SFRY ratified it in 1981 (Official Gazette of the SFRY - International Treaties, No. 11/81), and entered into force in 1982. In addition to the Convention, the FRY also became a member of the Optional Protocol to the Convention, which was adopted by the UN in October 1999, and which entered into force in 2000 (Official Gazette of the FRY - International Agreements, No. 13/2002).

[10] https://www.un.org/en/about-us/universal-declaration-of-human-rights

[11] Article 5 of the Universal Declaration of Human Rights.

[12] In 1966.

[13] Adopted in 1984 in the General Assembly of the UN.

[14] 10 Article 1 CAT UN.

[15] The possibility of invoking some exceptional circumstance regardless of whether it is a state of war, threat of war, internal political instability, or any other state of emergency, to justify torture is excluded.

Treaties, No. 9/03, 5/05 and Official Gazette of the RS - International Treaties, No. 12/10. Law on Ratification of Protocol No. 14 - Official Gazette of the Republic of Serbia, No. 5/05 - Official Gazette of the Republic of Serbia, No. 10/15. [16] and contains a norm prohibiting torture: No one shall be subjected to torture, or inhuman or degrading treatment or punishment. [17]

• *The European Convention on the Prevention of Torture and Inhuman or Degrading Treatment and Punishment* (Official Gazette of SCG - International Treaties, No. 9/03), which is based on Article 3 of the ECHR, was adopted by the Parliamentary Assembly of the Council of Europe in 1987. Improving protection against torture is the establishment of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

• *The European Charter on Patients' Rights* (hereinafter: EU Charter) [18] was adopted in Rome in 2002. The main goal of the EU Charter is to protect the rights of patients and to ensure the continuity of the quality of health care. In addition to the right to information and consent, the EU Charter also provides for the right to safety: Every individual has the right to be spared from harm caused by poor functioning of health services, medical malpractice and errors, and the right to access health services and treatments that meet high safety standards. [19]

• *The Convention of the Council of Europe on preventing and combating violence against women and domestic violence* (hereinafter: the Istanbul Convention (Official Gazette of the RS - International Treaties, No. 12/13) [20] does not contain the concept of obstetric violence, but Article 39 prohibits any form forced abortion and sterilization. [21] This document regulates the fight against violence against women in a general sense, which can include obstetric violence that takes

[16] https://www.echr.coe.int/Documents/Convention_SRP.pdf.

[17] Article 3 of the ECHR.

[18] https://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf

[19] Article 9 of the EU Charter.

[20] https://pace.coe.int/en/files/28017/html

[21] Article 39: "Parties undertake to take the necessary legislative or other measures and ensure that the following intentional acts are criminalized: a) abortion of a woman without her prior and informed consent; b) surgery for the purpose or with the result of preventing natural reproduction in a woman without her informed consent or understanding of the procedure."

place in gynecological-obstetrical institutions. Therefore, the norms of the Istanbul Convention must be applied in preventing violence against women regardless of the place of execution.

3. National regulatory visor

• *The Constitution of the Republic of Serbia*, hereinafter: the Constitution of the RS, (Official Gazette of the RS, no. 98/06 and 115/21) guarantees human and minority rights and freedoms that are directly applicable. Also, the Constitution of the RS guarantees human rights, which are guaranteed by generally accepted rules of international law, confirmed by international treaties and laws, and are directly applicable. [22] Human rights protect human dignity and achieve full freedom and equality of every individual in a fair, open, and democratic society, based on the rule of law. [23]

The Constitution of the RS guarantees the equality of all people, as well as their right to equal legal protection, without discrimination. Discrimination is prohibited, direct or indirect, on any basis (race, gender, nationality, religion, political or other belief, property, culture, language, age, mental or physical integrity). Measures introduced to achieve full equality of persons or groups of persons who are essentially in an unequal position with other citizens (special health care for women, pregnant women, and mothers in labor) cannot be considered discrimination. [24]

• *The Law on Health Care*, hereinafter: ZZZ, (Official Gazette of RS, No. 25/19) is one of the umbrella regulations governing health care, which is an organized and comprehensive activity of society. The basic goal of health care is to achieve the highest possible level of preservation and improvement of citizens' health. In addition to preserving and improving health, health care includes prevention, suppression, and early detection of diseases, injuries, and other health

[22] Article 18 of the Constitution of the RS.

[23] Article 19 of the Constitution of the RS.

[24] Article 21 of the Constitution of the RS.

disorders and timely, effective and efficient treatment, health care, and rehabilitation. [25] A citizen has the right to health care, as well as a foreign citizen and a stateless person who is permanently resident or temporarily resides in the Republic of Serbia. [26] Healthcare providers are one of the participants in the healthcare system.[27] Social health care is achieved by providing health care to population groups that are exposed to an increased risk of disease, health care for persons in connection with the prevention, suppression, early detection, and treatment of diseases and conditions of greater public health importance, as well as health care for socially vulnerable populations, under equal conditions on the territory of the Republic of Serbia. Social care for health includes persons in connection with family planning, as well as during pregnancy, childbirth and maternity up to 12 months after childbirth. [28] Women's health care is provided at all three levels of health care. A health center is a health institution that provides health care for women. [29]The general hospital performs healthcare activities in the field of gynecology and obstetrics. [30] At the tertiary level, women's health care is organized in university clinical centers and clinical-hospital centers (institutes, clinics).

• *Law on Health Insurance,* hereinafter: ZZO, (Official Gazette of RS, no. 25/19) regulates rights from compulsory health insurance and conditions for their realization, financing of compulsory health insurance, health care contracting, organization of compulsory health insurance, and other issues of importance for the system of compulsory health insurance. ZZO also regulates the field of voluntary health insurance. [31] Health services that are provided from the funds of compulsory health insurance are examinations and treatment related to family planning, pregnancy, childbirth, and the postpartum period, including termination of pregnancy for medical reasons. [32] Women have health insurance rights related to family planning, as well as during pregnancy, childbirth, and up to 12 months

[25] Article 2 ZZZ.

[26] Article 3 ZZZ.

[27] Article 4 ZZZ.

[28] Article 11, paragraph 2, point 3 ZZZ.

[29] Article 7, paragraph 1, point 3 ZZZ.

[30] Article 91, paragraph 3, point 2 ZZZ.

[31] Article 2 of the Health Protection Act.

[32] Article 131 of the ZZO.

after childbirth, regardless of the basis of insurance. [33] The chosen doctor (gynecologist) determines the age of pregnancy to exercise the right to leave work due to pregnancy and childbirth.[34]A woman has the right to health care that is provided in case of illness and injury outside of work[35], and that right includes examinations and treatment related to family planning, during pregnancy, childbirth and up to 12 months after childbirth[36]. Women are provided with health education related to family planning, pregnancy prevention, contraception and surgical sterilization, pregnancy testing, sexual testing and treatment in order to preserve and improve their health, prevent, detect and suppress diseases and other health disorders. communicable diseases and HIV infection[37]. A woman has the right to wage compensation during temporary incapacity for work, regardless of the payer of wage compensation, if she is temporarily prevented from working due to illness or complications related to pregnancy maintenance. [38]

• *The Law on Exercising the Right to Health Care for Children, Pregnant Women and Mothers,* hereinafter: ZDTP, (Official Gazette of RS, No. 104/13) regulates the right to health care and the right to compensation for transportation costs in connection with the use of health care for children, pregnant women and mothers in labor, regardless of the basis on which they are health insured, if they cannot exercise these rights based on mandatory health insurance by the law regulating health insurance. ZDTP defines the concept of pregnant women and mothers in labor. A pregnant woman is a woman in whom a doctor specializing in gynecology and obstetrics has determined the existence of pregnancy, while a woman in labor is a woman in the period up to 12 months after the birth of a live child. [39]

Pregnant women exercise the rights established by the ZDTP based on the health insurance document (health card) issued by the RFZO, regardless of

[33] Article 16 of the ZZO.

[34] Article 143 of the ZZO.

[35] Article 51 of the Health Protection Act.

[36] Article 52, paragraph 1, point 2 of the ZZO.

[37] Article 53, paragraph 1, point 4 of the ZZO

[38] Article 73, paragraph 1, point 3 of the ZZO.

[39] Article 2 ZDTP.

whether the document is certified, and the report of a doctor specializing in gynecology and obstetrics on the established pregnancy. Mothers in labor exercise their rights established by the ZDTP based on the health card issued by the RFZO, regardless of whether the document is notarized, and the discharge list of the health institution on the delivery. [40]

• *The Law on Patients' Rights,* hereinafter: ZoPP, (Official Gazette of the RS, No. 45/13) regulates the rights of patients when using health care, the way of exercising and protecting those rights, as well as other issues related to the rights and duties of patients. Every patient needs to exercise the right to quality and continuous health care. This right of the patient is guaranteed by the Constitution of the RS, ZZZ, ZZO and ZoPP. The quality and continuity of health care must be by the patient's health condition, generally accepted professional standards and ethical principles, and in her best interest, with respect for personal views. [41] One of the conditions to meet the standards of quality and continuity of health care is the establishment of a partnership relationship between health workers and patients.

Every patient has the right to all kinds of information about the state of her health, the health service and how she uses it, information that is available on the basis of scientific research and technological innovations, and to information about health insurance rights and procedures for exercising those rights. The patient must receive this information on time and in a way that is in her best interest. The information also refers to the first and last name and professional status of health workers who participate in undertaking medical treatments. [42]

In preserving and improving her reproductive health, the patient must have the right to preventive measures for preventing, suppressing, and detecting diseases and other health disorders. Taking into account ZZZ and social care for health at the national level, health institutions, especially gynecological-obstetric ones, must implement preventive measures by raising people's awareness and

[40] Article 4 ZDTP.

[41] Article 3 of the ZoPP.

[42] Article 7 of the ZoPP.

providing health services at appropriate intervals. [43] Any attitude towards the patient must be humane. [44] The right to the safety of female patients in the implementation of health care should be by the modern achievements of the health profession and science to achieve the most favorable treatment outcome and reduce unwanted consequences. The health institution is obliged to take care of safety in the provision of health care, to continuously monitor risk factors, and to take measures to reduce them. [45] The patient cannot suffer damage caused by the inadequate functioning of the health service. The healthcare professional must ensure that the right to timely notification is respected so that the patient has enough time to decide consenting to the proposed medical measure or rejecting it. The content of the notification is prescribed by the ZoPP, and it must be completely understandable to the patient. Only if the healthcare professional judges that the patient does not understand the given notice, the notice may be given to a member of the patient's immediate family. [46] Every female patient has the right to freely choose a doctor of medicine, that is, a doctor of dentistry, a health institution, and proposed medical measures,[47] as well as the right to a second professional opinion of a doctor who did not directly participate in the provision of health services.[48] The right to consent implies that the patient can freely decide on everything that concerns her life and health. ZoPP stipulates that no medical measures may be taken without the patient's consent.[49] Consent to the proposed medical measure can be given explicitly (orally or in writing) or tacitly (if the patient has not explicitly objected). When it comes to invasive diagnostic and therapeutic medical measures, consent must be in writing. [50]

The patient has the right to the highest level of alleviation of suffering and pain, by generally accepted professional standards and ethical principles. [51]

[43] Article 8 of the ZoPP.
[44] Article 9 of the ZoPP.
[45] Article 10 of the ZoPP.
[46] Article 11 of the ZoPP.
[47] Article 12 of the ZoPP.
[48] Article 13 of the ZoPP.
[49] Article15 of the ZoPP.
[50] Article 16 of the ZoPP.
[51] Article 16 of the ZoPP.

• *The Law on Prohibition of Discrimination*, hereinafter: ZZD, (Official Gazette of RS, no. 22/2009 and 52/21) regulates the general prohibition of discrimination. According to the ZZD, discrimination exists if it is acted against the principle of gender equality, that is, the principle of respecting the equal rights and freedoms of women and men. The rights of women and men must be completely equal.[52] Any type of violence due to pregnancy is prohibited.

The Code of Medical Ethics of the Medical Chamber of Serbia, hereinafter: the LKS Code, (Official Gazette of the RS, no. 104/16) prescribes ethical principles in the performance of the professional duties of members of the Medical Chamber of Serbia (hereinafter: LKS), the rights and duties of LKS members, attitude towards patients, colleagues, society and LKS. According to the principle of conscientiousness and equality, the doctor has to perform his professional activity conscientiously, according to the rules of the medical profession, and with the necessary attention, by the principles of medical ethics and the principles of humanity. One of the basic principles of medical ethics is "primarily do not harm".53 The doctor must perform the provision of health services without violating the right to prohibition of discrimination.[54] Prohibition of torture and other humiliating procedures is prohibited by the Constitution of the RS, but also by the Code of Civil Procedure, which means that a doctor must not allow his professional knowledge and experience to be used for inhumane purposes, as well as that he must not participate in torture or other forms of humiliation., belittling and cruel treatment of another human being. [55] The attitude towards the patient must

[52] Article 20 of the ZZD: "Discrimination exists if one acts against the principle of gender equality, that is, the principle of respecting the equal rights and freedoms of women and men in political, economic, cultural and other aspects of public, professional, private and family life.

Denial of rights or public or covert recognition of benefits about sex, i.e. gender and gender identity, or due to gender change, i.e. gender adjustment to gender identity, as well as pregnancy, maternity leave, leave for child care, or special child care is prohibited. Physical and other violence, exploitation, expressions of hatred, belittling, blackmailing, and harassment concerning gender, i.e. gender and gender identity, as well as public advocacy, support, and acting by prejudices, customs, and other social patterns of behaviour are prohibited. Based on the idea of gender subordination or superiority, or stereotypical gender roles."

[53] Article 4 of the LKS Code.

[54] Article 5 of the LKS Code.

[55] Article 36 of the LKS Code.

be such that she is not placed in a state of subordination and that she is not exposed to abuse, torture, inhuman and degrading treatment. The doctor performs medical treatment on the patient with her consent. This obligation of the doctor is by ZoPP in the part that regulates the right to consent.[56] Like ZoPP, the LKS Code defines a partnership between a doctor and a patient.[57]

• *The Code of Ethics of the Chamber of Nurses and Health Technicians of Serbia* (Official Gazette of the RS, no. 67/07) establishes basic ethical principles in the performance of the professional duties of nurses and health technicians. Nurses and health technicians should respect the needs of users of health services, their dignity, and integrity, as well as inform them about the availability of health care and provide precise and clear information on how to exercise the right to health care understandably.

• *The Business Code of the Gynecology and Obstetrics Clinic "Narodni Front"* (hereinafter: GAK Code)[58] governs the general rules of business conduct in a healthcare institution. An employee in communication with patients must never react aggressively and arrogantly,[59] as well as too emotionally, that is, he must not engage in verbal arguments, as well as act in a discriminatory manner towards female patients.[60] Also, when talking to patients, their companions, colleagues, or business partners, the employee should never speak in a raised tone.[61]

• *Business codes of university clinical* centers regulate the general rules of business conduct in healthcare institutions. All four university clinical centers in Serbia have their business codes. The Business Code of the University Clinical Center of Serbia (hereinafter: UKCS Code)[62] was adopted in 2021 and prescribes the rules of business conduct. The employee is obliged to treat patients and business partners with the highest degree of professional respect. The healthcare worker must respect the personality of each person, not to violate human dignity,

[56] Article 49 of the LKS Code.

[57] Article 51 of the LKS Code.

[58] http://gakfront.org/A3d2HmiN/assets/files/00000%20dokumenti%20vesti/poslovni%20kodeks% 2028062021/Poslovni%20kodeks%202008.pdf

[59] Article 17 of the GAK Code.

[60] Article 45 of the GAK Code.

[61] Article 50 of the GAK Code.

[62] http://www.kcs.ac.rs/images/Pravilnici/PoslovniKodeksUKCS.pdf

[63] and to fully inform the patient about his rights.[64] When getting acquainted with the patient, the employee is obliged to introduce himself with his full name. [65] The Business Code of the University Clinical Center of Vojvodina[66] (hereinafter: UKCV Code) is not harmonized with the new name of the institution, but it is still applied. The UKCV code obliges employees to treat female patients with respect and appreciation and provide them with all the necessary information for realizing their right to provide health services, refer them to competent health workers, and provide other necessary assistance. The UKCV Code stipulates that the principles of communication must be respected, that is, that female patients are addressed as "You" regardless of age and other personal characteristics, as well as that shouting, cursing, and addressing offensively is prohibited.[67] The business code of the employees of the University Clinical Center Nis (hereinafter: UKCN Code)[68] was adopted in March 2022. The UKCN Code instructs employees to treat female patients with respect,[69] not to express their bad mood[70] and not to behave aggressively.[71] The business code of the employees of the University Clinical Center Kragujevac (hereinafter: UKCKG Code)[72] has been in force since 2021. The employee is prohibited from discriminatory behavior, and the obligation to respect the patient is prescribed, [73] as well as any prohibition of aggressive behavior.[74]

[63] Article 45 of the UKCS Code.

[64] Article 15 of the UKCS Code.

[65] Article 54 of the UKCS Code.

[66] https://www.kcv.rs/wp-content/uploads/2018/08/Poslovni-kodeks-KCV.pdf

[67] Article 24 of the UKCV Code.

[68] Poslovni kodeks zaposlenih u UKC Nis_opt.pdf

[69] Article 15 of the UKCN Code.

[70] Article 16 of the UKCN Code.

[71] Article 24 of the UKCN Code.

[72] https://ukck.rs/wp-content/uploads/2022/03/poslovni.kodeks.20210901.pdf

[73] Article 15 of the UKCN Code.

[74] Article 17 of the UKCKG Code

4. Practice in gynecological-obstetrical institutions

Based on the experiences of female patients, obstetric violence can be classified into several groups:

Verbal violence and poor communication. Of the total number of reports analyzed, 76.36% related to verbal violence and poor communication experienced by female patients. Testimonies of patients show the seriousness of broken communication, disrespect for the personality of patients, and the forms of verbal violence they face in gynecological-obstetrical institutions. Female patients are often exposed to verbal violence by the entire medical staff at all stages of medical treatment, from admission to invasive medical procedures. The refusal of health workers to listen to the patient's proposal on how she wants to give birth can also be reduced to verbal violence. The reason for her choice must not be exposed to ridicule and be a basis for humiliation.

Frequent application of Christeller procedure and vacuum extraction. The Law on Patient's Rights stipulates that the patient has the right to freely decide on everything that concerns her life and health. Therefore, no measure, especially not an invasive one, must be undertaken without consent, which must follow only after the patient has received all the necessary information and enough time to make a decision. One of the most problematic procedures during childbirth in gynecology-obstetrics clinics is the frequent use of the so-called Christeller procedure, with which the doctor applies pressure to the uterine wall during the birth process. Many patients described their bad and traumatic experiences when undertaking this procedure. There are numerous examples in which doctors applied the procedure despite the explicit opposition of the patients. This procedure has great consequences for the health of patients, and some studies indicate that the benefits of its application have not yet been reliably established.[75]

[75] In the study "Fundal pressure during the second stage of labour (Chiseller's procedure) is associated with an increased risk of levator ani muscle avulsion", which was carried out in 2018, doctors from Bologna observed women who gave birth for the first time (134 parturients in whom Christeller's procedure was applied and 128 women were not applied). The results show that as many as 28.4% of women who underwent the Christeller procedure have consequences in the form of muscle rupture, compared to 14.1% of women who did not undergo this procedure. The doctors who conducted the research concluded that Christeller's procedure is directly related to the onset of muscle rupture in women who give birth for the first time and that all options should be carefully considered when advising women in labour to use the controversial procedure.

Along with Christeller's procedure, doctors often use vacuum extraction. By using these two medical procedures, a large number of patients suffered serious health consequences, such as uterine ruptures and large hematomas. Also, the consequences that have been observed in babies are hematomas on the heads.

Forced episiotomy. Episiotomy is a surgical process to protect the perineum from tearing when the baby's head emerges during childbirth. It is performed by cutting the perineum without using anesthesia. Episiotomy is very widespread in Serbian maternity hospitals, unlike maternity hospitals in other European countries. There are more and more scientific studies that support the fact that episiotomy brings more harm to women in labor than spontaneous rupture of the perineum during childbirth, especially because spontaneous rupture of the perineum does not damage blood vessels and nerves, as in the case of episiotomy. The WHO has published a recommendation that nowadays episiotomy should be performed only in special health indications, and not routinely, as is done in Serbian maternity hospitals. [76]

Physical injuries. They are often the result of torture and ill-treatment during the provision of medical treatment. The patients who described physical abuse stated that they left the gynecological-obstetrical institutions with severe injuries to their reproductive organs, and some even had their uteruses and ovaries removed.

Practice shows that not only female patients are exposed to torture and abuse, but also babies. There are numerous examples in which babies are victims of violence, during which they suffer physical injuries, and sometimes severe damage.

Physical violence. There are examples in which female patients in health institutions have also survived physical violence by doctors and nurses, who participate in the procedure of childbirth or gynecological-obstetric intervention. It is most often accompanied by verbal violence and is a type of demonstration of force and display of power over someone. Most patients do not dare to report this

[76] In the world, the lowest percentage of episiotomy is performed in Sweden (9.7% of cases), and the highest in Taiwan, 100%.

type of violence for fear of future actions of health workers, which would endanger health and life. The fear is well-founded, given that the patients are hit during childbirth.

Other inhuman and degrading treatment. International documents and domestic regulations stipulate that the doctor has to perform his professional activity conscientiously, as well as that he must not use his professional knowledge and experience for inhumane purposes, nor must he participate in torture or other forms of humiliation, belittling, and cruel treatment of others a human being. Elderly persons must be treated in a manner consistent with human rights even when accused or convicted of criminal offenses. These rights include non-discrimination, access to justice, fair trial, respect for dignity, humane treatment, etc. (Pavlović, 2023: 211)

Consent - The Law on the Rights of Patients stipulates that the patient must consent to the undertaking of medical procedures and that without such consent they cannot be undertaken. It is a completely wrong, even illegal, practice of health workers to give consent to patients before they are taken away or while they are in the delivery room when they are in great pain, and some may be under the influence of analgesics and are not fully aware of what they are signing. Following the Law on the Rights of Patients, every patient has the right to ask questions about the procedures being undertaken, the consequences, possible complications, and other options. Health workers cannot deny patients that right. On the other hand, the doctor and the nurse are obliged to give answers to all the questions that the patient asked. Nevertheless, the practice notes the violation of the right to consent, and especially to informed consent.

Entering incorrect data in the discharge list. A significant number of female patients confirmed that the data in the discharge lists are incorrect and that they most often refer to information about the course of admission, childbirth/operations, and especially in situations where "unforeseen circumstances" occurred. Taking into account the data that has been changed, the patients conclude that this information would show all the irregularities of the treatment and the negligent undertaking of medical measures. The omission of data or their modification is aimed at avoiding liability.

Torture and abuse. Numerous female patients testified about the inhumane and degrading treatment they were treated by both doctors and nurses. Obstetrical violence through torture and abuse is reflected in examples of tying during childbirth, whereby patients are forced to lie in a certain position without the right to change position and move. All prohibitions on the implementation of torture and ill-treatment in healthcare institutions have not yielded results in practice, because it is obvious that there is no adequate protection for the victims of such treatment.

5. Conclusion

Obstetric violence is a global problem to which women are exposed in gynecological and obstetric institutions.[77]

What is indisputable is that women have the right: to be given obstetric care with respect for their personality; to provide them with medical treatment without discrimination and any violence, torture, inhuman and degrading treatment; to receive services in gynecological-obstetrical institutions that protect their reproductive health; and to provide them with medical services without coercion.

It is also indisputable that medical services in gynecological-obstetrical institutions should be: by the standards of the World Health Organization; by human rights, so that the patient's decision is respected; with measures to alleviate suffering and pain; with the effective and proper application of informed consent in general; and with mandatory written informed consent for all invasive treatments.

[77] For example, even under the best conditions, every year at least 40 million women experience long-term health problems caused by childbirth, according to data from a study published in The Lancet Global Health at the end of last year (2023, https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(24)00367-2/fulltext). The study shows that there are postnatal conditions that last for months or even years after childbirth: these include pain during intercourse (dyspareunia), which affects more than a third (35 percent) of women after childbirth, lower back pain (32 percent), anal incontinence (19 percent), urinary incontinence (8-31 percent), anxiety (9-24 percent), depression (11-17 percent), pain in the perineum (11 percent), fear of childbirth (tokophobia) (6-15 percent) and secondary infertility (11 percent).

In gynecology-obstetrics institutions, empathy is not expected, but professionals who respect the dignity of patients - after all, they are rewarded for that. Women who bring a new life into the world not only have the right but also deserve gynecological and obstetric institutions, which will not only be a "happy place" and a "place of hope" in theory. Especially not in a country struggling with birth rates.

Obstetric violence refers to the inhumane and unethical treatment of women during pregnancy, childbirth, and the postpartum period, which includes disregarding their wishes, applying medical interventions without consent, verbal abuse, and other forms of disrespect. Pointing out obstetric violence can also be considered a feminist issue because it is about the fight for women's rights within the health system. Is that right?

The feminist movement is concerned with gender equality and the fight against oppression, including violence against women, be it physical, psychological, or systemic. Obstetric violence often reflects deeper gender inequalities in society and patriarchal patterns in medical treatment, where women's voices are marginalized and their autonomy diminished. Therefore, a feminist perspective recognizes that it is important that women have the right to informed consent, bodily autonomy, and dignity in all aspects of their lives, including health care.

To sum up, pointing to obstetric violence can certainly be seen as part of the broader struggle for women's rights and gender equality, which are the key goals of the feminist movement but the struggle for the right to life and body integrity.

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